January 1981

Commission Decisions



Administrative Law Judge Decisions

# Commission Decisions

JANUARY

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

Secretary of Labor, MSHA v. Salt Lake County Road Department, WEST 79-365-M; (Judge Vail, November 25, 1980)

Local 781, United Mine Workers of America v. Eastern Associated Coal Co., WEVA 80-473-C; (Judge Fauver, November 26, 1980)

Secretary of Labor, MSHA v. Lone Star Industries, Inc., VA 80-67-M; (Judge Steffey, November 28, 1980)

Secretary of Labor, MSHA v. Carolina Stalite Company, BARB 79-319-PM, etc.; (Judge Kennedy, December 2, 1980)

Secretary of Labor, MSHA v. Eastover Mining Company, VA 80-84; (Judge Laurenson, December 17, 1980)

Secretary of Labor, MSHA v. Climax Molybdenum Company, DENV 78-553-M, etc.; (Judge Cook, December 18, 1980)

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

Jackie R. Hammonds v. National Mines Corporation, KENT 79-345-D; (Judge Fauver, November 24, 1980)

Secretary of Labor, MSHA v. Rockite Gravel Company, LAKE 80-130-M; (Judge Bernstein, December 4, 1980)

Secretary of Labor, MSHA v. West Virginia Auger Corporation, WEVA 80-354; (Judge Melick, December 10, 1980, default decision)

Secretary of Labor, MSHA v. Scotia Coal Company, BARB 78-306, etc.; (Judge Kennedy, Interlocutory Review of April 30, 1980 order)

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 8, 1981

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | : | Docket No. DENV 78-558-M |
| v. | : | |
| CYPRUS INDUSTRIAL MINERALS<br>CORPORATION | : | |

DECISION

The issue before us is whether the site of the contested withdrawal order is a mine as defined by section 3(h)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979).

On August 3, 1978, an imminent danger withdrawal order was issued to Cyprus Industrial Minerals (CIM), which filed an application for review of that order. The area subject to the order was CIM's Bosal No. 1 claim. An independent contractor, Pee Wee Holmes, had contracted with CIM to establish a portal and drift in order to assess the ore on the claim. Holmes had one employee, Raymond Pederson, aiding him in performing the work. They began operations on July 29, 1978. On August 2, they cleared away muck at the base of the portal and cleared the overburden above the portal in preparation for setting posts. They also scaled from the top of the hill and the ground, and barred and scaled the brow. On August 3, Holmes and Pederson completed the barring and scaling to their satisfaction and were in the process of setting posts, when rocks suddenly broke loose from the face of the drift. Pederson was crushed to death by the rocks. An inspector from the Mine Safety and Health Administration (MSHA) investigated the area and issued an imminent danger withdrawal order under section 107(a) of the Act.

The administrative law judge found the operation to be a mine subject to the jurisdiction of MSHA under the Act. The judge concluded that the work at the Bosal No. 1 claim "was in fact work normally associated with a talc mining operation." Dec. at 13. He stated:

> Mr. Holmes was driving a drift at the time of the accident and this work included blasting, drilling, cutting, removal and cleaning of materials, timbering, bulldozing overburden, barring and scaling of loose rock, and attempts at establishing a brow and a portal for the express purpose of extracting minerals.... Further, applicant

> conceded the existence of a mineable ore body and that Mr. Holmes' work was directly related to the eventual mining of that ore; and, by the very terms of the contract ... Mr. Holmes agreed to establish a portal and to drive an exploration drift. Under these circumstances, I conclude and find that Mr. Holmes' work at the time of the accident were in fact mining activities within the meaning of the Act, that the work being performed at the Bosal Claim was work at a "mine" as defined by the Act, and that MSHA had enforcement jurisdiction to regulate those activities through the applicable mandatory safety standards promulgated under the Act.

Id. The judge affirmed the withdrawal order and dismissed the application for review. For the reasons that follow, we affirm the judge.

The legislative history of the Act mandates a broad reading of the expansive definition of "mine" in the Act. 1/ The Senate Committee that drafted the bill including the definition adopted in the Act stated with regard to that definition:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978). See also Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 592 (3rd Cir. 1979), cert. denied, 444 U.S. 1015 (1980). In addition, it is well established that safety and health legislation should be liberally construed. See, e.g., Whirlpool Corp. v. Marshall, ___ U.S. ___, 100 S. Ct. 883, 891 (1980)(OSHAct); Freeman Coal Mining Co. v. Interior Dept. Board of Mine Operations Appeals, 504 F.2d 741, 744 (7th Cir. 1974) (1969 Coal Act).

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1/ The definition of a mine is found in section 3(h)(1) of the Act:

> "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (b) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in non-liquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities....

The purpose of the Mine Act is to protect miners against the hazards of their occupation as Congress indicated in section 2(a)-(c) of the Act. Those hazards clearly were present in this case, and the activity at the Bosal claim must be included in the jurisdiction of the Act. CIM has argued that the Bosal operations were purely exploratory and, therefore, are not mining. It fears that "virtually any action taken merely to assess the ore body, even if only the taking of surface samples or use of a geiger counter, could convert an undeveloped mining claim into a 'mine' under the Act." This case involves, however, neither exploration with a geiger counter, nor taking of surface samples. Holmes and Pederson attempted to drive a drift and establish a portal at the Bosal claim. Their work was mining activity and involved the hazards intended to be protected by the Act. Whether or not the Mine Act reaches all activity labeled "exploratory"--a question we need not decide today--the activity at the Bosal claim falls within the definition of mining. The Act provides an expansive definition of a "mine", which Congress stated must be given the "broadest possible interpretation", with "doubts resolved in favor of inclusion." 2/

Accordingly, the judge's decision is affirmed.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

2/ CIM also asserts that the judge erred in finding that the activity at the Bosal claim was work normally associated with talc mining. CIM relies on the uncontradicted testimony of its production manager that CIM generally mines talc in open pits rather than from portals and drifts. It is true that the record does not contain information on "normal talc mining operations." The judge's error, if any, is harmless. The question in the case was whether the operation was mining, not whether it was "normal talc mining."

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 9, 1981

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| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. HOPE 75-708 |
| UNITED STATES STEEL CORPORATION | : | IBMA No. 77-40 |

DECISION

This proceeding was initiated when United States Steel Corporation filed an application for review of an order of withdrawal issued pursuant to section 104(c)(2) of the Federal Mine Health and Safety Act of 1969. After hearing, the administrative law judge affirmed the order and dismissed the operator's application for review. U.S. Steel appealed to the Board of Mine Operations Appeals (BMOA). BMOA acted on that appeal on March 15, 1977, remanding the case to the administrative law judge for a specific finding of fact to be made as to whether there had been a complete inspection of the mine subsequent to the issuance of the section 104(c)(1) order, and prior to the inspection which precipitated the issuance of the withdrawal order under appeal. The administrative law judge on remand found that the applicant (operator) had not established by a preponderance of the evidence that there had been a complete inspection.

U. S. Steel again appealed to BMOA. That appeal was pending before the Board as of March 8, 1978, and is therefore before the Commission for disposition. 30 U.S.C.A. §961 (1978).

In CF&I Steel Corporation, Docket No. DENV 76-46 (December 2, 1980), we held that "a prerequisite to the issuance of an order of withdrawal under section 104(c)(2) of the 1969 Coal Act was the absence of an intervening 'clean' inspection of the entire mine, and that it was MESA's obligation to present a prima facie case of that fact to sustain the order." In this case, the judge erred in not requiring MESA to present a prima facie case on the issue of an intervening "clean" inspection. We have reviewed the record and find that MESA did not establish a prima facie case of the absence of such an inspection.

Therefore, in accordance with our decision in CF&I Steel, the decision of the judge is reversed and the order of withdrawal is vacated.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 19, 1981

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | Docket No. BARB 78-600-P |
| v. | : | |
| KENNY RICHARDSON | : | |

## DECISION

This case presents several issues arising out of an alleged violation of section 109(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)("the Coal Act" or "the Act"). 1/ In his decision, the administrative law judge concluded that Kenny Richardson, Peabody Coal Company's (Peabody) day shift master mechanic, had "knowingly authorized, ordered, or carried out a violation of 30 CFR §77.404(a)". He found Richardson individually liable pursuant to section 109(c) and assessed a $500 penalty against him. 2/ For the reasons below, we affirm the judge.

On August 4, 1977, a federal mine inspector issued to Peabody a notice alleging that it had violated 30 CFR §77.404(a) because:

> [m]obile equipment in unsafe condition was not removed from service immediately, in that, a crack in the lower chord of the boom of the Bucyrus-Erie 1260 dragline was known to exist and not removed from service. 3/

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1/ The alleged violation occurred when the Coal Act was in effect. The Secretary of Labor filed a petition for assessment of civil penalty on July 28, 1978, after the effective date of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979) ("the Mine Act"). Thus, while the alleged violation arose under the Coal Act, the case has been processed under the Mine Act review procedures. Section 109(c) of the Coal Act and section 110(c) of the Mine Act are identical except for the redesignation of other affected sections. Therefore, although our analysis would be the same under either Act, this decision discusses the violation in terms of the statute in effect at the time the alleged violation occurred, the Coal Act.

2/ The judge concluded that Richardson had not "knowingly" violated another cited standard, 30 CFR §77.405(a). No issue concerning the judge's disposition of this alleged violation is before us on review.

3/ A dragline is "A [crane-like] type of excavating equipment which casts a rope-hung bucket a considerable distance, collects the dug material by pulling the bucket toward itself on the ground with a second rope, elevates the bucket and dumps the material on a spoil bank, in a hopper, or on a pile." Dictionary of Mining, Mineral and Related Terms, at 346 (Department of Interior, 1968).

The inspector issued the notice following his investigation of a fatal accident that had occurred while the boom was being repaired, after the dragline had been removed from service.

On July 28, 1978, the Secretary of Labor filed a petition for assessment of civil penalty against Richardson. 4/ Richardson contested the action and a hearing was held. From the administrative law judge's decision finding him in violation of section 109(c) of the Coal Act, Richardson filed a petition for discretionary review. We granted the petition for review and heard oral argument.

The issues before us are: 5/

(1) Is the Interior Board of Mine Operations Appeals' decision in Everett L. Pritt, 8 IBMA 216 (1977), correct insofar as it held that the corporate operator need not be a party to a section 109(c) proceeding against the corporate agent;

(2) Did the judge err in finding that the dragline was unsafe while it was in service;

(3) Did the judge erroneously construe the "knowingly" element of section 109(c) of the Coal Act;

(4) Did the judge err in concluding that Richardson knowingly permitted an unsafe dragline to remain in service in violation of 30 CFR §77.404(a);

(5) Is section 109(c) of the Coal Act unconstitutional because it imposes liability only on agents of corporate operators?

Was the Board correct in Pritt?

In its decision in Everett L. Pritt, the Interior Board of Mine Operations Appeals concluded that the corporate operator need not be a party to a section 109(c) proceeding against an agent, even though a necessary predicate for an agent's liability under section 109(c) is a finding that the operator violated the Act. Richardson urges that the Commission not follow the Board's Pritt decision, asserting that section 109(c) requires that a corporate operator must be found to have violated a mandatory standard, in a proceeding to which the operator is a party, before liability can be imposed on the corporate agent. Richardson submits that because the Secretary did not name Peabody as a party-respondent to the present proceeding, and because Peabody's failure to contest the violation alleged against it should not constitute an admission of liability, he cannot be held liable.

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4/ Peabody was cited separately for a violation of the same mandatory standard, but was not named as a party-respondent to the instant proceeding. Peabody did not contest the charges against it and paid the penalties assessed.

5/ Our statement of the issues restates, but encompasses, the issues raised in the petition for discretionary review.

Section 109(c) of the Coal Act provides:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) of this section or section 110(b)(2) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b) of this section.

We find the language of section 109(c) and its legislative history to be ambiguous and not dispositive of the question presented. Consequently, we have considered the arguments for and against the Pritt decision, and are persuaded by the strong practical arguments underlying the Board's decision. Here the corporate operator, Peabody, paid the penalty sought against it prior to formal assessment or a hearing. In doing so, the corporate operator exercised its rights under the statute and the applicable regulations not to contest the Secretary's allegation of a violation and proposed penalty, and by operation of statute it became a final order of the Commission not reviewable by any court or agency. 30 U.S.C. 815(a); 30 CFR Part 100. As a result of the operator's failure to contest the alleged violation, the Secretary could not have secured an adjudication on the merits that the operator violated the standard. Thus, unless the Secretary can prove the corporate operator's violation of the standard as an element of proof in its case against the agent, it would be impossible to reach the agent under section 109(c) in those cases where, as here, the operator paid the proposed penalty and thereby avoided a hearing on the merits.

Conversely, we are unpersuaded by the arguments in opposition to Pritt. First, the rationale of Pritt does not jeopardize either the agent's or the operator's due process rights. As did the Board, we believe that due process does not require a determination of the operator's violation in a proceeding separate from that in which the agent is found liable. The operator is not at risk for a penalty in the proceeding against the agent. Whether or not the operator is found liable in a separate proceeding, the Secretary must still fully prove his case in a section 109(c) proceeding against the agent. The operator's violation is merely an element of proof in the Secretary's case against the agent. Thus, the agent's due process rights are amply protected by this procedure; he has notice and an opportunity to be heard in the proceedings against him, including the opportunity to contest the threshold allegation that the operator violated the standard.

Second, a proceeding against only the agent does not necessarily permit the operator to escape without cost. Here the operator paid penalties prior to litigation. Such a procedure conserves the operator's and the government's resources by eliminating the need for a potentially protracted and costly administrative proceeding against the operator.

Third, we find the rationale of the dissent in Pritt unpersuasive. While Congress stated that the agent should not bear the brunt of corporate violations, it stated also that an agent should "stand on his own and be personally responsible for any penalties or punishment meted out to him." 6/ There is no indication in the legislative history that Congress intended to foreclose a penalty proceeding against an agent because the operator was not also a party, or that it intended to require that a separate proceeding be held to determine if the operator violated the standard. Also, we note that the dissent misconstrued the law in stating that in the absence of section 109(c), the "corporate shield" would protect a corporate agent from personal liability. We note that the corporate shield, as that term is normally used, does not protect agents; it protects shareholders. I.E. Fletcher, Cyclopedia of the Law of Private Corporations, §41.3 at 192-193 (rev. perm. ed. 1974). Therefore, in the absence of section 109(c), agents would be protected not by the corporate shield, but rather by the statute's general enforceability against operators.

For these reasons, we conclude that the Board's decision in Pritt correctly interpreted and applied section 109(c).

Did the judge err in finding that the machine was unsafe while in service?

The cited standard, 30 CFR §77.404(a), provides:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

The administrative law judge found that the 1260 dragline "was unsafe to operate and pursuant to 30 CFR §77.404(a) should have been removed from service immediately". Richardson challenges the judge's finding. We conclude that the judge's finding is supported by substantial evidence of record and must be affirmed.

Richardson asserts that the judge's finding of unsafeness was not supported by substantial evidence and that the evidence "compels the opposite conclusion". He argues that the finding of unsafeness is inconsistent with other findings made by the judge: that later repairs weakened the lower chord and caused it to break; that the crack was not considered unusual; and that the chord had been repaired numerous times. Richardson contends further that the judge's finding, based in part on a letter from the dragline's manufacturer after the accident, is unsound

6/ Rep. John H. Dent (D.-Pa.), House Debate on H.R. 13950, 91st Cong., 1st Sess. (1969); reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part I at 1191 (1975). ("Legis. Hist.").

because the manufacturer's field repair instructions do not mention any unsafeness. He also argues that the accident was caused by a design defect, not by an unsafe machine. 7/

The Secretary submits that Richardson "has ... ignored the basic legal principles pertaining to substantial evidence," because "[i]t is axiomatic ... that a judge's finding cannot be overturned merely because ... the judge could have made a contrary finding." The Secretary asserts that the judge could have, and did, reasonably conclude that the lower chord was cracked in all but 9 inches of its 38-inch circumference at the time of Richardson's inspection; that the crack was in a location which had been repaired on numerous previous occasions; and that the crack would continue to enlarge, thus permitting a reasonable inference that the dragline was unsafe.

An observation may help to clarify our discussion and resolution of the question of the dragline's unsafeness. A fatal accident occurred after the machine had been taken out of service and was under repair, after the violation at issue allegedly had occurred. Although this fatality is irrelevant to whether Richardson had knowingly failed to remove the unsafe machine from service at an earlier time, it has colored the discussion of the violation at issue by the parties and the judge. 8/

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7/ We reject, without extended discussion, two further challenges made by Richardson to the sufficiency of the evidence. Richardson argues that the judge's findings were not supported by substantial evidence because the Secretary purportedly based his entire case on uncorroborated hearsay evidence. First, evidence is admissible in an administrative proceeding so long as it is not immaterial or irrelevant. Administrative Procedure Act, 5 U.S.C. §556(d)(Supp. III 1979). Richardson v. Perales, 402 U.S. 389 (1971). The hearsay evidence relied on by the judge in this case was both material and relevant: it related to the safeness of the dragline and to Richardson's knowledge. Second, the judge relied only in part on hearsay evidence. Virtually all of the hearsay regarding unsafeness and knowledge was corroborated by direct evidence. See discussion, infra, at 6.

Richardson asserts also that the proper standard of proof to be applied by the administrative law judge is "direct and clearly convincing." The usual standard of proof required in an administrative proceeding is a preponderance of the evidence, and we hold that this is the appropriate standard of proof in proceedings before Commission administrative law judges. See 2 Am. Jur. 2d. Admin. Law §932, at 199. In any event, the Mine Act imposes a substantial evidence test for Commission review of findings of material fact. 30 U.S.C. §823(d)(2).

8/ An alleged violation arising out of the fatality was also tried before the judge: that Richardson had knowingly failed to ensure that the boom had been properly blocked or supported during repairs, as required by 30 CFR §77.405(a). The judge found for Richardson on this point because there was insufficient evidence of the "knowingly" element. The Secretary did not petition for review on this matter, and it is not before us.

The presence of a crack in the boom of the dragline is undisputed. There was also general agreement as to how long the crack had existed and that it had worsened over time. Numerous witnesses including Richardson testified that the crack, indicated by a drop in a pressure gauge, had developed sometime before Richardson's August 2 examination of the dragline. Richardson testified that he was told about the crack on August 1, the day before his examination, and that the crack "had extended a small amount from what they could see." Tr. at 233-234; Tr. II at 31, 130-131, 172, 187. He testified in addition that, on August 2, prior to his examination, he was told that the crack was getting worse. Tr. II at 64. When he examined the crack, he "could detect just a little movement...." Id. at 137. Other witnesses corroborated the fact that the crack was getting larger; "it was moving a little." Id. at 172, 199.

The testimony relative to the extent of the crack is somewhat ambiguous, and it is unclear whether Richardson realized the magnitude of the crack. Richardson testified that during his examination of the dragline from the catwalk, he could see a 10-inch long crack. Tr. II at 65, 66. The Secretary's witnesses reiterated that fact, and testified that the crack actually extended for about 29 inches of the chord's 38-inch circumference. Tr. at 94, 158-161, 217, 261.

There was also testimony by the federal mine inspector and a mechanical engineer familiar with the construction of the dragline that a 29-inch crack, or even the 10-inch segment visible from the catwalk, was serious enough to warrant removal of the machine from service. Tr. at 168-169, 266-267. Their testimony was substantiated by one of Richardson's witnesses, Peabody's director of heavy equipment. He testified in the hypothetical that if he had seen a 9-inch crack from the catwalk, and in investigating further had determined it was actually a 27-30 inch crack, he would have shut the machine down immediately. Tr. II at 263.

Richardson made a number of admissions, which go to the unsafeness of the dragline, as well as to his knowledge of the condition. He testified that he was concerned about the periodic recurrence of cracks in the boom. Prior to August 2, he had contacted the manufacturer for advice on repairs because he "wanted to achieve the possibility and reduce the chances of this area that had been cracked. It had been too numerous; it needed something to be stopped." Tr. II at 37-39, 64. Despite his testimony that he did not consider the machine to be unsafe, Richardson apparently decided that immediate repairs were necessary, because he stated "that we needed to make some repairs pretty quick." Tr. II at 66-67, 201. In response to a question about whether he believed that the machine should be shut down for repairs, Richardson answered, "As soon as I got the available equipment over." Id. at 67. Therefore, his conclusion that the machine was safe is at odds with his testimony relative to the immediacy of the risk.

Other evidence also tends to show that the dragline was unsafe while it was in service. The Secretary introduced into evidence a letter from the dragline's manufacturer, Bucyrus-Erie, in which it commented on the Secretary's post-accident report. The letter stated: "The machine is equipped with a crack detection and warning system. The crack should have been repaired immediately when it was detected." Pet. Exh. 38. 9/ Richardson also introduced evidence of prior cracks and repairs to support his argument that this crack was no different than many that preceded it and impliedly did not make the machine unsafe. We reject that argument. As the judge correctly stated:

> It is not enough ... that Mr. Richardson had allowed the machine to operate with a cracked chord in the past. This means only that the miners were lucky it did not break in the past, not that it was safe or that it should have been considered as safe.

We believe that the above evidence constitutes substantial evidence to support the judge's finding that the machine was unsafe while in service. We note, however, that the basis of the judge's finding of unsafeness is at least partially defective. The judge noted testimony by Richardson and his witnesses to the effect that the dragline was safe. However, he accepted as more convincing the testimony of the Secretary's witnesses "because the ultimate breaking of the chord demonstrates that the machine was unsafe". (Emphasis added.) Richardson correctly argues that this basis for the judge's finding is unsound. The breaking of the chord on the day after the alleged violation occurred did not necessarily demonstrate anything about the safeness of the machine at the time of the alleged violation because, as found by the judge, the collapse was caused, at least in part, by a repairman's actions, and we do not rely on this rationale in reaching our decision.

One further evidentiary issue merits comment. The judge found that the dragline would have been safe and the violation at issue would not have occurred if the dragline had been equipped with a modified suspension system. This finding is largely irrelevant to the violation at issue because the question here is whether the machine, however equipped, was unsafe while in service. The fact of unsafeness, rather than the reason for the unsafeness, is relevant. If the machine was unsafe, 30 CFR §77.404(a) required that it be removed from service immediately. 10/

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9/ Richardson argues that the judge's finding of unsafeness is "glaringly inconsistent" with the manufacturer's instructions for repair. This argument is without merit because the instructions relate only to support of the boom during repairs, not to the point at issue here, i.e., the unsafeness of the machine before it was taken out of service. Richardson refers also to the letter from Bucyrus-Erie as "clearly inconsistent" with its field instructions, because it failed to mention what Richardson contends was a design defect and the proximate cause of the accident. Again, the cause of the fatal accident is not at issue.

10/ Although there was some controversy over the length of time Richardson allowed the machine to remain in service, this factor relates to the amount of the penalty, not to the fact of violation.

For the above reasons, we affirm the judge's finding that the dragline was unsafe at the time of the alleged violation.

Did the judge erroneously construe the "knowingly" element of section 109(c) of the Coal Act?

In his decision, the administrative law judge construed the term "knowingly" as used in section 109(c) of the Coal Act to mean "knowing or having reason to know." Richardson asserts that the judge should have applied a "willfulness" test, rather than what he terms a "negligence" test. Alternatively, he urges that the statute requires a showing of actual knowledge. We reject both arguments and affirm the judge.

The statutory provision and its legislative history provide little guidance on the construction to be given to the term "knowingly". Section 109(c), as enacted, adopted the language of section 308(c) of the Senate bill insofar as it dealt with an agent's knowing violation. Neither the Conference Report nor the prior Senate Report discussed the knowledge requirement. 11/ The House bill imposed a "knowingly" element for criminal penalties against agents, but not for civil penalties.

Although Congress did not specify the meaning of "knowingly" that it intended to convey in section 109(c) of the Coal Act, we are persuaded that Congress did not intend that "knowingly" should be synonymous with "willfully." Section 109(b), which imposed criminal liability for violations, stated that any operator who "willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 104...." is subject to fine or imprisonment.(Emphasis added.) We believe that because the words "willfully" and "knowingly" were used in the disjunctive in section 109(b), and used singly in other sections of the Coal Act, e.g., sections 109(c), (d) and (e), Congress must have intended the words to have different meanings. See U.S. v. Illinois Central Ry. Co., 303 U.S. 239, 242, 243 (1938), quoting St. Louis and S.F.R. Co. v. U.S., 169 F. 69, 71 (8th Cir. 1909); see also, U.S. v. Consolidation Coal Co., 504 F.2d 1330, 1335 (6th Cir. 1974). Therefore, we reject Richardson's argument that "willfulness" must be shown in order to establish a violation of section 109(c).

11/ H. Conf. Rep. No. 91-761, 16, 71-72; S. 2917, 108; S. Rep. No. 91-411, 91st Cong., 1st Sess., 93 (1969); Legis. Hist. at 219, 889, 1515-1516.

The Mine Act's legislative history on section 110(c)'s continued use of the term "knowingly" sheds no further light on the issue. See H. Rep. No. 95-31, 20; S. Rep. No. 95-181, 40-41; and the Conference Report, S. Rep. No. 95-461, 57, 95th Cong., 1st Sess. (1977); reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. (1978) at 376, 628-629, 1335.

The question remains, however, as to whether Congress intended the interpretation reached by the judge in this case, that "knowingly" means "knew or should have known." As the judge observed:

> The word 'knowingly,' as used in civil and criminal statutes, is not a term of precise definition. The courts have given various shades of meaning to the word, depending upon the context in which it was considered.

In our view, the judge correctly analogized the meaning of "knowingly" as set forth in U.S. v. Sweet Briar, Inc., 92 F. Supp. 777 (D.S.C. 1950), to section 109(c) of the Coal Act. Although Sweet Briar involved the liquidated damages provision of the Walsh-Healey Public Contracts Act, 41 U.S.C. §35 et seq. (1976), and not the imposition of a civil penalty as is involved here, that Act, like the Coal Act, has certain humanitarian objectives; under it Congress used the government's purchasing power to raise labor standards. 92 F. Supp. at 779. Consequently, we believe the court's reasoning is equally applicable to the statutory requirement at issue here. In Sweet Briar the court stated:

> '[K]nowingly,' as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.

92 F. Supp. at 780. We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. 12/

Did the judge err in concluding that Richardson knowingly permitted an unsafe machine to remain in service?

The judge found that Richardson "knew or should have known that the 1260 dragline was unsafe," and did not remove it from service immediately. Therefore, "Richardson, as agent of ... [Peabody] corporation, knowingly authorized, ordered or carried out ... [a] violation [of 30 CFR §77.404(a)]." The judge stated that "[i]t was the kind of situation which would raise a person's suspicion, particularly a mechanic with considerable experience, that something bad was happening which could well endanger personnel." He concluded that Richardson "had such information as would lead a person exercising reasonable care to acquire knowledge of the facts in question or to infer [their] existence," as well as "considerable direct knowledge about a potentially dangerous situation."

12/ We note that the judge's discussion of Richardson's "negligence" arose only in terms of evaluating the penalty assessment criteria of section 109(a)(1) of the Coal Act, now section 110(a)(1) of the Mine Act.

Richardson submits that even if the judge's finding were properly based on a "should have known" test, it erroneously imputed to him knowledge of the machine's unsafeness, in view of his testimony that he was unaware of the modified intermediate boom suspension system and his lack of control over the purchase and installation of the system. Richardson contends further that his knowledge must be determined as of the time before the accident, and that no evidence demonstrates that he had any reason to consider the dragline unsafe.

We agree with Richardson that his knowledge must be determined as of the time of the violation at issue on review, i.e., before the machine finally was removed from service and before the fatal accident occurred. We conclude, however, that the record overwhelmingly supports the judge's finding that Richardson knew or should have known the machine was unsafe while it was in service. Although Richardson emphasizes his ignorance of the modified intermediate boom suspension system, the judge did not base his finding as to Richardson's knowledge on the presence or absence of that system, nor do we. The judge observed that, even without knowledge of the suspension system and the protection it would have provided, Richardson had reason to believe the machine was unsafe. The judge relied for the most part on the same evidence recited in our previous discussion establishing the unsafeness of the dragline. We find that this evidence also establishes that Richardson, in view of his position as day shift master mechanic with general supervisory authority over the dragline, knew or had reason to know that the dragline was unsafe and should have removed it from service. 13/

Accordingly, we affirm the administrative law judge's conclusion that Richardson knowingly violated the mandatory safety standard at 30 CFR §77.404(a).

13/ Richardson also asserts that he cannot be held responsible for Peabody's failure to comply with the manufacturer's recommended equipment modifications because he had no control over the purchase or modification of equipment. This argument misses the mark. The violation at issue involves only the question of whether Richardson knowingly permitted an unsafe machine to remain in service. There was undisputed testimony, including admissions by Richardson, that anyone, including Richardson, could remove from service a machine considered to be unsafe. This is the duty imposed by the standard. Richardson's authority to order the modified suspension system or other equipment is irrelevant.

Is section 109(c) of the Coal Act unconstitutional because it imposes liability only on corporate agents?

The administrative law judge rejected as a ground for dismissal Richardson's claim that section 109(c) is unconstitutional because it denies him equal protection of law. The judge ruled that resolution of challenges to the constitutionality of a provision of the Act is reserved to the courts.

Before us Richardson reiterates his argument that section 109(c) of the Coal Act violates his constitutional right to equal protection because it subjects him to a penalty solely because his employer does business in a corporate form. He asserts that such a distinction is illogical and bears no rational relation to the objective of mine safety or to any difference between a corporate or other form of business. The Secretary argues that the judge correctly held that the Commission lacks the authority to decide the constitutional question raised. Assuming that the Commission has such power, the Secretary argues that section 109(c) does not deny equal protection to corporate agents because the classification in that section has a rational basis.

The threshold question we must decide is whether we have the power to determine the constitutionality of a provision of the Act. We acknowledge the traditional view that administrative agencies lack the power to decide whether legislation is constitutional because such authority is reserved to the courts. 14/ K. Davis, 3 Administrative Law Treatise §20.04, at 74 (1967 ed.). However, we find that view and its underlying rationale deficient with respect to the situation here presented. See Southern Pacific Transp. Co. v. Public Utilities Commission, 18 Cal.2d 308, 556 P.2d 289 (1976); see also, "The Authority of Administrative Agencies to Consider the Constitutionality of Statutes," 90 Harv. L. Rev. 1682 (1977); and "Administrative Adjudication of Constitutional Questions; Confusion in Florida Law and A Dying Misconception in Federal Law," 33 U. Miami L. Rev. 527 (1979).

We note first that the Mine Act specifies that this Commission, rather than the United States district courts, has primary adjudicative jurisdiction over disputes arising under the Act. 30 U.S.C. §823(d). Congress authorized the Commission to decide independently questions of fact, law and policy. Id.; see also, Secretary of Labor v. Helen Mining Co., 1 FMSHRC 1796, 1800-1802 (1979), pet. for review filed, Nos. 79-2518, 79-2537 (D.C. Cir., December 19 and 21, 1979). A necessary concomitant of

14/ Many of the cases generally cited for the proposition that an administrative agency may not decide constitutional questions stop short of an absolute bar to agency determination, or do so in conditional language. "Adjudication of ... constitutionality ... has generally been thought beyond the jurisdiction of administrative agencies." Oestereich v. Selective Service Local Bd. No. 11, 393 U.S. 233, 242 (1968)(J. Harlan, concurring) (emphasis added). See Johnson v. Robison, 415 U.S. 361, 368 (1974).

that authority is that this Commission, whose members are sworn to uphold the Constitution, must make its determinations in accordance with the Constitution. Every branch of the government is obligated to uphold the Constitution, and "a law repugnant to the Constitution is void." Marbury v. Madison, 5 U.S. 368, 391 (I Cranch 137)(1803). We believe that we cannot properly fulfill our duty to interpret the law and to apply it constitutionally, without at the same time deciding whether the law or a portion of it conforms to the Constitution.

We have examined with great care, and have found inapplicable to us, the arguments advanced for denying administrative agencies the power to resolve constitutional questions. The conventional view is that only Article III courts, insulated from the influences of both the executive and legislative branches, possess the independence necessary to render an impartial decision on a constitutional question. 15/ We note, however, that this reasoning is generally applied to administrative agencies significantly different from this Commission, in that they often have combined regulatory and adjudicatory responsibilities. Because we do not have these combined functions, but are vested with solely adjudicative responsibilities, we are not susceptible to any inherent bias believed to exist in agencies that simultaneously regulate, prosecute and adjudicate. 16/

We are insulated also from pressures that some fear might be exerted on adjudicatory components that are one part of a larger executive department. The Mine Act established the Commission as an independent administrative adjudicatory agency. Commission members are appointed by the President with the advice and consent of the Senate. Members are selected from persons "who by reason of training, education, or experience are qualified to carry out the functions" of the office. Members are appointed for fixed terms of six years and can be removed from office only for "inefficiency, neglect of duty, or malfeasance in office". 30 U.S.C. §823. We believe that this independence assures the necessary impartiality for deciding constitutional questions.

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15/ E.g., J. Monaghan, "First Amendment Due Process," 83 Harv. L. Rev. 518, 523 (1970).

16/ The Board of Tax Appeals (BTA) was established in 1924 as an independent adjudicatory agency in the executive branch, and retained that characteristic after being renamed the Tax Court in 1942. Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 721, 725 (1929). 90 Harv. L. Rev. 1682, 1687, n. 29. Section 951 of the 1969 Tax Reform Act, 26 U.S.C. §101(a) et seq., converted the Tax Court to an Article I legislative court, but its prior designation as an independent adjudicatory agency in the executive branch did not change. Although the BTA initially divided sharply over its authority to decide constitutional questions (Cappellini v. Commissioner, 14 B.T.A. 1269, 1293 (1929)), it later found that it had such power and has since exercised it "with the apparent acquiescence of reviewing courts." 90 Harv. L. Rev., supra, at 1687, n. 29.

The Occupational Safety and Health Review Commission, an independent adjudicatory agency with functions analogous to this Commission's, has stated that it has "no power to declare any portion of its enabling legislation unconstitutional." Buckeye Industries, Inc., 3 BNA OSHC 1837, 1975-1976 CCH OSHD ¶20,239 (No. 8454, 1975). However, because the OSHRC did not discuss the underlying rationale for its conclusion, we find little that is instructive in its decision.

In addition to our institutional independence, the judicial nature of Commission proceedings adequately preserves due process. Our procedures are largely governed by the Administrative Procedure Act, 5 U.S.C. §551 et seq.; notice and an opportunity to be heard are provided; parties may retain counsel; and hearings culminate in reasoned opinions rendered by experienced administrative law judges. These decisions may then be reviewed by Presidentially-appointed Commissioners who possess the requisite competence for exercising their adjudicatory powers. 30 U.S.C. §823. Due process is protected further because aggrieved parties may appeal an adverse Commission decision to a United States court of appeals. 30 U.S.C. §816. Therefore, because of our "essentially judicial procedures and experience," we avoid the potential for bias that would undermine our ability to decide constitutional issues. Aircraft and Diesel Corp. v. Hirsch, 331 U.S. 752, 769 (1947); Dobson v. Commissioner, 320 U.S. 489 (1943). We believe that the judicial nature of our proceedings assures parties of reasoned consideration of their arguments and provides us with the institutional competence to decide constitutional issues, further distinguishing us from other agencies denied this authority by the courts. See Oestereich, 393 U.S. at 242 (J. Harlan, concurring); cf. Glines v. Wade, 586 F.2d 675, 676 (9th Cir. 1978).

Other reasons support our conclusion as well. It is generally agreed that, because of its expertise, an administrative agency may entertain constitutional issues at least to develop a factual record and clarify the issues for ultimate disposition by a reviewing court. An administrative agency may also hear constitutional issues where it is possible that the administrative proceeding will leave no remnant of the constitutional question. Weinberger v. Salfi, 422 U.S. 749, 765 (1975); Public Utilities Commission of California v. U.S., 355 U.S. 534, 539 (1958); Far East Conference v. U.S., 342 U.S. 570, 574 (1952). It has also been stated that an agency may resolve constitutional questions "not by reviewing the constitutionality of its statute but by interpreting the statute and by applying constitutional principles to specific facts." Babcock and Wilcox v. Secretary of Labor and Occupational Safety and Health Review Commission, 610 F.2d 1128, 1139 (3rd Cir. 1979). We reject as undesirable and artificial, however, the conventional view that an agency may only compile a factual record relevant to a constitutional issue or apply constitutional principles to particular facts, but may not pass judgment on the ultimate question of the constitutionality of the organic act or portions of it. As a solely adjudicatory agency the Commission regularly considers myriad legal questions, many with substantial constitutional components. We decide due process claims and consider constitutional objections to rules, standards, or other administrative actions. It is our belief that the judicial role of the Commission, admittedly adequate for entertaining various constitutional objections to agency actions, also appropriately permits the Commission to entertain constitutional objections to the underlying statute, especially where, as here, review in a United States court of appeals is available.

Finally, there are also several important policy considerations supporting our authority to decide constitutional questions. In establishing the Commission, Congress intended that the Commission have primary jurisdiction over disputes arising under the Mine Act. The ability to pass upon constitutional challenges is a vital step in the resolution of

many of those disputes, and is fully consistent with Congress' expressed preference for administrative adjudication under the Act. Such administrative review, we believe, will foster efficient and expeditious resolution of constitutional issues, as it does with non-constitutional questions, reducing costs of litigation to the parties as well as reducing delays in the ultimate disposition of the cases in which such questions arise. We believe also that courts will benefit from the Commission's action in compiling a complete factual record and in analyzing the constitutional question presented within the context of that record and the statute that the Commission interprets on a daily basis.

In sum, we are persuaded that there is no valid reason for our refusing to address the constitutional challenge raised against the enforcement of the statute in this case. Therefore, we now turn to an examination of Richardson's equal protection claim.

The first inquiry made in examining a claimed denial of equal protection is whether a suspect class or a fundamental right is involved. If the regulation burdens a suspect classification or a fundamental right, a strict scrutiny test is applied. If a suspect classification or a fundamental right is not involved, a rational relationship test applies. Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).

Both tests require analysis of the purpose of the legislation and the means the legislature has chosen to accomplish that purpose. Where the rational relationship test is applied, the law is presumed to be valid. The challenging party has the burden of proving that there is no rational reason for the means the legislature has used to reach its purpose or end. See Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), and Williamson v. Lee Optical, 348 U.S. 483 (1955). The fact that some legislation must, by its nature, classify people or activities is recognized by the Supreme Court. See Massachusetts Board of Retirement v. Murgia, supra. The question is whether the means are rationally related to the ends.

Under the strict scrutiny test, once it is established that a suspect class or a fundamental right is adversely affected by a classification, the burden shifts to the government to show a "compelling state interest" to justify the legislation. The government must also prove that, not only is there a rational relationship between the purpose of the law and the means by which it is accomplished, but that the means are necessary to the accomplishment of those ends. A court must look to see whether there actually is a less restrictive alternative to the legislature's choice. See McLaughlin v. Florida, 379 U.S. 184 (1964); In Re Griffiths, 413 U.S. 717 (1973); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972).

Persons classified according to the business form of their employer, e.g., corporate agents versus non-corporate agents, do not fall within any of the suspect classifications. Nor does imposing liability for

payment of civil penalties infringe on fundamental rights. 17/ As the Supreme Court observed in Murgia: "[W]e have expressly stated that a standard less than strict scrutiny 'has consistently been applied to ... legislation restricting the availability of employment opportunities.'" 427 U.S. at 313. Thus, Richardson must carry the burden of proving that the classification in section 109(c) is not rationally related to the purpose of the Act.

To assist in our analysis of the denial of equal protection claimed in this case, we turn to a discussion of six Supreme Court cases applying the rational relationship test. One of the more recent equal protection cases is Massachusetts Board of Retirement v. Murgia, supra. There the Court was faced with an equal protection challenge to a Massachusetts statute requiring that uniformed state police retire at age 50. Despite evidence that many persons over the age of 50 continue to be physically and mentally capable of meeting the rigorous demands of their profession, the Court found that the statute is "rationally related to furthering a legitimate state interest." 427 U.S. at 312. The Court conceded that "the state perhaps has not chosen the best means to accomplish" its purpose of protecting "the public by assuring physical preparedness of its uniformed police." 427 U.S. at 314, 316. In applying the rational relationship test, the Court stated:

> This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. [citation omitted]. Such action by a legislature is presumed to be valid.

427 U.S. at 314.

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17/ The Court provided the following list of fundamental rights and suspect classes in Massachusetts Board of Retirement v. Murgia, supra, 427 U.S. at 312 n.3, 4: The fundamental rights: E.g., Roe v. Wade, 410 U.S. 113 (1973) (right of a uniquely private nature); Bullock v. Carter, 405 U.S. 134 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel); Williams v. Rhodes, 393 U.S. 23 (1968) (rights guaranteed by the First Amendment); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (right to procreate). The suspect classes: E.g., Graham v. Richardson, 403 U.S. 365 (1971) (alienage); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Oyama v. California, 332 U.S. 633 (1948)(ancestry).

There is also a very limited middle ground: gender and age. The Court has shied away from labelling these classifications as being suspect, but in most gender cases and some age cases the Court has imposed a "substantial relationship" test, rather than either of the two standard tests: rational relationship or strict scrutiny. See Califano v. Webster, 430 U.S. 314 (1977)(age); Craig v. Boren, 429 U.S. 190 (1976)(sex); and Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979).

Smith v. Cahoon, 283 U.S. 553 (1931), concerned the imposition of certain licensing requirements upon commercial carriers, excluding private carriers and commercial carriers transporting agricultural and dairy products. The statutes in question carried criminal sanctions. The Court held that, although the state has "broad discretion in classification in the exercise of its power of regulation, ... the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary." 283 U.S. at 566-567. The classifications drawn in the laws in question were found to be so totally arbitrary in their distinctions as to be violative of equal protection.

Colgate v. Harvey, 296 U.S. 404 (1935), concerned a tax scheme that imposed a higher tax on dividends derived from corporations outside the state then on dividends derived from resident corporations. This portion of the tax was found to be constitutional because the Court found a "fair and reasonable" reason for the differentiation. Another portion of the scheme taxed interest from interest-bearing securities, but exempted interest received on account of money loaned within the state, while taxing income derived from similar loans made outside the state. This portion of the tax was found to be unconstitutional. The Court found that the tax was not rationally related to the purpose of the Act--raising revenue. It noted that if the legislation had gone further and required that the income from in-state loans be invested within the state as well, then it would have had a purpose: increasing the actual wealth within the state. The Court declined to interpret the provision in this manner, however, "for that would be to amend [the provision] and not to construe it." 296 U.S. at 424. Thus, the Court did not reject the entire tax scheme, but rather invalidated only that portion for which it was unable to find a rational explanation.

In Liggett Co. v. Lee, 288 U.S. 517 (1933), a Florida tax statute was challenged on equal protection grounds. The purpose of the statute was to require the licensing of all stores. The act established a licensing fee on a per store basis, but the amount of the per store fee increased if the owner operated stores in more than one county. The Court was unable to find a rational reason for increasing the tax where an owner had a store in more than one county. The Court found that the statute was not aimed solely at large corporate chains, which frequently owned stores in more than one county, but that it was aimed at all store owners. The Court stated:

> The legislature of Florida has declared the purpose and object of the statute to be to tax every store owner and operator, and we should not go behind that declaration and attribute to the lawmakers some other ulterior design. Corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons. [Citations omitted.] Unequal treatment and arbitrary discrimination as between corporations and natural persons, or between different corporations, inconsistent with the declared object of the legislation, cannot be justified by the assumption that a different classification for a wholly different purpose might be valid.

> Those provisions of §5 which increase the tax if the owner's stores are located in more than one county are unreasonable and arbitrary, and violate the guaranties of the Fourteenth Amendment. 288 U.S. at 536.

Williamson v. Lee Optical, 348 U.S. 483 (1955), may be the seminal case concerning the Supreme Court's view of the requirements of equal protection and due process. In Williamson the Court upheld an Oklahoma statute that forbade opticians from filling or duplicating eye glass lenses without a prescription from an opthamologist or optometrist. The Court stated "that regulation of economic interest will violate the principle of equal protection if such regulation fails to bear a rational relation to the objective sought." However, the Court went on to find the challenged statute constitutional:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. [Citation omitted.] Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. [Citation omitted.] The legislature may select one phase of one field and apply a remedy there, neglecting the others.

348 U.S. at 488-89. The Court speculated on various rationales the legislature might have had in mind when enacting the legislation. From these speculations, the Court concluded that "[w]e cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds." 348 U.S. at 491.

A final example of the Supreme Court's rational relationship analysis is Idaho Department of Employment v. Smith, 434 U.S. 100 (1977). The statute involved precluded any person who attended school during the day from receiving unemployment benefits. The classification challenged was night students versus day students. The Court stated:

> The holding below misconstrues the requirements of the Equal Protection Clause in the field of social welfare and economics. This Court has consistently deferred to legislative determinations concerning the desirability of statutory classifications affecting the regulation of economic activity and the distribution of economic benefits. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice

> it results in some inequality.'" Dandridge v. Williams, 397 U.S. 471,485 (1970), quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). See also Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Mathews v. De Castro, 429 U.S. 181 (1976); Jefferson v. Hackney, 406 U.S. 535 (1972). The legislative classification at issue here passes this test. It was surely rational for the Idaho Legislature to conclude that daytime employment is far more plentiful than nighttime work and, consequently, that attending school during daytime hours imposes a greater restriction upon obtaining fulltime employment than does attending school at night.... The fact that the classification is imperfect and that the availability of some students desiring full-time employment may not be substantially impaired by their attendance at daytime classes does not, under the cases cited supra, render the statute invalid under the United States Constitution.

434 U.S. at 101-102. Thus, despite the imperfection in the classification, the legislation was upheld because the Court found a rational reason to support the classification.

Richardson here argues that the classification of agents according to the business form of their employers cannot withstand constitutional challenge. Applying the rational relationship test we have examined whether the classification established by Congress in section 109(c) is rationally related to the accomplishment of its intended purpose. As discussed below, we find a rational basis for the classification in section 109(c) and reject Richardson's challenge.

The expressed fundamental purpose of the 1969 Coal Act is to "protect the health and safety of the Nation's coal miners." 30 U.S.C. §801 (1976). Section 109(c) is intended to provide one vehicle for accomplishing this purpose by holding corporate agents who commit knowing violations individually liable. We believe that imposing personal liability on corporate agents furthers the overall goal of the Act by providing an additional deterrent to many of those individuals in a position to achieve compliance. That this was the intent of Congress in enacting section 109(c) is clear. As stated in the legislative history concerning this section:

> The committee expended considerable time in discussing the role of an agent of a corporate operator and the extent to which he should be penalized and punished for his violations of the act. At one point, it was agreed to hold the corporate operator responsible for any fine levied against an agent. It was ultimately decided to let the agent stand on his own and be personally responsible for any penalties or punishment meted out to him.

> The committee recognizes, however, the awkward situation of the agent with respect to the act and his supervisor, the corporate operator, and his position somewhere between the two. The committee chose to qualify the agent as one who could be penalized and punished for violations, because it did not want to break the chain of responsibility for such violations after penetrating the corporate shield. The committee does not, however, intend that the agent should bear the brunt of corporate violations. It is presumed that the agent is often acting with some higher authority when he chooses to violate a mandatory health or safety standard or any other provision of the act, or worse, when he knowingly violates or fails or refuses to comply with an imminent danger withdrawal order or any final decision on any other order.

Legis. Hist. at 1041-1042 (Emphasis added.)

Furthermore, as stated by the Supreme Court in Lindsley v. Natural Carbonic Gas Co., supra, "when the classification ... is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted can be assumed". 220 U.S. at 78. The Secretary has proffered a further explanation in support of the rationality of section 109(c). In his brief the Secretary stated:

> Congress was obviously aware that it is often difficult to penetrate the corporate decision-making processes of large corporate mining operations and determine the precise involvement of individual officers, directors, and agents in any given situation. In contrast, when a mine is run by an individual partnership, or association, generally the operation is smaller and the individual, partner, or associate is involved in the day-to-day operation of the mine and thus is chargeable as a mine operator himself under the Act.
>
> The rational basis for the classification in [section 109(c) of the Coal Act] is the Congressional acknowledgement of the necessity for piercing the corporate shield and placing the blame directly on the individuals responsible for the violations.

Also, as stated by counsel for the Secretary at oral argument:

> One of the problems which concern[ed] the Congress when they considered the Coal Act was that while operators who conducted their business in the form of a partnership or sole proprietorship were directly and personally liable for violations of the Act, the decision makers in a mine conducting business within a corporate structure

> were insulated from such personal liability.... Congress also knew that a high proportion of the nation's coal mines are operated by corporate operators.
>
> In fact, as we noted in our brief, the top fifteen corporate operators of coal in this country produce forty percent of all the coal mined in the United States.
>
> To remedy this inequity, Congress chose to make corporate operators agents, as well as directors and officers, liable for knowing violations of the Act....

We find that the explanations set forth in the legislative history and by the Secretary provide rational reasons for the classification made in section 109(c). We recognize that much of the reasoning for placing individual liability on agents of corporate operators would likewise be applicable to imposing similar liability on agents of non-corporate operators. Such agents are also in a position to secure compliance with the Act's requirements to assure the safety of miners, but unlike their corporate counterparts they are not subject to the threat of direct enforcement against them. As noted by the Supreme Court in Dandridge v. Williams, 397 U.S. 471, 485 (1970), quoting Lindsley v. Natural Carbonic Gas Co., supra, however:

> If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality'.

As also recognized by the Supreme Court, Congress "may take one step at a time addressing itself to the phase of the problem which seems most acute to the legislative mind". Williamson v. Lee Optical, supra, 348 U.S. at 488-489. Finally, as cogently stated by the Supreme Court in Vance v. Bradley, supra, where a statutory distinction does not burden a suspect group or a fundamental interest,

> ... courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

440 U.S. at 96-97 (footnotes omitted).

Applying these principles we find that Congress' imposition of liability on corporate agents is not totally arbitrary but has a rational basis, and therefore conclude that the classification in section 109(c) does not offend the Constitution.

Accordingly, we affirm the judge's conclusion that Richardson violated section 109(c) of the Coal Act by knowingly permitting mobile equipment in an unsafe condition to remain in service. We also affirm the $500 penalty assessed by the judge against Richardson.

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

R. V. Backley, Chairman, Concurring In Part And Dissenting In Part.

I must dissent from that part of the decision that upholds the constitutionality of section 109(c) of the Coal Act. I do so because I can perceive no rational basis for singling out the agents of corporate operators for violations of the Act and excusing other agents for the same acts. The purpose of the section is to penalize individuals responsible for the safety of the miners who knowingly fail in that responsibility. I fail to see how mine health and safety is advanced when agents who are guilty of some grievous act are allowed to escape liability solely because they work for a partnership or sole proprietorship.

In this regard, the Secretary's comments quoted on pages 19-20 of the majority are wide of the mark. The question is not whether the liability falls directly upon the partnership or sole proprietorship but whether it can be placed upon the agent of those entities. In the case of a corporation, both the corporation and those individuals ennumerated in section 109(c), are subject to the assessment of a civil penalty. This is the case before us. However, under the same circumstances, the agent of a non-corporate operator would escape liability. Accordingly, I find no rational basis for the exclusion if the purpose of the section is to place responsibility where it properly belongs. In my opinion not only is the classification arbitrary but exculpatory. The exoneration of one class of offenders under the Act provides little support for the rational basis test.

Richard V. Backley, Chairman

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 27, 1981

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

v.

SIGLER MINING, INC.

Docket No. WEVA 80-519

DECISION

We directed the judge's order of default against Sigler Mining for review sua sponte on December 4, 1980. 30 U.S.C. §823(d)(2)(B) (Supp. III 1979). The Secretary had filed a petition for assessment of civil penalties on August 18, 1980. On October 6, an order to show cause was issued requiring Sigler Mining to file an answer within 15 days or show good reason for its failure to do so. Sigler Mining responded on October 18 by a letter to the judge stating that due to poor market conditions and recent resumption of operations, it did not have funds to pay the penalty. The judge assigned to the case then issued an order declaring the operator to be in default, and assessing the proposed penalty of $1,174. The order noted that Commission Rule 28, 29 C.F.R. §2700.28 (1979), requires that answers include a statement of why the violations are contested and whether a hearing is requested. The judge found that the operator's letter to the judge failed to comply with these requirements. We disagree. Sigler Mining filed pro se a timely response to the show cause order alleging an inability to pay the penalties. This response at least brings into issue one of the six criteria to be considered in assessing penalties under the Act--effect of the size of the penalty on the operator's ability to continue in business. 30 U.S.C. §820(i)(Supp. III 1979). As we have indicated in the past, a default judgment is a harsh remedy not suitable when a party has substantially complied with a show cause order, and has not demonstrated bad faith. Coaltrain Corp., 1 FMSHRC 1831 (1979); BB&W Coal Co. Inc., 1 FMSHRC 467 (1979). We express no view, of course, as to the merits of the operator's allegations, or as to the effect, if true, on any penalty ultimately assessed.

Accordingly, the order is vacated and the case is remanded.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 28, 1981

| | | |
|---|---|---|
| LOCAL UNION NO. 6843, DISTRICT 28, UNITED MINE WORKERS OF AMERICA | : | |
| v. | : | Docket No. VA 80-17-C |
| WILLIAMSON SHAFT CONTRACTING COMPANY | : | |

DECISION

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979). The United Mine Workers of America applied for compensation for 13 miners pursuant to section 111 of the Act. 1/ The company moved to dismiss the application for failure to state a claim upon which relief could be granted. The administrative law judge granted the motion. We affirm the judge.

In its application the union alleged the following: that an MSHA inspector visited the mine to conduct a roof-control inspection; that during the inspection he found that a majority of the roof bolts used to support the roof in a particular area lacked a proper amount of torque; that the inspector advised the company the only work which could be done in the area was to support the roof; and that as a result of this statement normal mining operations halted and 13 miners were idled. The union asserted that the inspector's instruction amounted to an oral imminent danger order of withdrawal under section 107(a) of the Act. 2/

1/ Section 111 of the Act provides:

> If a ... mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift....

2/ Section 107(a) states:

> 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 judge noted that section 107 specifically requires imminent danger orders to be written. 3/ The judge found that under the circumstances alleged in the application, the only type of withdrawal order the inspector could have issued was one for imminent danger and that he clearly did not issue one. Without an order upon which to base the compensation claim, the judge concluded the union's application was fatally defective.

The union would have us find the judge erred. It argues the requirement of the Act that an imminent danger order be in writing can not be relied upon to defeat a compensation claim. We disagree.

The mandate of section 107(d) that an imminent danger order be written is explicit. It reflects congressional concern that an operator be adequately advised of the imminent danger so that corrective action may be taken. 4/ In so doing it offers protection to an operator's property and to a miner's life and limb. Moreover, it offers all parties procedural protection in any subsequent litigation by placing them on notice as to the conditions which constitute the alleged imminent danger and the conditions under which the order arose. Presumably this eliminates much of the speculation and dispute an oral order would almost surely engender. This is not to say that a claim for compensation may never be based upon an oral finding of imminent danger. There may well be extraordinary circumstances wherein an inspector who makes such a finding fails in or is prevented by subsequent events from confirming it in a written order of withdrawal. However, no such special circumstances were pleaded by the union. The mere assertion that an inspector's statements are tantamount to an oral order without assertions that he intended to issue an imminent danger order and as to why the inspector was prevented from reducing it to writing will not support a claim. Accordingly, the judge's order is affirmed.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

3/ Section 107(c) and (d) state:

(c) Orders issued pursuant to subsection (a) shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger and a description of the area of the coal or other mine from which persons must be withdrawn and prohibited from entering.

(d) Each finding and order issued under this section ... shall be in writing, and shall be signed by the person making them.

4/ S. Rep. No. 95-181, 95th Cong., 1st Sess. 41 (1977) reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 626 (1978).

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 28, 1981

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| v. | : | Docket Nos. DENV 79-139-PM |
| | : | DENV 79-140-PM |
| EL PASO ROCK QUARRIES, INC. | : | DENV 79-176-PM |

## DECISION

This is a civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979). Mine Safety and Health Administration (MSHA) inspectors issued citations under section 104(a) of the Act to El Paso Rock Quarries, Inc., for alleged violations of mandatory safety standards. El Paso contested the citations and an evidentiary hearing was held. The administrative law judge held in part for El Paso vacating several of the citations, and in part for the Secretary finding that certain alleged violations occurred and assessing penalties with respect to those violations. Both El Paso and the Secretary sought Commission review of portions of the judge's decision adverse to them. 1/ The Commission granted, in part, each of the petitions for discretionary review. 2/ For the reasons that appear below, we affirm in part, and reverse and remand in part. 3/

## Citation No. 159658

This citation involved an alleged violation of 30 CFR §56.9-22. 4/ The inspector issued the citation because an elevated roadway that provided access to the top of the quarry wall was not equipped with either berms or guards along its outer edges. The roadway was elevated three hundred feet on one side and forty to fifty feet on the other side. Although the roadway was not used by El Paso to haul rocks, it was used to haul explosives and to provide access to areas which were to be drilled and blasted.

1/ El Paso sought review of the judge's findings of violation only. It did not seek review of the penalties assessed.

2/ We directed review of seven citations that the judge vacated, and of three citations that the judge upheld.

3/ The citations are treated separately, except where a common question of law or fact is presented.

4/ Section 56.9-22 provides:

> Berms or guards shall be provided on the outer bank of elevated roadways.

81-1-20

The judge vacated the citation on the ground that the standard applies only to roads used for loading, hauling and dumping and that the activities that the roadway was used for here did not fall into any of those categories. 5/ We disagree. The hauling of explosives is the kind of haulage contemplated by section 56.9. Therefore, we reverse the decision of the judge, reinstate the citation and remand for further proceedings consistent with this opinion. 6/

Citation No. 159662

This citation also involved an alleged violation of 30 CFR §56.9-22. The citation was issued because El Paso had allowed haulage trucks to be driven on a "bench" before berms were erected. 7/ The bench where the haulage took place was elevated forty feet above a lower bench. On the basis of those facts, the judge found a violation of section 56.9-22. The question on review is whether a "bench" is an "elevated roadway" within the meaning of the standard. El Paso argues that it is not and that the judge, therefore, erred in finding a violation. We disagree. Under the facts of this case, the quarry bench where the haulage trucks were driven is indeed an elevated roadway within the meaning of section 56.9-22. The judge's finding of a violation is, therefore, affirmed.

Citation Nos. 159660 and 159664

These citations involve a common question of law: whether El Paso may be held liable when its customers or employees of its customers do not comply with mandatory safety standards. 8/ One citation (No. 159660)

5/ The judge apparently based his conclusion upon the fact that 30 CFR §56.9 is entitled, "Loading, hauling, dumping."

6/ Because hauling activities were involved here, we do not pass upon the question of whether the provisions of 30 CFR §56.9 are applicable only to loading, hauling and dumping activities.

7/ The term "bench" is in part defined by A Dictionary of Mining, Mineral, and Related Terms, Department of the Interior (1968), as:

> A ledge, which, in open-pit mines and quarries, forms a single level of operation above which mineral or waste materials are excavated from a contiguous bank of bench face. The mineral or waste is removed in successive layers, each of which is a bench, several of which may be in operation simultaneously in different parts of, and at different elevations in an open-pit mine or quarry.

8/ The customers and employees of customers were referred to during the proceeding and in the judge's decision as "rock pickers".

alleged a violation of 30 CFR §56.15-4. 9/ It was issued because two rock pickers were not wearing eye protective equipment while breaking rocks with a hammer. The other citation (No. 159664) alleged a violation of 30 CFR §56.3-12. 10/ That citation was issued because two other rock pickers, who, while loading onto a truck rocks that were being rolled down to them from the top of the quarry bank, were working between the truck and the bank and did not have access to an adequate escape route.

The judge found that violations of both standards occurred. He also determined that El Paso was liable for the violations, because the rock pickers were "miners" as that term is defined in section 3(g) of the Act. He concluded, therefore, that the rock pickers were entitled to the same protection as that afforded miners who are employees of the mine owner.

We affirm. First, we hold that the judge was correct in concluding that the rock pickers were miners within the meaning of section 3(g) and were, therefore, entitled to the protections of the Act. We note that section 3(g) defines a "miner" as "any individual working in a coal or other mine". Here, the rock pickers broke, loaded and hauled the rock out of the quarry. In light of these activities the rock pickers were miners as defined by section 3(g). 11/

Second, we hold that the judge was correct in finding that El Paso was liable for the violations. The substantial involvement by the rock pickers in the quarrying operation of El Paso is a sufficient basis upon which to predicate El Paso's liability for the violations committed.

Therefore, we affirm the judge's holding that El Paso is liable for the failure of its customers or the employees of its customers to comply with the mandatory safety standards.

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9/ Section 56.15-4 provides:

> All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

10/ Section 56.3-12 provides:

> Men shall not work between equipment and the pit wall or bank where the equipment may hinder escape from falls or slides of the bank.

11/ Neither in that section nor elsewhere in the Act is one's status as a "miner" made contingent upon an employment relationship with the owner or operator of a mine.

Citation No. 159661

Here, the inspector cited El Paso for an alleged violation of 30 CFR §56.9-40(a). That standard provides that men shall not be transported "[i]n or on dippers, forks, clamshells, [or] beds of trucks unless special provisions are made for their safety, or buckets except shaft buckets." The inspector issued the citation upon observing a person riding on the running board of a truck. At the opening of the hearing, counsel for the Secretary moved to amend the citation so as to allege a violation of section 56.9-40(c), rather than section 56.9-40(a). Section 56.9-40(c) provides that men shall not be transported "[o]utside the cabs and beds of mobile equipment, except trains." Counsel for El Paso objected to the amendment and the judge denied the Secretary's motion.

We affirm. Granting or denying amendments is largely a discretionary matter with the judge to whom the motion is made. Although we might have ruled differently as an initial matter, 12/ we conclude that the judge did not abuse his discretion in denying the Secretary leave to amend the citation.

Citation No. 159665

This citation involved an alleged violation of 30 CFR §56.9-87. That mandatory standard requires that where an operator of heavy duty mobile equipment has an obstructed view to the rear, such equipment is to be provided with an automatic reverse signal alarm that is audible above the surrounding noise level, or in the alternative, that an observer is to be present in order to signal when it is safe to back up. The inspector issued the citation upon observing a truck back up with an inoperative reverse signal alarm. The judge vacated the citation on the ground that although the reverse alarm was inoperative, the Secretary failed to establish that El Paso knew or should have known it was inoperative.

The question on review is whether, under the 1977 Mine Act, an operator may be held liable for a violation of a mandatory safety standard regardless of fault. We answer that question in the affirmative. As we have previously held with respect to the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976) (amended 1977), unless the standard itself so requires, an operator's

12/ In this regard, we note that Rule 15(a), Fed. R. Civ. P., in part provides:

> (a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. [Emphasis added.]

negligence has no bearing on the issue of whether a violation occurred. Rather, it is a factor that is to be considered in assessing a penalty. United States Steel Corp., 1 FMSHRC 1306, 1 BNA MSHC 2151, 1979 CCH OSHD ¶23,863 (1979). Therefore, we reverse the decision of the judge, reinstate the citation and remand for further proceedings consistent with this opinion.

Citation Nos. 159669, 159675 and 159695

Each of these citations involved an alleged violation of 30 CFR §56.11-2. 13/ The inspector issued the citations upon observing tools, bars, pulleys, hooks, wire rope and rocks lying near the edge of elevated walkways that were not equipped with toeboards (i.e., raised edges around the perimeter of the walkway platforms). The inspector believed that the absence of toeboards constituted a violation of section 56.11-2 because the loose material lying on the walkways could fall over the sides of the platforms and onto employees working below. The judge vacated the citation on the ground that the standard is intended to protect only those employees working on the elevated walkways, and not those employees working underneath them.

We disagree. In view of the remedial nature of the 1977 Mine Act, we hold that one of the purposes of the toeboard provision contained in that standard is to protect persons working below elevated walkways from falling objects. 14/ Therefore, we reverse the decision of the judge, reinstate the citations and remand for further proceedings consistent with this opinion.

13/ Section 56.11-2 provides:

> 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. [Emphasis added.]

14/ The Occupational Safety and Health Review Commission has also recognized such a purpose of toeboards in similar standards under the Occupational Safety and Health Act. See Western Waterproofing Co., Inc., 7 BNA OSHC 1625, 1979 CCH OSHD ¶23,785 (1979); Truax & Hovey Drywall Corp., 6 BNA OSHC 1654, 1978 CCH OSHD ¶22,799 (1978). Also, with respect to toeboards, the Accident Prevention Manual For Industrial Operations, National Safety Council, 7th ed. (1978) states:

> Open-sided floors or platforms more than 4 ft above floor or ground level, and scaffolds more than 10 ft above floor or ground level, should be guarded by a 36- to 42 in.-high railing (with midrail). If persons can pass beneath or if there is moving machinery or other equipment with which falling materials could create a hazard, the guardrail should also have a 4-in.-high toeboard. Screening can also be added. [Fig. 16-7, at p. 389; emphasis added.]

Citation No. 159691

This citation involved an alleged violation of 30 CFR §56.12-68. 15/ The inspector issued the citation upon observing that the gate to a fence surrounding an electrical power transformer was not locked. In vacating the citation, the judge stated that it had apparently been issued within minutes after the issuance of another citation alleging the existence of a hole in the same transformer fence. The judge concluded that because of the hole in the transformer fence, El Paso was no longer under an obligation to keep the transformer gate locked at the time that the unlocked gate citation was issued.

We reverse. The 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards. It does not permit an operator to shield itself from liability for a violation of a mandatory standard simply because the operator violated a different, but related, mandatory standard. Therefore, we reverse the decision of the judge, reinstate the citation and remand for further proceedings consistent with this opinion.

Accordingly, the judge's decision is affirmed with respect to Citation Nos. 159662, 159660, 159664 and 159661. With respect to Citation Nos. 159658, 159665, 159669, 159675, 159695 and 159691, the judge's decision is reversed and the citations are reinstated and remanded for further proceedings consistent with this opinion.

Frank H. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

Backley, Chairman, dissenting in part -

I dissent from that part of the majority opinion that would reverse the judge's decision vacating Citation No. 159691. This citation involved an alleged violation of 30 CFR Sec. 56.12-68, which requires that transformer enclosures be kept locked against unauthorized entry. The record discloses that this citation was issued to the operator two minutes after the latter had received a citation for having a hole two feet wide in the transformer fence.

15/ Section 56.12-68 provides:

Transformer enclosures shall be kept locked against unauthorized entry.

The citations of the inspector were laudable - to a point. In issuing Citation No. 159691, the inspector gave the operator 30 hours to install a lock on the gate. The operator abated in 4½ hours. The operator was given 4 days to repair the fence. He abated this violation in 9½ hours.

The purpose of keeping a transformer fence locked is clear. What is not clear is whether the manner of enforcement present in this case accomplishes the purpose - keeping unauthorized persons out of the enclosure - where there is no enclosure. Had the operator abated both citations at the maximum time allowed by the inspector, he would have had a locked transformer fence with a hole in it. Somewhere, I miss the point.

Richard V. Backley, Chairman

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Administrative Law Judge Decisions

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 2 1981

| | | |
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| HARMAN MINING CORPORATION, Contestant | : | Contest of Order and Citations |
| v. | : | Docket No. VA 80-94-R |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Order No. 698509 February 9, 1980 |
| | : | Docket No. VA 80-95-R |
| UNITED MINE WORKERS OF AMERICA, (UMWA), Respondent | : | Citation No. 0698510 February 11, 1980 |
| | : | Docket No. VA 80-96-R |
| | : | Citation No. 0698511 February 11, 1980 |
| | : | Docket No. VA 80-97-R |
| | : | Citation No. 0698513 February 14, 1980 |
| | : | Central Preparation Plant |

DECISIONS

Appearances: Robert M. Richardson, Esq., J. Peter Richardson, Esq., Bluefield, West Virginia, for Contestant; John H. O'Donnell, Attorney, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent MSHA.

Before: Judge Koutras

## Statement of the Proceedings

These consolidated contests concern a section 103(k) order and three section 104(a) citations issued by MSHA to the contestant in February, 1980. The order was issued by MSHA inspector Roger L. Clevinger on February 9, for the purpose of facilitating an investigation into a fatal railroad haulage accident which occurred at contestant's central preparation plant on the evening of February 8. The accident resulted in the death of an employee (brakeman) of the Norfolk & Western Railroad Company who was struck by a

trip of two runaway loaded railroad cars being dropped by an employee (car dropper) of the contestant. The facts and circumstances surrounding the accident are detailed in the accident investigation report prepared by MSHA inspectors Clevinger and Merian O'Bryan (Exh. R-1). The citations were issued as a result of the information obtained by the inspectors during the course of their investigation, but only two of them were related to the accident.

The section 103(k) Order No. 0698509, February 9, 1980, issued by Inspector Clevinger reads as follows: "A fatal accident has occurred on the railroad side track serving this preparation plant. This order is issued pending an investigation to determine the cause and means of preventing a similar occurrence."

Citation No. 0698510, February 11, 1980, issued by Inspector Clevinger, cites a violation of 30 C.F.R. 77.1607(v), and states as follows: "The railroad car dropper did not have the two loaded railroad cars being dropped on the side track under control in a manner to where the cars could be stopped safely when needed. This was issued during a fatal accident investigation."

Citation No. 0698511 (as amended), February 11, 1980, issued by Inspector Clevinger, cites a violation of 30 C.F.R. 77.1713, and states as follows: "The onshift examination for hazardous conditions at the Central Preparation Plant was not being conducted by a certified person."

Citation No. 0698513, February 14, 1980, issued by Inspector Clevinger, cites a violation of 30 C.F.R. 48.31, and states as follows: "Hazard training was not provided for the Norfolk and Western employees serving this preparation facility."

A hearing was conducted in Pikeville, Kentucky on September 11, 1980, and the parties appeared and participated therein. Post-hearing proposed findings and conclusions were submitted by the parties and the arguments presented have been fully considered by me in the course of these decisions. Although notified of the hearing, respondent UMWA failed to appear and I dismissed them as a party (Tr. 80).

## Issues Presented

1. Whether the accident occurred on contestant's coal mine property and whether the asserted mining activities engaged in by the contestant at the time of the accident constituted "mining" within the meaning of the Act.

2. Whether the order and citations were properly and validly issued by the inspector pursuant to the Act, and whether the conditions and practices described in the citations constituted violations of the cited mandatory safety standards.

3. Whether the order and citations should have been served on the Norfolk and Western Railroad Company (N & W) as the "operator" of the "mine," rather than on the contestant.

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

## Findings and Conclusions

### The Jurisdictional Question

Resolution of the legal question concerning MSHA's jurisdiction in this case centers on the following questions: (1) Is the tipple and preparation plant part of a coal mine within the meaning of the Act? (2) Is the area of land where the N & W railroad tracks are located and where loaded coal cars are parked awaiting transportation by the railroad part of a coal mine?

The definition of "coal or other mine" found in section 3(h)(1) of the Act is as follows:

> "[C]oal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

In its post-hearing brief contestant argues that the fatal accident and all car-dropping activities relating to and leading up to the accident happened on the N & W railroad tracks, at a site physically separate from the preparation plant and that any coal preparation had been completed and transportation begun. In these circumstances, contestant advances the argument that since the accident did not occur in "a coal or other mine" as defined by the Act, MSHA has no jurisdiction to issue orders or citations for conditions or practices over which contestant has no control.

Conceding that the definitions of "coal or other mine" follows the mining process from extraction through preparation, contestant nonetheless advances the argument that while specific facilities are referred to by the definitions section found in the Act, transporting prepared coal in railroad cars is not included among the itemized activities listed therein. Further, contestant asserts that it conveyed all of its tangible property interests in

the railroad tracks, roadbeds, and appurtenances thereto to the railroad. Contestant would draw the line at the production or preparation end of its mining process precisely where the coal has been prepared and completely loaded into the railroad car delivery vehicle while it is on the track, but would not extend MSHA's jurisdiction to loaded railroad cars assertedly off of the coal company's property. In support of this argument, contestant points out that MSHA has not undertaken to regulate the defective railroad car brakes such as the ones which caused the accident in this case, and that the railroad has refused to submit itself to MSHA's jurisdiction because it believes that the accident occurred on a railroad rather in a coal mine, thereby subjecting the railroad to the jurisdiction of the Interstate Commerce Commission rather than MSHA.

Contestant's jurisdictional position was succinctly stated by its counsel during the course of the hearing as follows (Tr. 219):

> When that car is dropped onto tracks belonging to the Norfolk and Western Railroad in a Norfolk and Western railroad car completely loaded and ready for transportation to its destination with nothing more to be done to it in the manner of preparation or extracting, then I say that is the fine line. Because I say under the definition of a coal mine there is nothing, no language that would include the tracks of the Norfolk and Western Railroad as a part of the coal mine. But I think it is definitely a far cry different thing from a preparation facility belonging to Harman and I think when that car's under that preparation plant being loaded that it is subject to inspection. When it is dropped in position, which is the case in this case, below that tipple loaded in a Norfolk Western Car on a Norfolk and Western track with defective brakes on it that it is not on a coal mine.

Respondent MSHA's arguments in support of its jurisdiction in this matter includes a detailed analysis of the deed and agreement between contestant and the railroad concerning the use of the land and railroad equipment in question (Exhs. R-15 and R-16). In summary, MSHA argues that when read together, the agreement and deed do not reflect any intention on the part of contestant to convey the land below the tipple and preparation plant in fee to the railroad. To the contrary, MSHA argues that the effect of the deed and agreement is to grant to the railroad an easement or license across contestant's land for the purpose of providing a mutually beneficial and convenient method of transporting coal off mine property.

The record reflects that the railroad cars are loaded at the tipple preparation plant and trips of three to five loaded cars are then dropped by gravity and placed on certain tracks some four to five hundred feet from the plant until such time as they can be added to other trips and taken away by the railroad. During the dropping process the cars are dropped by gravity, they are manned by car droppers employed by the contestant, the car droppers control the positioning of the loaded cars on the tracks, and their duties

include operating the track switches to facilitate the placing of the loaded cars at the desired track locations (Tr. 29-31). The tracks consist of three storage tracks and the main railroad track (Tr. 32, Exh. R-2). The car dropper actually stands on a platform at one end of the loaded moving car, and his job is to control the speed of the car by means of a wheel-type mechanical braking device (Tr. 36).

The record also reflects that brakemen employed by the railroad also operate the track switching devices and often instruct the car droppers where to position the loaded coal cars. These railroad brakemen routinely spend time on mine property, and Inspector O'Bryan stated that "That's the only way the cars can get on and off is by N & W people or the railroad people. I know of no other company that has their own railroad" (Tr. 38, 40). Mr. O'Bryan believed that the storage tracks were on mine property but he had no knowledge as to who actually owned the land where the tracks are located, but it was his understanding that the area from the preparation plant to the "D-rail" is on mine property and that the three storage tracks were leased to the contestant mining company (Tr. 43-45).

Contestant's employees do have occasion to drop cars as far as the D-rail, but they are normally pulled to that area by a locomotive for storage purposes (Tr. 49). Contestant's car dropper James Bennett testified that employees of the railroad company are on the property from the tipple to the D-rail on a daily basis and that the tipple operates normally on two shifts, sometimes three, and there are times when the railroad employees extend their work hours (Tr. 146). He also testified that both he and railroad employees operate all of the track switches when required, and that he has dropped cars as far as the D-rail (Tr. 149). He also testified that he has been employed at the tipple for 27 years and that the coal processed at the tipple comes from three or four different mines and that it is transported to the tipple by trucks and railroad cars (Tr. 155-156). Car dropper Bill McCoy testified that railroad brakemen do not drop any of the loaded coal cars because "the union wouldn't let them" (Tr. 184).

Contestant's Vice-President for Operations, Paul Hurley, testified that "we couldn't operate as a coal mining company without the services of N & W" (Tr. 208). With regard to the source of the coal which is processed through the tipple and preparation plant, he testified as follows (Tr. 202):

> It comes from a multiplicity of mines around. Primarily the Harman Preparation Plant is a plant that was built many years ago to service the number one and number three mines which it still does and is still a part of that operation in that the mine cars from number three mine come in and dump right in directly into the back of the plant everyday and every night. In addition to that we have a facility on the hill back of this plant through a system of conveyors where we accept and receive coal from three of our truck mines - three of our outlying area mines that the coal from them is trucked in. And sixteen or seventeen small contract mines that is brought in by the truck route too.

Mr. Hurley described the operations of the tipple and preparation plant, and stated that the plant was constructed in 1937 to service the number one and number three mine. His office is located some 1,500 feet above the plant location, and he confirmed that the preparation and tipple operations have been regulated and inspected by MSHA for many years (Tr. 213-218). Although he did indicate at one point during his testimony that he did not consider the tipple to be a "mine" because coal was not extracted there, contestant's counsel conceded that it was (Tr. 219).

On July 6, 1978, I rendered a decision in the case of MSHA v. Consolidation Coal Company, Docket No. VINC 77-122-P, and ruled that a certain track area over which the Norfolk and Western Railroad Company had an easement to operate was part and parcel of Consolidation's coal mining operations and that the track area where an MSHA inspector issued a citation for failure by Consolidation to maintain the tracks as required by mandatory safety standard 30 C.F.R. 77.1605(m), was in fact a part of a coal mine within the meaning of the 1969 Act. A copy of my decision, as well as my jurisdictional ruling of January 5, 1978, in response to a motion for summary judgement, is attached to MSHA's post-hearing brief and are matters of record. The facts and circumstances in Consolidation, particularly with respect to the jurisdictional arguments advanced by the parties, are essentially similar, if not identical, to those presented in the instant case.

After careful review and consideration of all of the arguments presented in this case, I conclude and find that MSHA has the better part of the jurisdictional argument and I accept and adopt its contentions in this regard and reject those advanced by the contestant. I believe it is clear that contestant's tipple and preparation plant are in fact subject to MSHA's enforcement jurisdiction and that the activities at those locations are in fact coal mining activities within the meaning of the Act, and I believe that contestant has conceded as much and does not seriously dispute this fact. As pointed out in my prior decision in the Consolidation case, the definition of "coal or other mine" as found in section 3(h) of the Act includes mining activities which take place at a tipple or preparation facility.

The Dictionary of Mining, Mineral and Related Terms, Bureau of Mines, 1968 Ed., pg. 859, defines the term "preparation plant" as including any facility where coal is "separated from its impurities, washed and sized, and loaded for shipment." The term "tipple" is defined at pg. 1145 as:

> Originally the place where the mine cars were tipped and emptied of their coal, and still used in that sense, although now more generally applied to the surface structures of a mine, including the preparation plant and loading tracks * * *. The dump; a cradle dump * * *. The tracks, trestles, screens, etc., at the entrance to a colliery where coal is screened and loaded. [Emphasis supplied.]

Based on the testimony and evidence presented in this case, I believe there is no question that the tipple preparation plant is in fact a "coal or

other mine" for purposes of the Act. In addition, I also conclude that the track area below the tipple, up to and including the D-rail location, is also part of contestant's "coal or other mine" for purposes of the Act, and its very narrow arguments to the contrary are rejected. I conclude and find that contestant is the legal owner of the land where the track system is located, and the fact that the railroad has been allowed to use the land for its tracks and other equipment, including its locomotives and coal haulage cars, does not detract from this fact. As I construe the deed and agreement referred to by the parties, any conveyance from the contestant to the railroad was in effect a license or easement to use the land, and the fee ownership in the land itself has still be retained by the contestant. Further, as candidly admitted by Vice-president Hurley, for all practical purposes contestant cannot continue to exist and operate as a viable mine operator without the benefit of the railroad to carry away the coal processed and loaded at its central tipple and preparation plant.

Although coal extraction does not take place at the preparation plant, the work of loading the processed coal into railroad cars and dropping them below to the track storage area falls within the broad statutory language found in section 3(h), particularly the language "the work of preparing coal or other minerals, and includes custom preparation facilities." More importantly, the definition of "coal or other mine" is broad enough in my view to include the track area in question. The railroad track is an integral and indispensable part of contestant's mining operations at the tipple and preparation plant and I reject any attempt to divorce them from the normal mining operations obviously being carried out by the contestant on the basis of a somewhat artificial and semantical interpretation of a somewhat antiquated deed and agreement entered into by the contestant and the railroad for their mutual benefit.

This conclusion is in accord with Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3rd Cir. 1979), cert. denied, No. 79-614 (January 7, 1980), which dealt with a closely analogous situation. There, the State of Pennsylvania dredged a river and deposited the material into a nearby basin. The operator purchased this material and through the use of a front-end loader and conveyor belts transported the material to its plant where, through a sink-and-float process, a low-grade fuel was separated from the sand and gravel. The court held that the operator was engaged in the preparation of minerals within the jurisdiction of the Mine Act, and that "the work of preparing coal or other minerals is included within the Act whether or not extraction is also being performed by the operator." 602 F.2d at 592.

The legislative history of the Act clearly contemplates that jurisdictional doubts be resolved in favor of Mine Act jurisdiction. The report of the Senate Committee on Human Resources states:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it

is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 1977) at 14; Legislative History of the Mine Safety and Health Act, Committee Print at 602.

Docket No. VA 80-94-R

Order No. 698509

Inspector Clevinger testified that as a result of the fatal accident, he issued the section 103(k) order on February 9, 1980, to facilitate an investigation to determine the cause of the accident. The order was terminated on February 11, 1980, after the investigation was concluded. The investigation team consisted of Federal, Union, and company officials and the cars involved in the accident were not moved by the railroad company until after the investigation was completed (Tr. 80-83).

Section 103(k) states in pertinent part:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

Contestant's defense to the order is based on its jurisdictional argument that the track area where the accident occurred is not part of the mine and that the inspector therefore had no jurisdiction or authority to issue the order. Since I have rejected contestant's jurisdictional argument and have concluded that the accident site was part of the mine, contestant's argument in defense of the order on this ground is likewise rejected.

It seems clear to me that the inspector issued the order so as to maintain the status quo while an investigation was conducted. The order was limited to the railroad cars located in the track storage area and there is no evidence that contestant's coal tipple or preparation activities were in anyway otherwise curtailed or that contestant's production was in anyway affected by the order. The purpose of the order was to prevent the cars involved in the accident from being moved or disturbed until certain tests were conducted as part of the investigation. As a matter of fact, the railroad did not move the cars, the contestant participated in the investigation, and as soon as the investigation was completed the order was terminated. In these circumstances, I conclude and find that the inspector acted within his

authority in issuing the order and that the use of such an order in the circumstances presented in this case was reasonable, proper, and in accord with section 103(k). See: MSHA v. Eastern Associated Coal Company, HOPE 75-699, Commission Decision of September 2, 1980. Further, in view of my findings and conclusions concerning the jurisdictional question, I also conclude and find that the section 103(k) control order was properly served on the contestant as the mine operator. Considering all of these circumstances, the order is AFFIRMED.

Docket No. VA 80-96-R

Citation No. 698511

The citation in this case was issued because the inspector discovered that the person conducting the onshift hazardous conditions examination was not a certified person within the meaning of cited standard 77.1713(a). Inspector Clevinger confirmed that he issued the citation after reviewing the onshift examination books and observing that the signature of the person signing the report as the examiner did not include a certification number confirming the fact that he was in fact a certified examiner. He identified that person as David Ratliff and he confirmed that while Mr. Ratliff may have conducted the examination, he had no state or federal certification as a qualified onshift examiner (Tr. 95-97).

Inspector Clevinger testified further that the citation was terminated the day after it issued after a certified person conducted the required examination, and he confirmed that the citation was unrelated to the fatal railroad accident which occurred on February 8, 1980 (Tr. 96-98). He also testified that the preparation plant had its own MSHA "ID" or mine identification number and he considers it to be a surface mine (Tr. 122).

Mr. Ratliff conceded that when he signed the onshift examination report he was not a certified examiner. He explained that in order to be certified one must have 5 years of mining experience and that he will have 5 years' experience on January 1, 1981. He also indicated that Mr. Clevinger considered him to be a competent person to make the required examination but that the report should have been countersigned by a certified person (Tr. 240-243).

30 C.F.R. 77.1713(a) provides as follows:

> At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examination shall be reported to the operator and shall be corrected by the operator. [Emphasis added.]

The term "certified person" is defined in section 77.2(m) as:

> [A] person certified or registered by the State in which the coal mine is located to perform duties prescribed by this Part 77, except that, in a State where no program of certification or registration is provided or where the program does not meet at least minimum Federal standards established by the Secretary, such certification or registration shall be by the Secretary.

The regulatory details concerning "qualified and certified persons" are set forth in section 77.100 and need not be repeated here. Contestant does not dispute the fact that Mr. Ratliff was not "certified" as required by the regulations. Its defense is based on the assertion that the certification requirements of section 77.1713 apply only to surface coal mines, and that since the term "surface mine" is not defined, and the inspector testified that no coal is produced by the preparation plant, contestant argues that the plant is not a surface mine. In further support of its argument, contestant produced a copy of an MSHA Memorandum of April 10, 1979, from Administrator Joseph O. Cook to MSHA District Managers concerning the application of section 77.1713, and the pertinent portion of that memorandum reads as follows: "Section 77.1713, applies only to surface coal mines and does not apply to surface work areas of underground coal mines. Therefore, examinations as specified in Section 77.1713 are not required at surface work areas of underground coal mines."

MSHA argues that while contestant asserts that the preparation plant is the outside area of an underground mine, contestant does not specify which of its underground mines it wishes to associate with the plant. MSHA goes on to argue that the coal processed at contestant's central preparation plant is mined at different mine locations owned by the contestant as well as several mines operated under contract, and that the plant is the only one used by the contestant to process this coal. Each of contestant's mines, as well as the preparation plant, have separate mine identification numbers, and MSHA argues that the plant is in fact a surface facility independent of any mine.

With regard to the April 10, 1979, memorandum alluded to by the contestant, MSHA asserts that it was intended to apply to a preparation plant operated as part of one underground mine. MSHA attached a copy of a December 13, 1979, memorandum from its Associate Solicitor for Mine Safety and Health (Appendix No. 1, posthearing brief), which concludes in pertinent part as follows:

> Preparation plants not associated with surface or underground mines fall within the definition of "coal or other mine" because they conduct the work of preparing coal. Since all the activity at such preparation plants occurs on the surface, these plants are surface coal mines within the meaning of Part 77 which applies to surface coal mines and surface

work areas of underground coal mines. For the same reason, they are also active surface installations within the meaning of 77.1713.

The memorandums alluded to by the parties in these proceedings are not binding on me, nor are the interpretations of the application of section 77.1713. Accordingly, my findings and conclusions which follow are made on the basis of my independent consideration of the Act as well as the regulatory language of the pertinent standards found in Part 77.

Part 77, Title 30, Code of Federal Regulations, contains the mandatory safety and health standards applicable to surface coal mines and surface work areas of underground coal mines. While it is true that the term "surface coal mine" is not further defined, section 77.200 dealing with surface installations provides that: "All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees." The purpose of onshift examinations is to detect conditions which may contribute to hazards. The central preparation plant falls within the statutory definition of a "coal or other mine," and the fact that coal is not actually mined at that facility by use of drag lines or other machinery normally associated with the actual extraction of coal is not controlling. The definition of "coal or other mine" found in the Act is broad enough to include the work of processing the coal produced at contestant's mines through the central preparation facility.

I take note of the fact that the regulatory language found in section 77.1713 makes reference to "active surface installation" and it can hardly be argued that the central preparation plant is not an active surface installation. The activities taking place at this plant are as much an integral part of the mining process as is the initial extraction of the coal itself, and since these activities take part on the surface I conclude and find that for purposes of the application of section 77.1713, the central preparation plant may be considered a surface coal mine and contestant's arguments to the contrary are rejected. The citation is AFFIRMED.

Docket No. VA 80-97-R

Citation No. 698513

This citation was issued to the contestant because of its asserted failure to provide hazard training for the employees of the railroad who worked in and around the railroad yard near contestant's preparation plant. Specifically, MSHA asserts that the failure by the contestant to provide such training to the railroad employees who were engaged in duties connected with the transportation of the loaded railroad cars from contestant's property constituted a violation of the training requirements found in section 48.31. That section of the regulations provides as follows:

(a) Operators shall provide to those miners, as defined in § 48.22(a)(2) (Definition of miner) of this subpart B, a

training program before such miners commence their work duties. This training program shall include the following instruction which is applicable to the duties of such miners;

(1) Hazard recognition and avoidance;

(2) Emergency and evacuation procedures;

(3) Health and safety standards, safety rules and safe working procedures;

(4) Self-rescue and respiratory devices; and,

(5) Such other instruction as may be required by the Chief of the Training Center based on circumstances and conditions at the mine.

(b) Miners shall receive the instruction required by this section at least once every 12 months.

(c) The training program required by this section shall be submitted with the training plan required by § 48.23(a) (Training plans; Submission and approval) of this subpart B and shall include a statement on the methods of instruction to be used.

(d) In accordance with § 48.29 (Records of training) of this subpart B, the operator shall maintain and make available for inspection, certificates that miners have received the instruction required by this section.

The regulatory education and training requirements mandated by the Act are found in Part 48, Title 30, Code of Federal Regulations. Subpart B contains the requirements for the training and retraining of miners working at surface mines and surface areas of underground mines. For purposes of the hazard training requirements imposed by section 48.31, the term "miner" is defined in pertinent part by section 48.22(a)(2) as follows:

[A]ny person working in a surface mine or surface areas of an underground mine excluding persons covered under paragraph (a)(1) of this section and subpart C of this part and supervisory personnel subject to MSHA approved state certification requirements. This definition includes any delivery, office, or scientific worker, or occasional, short-term maintenance or service worker contracted by the operator, and any student engaged in academic projects involving his or her extended presence at the mine.

Inspector Clevinger stated that he issued the citation upon instructions from his supervisor and that he did so after confirming during the course of

his accident investigation that the contestant had not given any hazardous training to any of the railroad employees. An operator is required to maintain records of such training on MSHA Form 5000-23, and when plant supervisor Ronnie Cox could not produce the form attesting to such training, he issued the citation (Tr. 87-88). The abatement was extended several times because of the fact that contestant has sought review of the citation, and the violation has never been abated (Tr. 92).

On cross-examination, Inspector Clevinger identified a copy of a February 21, 1980, letter from the railroad trainmaster to contestant's vice-president for operations refusing to permit railroad employees to be trained by the contestant (Exh. R-8), and he confirmed that contestant would have compliance difficulties without the cooperation of the railroad. Mr. Clevinger suggested that the only alternative available to the contestant would be to exclude railroad employees from its property (Tr. 100-101; 110). Mr. Clevinger also stated that the hazardous training requirements under section 48.31 apply to anyone on contestant's mine property and that the requirements apply to any person whether he is a miner or not (Tr. 111). He confirmed that he has inspected other mine sites but has never previously cited other mine operators for not training railroad employees, nor could he recall that other MSHA inspectors cited operators for such violations (Tr. 113-114).

Contestant's Vice-President Hurley testified that when he initially contacted the railroad trainmaster concerning the training of railroad employees, the trainmaster advised him that the railroad would object and he confirmed this in writing by letter (Exh. R-8, Tr. 204). Mr. Hurley testified further that he did not inquire any further and accepted the trainmaster's refusal to permit railroad employees to be trained as the railroad's policy in this regard, and he made no further inquiries and confirmed the fact that the railroad services provided to the contestant were an essential part of its mining operations (Tr. 205-212).

Contestant's defense to the citation is based on the fact that the railroad has refused to submit its employees to the required training, as well as the argument that as an independent contractor "mine operator," the railroad should be held accountable for its refusal to allow its employees to be trained, and that as an independent contractor, the railroad rather than contestant should be cited for the violation.

In support of the citation, MSHA points to the fact that since the employees of the railroad are routinely assigned to contestant's property to perform duties connected with the loading of the railroad cars at the tipple, it is incumbent on the contestant to insure that they receive the required training. MSHA views the letter from the railroad trainmaster as a half-hearted attempt by the contestant to escape liability in this case and suggests that more effort by the contestant could have achieved compliance. In the final analysis, MSHA would have the contestant refuse entry to all railroad employees who do not subject themselves to contestant's training efforts.

The citation issued in this case charges the contestant with the failure to provide hazard training for the employees of the Norfolk and Western Railroad. MSHA's evidence and testimony in support of the alleged violation is the testimony of Inspector Clevinger that mine management was unable to produce an MSHA form attesting to the fact that the employee who was killed had received any training. Contestant's defense is that it provided an opportunity for training, but that the railroad refused to allow its employees to be trained. MSHA has not proven that contestant does not have a training program for its own employees, nor has it not rebutted the fact that the contestant was ready, willing, and able to train railroad employees working on its mine property. Since MSHA has the initial burden of making out a prima facie case to support its contention that training was not provided in accordance with the requirements of section 48.31, it is incumbent on MSHA to prove its case by a preponderance of the evidence. Since section 48.31 requires that such training be provided, I cannot conclude that contestant did not in fact provide such training. The railroad simply failed to take advantage of it by refusing to submit its employees to such training. As an analogy, a public school system provides for the education of its citizens, but if the citizens do not accept the opportunity to educate themselves one can hardly hold the school system accountable. Of course, one recourse by the school authorities is to seek enforcement of any compulsory school attendance law if one is in fact in effect. In such a case, the local authorities would undoubtedly hold a parent accountable for failure to insure that his child take advantage of the education which has been provided. By the same token, MSHA should look to the "parent railroad" rather than the "surrogate parent" mine company to insure that its own people take advantage of the training which has been provided.

MSHA does not dispute the fact that the contestant has given the railroad an opportunity to train its employees. MSHA's position seems to be that although training has been provided, the contestant must go one step further and insure that the railroad employees avail themselves of the training, or suffer the consequences of citations and closure orders for failing to insure that railroad employees submit to such training. In the circumstances, I conclude and find that MSHA has not established a violation of the cited standard and the citation is VACATED. Further, on the facts and circumstances presented in this case, I feel compelled to comment further with regard to the training requirements and the theory of MSHA's attempts to enforce those standards, and my remarks follow below.

Since MSHA has the initial enforcement jurisdiction in matters relating to mine safety and health compliance, I suggest that MSHA take the initiative to insure compliance by railroad companies operating on mine property, rather than to shift the burden to mine operators or to the Commission Judges. Failure by MSHA to act directly against a contractor-operator is precisely why I recently dismissed nine civil penalty dockets remanded to me from the Commission, MSHA v. Pittsburgh & Midway Coal Mining Company, Dockets BARB 79-307-P, etc., September 5, 1980. On the facts presented in this case, MSHA concedes that the independent contractor railroad is in fact subject to

the Act and can be regulated by MSHA, and in support of this conclusion I cite the following colloquy between MSHA counsel and me during the course of the hearing (Tr. 76-79):

JUDGE KOUTRAS: But, what I'm saying, there's nothing to preclude the Secretary if he wanted to, to subpoena some Norfolk and Western people and during the course throughout the investigation.

MR. O'DONNELL: We could have them there if we wanted them. One thing I've been listening with amusement here. Both Mr. Richardson and to a certain extent our own people seem to indicate that these railroad people are what - Government? they're just - we have the same rights with them that you've got against the driver of a - and an accident on the property we could go in and slap them good. We're not afraid of the railroads. We'll tell the railroad what to do and they'll do it. If they don't do it, they won't haul coal. And if they don't haul coal, they're going to be hurting in this area. That's the major part of their business.

JUDGE KOUTRAS: Are the railroad companies that haul coal regulated at all by any regulations and safety standards by MSHA?

MR. O'DONNELL: Every railroad, every airline, every, everybody that is on mine property is subject to the Federal Mine Safety and Health Act of 1977. And they have to comply. Whether it's anything or whether it's a United States Postal person coming on there. If he comes onto the mine property as part of his duty, he's subject to it. Everybody is. It comes in the jurisdiction of a mine they are responsible. And we can control them. And we will control them.

JUDGE KOUTRAS: In other words, if they were to find defective brakes on these locomotives, the theory against Harman Mining would be what?

MR. O'DONNELL: Independent contractor.

JUDGE KOUTRAS: Who?

MR. O'DONNELL: The railroad is an independent contractor performing services for Harman Mining Company - they are a necessary part of their mining operation.

JUDGE KOUTRAS: That's the way you would proceed now, you would look at the railroad company as an independent contractor?

MR. O'DONNELL: Exactly. Same way we would a coal haul truck. What is the difference between a coal haul truck and the railraod cars? They both haul coal out of the way and take it to the supplier. If there's any difference at all - you might say, well, the railroad is subject to Interstate Commerce Acts of Congress, but if those Acts don't conflict with the Federal Mine Safety and Health Act of 1977, then this steps into that void and that's it then. This is a later Act for that matter.

JUDGE KOUTRAS: But the theory of the Government's case in this particular proceeding is that the loaded coal trips were being operated by Harman employees and that they were operated at the mine site, which in the Government's eyes is from the tipple down to the D-rail. And it's the responsibility of Harman Mining Company rather than the railroad in this case.

MR. O'DONNELL: That's right.

JUDGE KOUTRAS: Theoretically, if this case were to start today, assuming that you found no defective brakes et cetera, et cetera, that you would proceed in the same manner or in a combination. You could possibly have the railroad in here as co-respondent, couldn't you?

MR. O'DONNELL: I believe we would cite them both. I'm reminded of the Austin Powder Company case where we cited the mine operator for some of the problems and the Austin Powder Company for other violations.

MSHA's suggestion that a mine operator may exclude or evict railroad employees from its mine property is of course one course of action available to an operator who is faced with a recalcitrant railroad company, and although this is precisely what I suggested in my prior decision in the Consolidation Coal case, I do not believe that this is the most effective way of dealing with a training problem that will undoubtedly have a broad and far reaching effect upon the entire railroad and mining industry. Further, it seems to me that after many years of litigation concerning independent contractors, the case-by-case method of adjudicating disputes which have broad application on a day to day basis is not the best way of gaining compliance. The Consolidation Coal Company decision and the instant proceeding are classic examples of MSHA attempting to place the Judge in the position of policing the railroad and coal industry, and MSHA's counsel reminding me that after my decision in the Consolidation Coal case nearly 2 years ago the railroad somehow found time to repair defective tracks for which the mine operator was cited confirms my point. Conversely, I remind counsel of my observations at pg. 20 of that decision where I stated as follows:

The choice of a proper party-respondent lies within the authority and discretion of the enforcing agency. However,

aside from the fact that petitioner acted on the basis of the then prevailing policy and controlling decisions when it cited the respondent for the violation in this case, it seems to me that in future cases of this kind, petitioner should seriously consider joining the independent contractor as a party respondent, particularly in a case of a culpable independent contractor, rather than taking the expedient route of simply naming the mine operator.

During the course of the hearing MSHA's counsel alluded to the fact that the manner in which MSHA would proceed to insure that railroad employees are trained by mine operators is to issue withdrawal orders to the mine operators, and he stated that "we can issue one against every single customer that Norfolk and Western has until they comply" (Tr. 104). As a matter of fact in the instant case, assuming my decision is favorable to MSHA, MSHA stands ready to issue a section 104(b) withdrawal order to the contestant, thereby hoping to force submission by employees of the railroad (Tr. 93-94). The fact that the railroad refuses to submit its employees to training is a matter that MSHA leaves to me. In short, MSHA's position seems to be that a decision adverse to the contestant on this question will undoubtedly result in the railroad's immediate submission to MSHA's training requirements. Assuming that this is the case, I am not convinced that in the next identical set of circumstances MSHA will in fact cite the railroad. My guess is that MSHA will await the next contest by another mine operator involving another, or possibly the same railroad company, and will undoubtedly opt to gain compliance in precisely the same manner as this case has unfolded.

As I observed during the course of the hearing in this case, MSHA apparently has made no effort to enforce the training requirements provided for in the Act or in its mandatory regultory training requirements directly against a railroad until the unfortunate accident which occurred in this case. Once the accident occurred, immediate focus was placed on the lack of training and the fact that there was no confirmation of the fact that the railroad employee who met his demise was not trained to stay clear of an oncoming trip of loaded coal cars. Assuming that I were to issue a decision favorable to MSHA in this case, I honestly and candidly believe that it will not trigger further enforcement of the training requirements for railroad employees directly against a railroad. Experience has shown that we will simply await the next contested case in which the issue is again placed in focus the next time there is an accident involving a railroad employee performing work on mine property.

It occurs to me that the time has come for MSHA to meet the problem presented by the facts of this case head-on rather than to attempt to avoid the inevitable. MSHA's proposed remedy is an easy solution to its not to pleasant task of taking on a major railroad. It would be a simple matter to suggest that the contestant in this case notify the railroad that it is no longer welcome on its property until such time as it agrees to submit its employees to MSHA's training requirements. However, I believe that a more effective sanction would be to cite the railroad as a "mine operator" and

insist that it train its own employees. If the railroad refuses, then MSHA could impose the direct sanction provided for in section 104(g)(1) of the Act, and order the withdrawal of railroad employees which have not been trained according to MSHA's requirements. Section 104(g)(1) provides that:

> If, upon inspection or investigation pursuant to section 103 of this Act, the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary or an authorized representative shall issue an order under this section which declares such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act.

Section 104(g)(1) mandates the immediate removal from mine property of miners who have not received the requisite training mandated by section 115 of the Act and the Secretary's regulations implementing those requirements. Section 115(a) requires each mine operator to establish its own training programs, subject to review and approval by the Secretary. Since an independent contractor is in fact a mine operator under the Act, and since MSHA has indicated it will treat railroads such as the Norfolk & Western on an equal basis with other operators, then it seems to me that MSHA should hold all such railroads accountable on an equal footing with other mine operators and the railroad should be required to train its own employees or suffer the consequences of having its untrained personnel barred from mine property through the sanction of a withdrawal order served directly on the railroad company.

Docket No. VA 80-95-R

Citation No. 698510

In this case the contestant is charged with a violation of section 77.1607(v) for the failure by its car dropper to keep two loaded cars under control in a manner to insure that the cars could be safely stopped "when needed." The cited standard states as follows: "Railroad cars shall be kept under control at all times by the car dropper. Cars shall be dropped at a safe rate and in a manner that will insure that the car dropper maintains a safe position while working and traveling around the cars."

Inspector Clevinger testified that he issued the citation in question after being advised by plant supervisor Ronnie Cox during the course of the accident investigation that car dropper James Bennett could not control the trip of cars which were involved in the accident. Mr. Clevinger confirmed that he was present when certain post-accident car tests were conducted on Monday, February 11, but denied that the tests influenced his decision to issue the citation. He issued the citation because the cars were not under

control and his conclusion that they were not under control stemmed from the fact that the car dropper could not stop them (Tr. 83-85). Mr. Clevinger further confirmed that he had no way of knowing why the cars in question were not under control, and MSHA's counsel confirmed that the citation was issued because the car dropper couldn't stop the cars and had to jump off to protect himself (Tr. 129-130).

Car dropper James Bennett described the procedure he followed in dropping the cars which were involved in the accident. After cleaning some snow off the tracks, throwing some switches, and consulting with several employees of the railroad as to where he should drop the cars, he was advised by Harman car dropper Bill McCoy that one of the loaded cars had no brakes and that it should be held by another car. Mr. Bennett proceeded to position another car in place to hold back the one with no brakes and his intent was to drop and couple the cars onto the rear of a trip of cars which were ready to be pulled out by the locomotive. However, that trip had been moved out before he could drop and position the cars he was handling, and as he dropped them he picked up speed, attempted to apply pressure to the brakes, and when they would not hold, he jumped off the fast moving trip. He then proceeded to the area where he thought the cars had derailed and found the man who had been struck and killed by the runaway cars (Tr. 137-143).

Mr. Bennett stated that he has 27 years experience as a car dropper, and indicated that during any 8 hour shift "anywhere from one to five cars" with faulty brakes are encountered. He indicated that the contestant is not equipped to make major brake repairs and that efforts at correcting such problems are limited to making brake adjustments (Tr. 144). He also confirmed that when he finds a car with defective brakes, he simply places it behind another one with good brakes and attempts to control both cars with the one with the best brakes (Tr. 151; 157-158). That is what he did in this case, but the front car would not hold the other cars behind it and they ran away and struck the rear of the train of cars which was being pulled away (Tr. 154-155). He is no longer employed with Harman and does not know whether the procedures for dropping cars has changed as a result of the accident (Tr. 158). However, he did allude to the fact that when cars are found with defective brakes they are marked with chalk so as to alert the train crew that they need repair, and the railroad is responsible for repairs. Once they are repaired, the chalk marks are removed by painting over them, but he has observed empty cars returned to the tipple loading point with the chalk marks intact indicating that the brakes are still not repaired. These cars with defective brakes are logged in a record book and the railroad is supposed to take care of them (Tr. 157-162).

Car dropper Bill McCoy, testified that at the time of the accident his duties involved the dropping and positioning of empty railroad cars at the tipple loading point. He confirmed that he often encountered empty cars being returned by the railroad with defective brakes and he indicated that he is not equipped to do anything but make minor brake adjustments and that the railroad has the responsibility of maintaining the cars which they own. He confirmed that cars with faulty brakes are controlled by positioning them

behind ones with good brakes, and he also confirmed the system of marking the defective cars to alert the railroad to make the necessary brake repairs (Tr. 163-169). He also stated that he has had to jump off a car because he could not stop it and indicated that when cars with defective brakes are found they are loaded anyway (Tr. 171), but he explained that they are usually positioned behind cars with good brakes (Tr. 174), and more than one car dropper is used to control the cars in these cases (Tr. 178). Mr. McCoy also stated that a car with defective brakes which is usually placed behind one with good brakes can usually be controlled by the car dropper, and that is the usual manner to "build trips." However, in this case the train had already pulled out and Mr. Bennett had no choice but to drop the cars down to a location where others could be positioned behind them (Tr. 182).

Contestant's Vice-President Hurley testified as to the procedures followed by the car droppers at the preparation plant, explained the logistical difficulties in removing empty cars which are returned by the railroad with defective brakes, and he believed that the practice of placing cars behind others with good brakes is a safe practice as long as the car dropper does not attempt to drop one loaded car by itself. In short, the current car dropping procedures are essentially the same as those which were in effect at the time of the accident, except that more emphasis is now placed on those procedures, and in particular the fact that single cars should not be dropped and insuring that only a minimum number of cars are placed behind those with good brakes (Tr. 186-195). He also indicated that contestant has limited facilities for making brake repairs, was unsure as to the contestant's right to make such repairs, and his testimony regarding the braking problems is reflected in pertinent part as follows (Tr. 199):

> I don't know of anything that has been done on either side on what you're asking now. We're getting down to do any repairs to their brakes other than the fact that we mark the cars so that they can tell the ones that have the bad brakes or no brakes and we're just not in any position to dictate to them to what they do. We have had bad brakes and no brakes for as long as I can remember and as for as long as I can remember most of all coal mining companies drop their cars through under their loading points and drop them out on the lower end. There are few exceptions. And there's always been a problem with brakes that you've always had to have some kind of system to keep the good brakes and bad brakes together to affect the safe dropping.

Tipple foreman David Ratliff testified that his duties include the supervision of car droppers and he was the shift foreman on the day of the accident in question. He described the general procedures used for the loading and dropping of the railroad cars and confirmed the fact that cars with defective brakes are controlled by placing them behind cars with good brakes (Tr. 228-231). He confirmed that he checked the brakes on the cars involved in the accident and that he knew the brakes on one of the cars were bad before it was loaded because Mr. McCoy told him so (Tr. 234). When asked

to give his opinion as to what caused the cars to get away from Mr. Bennett, he stated that one car had bad brakes, one car had good brakes, and that "something did go wrong, the brakes failed. The brake would not hold the two cars" (Tr. 238-239).

MSHA's theory in support of the violation is that the car dropper had to jump from the cars because he obviously could not control them, and since he could not control them a violation of section 77.1607(v) occurred; and, the fact that no one knows why the car dropper could not control the cars is immaterial (Tr. 130). Further, during the hearing, MSHA's counsel points to the fact that the contestant knew that one of the cars had faulty brakes, yet still dropped it with another loaded car behind it, and the trip could not be controlled (Tr. 131).

Contestant's defense to the citation rests on its jurisdictional argument that the site of the accident was not on coal mine property and that it occurred at a site physically separate from the preparation plant and from the coal preparation function performed at the plant. This defense is rejected. The evidence establishes that the loaded cars involved in the accident had been dropped into place at the preparation plant where they were loaded with coal processed at that plant and were then being dropped into position by contestant's car droppers. While attempting to drop these cars, the car dropper lost control of the cars and he jumped from the cars to protect himself. The resulting run-away trip of loaded cars continued on their way until they came to rest after colliding with the trip of cars being transported from the coal mine property. In these circumstances, I conclude and find that the alleged violation occurred on coal mine property and that contestant was properly served with the citation. Further, on the basis of the evidence and testimony presented by MSHA in support of the citation, I conclude and find that the failure by the car dropper to maintain control of the trip of loaded coal cars constituted a violation of the cited mandatory safety standard and the citation is AFFIRMED.

While I have affirmed the citation in this case, I take note of the fact that abatement was achieved by mine management giving a safety talk to its employees with regard to the proper procedures to be followed during the car dropping process, and the posting of those procedures on the mine bulletin. However, it would appear from the testimony and evidence adduced in this case that contestant is apparently still permitting railroad cars with defective brakes to be loaded and dropped into place behind cars with good brakes and that MSHA still accepts this procedure and the inspector apparently accepted it when he terminated the citation (Tr. 85-86). Although the official accident report does not specifically conclude that the use of cars with defective brakes contributed to the accident which occurred, it seems to me that the testimony of those persons directly involved in the incident warrants a further examination of the continued use of such cars in the loading and dropping process. Requiring a car dropper to maintain control over loaded coal cars at all times while such cars are dropped down a grade is one thing, but requiring him to do so with additional loaded cars with defective brakes coupled to the rear of the one on which he is riding defies logic. Again,

it occurs to me that some action should be taken against the railroad to insure that the defective brakes on their cars are repaired, or to insure the removal of such cars from service.

George A. Koutras
Administrative Law Judge

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 5 1981

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| SECRETARY OF LABOR, | : | Civil Penalty Proceeding |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 80-311 |
| Petitioner | : | A/O No. 33-02024-03093 |
| v. | : | |
| | : | Powhatan No. 7 Mine |
| QUARTO MINING COMPANY, | : | |
| Respondent | : | |

DECISION

This case consists of a petition for the assessment of a civil penalty for one alleged violation of the Act. The operator has filed a motion to dismiss the proceeding and the Solicitor has filed a memorandum in opposition to the respondent's motion. For the reasons which follow respondent's motion is hereby GRANTED.

Citation 1008730 was issued for an alleged violation of 30 CFR 75.316. On September 8, 1980 a hearing was held in Secretary of Labor v. Nacco Mining Company, Quarto Mining Company and The North American Coal Corporation, LAKE 80-251, et al. in which the same provision of respondent's dust control plan at issue in this citation was litigated. In those cases a decision dated September 22, 1980 held invalid this provision of the dust control plan. The decision in LAKE 80-251 is dispositive of this citation.

ORDER

Citation 1008730 is hereby VACATED and the petition to assess a civil penalty is hereby DISMISSED.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

Linda Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, 881 Federal Office Bldg., 1280 East 9th St., Cleveland, OH 44199 (Certified Mail)

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 5 1981

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceeding |
| | : | Docket No. LAKE 80-360 |
| | : | A/O No. 33-01157-03167 |
| v. | : | |
| | : | Powhatan No. 4 Mine |
| QUARTO MINING COMPANY, Respondent | : | |

DECISION

This case consists of a petition for the assessment of civil penalties for two alleged violations of the Act. The operator has filed a motion to dismiss the proceeding and the Solicitor has filed a memorandum in opposition to the respondent's motion. For the reasons which follow respondent's motion is hereby GRANTED.

Citations 779679 and 825966 were issued for alleged violations of 30 CFR 75.316. On September 8, 1980 a hearing was held in Secretary of Labor v. Nacco Mining Company, Quarto Mining Company and The North American Coal Corporation, LAKE 80-251, et al. in which the same provision of respondent's dust control plan at issue in these citations was litigated. In those cases a decision dated September 22, 1980 held invalid this provision of the dust control plan. The decision in LAKE 80-251 is dispositive of these citations.

ORDER

Citations 779679 and 825966 are hereby VACATED and the petition to assess civil penalties is hereby DISMISSED.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 5 1981

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceeding |
| | : | Docket No. LAKE 80-384 |
| | : | A/O No. 33-01157-03170 |
| v. | : | |
| | : | Powhatan No. 4 Mine |
| QUARTO MINING COMPANY, Respondent | : | |

## DECISION

This case consists of a petition for the assessment of a civil penalty for one alleged violation of the Act. The operator has filed a motion to dismiss the proceeding and the Solicitor has filed a memorandum in opposition to the respondent's motion. For the reasons which follow respondent's motion is hereby GRANTED.

Citation 825974 was issued for an alleged violation of 30 CFR 75.316. On September 8, 1980 a hearing was held in Secretary of Labor v. Nacco Mining Company, Quarto Mining Company and The North American Coal Corporation, LAKE 80-251, et al. in which the same provision of respondent's dust control plan at issue in this citation was litigated. In those cases a decision dated September 22, 1980 held invalid this provision of the dust control plan. The decision in LAKE 80-251 is dispositive of this citation.

## ORDER

Citation 825974 is hereby VACATED and the petition to assess a civil penalty is hereby DISMISSED.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

| | | |
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| SECRETARY OF LABOR, | : | Civil Penalty Proceeding |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 80-84 |
| Petitioner | : | A/O No. 46-01286-03035 |
| v. | : | |
| | : | Beech Bottom Mine |
| WINDSOR POWER HOUSE COAL COMPANY, | : | |
| Respondent | : | |

DECISION

The above-captioned case is a civil penalty proceeding brought pursuant to section 110 1/ of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter referred to as the Act).

Inspector Charles Coffield issued Citation No. 811574 to Windsor Power House Coal Company (hereinafter Windsor) on May 11, 1979. The inspector cited a violation of 30 C.F.R. § 75.316 2/ and described the pertinent condition or practice as follows:

1/ Section 110(i) of the Act provides:

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

2/ Section 303(o) of the Act, reproduced in the regulations as 30 C.F.R. § 316, reads as follows:

"A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form within ninety days after the operative date of this title. The plan shall show the type and location of mechanical ventilation

> The ventilation, methane and dust control plan was not being followed in 6 West (028) section in No. 5 entry when coal was cut with a 15RV cutting machine and there was only approximately 1280 cubic feet of air per minute and 15 fm of mean air velocity reaching the working face. No. 1 entry, 3420 CFM, 29 FM; No. 4 entry, 2625 CFM, 22 FM; No. 6 entry, 2520 CFM, 30 FM. * * * 3600 CFM, 35 FM required.

Approximately 2 hours later, the inspector issued an order of withdrawal pursuant to section 104(b) of the Act on the grounds that "little or no effort" was made to abate the condition.

Windsor has previously contested the issuance of both the citation and order in a review proceeding pursuant to section 105(d) of the Act (hereinafter, the contest proceeding). A decision was rendered in that proceeding by Judge Melick on March 10, 1980. It was found therein that Citation No. 811574 was properly issued and that Windsor was in violation of 30 C.F.R. § 75.316 as alleged.

Windsor petitioned the Commission for discretionary review of the decision rendered in the contest of Citation No. 811574, but the petition was not granted. Windsor did not pursue its right to obtain judicial review pursuant to section 106 of the Act. The decision rendered in the contest proceeding, therefore, became a final decision of the Commission.

A petition for assessment of a civil penalty was filed by the Secretary of Labor (hereinafter the Secretary) on December 17, 1979. After assignment of the case on February 12, 1980, it was set for hearing in Charleston, West Virginia, on May 12, 1980, along with another subsequently settled case, Docket No. WEVA 80-68. On March 19, 1980, pending settlement negotiations, the cases were continued to April 18, 1980. On April 17, 1980, the cases were continued to June 18, 1980. Windsor stated that the parties were in the process of developing stipulations of fact and that no evidentiary hearing would be necessary.

On June 13, 1980, Petitioner submitted a motion for partial summary disposition and on August 25, 1980, the parties submitted stipulations of fact. As grounds for the motion for partial summary disposition, counsel for Petitioner asserted the following:

> 1. Under the authority of Reliable Coal Corp., 1 IBMA 51 at 61, the "fact of violation" should not be litigable in more than one administrative proceeding.

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fn. 2 (continued)
equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every six months."

2. In the case at bar, a Notice of Contest was filed and on December 12, 1979, an evidentiary hearing was held before Judge Melick on the underlying fact of violation.

3. On March 10, 1980, a decision was issued by Judge Melick affirming the fact of violation.

4. On April 7, 1980, the Contestant filed a Petition for Discretionary Review with respect to Judge Melick's decision issued on March 10, 1980.

5. The Petition was subsequently denied by the Commission.

6. The Secretary does not oppose Windsor Power House Coal Company's right to an evidentiary hearing in the civil penalty proceeding, however, the proceeding should be limited to the six statutory criterion found in 105(B) of the Federal Mine Safety and Health Act of 1977, and not include another hearing on the fact of violation which has already been established.

Windsor filed its statement in opposition to Petitioner's motion for partial summary disposition on July 1, 1980. Windsor disagreed with the decision rendered in the earlier contest proceeding and desired to relitigate the fact of violation.

The parties submitted stipulations of fact on August 25, 1980. These stipulations are as follows:

1. At approximately 2:00 p.m. on May 11, 1979, Inspector Charles B. Coffield arrived at Respondent's Beech Bottom Mine.

2. Shortly after 2:00 p.m. on May 11, 1979, Inspector Coffield and Roger Caynor, representing Respondent, entered the mine and proceeded to the Six West section.

3. The feeder for the Six West section, which was located approximately 240 feet outby the face of the No. 4 entry, had broken at about 2:45 p.m. on the subject date and was not repaired during the 8:00 a.m. to 4:00 p.m. shift on May 11, 1979.

4. After the above-mentioned feeder had broken, the Six West section crew went to the dinner hole, except for the bolters and the men repairing the feeder.

5. While walking towards the face of the No. 5 entry in the Six West section at about 3:05 p.m., Inspector Coffield and Mr. Caynor noticed an energized cutting machine in the No. 5 entry.

6. While in the No. 5 entry Inspector Coffield asked the section foreman what the air reading was when the cutting machine was cutting coal in the No. 5 entry and the foreman responded that the cutting machine had quit cutting just about 1/2 hour ago (at approximately 2:45 p.m.). At that time there was 4100 cubic feet a minute (hereinafter "cfm") of air reaching the No. 5 face and about 4000 cfm of air reaching the face of the other entries.

7. At no time during Inspector Coffield's inspection on May 11, 1979, did Inspector Coffield or Mr. Caynor observe the cutting machine cutting coal in the Six West section of the Beech Bottom Mine.

8. At no time during Inspector Coffield's inspection on May 11, 1979, did any of the parties observe the loading of coal in the Six West section of the Beech Bottom Mine.

9. After observing the No. 5 entry Inspector Coffield and Mr. Caynor (hereinafter the "parties") proceeded to the No. 1 entry at approximately 3:20 p.m. and observed spot roof bolting in the last open crosscut between the No. 1 and 2 entries. Spot roof bolting was concluded in the applicable area at approximately 3:25 p.m.

10. After the above spot roof bolting was completed, no other equipment was used by the Six West section crew during the May 11, 1979, 8:00 a.m. to 4:00 p.m. shift.

11. Except for two miners who were repairing the feeder, the 8:00 a.m. to 4:00 p.m. Six West section crew left the section between 3:30 and 3:40 p.m. on May 11, 1979.

12. The afternoon shift at the Beech Bottom Mine begins at 4:00 p.m. and ends at 12:00 a.m.

13. At about 3:45 p.m. on the subject date Inspector Coffield took an air reading in the No. 5 entry and determined that the quantity of air at the face of the No. 5 entry at the time was less than 3600 cfm and the mean air velocity reaching the face was less than 35 feet per minute (hereinafter "fm").

14. The parties then proceeded to the No. 1 entry where Inspector Coffield determined that there was an air quantity of 3420 cfm and an air velocity of 24 fm.

15. After the Inspector took air readings in the faces of the No. 2 and 3 entries and determined that the quantity and velocity of air was greater than 3600 cfm and 35 fm, the

parties then proceeded to the No. 4 entry at approximately 4:00 p.m.

16. After Mr. Caynor was relieved by Mr. Roxby in the No. 4 entry, Inspector Coffield determined that the air quantity and velocity in the face of the No. 4 entry was 2625 cfm and 25 fm respectively and the air quantity and velocity in the face of the No. 6 entry was 2520 cfm and 30 fm respectively.

17. At the time Inspector Coffield took his air readings in the Six West section on May 11, 1979, because the miners working the day shift had left and the miners working the afternoon shift had not yet begun working, the equipment in the Six West section was not energized and no miners were working in the face area of any of the entries of the Six West section.

18. Thereafter Inspector Coffield served upon Mr. Roxby Citation No. 811574 (a copy of which is attached hereto as Exhibit A) alleging a violation of 30 C.F.R. § 75.316, in that the ventilation plan was not being followed in the Six West (028) section in the No. 5 entry where coal was cut with a 15RV cutting machine, since there was only approximately 1280 cfm of air and 15 fm mean air velocity in the working face; No. 1 entry 3420 cfm, 24 fm; No. 4 entry 2625 cfm, 22 fm; No. 6 entry 2520 cfm, 30 fm. Inspector Coffield further alleged that the ventilation plan required 3600 cfm and 35 fm mean air velocity.

19. On May 11, 1979, at 5:40 p.m., Inspector Coffield served upon Respondent Order of Withdrawal No. 811576 (a copy of which is attached as Exhibit B) alleging that little or no effort was being made to abate this violation in that air had not been increased in No. 5 and 6 entries of 6 West (028) section although 1 and 4 entries were increased to more than 3600 cfm and 35 fm.

20. Respondent's ventilation plan in effect at the time of the issuance of Citation No. 811574 provided in Item 24 on page 5 and Item 2 on page 6 that Respondent shall "maintain a minimum of 3000 cfm at each working face, where coal is being cut, mined, loaded or the roof bolted * * *." A copy of the subject ventilation plan is attached hereto as Exhibit C.

21. Respondent's subject ventilation plan stated in Item 1 on page 12 in column form:

Quantity air at face - 3600 cfm
Mean air quantity - 35 fpm

The above constitutes the ventilation plan's only reference to mean air velocity.

22. 30 C.F.R. § 75.301-1 specifies that "[a] minimum quantity of 3000 cubic feet a minute of air shall reach each working face from which coal is being cut, mined, or loaded or any other working face so designated by the District Manager, in the approved ventilation plan."

23. 30 C.F.R. § 75.301-4(a) specifies that "except * * * in working places where a lower mean entry air velocity has been determined to be adequate to render harmless and to carry away methane and to reduce the level of respirable dust to the lowest attainable level by the Coal Mine Safety District Manager, the minimum mean entry air velocity shall be 60 feet a minute in (1) all working places where coal is being cut, mined, or loaded from the working face with mechanical mining equipment * * *."

24. Beech Bottom Mine constitutes a coal mine, the products of which enter commerce or the operations or products of which affect commerce. Respondent, Windsor Power House Coal Company, operates and at all times pertinent to the citation and order at issue operated Beech Bottom Mine. Respondent and every miner employed in the above-stated mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977.

25. Jurisdiction of the above-captioned matter vests in the Federal Mine Safety and Health Review Commission.

26. As of June 27, 1980, Beech Bottom Mine employed 231 UMWA and 57 exempt and nonexempt employees. The mine, which is Respondent's only mine, produced a total of 575,935 tons of coal during 1979. Windsor Power House Coal Company is a wholly-owned subsidiary of Ohio Power Company.

Motion for Partial Summary Judgment

The question presented by Petitioner's motion for partial summary judgment is whether the operator can litigate the fact of violation before one judge in a proceeding contesting the citation and order and later litigate the same fact of violation before another judge in a civil penalty proceeding.

Petitioner's position is, in essence, that the fact of violation should not be litigable in more than one administrative proceeding. By reference, Petitioner sought application of the doctrines of res judicata or collateral estoppel to prevent Respondent from litigating the fact of violation twice.

Windsor advanced a number of arguments in opposition. Windsor urged, in substance, that the fact of violation alleged in the citation must be reviewed two times because 29 C.F.R. § 2700.73 in the Procedural Rules of the Commission states that an unreviewed decision of a judge is not a precedent binding on the Commission. While it is not a precedent binding on the Commission or its administrative law judges in future cases, discretionary review was denied by the Commission and the decision is, therefore, a final order of the Commission. Section 113(d)(1) of the Act provides that the decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period of time the Commission has directed that such decision shall be reviewed by the Commission. It does not follow that, because the decision is not a precedent binding on the Commission in future cases, the fact of violation in this case must be reviewed two times. By this assertion, Windsor apparently seeks a second trial on the issue of the fact of violation by application of the rules of legal precedent and stare decisis which are distinct from those regarding res judicata and collateral estoppel. Windsor's assertion that the doctrines of res judicata or collateral estoppel should not be applied in the instant action in which the judge's decision was unreviewed is unfounded.

Respondent advanced a second argument in support of its contention that the doctrines of res judicata or collateral estoppel should not be applied in this proceeding by asserting that these doctrines preclude only matters which can be demonstrated to have been litigated and determined. 3/

In the review proceeding, the judge determined that Windsor was in violation of 30 C.F.R. § 75.316. This precise question of the fact of violation is the one raised in the instant proceeding. The basis of the decision in the review proceeding was that Respondent failed to provide the amount of ventilation required by the ventilation plan. The time at which the air measurements were taken and the violation was found to have occurred was during the mining cycle even though coal was not actually being cut, mined or loaded, or the roof bolted. In view of the stipulations by the parties in the instant proceeding, the basis of any finding as to whether Windsor was in violation of the same regulation, 30 C.F.R. § 75.316, would also be whether Respondent was required to maintain the required amount of ventilation even though coal

3/ Windsor cited Russell v. Place, 24 L.Ed 214 (1876), which involved a suit for patent infringement, and in which the U.S. Supreme Court stated:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record * * * the whole subject matter of the action will be at large, and open to a new contention, unless this certainty be removed by extrinsic evidence showing the precise point involved and determined." [Emphasis added.]

was not actually being cut, mined, or loaded or the roof bolted at the time the air measurements were taken.

Windsor argued, however, that the precise determination whether coal was being "cut, mined, loaded or the roof bolted" had not been made in the earlier proceeding. It asserted the following:

> WPHCCo contested the validity of the subject citation and the order based thereon on the basis that no coal was being "cut, mined, loaded or the roof bolted" at any of the subject face areas at the time of the issuance of the subject citation and order and that the locations cited by the Inspector did not constitute "working faces." * * * Subsequently on March 10, 1980, Judge Melick issued his decision, in which he determined that the readings were taken at "working faces". However, while Judge Melick determined that "there was no active cutting or loading of coal in any of the face areas", he made no determination as to whether coal was being "cut, mined, loaded or the roof bolted" at the subject locations at the time of the issuance of the subject citation. [Footnote omitted.]

In a footnote, Windsor referred to page 2 of the decision. On page 2 of the decision, the judge stated at the beginning of the last paragraph that:

> The air readings cited herein were taken in the Nos. 1, 4, 5, and 6 entries of the 6 West section of the mine by Inspector Coffield beginning around 3:45 p.m., on May 11, 1979. At that time there was no active cutting or loading of coal in any of the face areas although mining equipment was being moved about.

It is possible that these sentences, taken out of context, provide the basis for Windsor's allegation that a litigable issue still exists. However, not only had the judge in that decision clearly held that Windsor was in violation of 30 C.F.R. § 75.316, but it is also clear that he had not ignored or overlooked the issue of roof bolting in his rationale. The judge also stated on page 2 of his decision that:

> It is apparent, however, that Windsor has reached an erroneous conclusion because of its misplaced reliance upon only a small segment of the definition of "working face" lifted out of context. "Working face" is defined in 30 C.F.R. § 75.2(g)(1) as "any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle." The issue to be resolved then is not whether the inspector's air readings were taken while coal was being extracted, but rather whether the readings were taken at places "in which work of extracting coal from its natural deposit in the earth [was] performed during the mining cycle."

After finding that the readings were taken beginning around 3:45 p.m., the judge stated:

> The operator concedes that the full sequence of conventional mining operations continued in the cited entries until 2:45 p.m. It appears that at that time the feeder had broken down and, as a result of that and an anticipated shift change at 3:45 p.m., the various operations were being phased out. Even after 2:45 p.m., however, the evidence shows that further work was performed with the admitted purpose of setting up the entries for production to resume as soon as the feeder was repaired. The uncontradicted evidence shows that various equipment used in the mining cycle was energized at least until 3:45 p.m., that a roof-bolting machine continued to spot roof bolts (the process of replacing bolts) at the inby corner of the No. 1 entry until at least 3:15 or 3:20 p.m., that the cutting machine which had completed cutting the No. 5 entry at around 2:45 p.m., was on its way to cut the No. 4 entry and that the loading machine was waiting to operate in the No. 6 entry.

The decision, therefore, disposes of the issue of roof bolting. It does not hold or even intimate that the decision was reached because roof-bolting operations, which continued until at least 3:15 or 3:20 p.m., were still in progress at 3:45 p.m., when the air readings were taken by the inspector. 4/

4/ Even if the judge in that decision had not taken cognizance of the issue of roof bolting and after due consideration found a violation on a different theory, there would still be no litigable issue in this case as to whether roof bolting was in progress at the time the air readings were taken because of the stipulations of the parties. The parties have effectively disposed of this issue by stipulating that spot roof bolting was concluded in the applicable area at approximately 3:25 p.m. (Stipulation No. 9) and air readings by the inspector were commenced at about 3:45 p.m. By these stipulations read in context, the parties have therefore agreed that roof bolting was concluded before the air measurements were taken. There is, therefore, nothing left to litigate on this issue.

Moreover, Windsor is aware that there was never a litigable issue as to whether roof bolting was actually in progress at the time the air readings were started. In footnote 2 to its allegation that the judge had not made findings relative to roof bolting at the time the air readings were taken, Windsor stated: "Because the Secretary never alleged that the roof was being bolted at the subject faces at the applicable times, for the purposes of this case the "cut, mined or loaded" language in the ventilation plan can be considered as identical to that in 30 CFR 75.301-1 and 30 CFR 75.301-4(a)."

While this acknowledges that no such issue on which the judge was required to make findings existed, it is not a correct statement. Although the additional requirement in the ventilation plan for ventilation while the roof was being bolting was not raised as a factual issue in this case, that requirement may have a bearing on whether ventilation is required only at those times, continuously, or during the entire mining cycle.

Although the judge did not find that coal was actually being cut, mined or loaded or the roof bolted at the time the air readings were taken, he stated:

> Within this framework, I have no difficulty concluding that when Inspector Coffield took his air readings each of the cited entries was a place in which work of extracting coal from its natural deposit in the earth was performed during the mining cycle. Thus, the readings were taken at "working faces." 30 C.F.R. § 75.2(g)(1). Under the circumstances, the underlying citation in this case was properly issued and the subsequent order of withdrawal was therefore valid. [Emphasis added.]

A reading of sections 303(b) and 303(c)(1) of the Act (30 C.F.R. §§ 75.301 and 75.302(a)) 5/ by themselves might lead one to conclude that line brattice

5/ Sections 303(b) and 303(c)(1) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act) provide:

"(b) All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes. The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be nine thousand cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line shall be nine thousand cubic feet a minute. The minimum quantity of air in any coal mine reaching each working face shall be three thousand cubic feet a minute. Within three months after the operative date of this title, the Secretary shall prescribe the minimum velocity and quantity of air reaching each working face of each coal mine in order to render harmless and carry away methane and other explosive gases and to reduce the level of respirable dust to the lowest attainable level. The authorized representative of the Secretary may require in any coal mine a greater quantity and velocity of air when he finds it necessary to protect the health or safety of miners. Within one year after the operative date of this title, the Secretary or his authorized representative shall prescribe the maximum respirable dust level in the intake aircourses in each coal mine in order to reduce such level to the lowest attainable level. In robbing areas of anthracite mines, where the air currents cannot be controlled and measurements of the air cannot be obtained, the air shall have perceptible movement.

"(c)(1) Properly installed and adequately maintained line brattice or other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive, and noxious gases, dust, and explosive fumes, unless the Secretary or his authorized representative permits an exception to this requirement, where

or other approved devices are required to be continuously used to provide 3,000 cubic feet of air a minute to each working face. 30 C.F.R. § 75.301-1, however, provides as follows 6/: "A minimum quantity of 3,000 cubic feet a minute of air shall reach each working face from which coal is being cut, mined or loaded and any other working face so designated by the District Manager, in the approved ventilation plan." [Emphasis added.] The specific issue in the earlier proceeding was not whether Windsor was in violation of section 75.305-1 for failure to provide 3,000 cubic feet of air per minute at each working face from which coal is being cut, mined or loaded. It was whether Windsor failed to provide 3,000 cubic feet per minute of air at working faces designated by the District Manager in the approved ventilation plan. If the ventilation plan specified that 3,000 cubic feet of air per minute must reach all working faces, the operator would be obligated to provide 3,000 cubic feet of air per minute to those faces as defined in section 75.2(g)(1), i.e., any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle. As Judge Melick held, that was the net effect of the provision specifying the places where 3,000 cubic feet of air per minute were required in Windsor's approved ventilation plan.

Respondent's ventilation plan in effect at the time of the issuance of Citation No. 811574 provided that Respondent shall "maintain a minimum of 3000 cfm at each working face, where coal is being cut, mined, loaded or the roof bolted * * *." [Emphasis added.] Where roof bolting was used to support the roof in the Beech Bottom Mine, the times and occasions when Respondent

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fn. 5 (continued)
such exception will not pose a hazard to the miners. When damaged by falls or otherwise, such line brattice or other devices shall be repaired immediately." [Emphasis added.]

Section 303(b) of the Act has been reproduced in the regulations as 30 C.F.R. § 75.301. Section 303(c)(1) of the Act has been reproduced in the regulations as 30 C.F.R. § 75.302(a).

6/ 30 C.F.R. § 75.301-4(a), the other regulation cited by Windsor in its footnote, concerns the velocity of air and provides as follows:

"(a) On and after March 30, 1971, except in working places using a blowing system as the primary means of face ventilation or in working places where a lower mean entry air velocity has been determined to be adequate to render harmless and carry away methane and to reduce the level of respirable dust to the lowest attainable level by the Coal Mine Safety District Manager, the minimum mean entry air velocity shall be 60 feet a minute in (1) all working places where coal is being cut, mined, or loaded from the working face with mechanical mining equipment, and (2) in any other working place designated by the Coal Mine Safety District Manager for the district in which the mine is located in which excessive amounts of respirable dust are being generated by any type of mechanical mining equipment." [Emphasis added.]

was required to maintain 3,000 cfm at each working face closely correspond to the sequence of events which comprised the mining cycle found to be in effect at Respondent's mine. In his decision, Judge Melick found as follows:

> The term "cycle" is defined in the Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior (1968), as the complete sequence of face operations required to get coal. In conventional mining, as followed in the Beach Bottom Mine, the sequence consists of supporting the roof, cutting the face, drilling the face, shooting the face, and loading and hauling the coal. In order for the face to be a "working face," it is not therefore necessary that work of extracting coal be performed at all times. Cf. Peggs Run Coal Company, Inc., PITT 73-6-P, March 29, 1974, aff'd., 3 IBMA 421, December 6, 1974. The definition clearly contemplates that the mining cycle is a continuing process in spite of temporary delays caused by shifting equipment or mechanical break down.

Except for the use of the words "loading and hauling" used by the judge in the contest proceeding in describing the mining cycle instead of the word "loaded" used in Respondent's approved ventilation plan, the mining procedures described are identical. Since coal may be hauled away from a face area during all of the phases of the cycle, the actual hauling at the face area might be considered for purposes of definition or construction of the ventilation plan to be an inconsequential part of the "sequence of face operations to get coal." Thus, the words in Windsor's ventilation plan might be construed to be identical for all practical purposes with the definition of the mining cycle. It follows that it could be held that Windsor's ventilation plan required 3,000 cfm at the working face--defined as any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle--throughout the entire mining cycle.

Windsor asserted that "the administrative law judge in his March 10, 1980, decision did not determine whether the cutting, mining, and loading inactivity at the subject face areas at the time of the issuance of the subject citation should deem the citation and order based thereon invalid, even though this issue was raised and discussed both orally and in writing prior to the issuance of the judge's decision." This assertion is unfounded. The judge expressly stated that "at that time there was no active cutting or loading of coal in any of the face areas although mining equipment was being moved about." It is clear that he did not find a violation because coal was actually being cut, mined, loaded or the roof bolted. The basis of the decision was that the air readings were taken at places in which the work of extracting coal from its natural deposit in the earth was performed during the mining cycle although not while coal was actually being cut, mined, loaded or the roof bolted. The requirement of the ventilation plan was not suspended by a temporary interruption of cutting, mining, loading or roof bolting.

In view of the above, Respondent's assertion that Judge Melick did not make certain determinations critical to the finding of the fact of violation is rejected.

Unlike the 1977 Act, the Federal Coal Mine Health and Safety Act of 1969 (hereinafter, the 1969 Act) made no provision for the review of abated violations and no provision for the review of unabated notices of violation other than that made incidental to the review of the reasonableness of the time allowed for abatement. In Reliable Coal Corp., 1 IBMA 51 (June 10, 1971), which held that there was no provision in the 1969 Act for review of such violations prior to the institution of a civil penalty proceeding, the Interior Board of Mine Operations Appeals stated:

> [W]e find no merit in Reliable's contention that the interrelationship of the statutory provisions of sections 104, 105(a)(1) and 109(a)(3), supports its view that an operator has a statutory right of review of the "fact of violation" in a section 105(a) proceeding. As we interpret these provisions of the Act, and as we held in Freeman, the Act does not preclude a determination of this issue in a section 105(a) proceeding where it is raised as an element of the reasonableness of time allowed for abatement. Indeed, in such case, a decision under section 105(a) on the issue of reasonableness of time must inherently incorporate a determination that the violation did or did not occur -- and such determination, if final, would be res judicata within the Department. Thus, the "fact of violation" would not be litigable in more than one administrative proceeding.

Reliable serves to show that the application of the doctrine of res judicata was appropriate under the 1969 Act. There is even more reason for the application of res judicata or collateral estoppel in the instant case. Under the 1977 Act, provision is expressly made for the review of the "fact of violation" of a citation in a review case, even when the violation is abated, Energy Fuels Corp., 1 MSHC 2013 (May 1, 1979).

In Energy Fuels Corporation, the Commission, in holding that the operator is permitted to contest the citation immediately upon its issuance, stated:

> If the citation lacked special findings, and the operator otherwise lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed. Even if he were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and ripe for hearing. The two contests could then be easily consolidated for hearing upon motion of a party or the Commission's

or the administrative law judge's own motion. If the operator has an urgent need for a hearing, the Secretary could make it more likely that the two contests would be tried together by quickly proposing a penalty. If a penalty is contested, and the hearing on the citation is already underway, consolidation would still be possible. Moreover, even if consolidation were not possible, it has not yet been suggested that principles of repose, such as res judicata, or collateral estoppel, could not be employed to prevent multiple hearings on the same issues. We are unwilling to eschew so early in the history of the 1977 Act these possible avenues of accommodation.

The proceeding in which Citation No. 811574 and Order No. 811576 were contested had already been completed, therefore, consolidation with this civil penalty proceeding was not feasible. Although section 105(a) of the Act requires the Secretary to propose a penalty within reasonable time after the termination of an inspection or investigation, compliance with the assessment procedures prescribed in Part 100 of Title 30 Code of Federal Regulations requires a considerable amount of time. Under the regulations all citations which have been abated and all closure orders, regardless of termination or abatement, are referred by MSHA to the Office of Assessments for a determination of the fact of the violation and the amount, if any, of the penalty to be proposed. These regulations prescribe an initial review of the citation or order, formula computations, conferences or the submission of additional information for consideration, issuances of notice of proposed penalty and notices of contest. In addition to the time required to perform some of these steps, periods of time such as 10 days, 33 days and 30 days are allowed between some of the steps. In addition to those delays, 29 C.F.R. Part 100 provides that the Secretary has 45 days from the receipt of the notice of contest to file a proposal for a penalty with the Commission. Even after this, the Respondent has 30 days to file an answer, the parties have 60 days from the filing of the proposal of a penalty to complete discovery and 10 days to oppose each motion, and notice to all parties must be given at least 20 days before the date set for hearing.

In actual practice, it has developed that considerable time is required between the issuance of the citation and the assignment of the civil penalty proceeding for trial. The instant case was not assigned to a judge until February 12, 1980, 2 months after the contest proceeding hearing had been held in December 1979. It was not apparent that res judicata or collateral estoppel was an issue until several months later, after the case had been continued, when the Secretary filed its motion for pretrial summary disposition.

Since consolidation was not feasible by the time the existence of the review case was disclosed in the record of the instant case, the remaining alternatives are (1) to make two separate determinations of the same fact of violation or (2) to apply the doctrines of collateral estoppel or res

judicata. 7/ Under the generally recognized rules of law, these doctrines are applicable in such cases to eliminate wasteful, time-consuming and possibly disruptive repetitive decisions. The application of the rules of collateral estoppel or res judicata in the instant case would not contravene any overriding public interest or result in manifest injustice. The application of these doctrines should not, therefore, be qualified or rejected as urged by Windsor. This narrow ruling in regard to the issue of "fact of violation" is that Respondent is estopped from having the fact of violation determined for a second time under the circumstances of this case.

In view of the above, Petitioner's motion for partial summary disposition is granted. A violation of 30 C.F.R. § 75.316 has been established.

Assessment of Civil Penalty

Since Windsor was in violation of a mandatory safety standard, the Act requires that it be assessed an appropriate civil penalty. In assessing this civil penalty, consideration must be given to the six criteria contained within section 110(i) of the Act. The facts serving as basis for a determination of those statutory criteria, with the exception of the effect of a penalty on the ability of the operator to remain in business and the operator's history of previous violations, were stipulated by the parties. In the absence of indication in the record otherwise, it is found that the penalty assessed herein will not affect the ability of Windsor to remain in business. The amount of the penalty assessed will be as if the operator had no history of previous violations.

The Beech Bottom Mine was above average in size with 288 employees producing 575,935 tons of coal during 1979.

In the absence of evidence to the effect that the operator knew or should have known of the inadequate quantity and velocity of air in the Six West section on May 11, 1979, it is found that the record will not support a finding of negligence on the part of Respondent. The parties stipulated that the foreman stated that the cutting machine had quit cutting about one-half hour previously and that there were 4,100 cfm of air reaching the No. 5 face and about 4,000 cfm of air reaching the face of the other entries. The times of the air measurements and who made the measurements upon which the foreman's statement was based were not stipulated.

7/ In a footnote to its argument, Windsor states:

"Considerable confusion seems to exist regarding when the doctrine of res judicata is applicable and when the doctrine of collateral estoppel. Collateral estoppel, unlike res judicata, does not necessitate an identity of causes of action. See IB Moore's Federal Practice 0.411[2] at 3777. Both doctrines are discussed herein."

If confusion exists, it need not be infused into the instant proceeding. The doctrine of collateral estoppel is clearly applicable. The doctrine of res judicata may also be applicable.

As noted in the stipulations, at the time the inspector took his readings, the miners working the 8:00 a.m. to 4:00 p.m. shift had left the section and those working the evening shift had yet to arrive. Two miners remained on the section to repair the feeder during the pertinent time period. Two of the faces were ventilated in accordance with the plan. A third face received only slightly less than the required amount of air. The ventilation at the remaining three faces was substantially less than that required by the plan. There is no indication that, because of the reduced air volume or velocity, methane had been allowed to accumulate or, in the absence of any actual cutting, mining, loading or roof bolting that there was any mining activity which would be likely to cause or increase the liberation of methane. Although the operator was in violation of 30 C.F.R. § 75.316 for failure to provide the prescribed volume and velocity of air for ventilation, there is no indication that such failure for an undetermined, but possibly a short time, actually failed to dilute, render harmless, and carry away, flammable, explosive, noxious, harmful gases, dust, smoke, and explosive fumes. It is accordingly found that the probability of an accident resulting in injury was low.

In the absence of any explanation why the required volume of 3,000 cfm was not restored in entries 5 and 6 within the time set by the inspector for abatement, it is found that Respondent did not demonstrate good faith in attempting to achieve rapid compliance after notification of the violation.

In consideration of the findings of fact and conclusions of law contained in this decision, an assessment of $50 is appropriate under the criteria of section 110 of the Act.

ORDER

It is ORDERED that Respondent pay the sum of $50 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 5 1981

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| MATHIES COAL COMPANY, | | : | Contest of Order |
| | Contestant | : | |
| v. | | : | Docket No. PENN 79-89-R |
| | | : | |
| SECRETARY OF LABOR, | | : | Order No. 620637 |
| MINE SAFETY AND HEALTH | | : | June 20, 1979 |
| ADMINISTRATION (MSHA), | | : | |
| | Respondent | : | Mathies Mine |

DECISION

Appearances: Michel Nardi, Esq., Mathies Coal Company, Pittsburgh, Pennsylvania, for Contestant;
Barbara K. Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.
The United Mine Workers of America (UMWA) filed an answer but did not enter an appearance at the hearing.

Before: Judge Stewart

In the course of a ventilation saturation inspection at the Mathies Coal Company's Mathies Mine, the inspector issued Order No. 0620637 pursuant to section 104(d) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act). 1/ The operator filed a timely challenge to this order pursuant to section 105(d) of the Act. Subsequent to the hearing in this matter held in Pittsburgh, Pennsylvania, on February 5, 1980, Contestant and Respondent Mine Safety and Health Administration submitted posthearing briefs. Proposed findings and conclusions therein inconsistent with or immaterial to this decision are rejected.

1/ Originally, on June 20, 1979, the inspector purported to have issued Order of Withdrawal No. 620637 pursuant to section 104(a) of the Act. Later, on the same day, he issued a modification of Order No. 620637 showing the order to have been issued pursuant to section 104(d)(2).

In issuing Order No. 620637, Inspector Wolfe cited 30 C.F.R. § 75.1002-1(a) and alleged the existence of the following condition or practice:

> The nonpermissible S & S battery charger located between the 6 and 7 entries at the 26 + 48 split on the 14 Butt 19 1/2 face section (I.D. 055) was 95 feet, as measured with a standard measuring tape, from the line of pillar being extracted. The foreman in charge stated that he had seen the charger earlier in the shift.

Section 75.1002-1(a) reads as follows:

> Electrical equipment other than trolley wires, trolley feeder wires, high voltage cables, and transformers shall be permissible, and maintained in a permissible condition when such electrical equipment is located within 150 feet from pillar workings, except as provided in paragraphs (b) and (c) of this section.

The factual details established at the hearing are set forth below in the stipulations by the parties, the synopsis of the exhibits, and the synopsis of the testimony of each witness called by the parties.

Stipulations

At the hearing, the parties stipulated that the Mathies Mine is owned and operated by Mathies Coal Company; that both are subject to the jurisdiction of the Mine Safety and Health Act of 1977; that the Administrative Law Judge has jurisdiction over this proceeding; that inspector Okey Wolfe was at all times relevant hereto an authorized representative of the Secretary of Labor; that true and correct copies of the order and modification were served upon the operator in accordance with the provisions of the Act; that copies of the order and modification are authentic and may be entered into evidence as authentic documents; that the citation or the violation was timely abated; that the battery charger in question was not permissible electrical equipment; that the battery charger was located 95 feet from the pillar line as specified in the order; and that the subject battery charger was deenergized and unplugged from the load center.

Exhibits

MSHA Exhibit 1 is Order of Withdrawal No. 0620637. MSHA Exhibit 2 is a modification of that order stating that the "type of action" should be 104(d)(2) rather than 104(a).

Contestant's Exhibit 1 is a wiring diagram for the battery charger. Contestant's Exhibit 2 is a drawing of 14 butt 19-1/2 face section showing the general location of the gob, the bleeder entry, the battery charger, and the load center.

Testimony of MSHA Witnesses

Okey Wolfe--Federal Coal Mine Inspector, MSHA

The inspector visited the Mathies Mine on June 20, 1979, for the purpose of making a ventilation inspection. While conducting his inspection on the 14 butt 19-1/2 face section, he found the battery charger located between the sixth and seventh entries at the 26+48 switch, a distance of 95 feet from the outside corner of the pillar. This was a retreat mining section and pillar-extraction was in progress. The inspector took measurements and talked to the section foreman in charge of the day shift. William Lendvei, the section foreman, stated that he had seen the charger during that shift prior to the commencement of mining and that the charger had been in this location at least for a day or two. By questioning foreman Lendvei, the inspector determined that mining had been done on the same pillar on the midnight shift. He informed Mr. Matson, the company representative traveling with him that day, that an order had been issued and in discussing the violation, Mr. Matson concurred that a violation did exist by stating, "They (the company) had been caught with their pants down."

The notation "104(a)" on the order of withdrawal was a mistake on the part of the inspector. He usually issues a 104(a) citation and in filling out the form without thinking, he wrote "104(a)" rather than "104(d)(2)." When he discovered the violation, he informed the foreman that an order was going to be issued. After Inspector Wolfe discovered his mistake on the ride back to the office, the order was modified by inspector Thomas H. Devault to show that the type of action was a 104(d)(2).

The battery scoop has to be charged periodically depending upon the amount of use it receives. The battery charger was set up as a charging station but it was not hooked up. In order for it to be put to use, it would be plugged into the power center and energized. The scoop is used for cleaning up sections. It does a better job of getting up against the ribs to get the loose coal than the miner itself does. The inspector has seen it used to haul supplies from outer areas to working places if needed. It is possible for mining operations to take place without the use of a scoop and coal could be mined without using a scoop even once during a shift. The scoop was not being operated on the section when the inspector arrived and he does not recall seeing it in use until the order was issued when it was used to move the charger.

The charger was not energized and the cable was wound up at the charger. The load center was located a little over a block of coal outby the charging station, a distance of a little more than 96 feet. The distance between the center lines of the block entries was 96 feet. Give or take a couple of yards, the battery charger was 120 feet from the battery charger. To be energized, the charger must be plugged into the load center. The load center was energized. There were no batteries in the charger.

The continuous-mining machine is permissible equipment which can be used inby the last open crosscut or in return areas. Permissible equipment is so sealed that, where there is a chance of arcing or sparking from the

components of the electrical equipment, it will prevent the escape of flame into what might possibly be a methane atmosphere. Equipment is certified by the Secretary as to whether it is permissible or nonpermissible. Under section 75.1002-1, the idea is to keep any type of nonpermissible equipment that could serve as an ignition source more than 150 feet away from any pillar areas. It is not uncommon for methane to build up in a pillar and a large flow of air can force methane out of the gob area into the working place. In order to have a fire or explosion, there must be an ignition source. The effect of a roof fall within 150 feet of the gob where methane was liberated on a deenergized continuous-mining machine and a deenergized battery charger would be similar. The methane detected by the inspector in the outlying area was very minimal. He could not attest to what was back in the pillar. The battery charger does not have gasoline in it.

The inspector did not measure the length of the charger cable. In his opinion, there was enough cable to reach the power center but he did not stretch it out. If the cable had been too short, the charger could be energized by moving the power center, moving the charger, or possibly using a jumper cable. The input voltage on the charger was 440 volts AC. The scoop batteries can be charged by removing the batteries or by leaving the tray on the scoop and charging the batteries with it on. The inspector saw no other battery-charging station on the section and did not know where the next nearest battery-charging station was located.

In referring to the distance between the battery charger and the load center marked on Contestant's Exhibit 2, the inspector stated that he was not sure that they were "quite that far out, but it's close." The distance was about 100 feet. He acknowledged that it was possible that the cable was in fact too short. The load center was active at the time providing power to other operating machinery.

Testimony of Contestant's Witnesses

Allen M. Newcoe--Manager of Purchasing and Materials Control, Eastern Region, Consolidation Coal Company

A permissible enclosure is one so constructed that it eliminates the escape of hot gases. It protects against the admission of combustible materials into the area in which electrical equipment is operated in case there is an internal explosion. If a piece of equipment is not being operated, the permissibility would not be questioned.

When exposed to a roof fall within 150 feet of a pillar line, there would be a great hazard from energized, nonpermissible equipment and less of a hazard from energized permissible equipment. If they were both deenergized, there would be no hazard present. Contestant's Exhibit 1 is a schematic diagram of a battery charger with a 440-volt input and a 20-volt output. A battery charger's function is to charge batteries.

To energize the battery charger, it is plugged into a 440-volt source, the switch on the load center turned on, and the switch on the battery charger activated. He knows of no other equipment used in the section that

utilizes batteries requiring charging in this particular battery charger. The load center is not permissible equipment. The charger serves as a power source for the mining face equipment and is continually energized during mining operations. The function of the scoop is to clean up or to transport materials to the mining junction. The length of time that a charge for a battery will last is based on the use and load it is carrying. Normally, it will operate a full shift without being recharged. There would be no purpose in energizing the battery charger other than for charging the battery to the scoop. A roof fall on the battery charger in its deenergized, unplugged state would be no different from a roof fall on a lunch bucket.

Mr. Newcoe works at the offices of Consolidation and was not at the mine to observe the actual work activities of the section. The scoop would probably not be operated continuously for 8 hours. The plug is inserted by hand, normally without the use of tools, by plugging it in and spinning the cap.

Bruce Matson--General Assistant Mine Foreman

Mr. Matson escorted Inspector Wolfe on a "blitz" inspection which was being made by a number of Federal inspectors. When Mr. Wolfe told him that the battery charger was not within permissible distance from the pillar line, Mr. Matson replied that it was inoperable and the cable was wrapped up on the charger. The battery charger was not being used at the time. The scoop was not running at the time but it could have been operated. The battery charger was better than one block from the load center, a distance of over 100 feet. The cable itself was not as long as the block. There were no batteries in the general vicinity of the battery charger. The charger must be operated in intake air because of the hydrogen gas generated. The section was mined from left to right and there was mining on the last block on the right side of the section. Mining the next pillar line, starting with block No. 73, would establish a new pillar line. The belt line, the track, and the load center would be moved back.

The load center had been moved back and energized. The unenergized battery charger was disconnected so it could be moved back. The cable was wrapped up on the charger so it could be handled without damage to the cable when it was picked up and transported to another charger station. It would be necessary to erect another charger station. It was eventually moved one break outby.

The scoop was not used continuously. It was run once or possibly twice each shift. It would probably last 3 or 4 days or possibly the entire week. It was used only for the primary supplies. Assuming one block per day on three shifts, it would take a full week to mine the pillar line. If the battery had been charged before mining was commenced, the charged battery would last until mining had been completed. Mining had been in progress 4 work days, going into the fifth day. There had been some trouble with the scoop when the battery itself would not hold a charge but people had been called in to repair it.

Mr. Matson does not recall making a statement that the company had been caught with its pants down. It has been common mining practice when moving the belt and the tracks back from an area that has been mined, to cut the trolley wire and leave that portion of the trolley wire within a 150-foot distance. He had never received a citation for doing so notwithstanding the provisions of section 75.1002. There are five working sections under his jurisdiction at the mine. He does not visit each section every day but he receives reports of adverse conditions. When the scoop had difficulty in holding a charge, it would run down sooner than it normally would. Mining in the last block had started on the midnight shift. They were not mining when he got there.

It was his understanding that section 75.1002 applied to energized equipment and he did not think that having a battery charger within 150 feet of the gob was a violation when it was deenergized. A new charging station was constructed and the battery charger moved back. One-half hour or less was required to do so. It had been more than a week prior to the 20th when there had been trouble with the battery charger and it had been repaired. He does not know the days it was out of service and the days it was in service. He believes there was a fault in the charger itself. Instead of an 8-hour charge, it was only giving it a 3- or 4-hour charge. He does not know if the batteries were replaced in the scoop. The problem had first become apparent several weeks previously. It was holding its charge on the 20th. Mining in entry No. 6 was on the last block, block No. 71. Block No. 72 was to remain. The belt and track were not as shown on Exhibit O-2. They had been moved back two blocks 4 or 5 days before the date of the citation. The load center was also moved back at that time.

The distance from the battery charger to the load center was more than one block. From center-to-center a block would be 96 feet. The distance would probably be another 50 feet. The load center was not in the intersection as shown in Exhibit O-2. Ordinarily, the belt, track and load center are moved back about once each week. He does not know of his own knowledge how far the charger was from the load center.

The battery charger could not have been used from the load center for 4 or 5 days. He believes the scoop could go that long without a charge. He assumes the charger station had not been built because they were mining coal. To build a charger station, six posts are set and the area enclosed with tin sheeting. After an air current is directed to the location, the charger can be moved to the station. The trouble with the charger had been eliminated at least a week before the (d)(2) order. From indications on Exhibit O-2, the battery charger was used 4 or 5 days previously when the belt, track, and load center had been moved. That is the normal mining cycle.

William Lendvei--Section Foreman

Mr. Lendvei worked the 8 to 4 shift on June 20 on the 14 butt 19-1/2 section. He went into the mine with Mr. Wolfe and the UMWA safety representative. After walking through the section at about 8:45 a.m., he started mining. After mining five or six buggies, the inspector told him to stop

mining because the charger was in violation of the law. He was told he had 30 minutes to move it, so he shut down. He believed that so long as it was deenergized it would not create a hazard and was surprised that this was a violation of the law. The battery charger was not energized and the cable was coiled next to it. The cable would not reach the load center. He had been mining there about 4 days and did not use the battery charger during that time. It could not be used with the cable wrapped up. He did not measure the cable but knew from previous times that it is less than one block--96 feet. The distance from the battery charger to the load center was 1-1/2 blocks. He does not recall the last time the battery was charged. He believed the battery charger would be moved when there was a breakdown or delay in mining. He would not have used it at that location. The scoop was used to transport posts and supplies. He does not know the extent of the use of the scoop on the evening or midnight shift. The scoop is not used to clean up.

Validity of Order No. 620637

An order of withdrawal may be issued pursuant to section 104(d)(1) 2/ if, given the requisite underlying citation, an authorized representative of the Secretary finds a violation and finds such violation to be caused by unwarrantable failure of the operator to comply. Once an order has been issued pursuant to section 104(d)(1), an order pursuant to section 104(d)(2) may be issued upon observation by an authorized representative of a "similar" violation. That is, a 104(d)(2) order is properly issued if an authorized representative observes a violation and finds that such violation was caused by an unwarrantable failure to comply on the part of the operator.

Mathies urges that: (1) a deenergized battery charger located within 150 feet of the gob is not a violation of 30 C.F.R. § 75.1002-1; (2) Contestant's actions did not constitute an unwarrantable failure to comply with

2/ Section 104(d)(1) of the Act reads 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."

30 C.F.R. § 75.1002-1; and (3) the condition as it existed did not significantly and substantially contribute to the cause and effect of a mine safety hazard.

It is undisputed that the battery charger in question was not permissible equipment, that it was located within 95 feet of the pillar line as specified in the order and that it was deenergized and unplugged from the load center.

In order to energize the battery charger, it was necessary to plug it into the energized load center and then activate it by switching it on. The load center, which was not permissible equipment, was located 1-1/2 blocks, or approximately 150 feet, outby the battery charger. The battery charger cable was less than 96 feet in length and was too short to reach the load center. It had been coiled and placed on the battery charger.

The battery charger was used primarily to charge the batteries of the scoop, a piece of equipment used to haul posts and supplies from the track entry to the particular mining area. The scoop was not used on a continual basis during mining operations. The length of time a charge would last was dependent upon the use of the scoop and the load carried. The last occasion prior to June 20, 1979, on which the scoop batteries had been recharged was not established.

Violation of 30 C.F.R. § 75.1002-1

In pertinent part, section 75.1002-1(a) requires that electrical equipment, be permissible and maintained in a permissible condition when such equipment is located within 150 feet from pillar workings. The battery charger was clearly non-permissible and located about 95 feet from the pillar line. This condition was in violation of the standard as alleged.

Mathies' argument that the condition was non-hazardous and, therefore, not a violation of the standard 3/ is rejected on two grounds. In the first place, the condition was hazardous and, secondly, there is nothing in the standard to support the contention that the violation thereof is premised on the existence of a hazard.

A battery charger which may be energized is a potential source of ignition. 4/ The unrebutted testimony of the inspector established that the charger could have been energized by moving the load center or by use of

3/ Mathies asserted that: "Clearly, the drafters of the regulations contemplated the use of nonpermissible equipment within the 150-foot distance from the pillar line, since the purpose of the standard is to protect against explosive hazards. Consequently, a battery charger's location does not become relevant with respect to the subject mandatory standard until it is energized, adding the element of potential hazard."

4/ Mathies' analogy of a deenergized charger to a lunch pail is specious for this very reason. A lunch pail is not a piece of electrical equipment which might be energized or activated.

a jumper or extension cable. Mathies contention that it would have been necessary to move the charger outby its location if it were to be used is rejected. Since the charger could be energized and used at its location within 150 feet from the pillar workings, the hazard against which section 75.1002-1(a) is directed clearly existed.

Even if the conditon was not hazardous, it would have been a violation of section 75.1002-1. Section 75.1002-1 contains certain qualifications to the application of the mandatory standard but the element of hazard is not one of them. In essence, Mathies' contention that there is no violation if the proscribed condition is not a hazard is an attempt to add an exception to the regulation.

Some regulations promulgated under the Act in Title 30, Code of Federal Regulations, Section 75, do contain requirements that must be met only when there is an unsafe condition. Where certain explosive gases are liberated accidentally, a report must be made and ventilation and control measures instituted to reduce the accumulations (section 75.301-8). Exposed moving machine parts which may cause injury to persons must be guarded (section 75.1722(a). Safety chains, suitable locking devices, or automatic cut-off valves are required at connections of machines to certain high pressure hose lines or between certain high pressure hose lines where connection failure would create a hazard, (Section 75.1730(e)). Protective clothing or equipment and face-shields or goggles must be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist from flying particles. (Section 75.1720(a))

Section 75.1002-1, however, is clearly not premised on the existence of a hazard. The qualifying language therein prescribes no exception for an unenergized battery charger. In view of the clear language of the standard, no basis exists for qualifying the application of the standard by reading into it a requirement that the condition be hazardous.

Effect of Subsequent Modification

When the inspector discovered the battery charger, he issued an oral order of withdrawal. He also issued MSHA Form 7090-3 on which he clearly marked "Order of Withdrawal." The form, as issued, clearly indicated that the order of withdrawal was directed at the 14 butt 19-1/2 face section. The order of withdrawal was issued at 10:15 a.m. At 11:05 a.m., after the battery charger had been moved outby so that it was more than 150 feet from the pillar line, the inspector noted on the same form that the order was terminated.

On the form there is a space with the heading "Type of Action." In this space, the inspector inadvertently inserted the characters "104(a)." He explained that he did this "without thinking" because he issues more 104(a) citations than orders of withdrawal during his inspections. After the

inspector became aware of his mistake on his way to the office, he had inspector Thomas H. DeVault issue a modification to show that the "type of action" was 104(d)(2). 5/ On the order of withdrawal, the inspector had noted in the space marked "Initial Action" that the underlying order, No. 231726, was the one issued on November 14, 1978.

In McCoy Elkhorn Coal Corporation v. Secretary of Labor, Mine Safety and Health Administration, Docket No. KENT 80-243-R (October 31, 1980) (Judge Steffey), the Administrative Law Judge held that the inspector's order was not rendered invalid by the fact that he mistakenly wrote an incorrect citation number in the "initial action line." In its contest of an order, the contestant argued that the inspector did not correct the reference to the incorrect citation until it had already filed its notice of contest. Contestant also contended that section 104(h) of the Act does not permit the inspector to modify an order after he has terminated it. In rejecting these arguments, the Judge stated in part:

> In Old Ben Coal Co., 2 FMSHRC 1187 (1980), the Commission affirmed an administrative law judge's decision which had affirmed four orders of withdrawal which indicated that they had been issued under section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969 when, in fact, they should have shown that they were issued under section 104(c)(2) of the 1969 Act. The judge had held that the incorrect reference to section 104(c)(1) was no more than a clerical error which did not prejudice Old Ben in any way. The Commission stated that it agreed with the judge that Old Ben was not prejudiced because Old Ben did not show how its defense to a 104(c)(2) order would differ from its defense to a 104(c)(1) order * * * It appears to me that an inspector ought to be able to correct a mistake regardless of whether he discovers it before or after a Notice of Contest has been filed or whether he discovers it after he has already terminated the order.

There was never any doubt that Inspector Wolfe issued an order of withdrawal and that it was issued under subsection 104(d)(2) of the Act. Mathies' contention that the order was issued invalidly in that section 104(a) was cited on the order and the order had been abated 4 hours prior to its modification to cite section 104(d)(2) is without merit. Although there

5/ Section 104(d)(2) of the Act reads as follows:

"If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to [section 104(d)(1) of the Act], a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under [section 104(d)(1)] until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine."

was a clerical error on the form on which the order was issued, it was clear from the beginning that the inspector issued an order of withdrawal and not a citation. This error was discovered and corrected on the same day that the order was issued. There is no evidence whatever that Mathies was misled or prejudiced by the clerical error.

Significant and Substantial Contribution to the Cause and Effect of a Mine Safety Hazard

Mathies asserted that the condition as it existed did not significantly and substantially contribute to the cause and effect of a mine safety hazard. Although the Secretary did not so allege, the record establishes that the condition did significantly and substantially contribute to the cause and effect of a mine safety hazard.

Section 104(d)(2) does not condition the issuance of an order of withdrawal on a finding that the condition found significantly and substantially contributed to the cause and effect of a mine safety hazard. There is no such gravity requirement for orders of withdrawal issued under section 104(d)(2). See International Union, United Mine Workers of America v. Kleppe, 532 F.2d 1403, 1407 (D.C. Cir. 1976). Even if there had been such a requirement, it would have been met in this case. As previously discussed in this decision, a hazard was clearly present.

The battery on the scoop would last for several hours. The length of time was dependent upon the load and the usage. With no use, the charge might last for several weeks; given normal use, it might last for a week. Although there had been a time when the battery would hold a charge for only 3 or 4 hours, the problem had been corrected before June 20. On June 20, mining had been in progress for 3 or 4 days and the scoop had been used. The date of the last recharge was not specifically established.

If the battery were to run down before the pillar line was completed, there was no way to recharge it on the section other than to use the battery charger. Although Mr. Lendvei, the section foreman, testified that he would not have used the charger in the location where it was found by the inspector, there would have been no operable scoop on the section to move the charger if the battery had been run down due to hard use or recurring fault. If the battery had run down, the charger more than likely would have been used to charge the battery by someone on one of the three shifts. Even if the charger had been dragged outby by manual labor or means other than the scoop, there is no assurance that it would be moved beyond the 150-foot distance from the gob or that a split of intake air would have been provided to carry away the hydrogen gas generated during charging of the batteries. The charger could have been energized at the location in which it was found by the inspector through use of an extension or jumper cable, or even by moving the power center. Such use of the charger could have had disastrous results. It is evident that the violation found by the inspector was serious. Certainly, the location of the battery charger was not a mere technical violation that posed no risk to any miner as asserted by Mathies.

Unwarrantable Failure

Mathies asserts that it did not unwarrantably violate 30 C.F.R. § 75.1002-1 because the section foreman could not reasonably be expected to know that the existence of a deenergized battery charger within the 150-foot distance was a violation of the law since it was his understanding that the law only applied to battery chargers that were in fact being used.

Section Foreman Lendvei was aware that the battery charger was not outside the 150-foot zone prescribed by law. That is, he had knowledge of the condition which was in violation of the standard. His misapprehension of the law does not excuse his failure, or that of Contestant, to comply with the standard. The prohibition was clearly spelled out in the regulations. Exceptions in addition to those which might be set forth in the standard should not have been presumed.

The record indicates that the battery charger was not moved outby to a safe location because the operator was mining coal and, although it might have been moved if production were to be temporarily halted due to a breakdown, the failure to move the battery charger was a deliberate omission on the part of the operator. Any inconvenience or possible loss of production that might result from the very short time required to use the scoop to transport the battery charger and erect a new battery-charging station in no way serves as an excuse for failure to comply with the mandatory standard.

Contestant also asserted in its brief that:

> With respect to the issue of unwarrantability, it is well settled that a violation of a mandatory safety standard is negligence per se. Therefore, if the conditions cited in the above Order are found to constitute a violation of the duty imposed by the mandatory standard, ordinary negligence can be conclusively presumed. Negligence per se, however, will not satisfy the element of unwarrantability otherwise every failure of the operator to fulfill the duty imposed by the mandatory safety standard could constitute an unwarrantable failure, Zeigler Coal Company, 7 IBMA 280, (1977).

> An unwarrantable failure to comply [has been defined by the Interior Board of Mine Operations Appeals as] the failure of the Operator to abate a condition or practice constituting a violation of mandatory standard which the Operator knew or should have known existed Zeigler Coal Company, 7 IBMA 280, 295, IBMA Docket No. 74-37 (1977) (emphasis added).

It is important to note that the Board's decision in Zeigler Coal Company, supra, discussed at length the legislative history and case law applications of the unwarrantability requirements of Section 104(c) of the 1969 Act. This section of the law remains basically unchanged under the 1977 Act. 6/

The violation of a mandatory safety standard is not negligence per se. There may be a violation of a mandatory safety standard without negligence on the part of the operator. However, the record in this case has established negligence and an unwarrantable failure to comply well beyond the definition enunciated in Zeigler. Since the violation existed as alleged and it was the result of an unwarrantable failure on the part of Mathies to comply with section 75.1002-1, the order of withdrawal was properly issued pursuant to section 104(d)(2) of the Act.

ORDER

It is ORDERED that Order No. 0620637 is AFFIRMED and that the above-captioned contest of order is hereby DISMISSED.

Forrest E. Stewart
Administrative Law Judge

Distribution:

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6/ The 1977 Act adopted the safety and health standards then existing under the 1969 Act with the proviso that "any new standards [promulgated] in areas covered by existing standards cannot reduce existing levels of protection." Sen. Rep. No. 95-181, 1977 U.S. Code Cong. and Admm. Nes 3401 at 3411.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

JAN 5 1981

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | ) | CIVIL PENALTY PROCEEDING |
| Petitioner, | ) | DOCKET NO. WEST 79-241 |
| v. | ) | |
| C.F. & I. STEEL CORPORATION | ) | MSHA CASE NO. 05-00296-03013 |
| Respondent. | ) | MINE: Allen |

## DECISION AND ORDER

APPEARANCES:

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For the Respondent

BEFORE:

Judge Jon D. Boltz

## STATEMENT OF THE CASE

This proceeding arose through initiation of an enforcement action brought pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) [hereinafter cited as "the 1977 Act" or "the Act"]. On September 13, 1979, Petitioner, the Secretary of Labor, Mine Safety and Health Administration (MSHA) [hereinafter "the Secretary"], filed with the Commission his Proposal for Penalty. Respondent, C F & I Steel Corporation [hereinafter "C F & I"], duly contested the proposal for penalty by filing an answer with the Commission on October 16, 1979. Pursuant to notice, a hearing was held in Pueblo, Colorado, on June 17, 1980.

FINDINGS OF FACT

1. On February 20, 1979, an authorized representative of the Secretary conducted a spot inspection for liberation of excessive quantities of methane at C F & I's Allen Mine pursuant to section 103(i) of the Act.

2. The inspector conducted tests and took samples to determine whether any excessive methane accumulations were present. On the basis of methane detector readings showing concentrations of 1 to 2% methane, three vacuum bottle air samples were taken along the conveyor belt line of a particular section. The samples, upon analysis, subsequently revealed methane accumulations in amounts of 1.42 to 1.86%.

3. Order of Withdrawal No. 387764 was issued for excessive concentrations of methane pursuant to the imminent danger provision of the Act, section 107(a). The order of withdrawal encompassed the entire section.

4. At the time the imminent danger withdrawal order was issued, and immediately prior thereto, C F & I was doing all it possibly could do to rectify the situation as it existed. No production was ongoing. Only authorized personnel were within the subject area. No power was energized in the section at the time the order was issued or prior to its termination. The only work being performed were attempts to establish a greater volume of ventilation.

5. The accumulation of methane in the conveyor belt line was caused by a lack of adequate ventilation. The inadequate flow of air was due to an improperly secured check curtain which regulated the air intake to the section.

6. Even in this condition of disrepair, sufficient quantities of air were being delivered to the last open crosscut in the belt line section to prevent the concentration of methane from increasing to the explosive range. The explosive range of methane in air is in concentrations of 5 to 15%.

7. The inspector did not mark the "CITATION" box on the order of withdrawal issued to C F & I. The "ORDER OF WITHDRAWAL" box was

marked with an "X" and "107-a" was indicated as the "TYPE OF ACTION" undertaken. Under "PART AND SECTION" the inspector listed "75.326" (30 CFR 75.326).[1]

## ISSUES PRESENTED

The following issues are presented for determination:

1. Whether the conditions which existed in C F & I's Allen Mine, at the time the order of withdrawal was issued, constituted an imminent danger?

2. Whether a violation of a mandatory safety and health standard, capable of supporting a penalty, occurred at C F & I's Allen Mine?

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1/ §75.326 Aircourses and belt haulage entries.

[STATUTORY PROVISIONS]

In any coal mine opened after March 30, 1970, the entries used as intake and return air courses shall be separated from belt haulage entries, and each operator of such mine shall limit the velocity of the air coursed through belt haulage entries to the amount necessary to provide an adequate supply of oxygen in such entries, and to insure that the air therein shall contain less than 1.0 volume per centum of methane, and such air shall not be used to ventilate active working places. Whenever an authorized representative of the Secretary finds, in the case of any coal mine opened on or prior to March 30, 1970, which has been developed with more than two entries, that the conditions in the entries, other than belt haulage entries, are such as to permit adequately the coursing of intake or return air through such entires, (a) the belt haulage entries shall not be used to ventilate, unless such entries are necessary to ventilate, active working places, and (b) when the belt haulage entries are not necessary to ventilate the active working places, the operator of such mine shall limit the velocity of the air coursed through the belt haulage entries to the amount necessary to provide an adequate supply of oxygen in such entries, and to insure that the air therein shall contain less than 1.0 volume per centum of methane.

## DISCUSSION

"Imminent danger" is legislatively defined in section 3(j) of the Act to mean ". . . 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 [.]" 30 U.S.C. § 803(j). The term has also received judicial construction.

In Eastern Assoc. Coal Corp. v. Interior Bd. of Mine Op. App., 491 F.2d 277 (7th Cir. 1974), the Court of Appeals construed a virtually identical definition contained in the Federal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977). In that case, the Court 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." Id. at 278. Similarly, the Fourth Circuit construed an ". . . 'imminent danger' as being a situation in which a reasonable man would estimate that, if normal operations designed to extract coal in the designated area should proceed, it is just as probable as not that the feared accident or disaster would occur before elimination of the danger." Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App., 504 F.2d 741, 745 (4th Cir. 1974).

Both courts affirmed decisions of the former Interior Board or Mine Operations Appeals which incorporated into the definition of imminent danger the clause: ". . . if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Eastern Associated Coal Corporation, 2 IBMA 128, 136 (1973). Accord, Freeman Coal Mining Corporation, 2 IBMA 197, 212 (1973). That proviso was not included in the legislative definition formulated by Congress, but all of the courts which have considered the issue have agreed that the Board legitimately inserted the clause. The courts' reasoning was that unless miners were to engage in production, there would be no ongoing exposure to the dangerous condition. See, McCoy Elkhorn Coal Corporation v. Secretary of Labor, Mine Safety and Health Administration (MSHA), 2 FMSHRC 1143, 1148 (1980).

The conditions which existed at C F & I's Allen Mine on February 20, 1979, did not constitute an imminent danger under the definitions to which I have just referred. Prior to issuance of the withdrawal order, C F & I had voluntarily removed all miners from the area. No production was in progress. No power was energized in the affected section. The only work being performed were attempts to establish a greater volume of ventilation,

and that work was being performed by those persons who would have been authorized to be in the area had a section 107(a) order of withdrawal been in effect.[2]

There was no evidence of an intent to return miners to production until the situation had been rectified. Had such an intent been demonstrated by C F & I, my conclusion would be different. In issuing the order of withdrawal, I believe that the inspector was properly motivated in his concern that miners not be returned to the affected area until the condition had been corrected. However, at the moment that the order of withdrawal was issued, no imminent danger then existed. Therefore, I find that the order is invalid and should be vacated.

Even after an imminent danger order of withdrawal has been vacated, the violation alleged therein may still be the subject of a civil penalty proceeding. Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Van Mulvehill Coal Co., Inc., 2 FMSHRC 283, 284 (1980). "That allegation, unless itself properly vacated, survives a vacation of the order it is contained in, and, if proven, the assessment of a penalty under section 110 is required." Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Island Creek Coal Company, 2 FMSHRC 279, 280 (1980). I must, therefore, determine whether a violation of a mandatory safety and health standard, capable of supporting a penalty, occurred at C F & I's Allen Mine.

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2/ Section 104(c) of the Act reads:

"(c) The following persons shall not be required to be withdrawn from, or prohibited from entering, any area of the coal or other mine subject to an order issued under this section:

"(1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order;

"(2) any public official whose official duties require him to enter such area;

"(3) any representative of the miners in such mine who is, in the judgment of the operator or an authorized representative of the Secretary, qualified to make such mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the conditions described in the order; and

"(4) any consultant to any of the foregoing."

Under the above-mentioned precedents, whether Order of Withdrawal No. 387764 was properly issued pursuant to section 107(a) of the Act is not relevant to the assessment of a penalty for any proven violations cited in that order. The underlying allegation contained in the order provides a sufficient basis for any potential penalty assessment. It follows that whether the 107(a) order contained a legally sufficient 104(a) citation is likewise irrelevant to the penalty assessment determination. Therefore, it is not necessary that I rule on the significance of the fact that the "CITATION" box on the order was not marked and how that fact affects the sufficiency of the order as a section 104(a) citation.

The mandatory safety and health standard allegedly violated was 30 CFR 75.326 (see footnote, page 3). The Allen Mine was opened prior to March 30, 1970, therefore only the second portion of section .326 is applicable. Clause (b) of that section contains a required standard with respect to methane accumulations. Clause (a) contains no similar provision. In order for the methane standard contained in clause (b) to be applicable, it must be demonstrated that the belt haulage entries were not necessary to ventilate the active working places. No evidence is contained in the record regarding the necessity vel non of utilizing the belt haulage entries for ventilation of active working places. Therefore, I have no basis upon which to determine whether clause (a) or clause (b) is relevant. Consequently, without evidence establishing the relevancy of the cited section, I cannot sustain the violation of 30 CFR 75.326 alleged in Order of Withdrawal No. 387764.

Another factor of importance in my decision is the fact that the inspector who issued the 107(a) withdrawal order did not himself believe that C F & I had violated 30 CFR 75.326. On redirect examination, in response to a question regarding his opinion as to whether or not there was a violation, the inspector stated:

> "I felt that in this instance, since the company had recognized the condition and were taking steps to rectify it, I didn't feel personally there was a violation of .326." (Tr. 47).

This admission by the inspector provides further grounds for my refusal to sustain the violation of 30 CFR 75.326 alleged in Order of Withdrawal No. 387764.

## CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. The conditions which existed at C F & I's Allen Mine on February 20, 1979, did not constitute an imminent danger at the moment that Order of Withdrawal No. 387764 was issued.

3. The order was invalid and should be vacated.

4. The alleged violation of 30 CFR 75.326 contained in Order of Withdrawal No. 387764 was not proven by a preponderance of the evidence.

5. The allegation was not sustained and should be vacated.

## ORDER

Based upon the foregoing findings of fact and conclusions of law, Order of Withdrawal No. 387764 and the violation alleged therein are hereby VACATED. This matter is hereby DISMISSED WITH PREJUDICE.

Jon D. Boltz
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 6 1981

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| SECRETARY OF LABOR, | : | Civil Penalty Proceeding |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. VA 80-77 |
| Petitioner | : | A.O. No. 44-02690-03017 V |
| v. | : | |
| | : | Jewell 18, Lower Jewell Mine |
| JEWELL RIDGE COAL CORPORATION, | : | |
| Respondent | : | |

DECISION

Appearances: Catherine M. Oliver, Esq., Office of the Solicitor, U.S Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Gary W. Callahan, Esq., Lebanon, Virginia, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging one violation of a safety regulation. The general issue is whether the Jewell Ridge Coal Corporation (Jewell Ridge) has violated the cited regulation and, if so, the appropriate civil penalty to be paid for the violation. An evidentiary hearing was held in Abington, Virginia, on November 5, 1980.

The citation at issue (No. 696012) charges one violation of the standard at 30 C.F.R. § 75.400. That standard requires that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein. The citation here states that Jewell Ridge permitted dry, loose coal and coal dust to accumulate in the No. 1 return entry on the No. 1 section. The size of the "accumulation", described as approximately 38 feet long, 4 feet high and 20 feet wide, is not disputed. Moreover, from the admissions of Respondent's own witnesses including the general mine foreman Ralph Miller, it is clear that the cited "accumulation" was intentionally created as part of a cleanup process on the day shift 5 days before that condition was cited.

Jewell Ridge first seems to claim that MSHA did not prove that the "accumulation" consisted of combustible materials. MSHA inspector Harold Burnett testified however, based on his visual observations, that the "accumulation" indeed consisted of loose coal and coal dust of such a nature as to

be combustible. The particles ranged in size from dust to the size of his fist, were black and dry and contained no perceptible inert material such as rock, stone, cement, or rock dust. This testimony is not directly contradicted. I find Burnett's visual observations of the combustible nature of the "accumulation" to be sufficient to support the violation cited. Coal Processing Corporation, 2 IBMA 336 at pages 345-346. Under the circumstances there is no need to determine the weight, if any, to be given to the analysis of the coal samples collected by Inspector Burnett and the laboratory test results purportedly obtained therefrom.

Jewell Ridge next seems to contend that extenuating circumstances existed to justify the presence of the cited "accumulation" for a period of more than 4 days. Mine foreman Miller explained that he directed section foreman Blankenship to clean up the No. 1 entry by having the excess loose coal scooped up into the face during the day shift on August 16th in anticipation that the continuous miner would, in the course of the mining cycle, later clean it up. For reasons unexplained however the "accumulation" was not cleaned up during that day shift nor on the following night shift on August 16th. Miller explained that the pile was not cleaned up on the 17th because the mine was idle "for lack of railroad cars or something" and that it was not cleaned up on the 18th or 19th because that was a weekend during which the miners did not ordinarily work. He offered no reason why it was not cleaned up before 1 p.m. on Monday the 20th but explained that at that time bad roof conditions were discovered in the haulway which then provided the only access to the "accumulation". Crib blocks used to support that roof thereafter obstructed passage of equipment needed for the cleanup. Miller argued that until the evening shift of August 20th when the No. 1 entry was cut through from another direction it was therefore impossible to remove that "accumulation". Miller admitted however that although the "accumulation" was reported in the preshift examination book before the day shift began on the 21st no cleanup work was performed until the condition was cited by Inspector Burnett at 10:15 that morning.

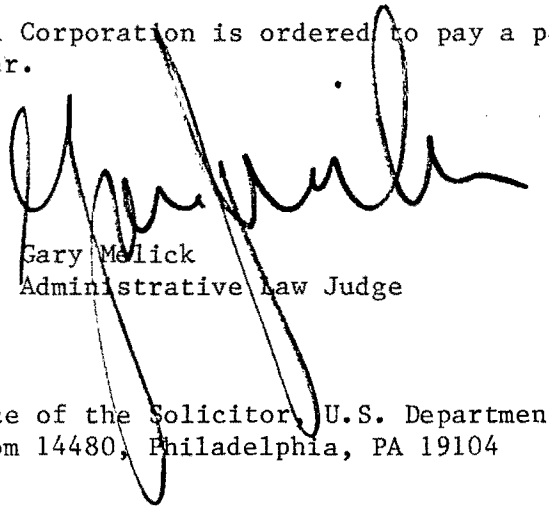
Miller's various excuses for his failure to have the "accumulation" cleaned up for more than 4 days do not provide an acceptable defense to the cited violation. The mere existence of an "accumulation" of combustibles is sufficient to support a violation of 30 C.F.R. § 75.400. Secretary v. Old Ben Coal Company, 1 FMSHRC 1954 (December 1979); Secretary v. Old Ben Coal Company, 2 FMSHRC 2806 (October 1980). Miller's testimony does however, to the contrary, support a finding of gross negligence for his failure to have the accumulation cleaned up for the several days before the roof deteriorated. The foreman's gross negligence is imputed to the operator. Under the circumstances I have no difficulty in concluding that the vast pile of loose coal and coal dust found by Inspector Burnett in this case constituted an "accumulation" within the meaning of the cited standard, Old Ben Coal Company, 1 FMSHRC 1954, supra, and that the loose coal and coal dust constituted combustible materials which could cause or propagate a fire or explosion if an ignition source were present. Old Ben Coal Company, 2 FMSHRC 2806, supra.

In determining the amount of penalty that is appropriate in this case I have already determined that gross negligence existed. Evidence that there were only insignificant amounts of methane present in the section of the mine cited, that no ignition sources were discovered by Inspector Burnett as a result of his inspection that day and testimony from Burnett that the likelihood of an explosion or fire under the circumstances was "improbable" do mitigate the gravity of the hazard. I observe however, that even though no ignition source may have been discovered by Burnett during his inspection, there is always the risk of such an ignition source developing at any time. In this regard Burnett testified that it was not uncommon for electric trailing cables to become damaged from moving equipment and for the creation of sparks from ripper heads striking rock. The hazard from fire or explosion was also increased here by the fact that oil and explosives were stored nearby.

While the cited accumulation was indeed cleaned up within the time specified for abatement it is apparent that under the circumstances Jewell Ridge had little choice but to clean up the accumulation if it wished to continue in operation. It has been stipulated that any penalty imposed in this case would not affect the operator's ability to continue in business. The specific mine at issue is medium in size with production of slightly over 96,000 tons in a recent year. The operator is large in size with a production of over 6 million tons in a recent year. It is difficult to determine the precise history of violations from the computer print-out offered by MSHA in evidence so that I have neither increased nor decreased the penalty I am imposing in this case as a result. Under all the circumstances I conclude that a penalty of $1,500 is appropriate.

ORDER

WHEREFORE, the Jewell Ridge Coal Corporation is ordered to pay a penalty of $1,500 within 30 days of this order.



Gary Melick
Administrative Law Judge

Distribution:

Catherine M. Oliver, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Room 14480, Philadelphia, PA 19104 (Certified Mail)

Gary W. Callahan, Esq., Assistant General Counsel, Jewell Ridge Coal Corporation, Lebanon, VA 24266 (Certified Mail)

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 6 1981

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | Petitioner | Civil Penalty Proceeding<br>Docket No. CENT 80-276-M<br>A/O No. 41-01330-05003 |
| v. | | |
| PRICE CONSTRUCTION, INC., | Respondent | O'Daniel Pit and Plant |

## DECISION

Appearances: E. Justin Pennington, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner; Bob Price, Vice President, Price Construction, Inc., Big Spring, Texas, for the Respondent.

Before: Judge Stewart

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA), under section 110(a) 1/ of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereinafter the Act), to assess civil penalties against Price Construction, Inc. (hereinafter Price) for violations of mandatory safety standards. A hearing was held in

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

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

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

the 118th Judicial District Courtroom, County Courthouse, Big Spring, Texas, on November 7, 1980. Two witnesses were called by MSHA and one witness was called by Price. The parties entered the following stipulations on the record:

> The parties have stipulated to the jurisdiction of the Review Commission.
>
> We have also stipulated as to the coverage of the Act as related to Price Construction, Incorporated, in that Price Construction operates a mine which has products entering into commerce or affecting commerce.
>
> The parties have also stipulated to the company's history of previous violations, and we have agreed that the company has a good history.
>
> The parties have stipulated to the size of the business. The company, Price Construction, Incorporated, the Respondent, is regarded as a small company. The mine involved, the O'Daniel Pit and Plant, is regarded as a medium sized pit.
>
> We have also stipulated to the effect of this particular penalty proceeding on the ability of the operator to continue in business and we have agreed that this will have little or no effect on the operator's ability to continue in business.
>
> The Secretary has marked Petitioner's Exhibit Number 1, a data printout which reflects the assessed violation history of Price Construction Company and the O'Daniel Pit and Plant, and the parties have stipulated that the printout accurately reflects the history of the company.
>
> With respect to the size of the mine, the parties have stipulated that * * * the size of the company is about 95,000 manhours per year. The size of O'Daniel Pit and Plant is approximately 43,000 manhours per year.

The decision rendered orally from the bench at the hearing, following argument by the parties on the fact of violation and the statutory criteria, is reduced to writing below as required by the Rules of Procedure of the Federal Mine Safety and Health Review Commission, 30 C.F.R. § 2700.65.

> In an off-the-record conference, the parties have waived the submission of proposed findings of fact and conclusions of law and supporting briefs.
>
> Pursuant to the parties' stipulation to the accuracy of an exhibit showing that the Price's history is good with 13 paid violations, I accordingly find that the operator's history of previous violations is good.

The parties have stipulated that the Price Construction Company is a small company with approximately 95,000 manhours of work per year and that the O'Daniel Pit is a medium sized operation with approximately 43,000 manhours per year. There are twelve employees at the O'Daniel Pit. I therefore find that Price Construction Company is a small company, and that the O'Daniel Pit is a medium sized operation.

Pursuant to the parties' stipulation, I also find that the assessed penalty in this case will have no effect on the operator's ability to continue in business.

Citation Number 160687 was issued on February 6, 1980 by Federal Mine Safety Inspector, Kenneth Page, in which he noted the condition or practice to be as follows: "Upon arriving at the primary hopper area, an employee was observed standing atop the grizzly breaking a boulder with a twelve pound sledge hammer without the aid of eye protection. The possibility of flying foreign matter striking employee in the eyes and causing injury existed."

The citation was issued at 0800, and the operator was given until 0815 in order to abate the citation. The citation was terminated by the inspector at 0815 with the action to terminate noted as follows: "employee was instructed to wear eye protection and his goggles were supplied and worn during this procedure."

The citation cited a violation of 30 CFR 56.15-4 which reads as follows: "Mandatory. All persons shall wear safety glasses, goggles or face shields, or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes."

The evidence establishes that there were two persons working on top of a grizzly, a grate or a sieve-type protection over the hopper opening where one of the employees - Mr. Leslie Coleman - was breaking a boulder by striking it with a sledge hammer. Mr. Coleman was not wearing safety type glasses, goggles, face shield or other suitable protective device, although the other person working on the grizzly was doing so.

In this area on the grizzly where boulders are broken by the use of a sledge hammer, a hazard exists which could cause injury to unprotected eyes. This is an operation normally carried on on top of the grizzly since out of a truckload of material there may be four or five boulders so

large that they will not fall through the opening or openings of the grizzly. These must be broken into smaller pieces, and the normal means of doing so is by striking them with a sledge hammer.

Mr. Coleman had been the object of a prior citation for failure to wear eye protection when working on the grizzly. After this time he had quit the employment of Price Construction Company but had subsequently come back to work for that company. He had been cautioned by Mr. Ed Morris, the plant foreman at the O'Daniel Pit on several occasions for failure to wear his glasses or other protective devices. Normally in the past when he failed to wear protective devices, his goggles were in the control tower, a short distance from the grizzly.

On the occasion when the citation was issued on February 6, 1980, Mr. Coleman had left his goggles in the lab area which is near the plant office, about 100 yards from the grizzly. In order to abate the violation, someone in the employ of Price Construction Company had to go and obtain goggles for Mr. Coleman. That took in the nature of fifteen minutes.

There has been testimony from the safety officer, Mr. Jim Hill, who assumed that position in March of 1980 after citation Number 160687 had been issued. He states that there is now a safety program under which he recalls only one instance where a man was working on a feeder without eye protection and he was not on the grizzly breaking rocks. When Mr. Hill assumed his duties as safety officer, he found a set of safety instructions promulgated by Price Construction company for O'Daniel Pit, but the particular operation of breaking rock on top of this grizzly was not included.

Price Construction Company should have been aware of the propensities of Mr. Coleman concerning his failure to wear safety goggles, and further, more strenuous efforts should have been made in order to insure that safety protection was worn by him when breaking rocks on the grizzly. Although some efforts have been made by Price Construction Company in an effort to prevent violations of this type, I find that a requirement to wear eye protection when working on the grizzly in the process of breaking rocks was not effectively enforced.

The failure of Mr. Coleman to wear his safety eye protection was not controverted. Since Respondent did not take adequate action to insure the use of such equipment through an effectively enforced requirement I find that Price Construction Company is in violation of 30 CFR 56.15-4.

The evidence establishes that as Mr. Coleman was breaking the boulder on top of the grizzly by striking it with a twelve pound sledge hammer. Small pieces of rock were flying from the boulder for a considerable distance. It has been established that this distance and the type of chips from the boulder were sufficient to cause an eye injury. I therefore have found it is probable that the violation would result in serious injury.

Inspector Page has testified that the operation of O'Daniel Pit as compared with the operation of the pits of other similar companies is excellent. Nevertheless, our attention must be directed on this occasion to the particular citation that was issued on February 6th. The evidence establishes that the operator should have known of the violation at the time that it was observed by the inspector. Mr. Coleman had a history of failing to wear eye protective devices, and the operator was aware of that history. He reported to work at about 7:00 a.m. that morning, and the violation was observed at 8:00 a.m. Although the main office was a considerable distance from the hopper, the operator could have prevented this violation by an effectively enforced program.

Although it is possible, as Price Construction Company contends, that the violation would have been observed and corrected within an hour after the time of the citation at 8:00 a.m., the evidence nevertheless shows that the violation was observed at 8:00 a.m. by the inspector and that there was nothing in the operator's safety program to prevent that particular violation at that specific time. Breaking boulders with the consequent flying about of rock particles is a normal part of the operation at the hopper. Since Price Construction Company failed to prevent the practice observed by the inspector, I find that the operator was negligent.

As to good faith, the inspector has testified that the abatement efforts by Price Construction Company were excellent. I therefore find that the respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

In consideration of the statutory criteria prescribed by the Act, I find that the appropriate penalty in this case is $60.00. Respondent Price Construction Company is ordered to pay Petitioner, MSHA, the sum of $60.00 within thirty days of the date of this decision.

ORDER

The decision announced from the bench in the above-captioned proceeding is AFFIRMED.

Respondent is ORDERED to pay 2/ the amount of $60.00 within 30 days of the date of this order if it has not already done so.

Forrest E. Stewart
Administrative Law Judge

Distribution:

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Bob Price, Vice-President, Price Construction, Inc., P.O. Box 1029, Big Spring, TX 79720 (Certified Mail)

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

"(j) Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation occurred or where the operator has its principal office. Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order".

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

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| SHARP MOUNTAIN COAL COMPANY; D AND R COAL COMPANY, a partnership; and BOBBY DONOFRIO, Applicant | : | Application for Review |
| | : | Docket No. PENN 80-218-R |
| v. | : | Orchard Vein Drift Mine |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | |

## DECISION

Appearances: Lee Solomon, Esq., Philadelphia, Pennsylvania, for Applicant; Barbara K. Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge James A. Laurenson

## JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by Bobby Donofrio in his capacity as partner and owner of D & R Coal Company and Sharp Mountain Coal Company (hereinafter Applicant) under section 107(e) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 817(e), (hereinafter the Act) to vacate an order of withdrawal issued by a Federal mine inspector employed by the Mine Safety and Health Administration (hereinafter MSHA) pursuant to section 107(a) of the Act. The parties filed prehearing statements and posthearing briefs. The matter was heard in Philadelphia, Pennsylvania on October 23, 1980.

The order in question was issued on April 8, 1980. This proceeding was filed on May 5, 1980. At no time prior to the date of the hearing did Applicant request that this matter be expedited pursuant to 29 C.F.R. § 2700.52. However, at the hearing, Applicant moved to vacate the order of withdrawal for failure to hold a timely hearing. The motion was denied because Applicant failed to move for an expedited hearing pursuant to the Commission's Rules of Procedure.

The controversy in this matter concerns Applicant's use of nonpermissible fuses and blasting caps in its underground anthracite coal mine. MSHA's contention that such use constitutes an imminent danger is disputed by Applicant.

## ISSUE

Whether the order of withdrawal due to imminent danger should be affirmed, vacated or modified.

## APPLICABLE LAW

Section 107(a) of the Act, 30 U.S.C. § 817(a), 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 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.

Section 3(j) of the Act, 30 U.S.C. § 802(j), states: "'imminent danger' means 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."

30 C.F.R. § 75.1303 provides as follows:

> Except as provided in this section, in all underground areas of a coal mine only permissible explosives, electric detonators of proper strength, and permissible blasting devices shall be used and all explosives and blasting devices shall be used in a permissible manner. Permissible explosives shall be fired only with permissible shot firing units.

30 C.F.R. § 15.19 provides in pertinent part as follows:

> An explosive certified as permissible under this part is permissible in use only so long as it meets the following requirements: . . . (d) Is initiated with a copper or copper-based alloy shell, commercial electric detonator (not cap and fuse) of not less than No. 6 strength.

## STIPULATIONS

The parties stipulated the following:

1. Sharp Mountain Coal Company is subject to the jurisdiction of the Act.

2. Orchard Vein Drift is a mine within the meaning of the Act.

3. Order No. 225365 was properly served upon Applicant.

4. The Applicant is a small operator.

5. There is no prior history of violations at this mine.

## FINDINGS OF FACT

I find from the preponderance of the evidence of record the facts as follows:

1. Orchard Vein Drift Mine, an underground anthracite coal mine, is owned and operated by Applicant.

2. Michael C. Scheib, who issued the order in controversy, was an inspector employed by MSHA and a duly authorized representative of the Secretary of Labor at all times pertinent herein.

3. For approximately 2 years prior to the inspection in controversy, this mine was not inspected by MSHA because of the operator's denial of entry to MSHA inspectors and its unsuccessful litigation to challenge MSHA's authority to inspect this mine.

4. This mine employs no miners and the only persons who work in the mine are the named partners: Bobby Donofrio and Robert Rand. Approximately 50 to 60 tons of coal per week are extracted when the mine is in operation.

5. On March 26, 28, and 31, 1980, Inspector Scheib, accompanied by MSHA Inspector James E. Schoffstall, conducted a regular inspection of this mine. On March 28, 1980, the inspectors found nonpermissible fuses and blasting caps in the working area of this mine.

6. No order or citation was issued on March 28, 1980, concerning the use of nonpermissible fuses and blasting caps.

7. On April 8, 1980, the inspectors returned to the mine and informed Bobby Donofrio that an order of withdrawal due to imminent danger would be issued unless he removed all nonpermissible fuses and blasting caps from the mine.

8. The fuses and blasting caps were not removed from the mine; thereupon, the inspectors issued Order No. 225365 which closed the mine due to an alleged imminent danger. The order further alleged a violation 30 C.F.R. § 75.1303.

9. The order has not been terminated and the mine remains closed.

10. At all times relevant herein, Applicant used nonpermissible fuses and blasting caps in the mine.

11. No explosive gas was found in the mine during any of the 4 days in which the inspectors were present, and, hence, the possibility of a methane explosion was unlikely.

12. The possibility that either of the two miners working in this mine would be exposed to death or serious physical harm due to a defective fuse, a stumble and fall, or entering the blasting area without knowledge of the impending blast was unlikely.

## DISCUSSION

The order in controversy was issued after the first inspection of this mine following protracted litigation between the parties concerning MSHA's authority to inspect the mine. The undisputed evidence shows that the regular inspection of the mine was conducted on March 26, 28, and 31, 1980. Inspector Schoffstall, testified that he and Inspector Scheib found the nonpermissible fuses and blasting caps in the working area of the mine on March 28. No order or citation was issued at that time. When the inspectors returned to the mine 11 days later on April 8, they informed Bobby Donofrio that no order would be issued if he voluntarily removed the nonpermissible fuses and blasting caps from the mine. He declined to remove them and this order was issued.

The fact that the order in question was issued 11 days after the condition was discovered by the inspectors is strong evidence that the danger was not imminent. The inspectors agree that the condition was no more dangerous on April 8, than it had been on March 28. Inspector Schoffstall testified that although he believed that the use of nonpermissible fuses and blasting caps in the mine constituted an imminent danger on March 28, no order was issued because MSHA wanted "to keep a very workable situation with the operators due to the litigation that he had been going through." Hence, MSHA followed the unusual practice of giving the operator the option to remove the nonpermissible fuses and blasting caps from the mine and thereby avoid a citation or order. Suffice it to say, such conduct by MSHA belies its contention here that an imminent danger existed at the time the order was issued. The definition of imminent danger in section 3(j) of the Act is "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." [Emphasis supplied.] It should be obvious to MSHA that if the condition or practice in question is such that the operator is given the option to abate it without any sanction from MSHA, the condition or practice could not reasonably be expected to cause death or serious physical harm before it can be abated.

The evidence establishes that an open flame is required to ignite the fuses which lead to the blasting caps in question. One of the reasons given by Inspector Scheib for the issuance of the immiment danger order was that the open flame could ignite methane and cause a premature explosion. However, the inspector conceded that no methane was found in the mine on any of the inspection days in question. While the possibility of a methane accumulation is always present in an underground mine, the total absence of methane in this mine at the time the order was issued requires a finding that any such methane accumulation in the explosive range is only speculative and remote. The inspector's assertions that the use of the fuse and cap method of blasting could cause death or serious physical harm due to a defective fuse, a stumble or fall, or entering the blast area without knowledge of the impending blast are also speculative and remote. In fact, Inspector Scheib admitted that cap and fuse blasting can be done in a safe manner. None of the inspectors testified that the particular method of cap and fuse blasting employed by Bobby Donofrio was unsafe. Their testimony that such a procedure is inherently dangerous is contradicted by Inspector Scheib's admission that such a procedure can be conducted in a safe manner. In conclusion, MSHA has failed to establish the requisite elements of an imminent danger.

In the typical case where an order of withdrawal due to imminent danger is issued, the judgment of the inspector acting under emergency or near-emergency conditions is entitled to great weight in a review proceeding concerning the validity of that order. See Old Ben Coal Company v. IBMA, 523 F.2d 25, 31 (7th Cir. 1975). This rationale is inapplicable to matters like the instant one where the inspector waits for a period of 11 days after discovery of an alleged imminent danger before issuing the order. However, MSHA argues that the instant case is analogous to Itmann Coal Company, Docket No. WEVA 80-7-R, June 26, 1980, where I upheld an imminent danger order of withdrawal. In Itmann Coal Company, supra, the facts were that the MSHA inspector observed a miner travelling under unsupported roof and issued an order of withdrawal. While the miner in question was no longer under the unsupported roof at the time the order was issued, the order was affirmed because the evidence established that it was the practice of miners to travel under this unsupported roof and that the practice could reasonably be expected to cause death or serious physical harm before it could be abated. The order in that case was issued moments after the occurrence. Itmann Coal Company, supra, is distinguishable from the instant case because here MSHA has failed to establish that the danger was imminent. This is so because of the passage of 11 days from the time the condition or practice was discovered and the time the order was issued and the fact that MSHA gave the Applicant the option of abating the violation without any sanction.

The foregoing should not be construed as an approval of fuse and cap blasting in underground mines or a determination that such a practice can not constitute an imminent danger under the Act. Fuse and cap blasting is prohibited in underground coal mines persuant to 30 C.F.R. § 75.1303. Such blasting can be prevented by MSHA's use of citations, orders, and civil penalties. However, under the peculiar facts of this case, I find that MSHA has failed to establish that an imminent danger existed at the time the order was issued.

Nevertheless, Applicant admittedly used fuse and cap blasting in this mine in contravention of 30 C.F.R § 75.1303. The proper procedure for MSHA to follow in this matter, where the inspectors discovered the violation 11 days before taking action on it, was to issue a citation pursuant to section 104(a) and set a reasonable termination due date. If the citation was not abated within the time allotted, the mine could have been closed by an order pursuant to section 104(b) for failure to abate a violation. Under the facts of the instant case, the determination to issue an imminent danger order of withdrawal was improper. Therefore, the application for review is granted in part and the document issued as Order No. 225365 is modified to a citation pursuant to section 104(a) of the Act, and that citation is affirmed. The above document is further modified to show that the termination due date shall be 8 a.m. on the 41st day following the issuance of this decision.

In the application for review, the request for relief included a claim for an award of attorney's fees and costs. Applicant appears to have abandoned that request since it was not mentioned in its closing argument or brief. In any event, the Act does not provide for such an award in these proceedings but does allow for such relief in actions for discrimination or discharge pursuant to section 105(c) of the Act. Since there is no authority for the award of attorney's fees and costs in this action, that request is denied.

In MSHA's posthearing brief, it requests the assessment of a civil penalty in the amount of $2,000 although its assessment office has proposed a civil penalty of only $275. MSHA has not filed a civil penalty proceeding with the Commission on this matter. The operator has not consented to the assessment of a civil penalty in this proceeding. I find that the operator has the right to pursue its other administrative remedies in this case and I will not assess a civil penalty at this time. However, the parties are directed to notify me promptly of the filing of any civil penalty proceeding arising out of this matter.

## CONCLUSIONS OF LAW

1. I have jurisdiction over this matter pursuant to section 107 of the Act.

2. The inspector improperly issued the subject order of withdrawal pursuant to section 107(a) of the Act because no imminent danger existed in that there was no reasonable expectation that the use of nonpermissible fuses and blasting caps could cause death or serious physical harm before such condition or practice could be abated.

3. The use of nonpermissible fuses and blasting caps in the mine was a violation of 30 C.F.R. § 75.1303.

4. The application for review is granted in part and the order in question is modified as follows: (A) The order of withdrawal due to imminent danger pursuant to section 107(a) of the Act is modified to a citation pursuant to section 104(a) of the Act alleging a violation of the statutory

provision contained in 30 C.F.R. § 75.1303; and (B) the termination due date on the document in question is modified to be 8 a.m. on the 41st day following the date this decision is issued.

5. Applicant is not entitled to an award of attorney's fees or reimbursement for other costs incurred in connection with this proceeding.

ORDER

THEREFORE, IT IS ORDERED that the application for review is GRANTED in part in that the subject withdrawal order is MODIFIED to a citation pursuant to section 104(a) of the Act and said citation is AFFIRMED.

IT IS FURTHER ORDERED that the termination due date on the above citation shall be MODIFIED to 8 a.m., on the 41st day following the issuance of this decision.

IT IS FURTHER ORDERED that Applicant's request for an award of attorney's fees and costs is DENIED.

James A. Laurenson, Judge

Distribution by Certified Mail:

Lee Solomon, Esq., 872 Public Ledger Building, Independence Square, Philadelphia, PA 19106

Barbara K. Kaufmann, Esq., U.S. Department of Labor, Office of the Solicitor, Room 14480, Gateway Building, 3535 Market Street, Philadelphia, PA 19104

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 6 1981

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | Civil Penalty Proceeding |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 80-324-M |
| Petitioner | : | A/O No. 41-02534-05003 |
| v. | : | |
| | : | Mound Plant |
| BELTON SAND & GRAVEL COMPANY, INC., | : | |
| Respondent | : | |

## DECISION

Appearances: Max A. Wernick, Esq., Millie Brooks, Legal Assistant, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Mr. Richard Prater, President, Belton Sand & Gravel Company, Inc., Temple, Texas, for Respondent.

Before: Judge Stewart

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereinafter the Act), 1/ to assess civil penalties against Belton Sand & Gravel Company, Inc. (hereinafter, Belton). A hearing was held on November 26, 1980, in Dallas, Texas. Each of the parties called one witness and entered into the following stipulations on the record:

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

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

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

We have reached an agreement as to the company's history of previous violations and we would indicate at this time that it is good. They have been inspected on an average of three times per year and they received one citation in 1978 and one citation in 1979, both of which were uncontested and immediately abated.

We would also indicate that this is a small operator in that their total tonnage at the Mound Plant is between 10,000 and 12,000 tons per month and that their monthly man-hours average around 2,000 per month.

With regard to the effect of these citations on the operator's ability to continue in business we would indicate, and it is stipulated, that Belton Sand & Gravel Company, Inc., do an annual dollar volume of business in the area of $800,000 and a million dollars a year. The effect of the proposed penalty would have no appreciable effect on the operator's ability to continue in business.

The decision rendered orally from the bench at the hearing is reduced to writing below as required by the Rules of Procedure of the Federal Mine Safety and Health Review Commission, 30 C.F.R. § 2700.65:

Pursuant to stipulation by the parties, I find that the operator's history of previous violation is good. He has been inspected approximately three times per year and has had only one citation in 1978 and one citation in 1979. Both of these citations were immediately abated.

As to the appropriateness of the penalty to the size of the operator I find that Belton Sand & Gravel Company, Inc., the Respondent, is a small operator, producing between 10,000 and 12,000 tons per month with an average of 2,000 man-hours per month.

I also find, pursuant to the stipulation by the parties, that the penalty will not affect the operator's ability to continue in business.

Order of Withdrawal No. 154781 was issued by MSHA inspector Stephen R. Kirk on March 19, 1980. The condition or practice noted on the order of withdrawal was: "The Euclid haul unit No. 1 did not have adequate brakes. At a slow speed on a flat, level surface, the unit made no attempt to stop when the brakes were applied." This order of withdrawal cited a violation of 30 C.F.R. § 56.9-3.

Order of Withdrawal No. 154782 was also issued by MSHA inspector Stephen R. Kirk on March 19, 1980. The condition

or practice noted on this order was: "The Euclid Haul unit No. 2 did not have adequate brakes. At a slow speed on a flat, level surface, the haul unit made no attempt to stop when the brakes were applied. This order also cited a violation of 30 C.F.R. § 56.9-3.

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

When Inspector Kirk arrived at the Mound Plant of the Belton Sand & Gravel Company, Inc., on March 3, 1980, he tested the brakes of the two Euclid haul units in service at the pit and found that they were inadequate and did not stop the units at a slow speed when the brakes were applied. The No. 1 haul unit has been identified as the bright green Euclid haul unit in service, and the No. 2 haul unit has been identified as the pale green or yellow-green Euclid haul unit in service. Since the brakes of the two units were inoperative, it is clear that a violation did occur on each unit, and Respondent has acknowledged that there was a violation.

As to the gravity of the violations in each instance, the testimony indicates that the only method of stopping the units would be to gear the engine down and slow it through the low gearing to a very slow speed, or to possibly stall the unit by dumping the load. While operating in the sand near the pit, the units operate at a very slow speed of approximately 1 or 1-1/2 miles per hour. When the units are operating out on the hard surface, they may operate at speeds from 10 to 15 miles per hour. Although there are means of slowing these vehicles other than by the use of brakes, I find that the stopping ability was critically impaired by the lack of adequate brakes on the two units.

The record establishes that it was possible that there would be pedestrians and other traffic in the area of the operation of the Euclid unit, as well as the operation of other units in the area. I find it is probable that a serious injury could result as a result of the inadequacy of brakes of these two Euclid haul units.

The record establishes that the operator's foreman had knowledge for some time prior to issuance of the orders of withdrawal on March 19, 1980, that the brakes of the two Euclid haul units were inadequate. The exact period of time that these brakes had been inadequate has not been definitely established, however, it is clear that the time was sufficiently long that something should have been done to correct the situation.

The brakes had been adjusted on occasion, as it was normal to do in the regular course of business at the pit. Nevertheless, when there came a time when the brakes would not stop the vehicles and adjustment would not remedy the situation, that was a time at which other attempts should have been made to undertake further repair work and remedy the inadequacies in the braking ability.

The company, after finding that the brakes were inadequate, did stop using the vehicles to go up the ramp and, instead, dumped the materials at the stockpile which was on level area. Nevertheless, the vehicles were allowed to continue to operate with inadequate brakes, which created a hazard. The fact that it was a costly and time-consuming operation to pull the wheels and overhaul the brakes is no excuse for failure to operate the vehicles with adequate brakes. I therefore find the operator negligent in operating the Euclid haul unit No. 1 and the Euclid haul unit No. 2 with inadequate brakes.

As to the good faith of the operator, the order of withdrawal was issued on March 19, 1980, by inspector Stephen R. Kirk and was abated on March 26, 1980, by inspector Stephen R. Kirk. In terminating the order, Inspector Kirk noted that: "The brakes on the No. 1 Euclid haul unit were rebuilt and working." Mr. Kirk has testified that the operator exhibited good faith in accomplishing these repairs in this time.

Order of Withdrawal No. 154782, which was also issued on March 19, 1980, was terminated by inspector Harold R. Yount on March 31, 1980. In terminating the order, Inspector Yount noted: "New brakes and cylinders were installed on the No. 2 Euclid haul unit."

Mr. Prater has testified that these repairs were accomplished as expeditiously as possible and that the operator was fortunate in being able to obtain these parts in time to accomplish the repairs as soon as he did.

I find that as to both citations, Citation No. 154781 and No. 154782, the operator demonstrated good faith in achieving rapid compliance after notification of the violations.

In consideration of the statutory criteria and the findings already made, I find that the appropriate penalty for each of these citations is $200. The sum of $200 is assessed for the violation noted in Order of Withdrawal No. 154781, and a penalty of $200 is assessed for Order of Withdrawal No. 154782.

Respondent is ordered to pay Petitioner the sum of $400 within 30 days of the date of this decision.

ORDER

The decision and order announced orally from the bench at the hearing on November 26, 1980, is AFFIRMED. It is ORDERED that Respondent pay Petitioner the sum of $400 within 30 days of this decision if it has not already done so. 2/

Forrest E. Stewart
Administrative Law Judge

Distribution:

Max A. Wernick, Esq., Millie Brooks, Legal Assistant, Office of the Solicitor, U.S. Department of Labor, 555 Griffin Square Building, Suite 501, Dallas, TX 75202 (Certified Mail)

Mr. Richard Prater, President, Belton Sand & Gravel Company, Inc., P.O. Box 3634, Temple, TX 76501 (Certified Mail)

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

"(j) Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation occurred or where the operator has its principal office. Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order."

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

**JAN 7 1981**

| | | |
|---|---|---|
| BARNES & TUCKER COMPANY, | : | Contests of Citations |
| Contestant | : | |
| v. | : | Docket No. PENN 80-246-R |
| | : | |
| SECRETARY OF LABOR, | : | Citation No. 848844 |
| MINE SAFETY AND HEALTH | : | April 29, 1980 |
| ADMINISTRATION (MSHA), | : | |
| Respondent | : | Docket No. PENN 80-247-R |
| | : | |
| | : | Citation No. 848845 |
| | : | April 29, 1980 |
| | : | |
| | : | Lancashire No. 24-B Mine |

DECISION

Appearances: Michael T. Heenan, Esq., Smith, Heenan, Althen & Zanolli, Washington, D.C., for Contestant;
Michael C. Bolden, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent.

Before: Judge Charles C. Moore, Jr.

At approximately 7:50 a.m. on April 23, 1980, a fire was discovered in the penthouse containing the hoisting equipment for the elevator at the Teakettle Portal of Contestant's No. 24-B Mine. Upon being notified, the mine superintendent, mine foreman and a number of others attempted to extinguish the fire with $CO_2$ firefighting equipment. At approximately 8 a.m., they called the local fire department which was 7 miles from the mine. It was estimated, and the basis for the estimation seems reasonable, that the fire department could have arrived at the mine no later than 8:15. They began extinguishing the fire using a 1-1/2-inch water hose, but there is no evidence as to when the firemen actually extinguished the fire. There is evidence, however, that they had returned to the firehouse by 9:15 a.m. At 8:40 a.m., Inspector Niehenke was inspecting another mine and was informed that the fire at Contestant's Teakettle Portal was being broadcast on CB radio as well as commercial radio. Inspector Niehenke called his supervisor, Mr. Gobert, to see if Mr. Gobert knew of the fire. Mr. Gobert did not, but said he would call the company, which he immediately did. Mr. Gobert called Inspector Niehenke at 8:50 a.m., confirmed the fact of the fire and directed him to proceed to the Teakettle Portal. The inspector arrived at the Teakettle Portal at 9:15 a.m., the approximate time the firemen returned to their station.

The inspector arrived at the mine while it was being evacuated and when he reached the penthouse workers were attempting to clean the area and restore order. Upon entering the penthouse, he saw electrician Fred Gormish cut an electric cable that led from a disconnect switch to a space heater. He told Mr. Gormish that he was destroying evidence and immediately (at 9:30 a.m.) issued an order under section 103(k) of the Act which prohibited further restoration activities. 1/

An accident investigation commenced at 9:45 that morning and lasted 5 days. After the investigation, two citations were issued charging the company with failing to immediately report an accident and altering the scene of an accident. The citations allege violations of 30 C.F.R. § 50.10 and 30 C.F.R. § 50.12, respectively. 2/

Twelve situations are defined in 30 C.F.R. § 50.2(h) as accidents reportable to MSHA under 30 C.F.R. § 50.10, supra. Four of the 12 definitions include a 30-minute time period; two of those four are relevant to the facts of this case.

Subsection (h)(6) defines as an accident: "An unplanned mine fire not extinguished within 30 minutes of discovery * * *" and subsection (h)(11) defines as an accident: "Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than 30 minutes."

Whether the 30-minute time period refers to the time within which the above occurrences are to be reported to MSHA or whether it refers to a time period which must elapse before the fires become reportable accidents was disputed at the hearing. Both the inspector and his supervisor were of the opinion that the 30-minute period referred to the time within which an accident must be reported, but MSHA decided not to charge Barnes & Tucker for

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1/ There is an implication in the inspector's testimony and in the Government's brief that the issuance of a 103(k) order is the proper way to preserve evidence. While this may be true if the preservation of evidence also insures "the safety of any person in the * * * mine," preservation of evidence alone will not justify such an order. Eastern Associated Coal Co. HOPE 75-699; 2 FMSHRC 2467 (September 2, 1980).

2/ Section 50.10 states:

"If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, toll free at (202) 783-5582."

Section 50.12 states:

"Unless granted permission by a MSHA District Manager or Subdistrict Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment."

failing to report a subsection (h)(6) accident as they were unable to determine how long the fire lasted (Tr. 150). 3/ My interpretation is that, contrary to the Government's testimony, 30 minutes must elapse before the accidents defined in subsections (h)(6) and (h)(11) become reportable.

Section 50.10 states that if an accident occurs "an operator shall immediately contact the MSHA district or subdistrict office * * *." The regulations do not say what is meant by the words "immediately contact" but certainly in the case of an injury MSHA would not expect a miner or a supervisor to run for a telephone rather than give aid to an injured miner. It seems that reasonable promptness is what should be expected of the mine operator. But in the case of those accidents which only become reportable if they last a certain length of time, the "reasonable promptness" time period cannot be expected to start until after the time period has passed. There is no accident to report until after the time has elapsed.

During the course of the firefighting effort by the fire department, the electrical hoist machinery was soaked and there was testimony that it should not have been operated without having first been cleaned and dried. The machines were not damaged in any way by the fire itself. It is impossible to determine exactly when the firemen sprayed the hoisting equipment. Inasmuch as the firemen probably did not arrive at the mine until 8:15 a.m. and the damage was done sometime after that, and inasmuch as MSHA was notified of the accident at 8:45 a.m. there is no way that 30 minutes could have passed (even if that were the correct rule, which it is not) between the time the hoists were damaged and MSHA was notified of the accident. MSHA has thus failed to establish that the company violated 30 C.F.R. § 50.10 and the citation alleging such a violation is vacated.

The allegation that the mine operator altered the accident site prior to completion of the investigation presents a more difficult problem. The inspector's description of the physical layout of the penthouse is at variance with the photographic evidence and testimony presented by the Contestant. The inspector testified that the wire which he saw the electrician cut extended from the heater to a breaker switch which was in the open position. The electrician, however, testified that he had removed the breaker switch before the inspector arrived. The electrician also testified that in cutting the wire he thought he was eliminating an imminent danger, but obviously if the breaker switch had already been removed no power could reach the line he severed, and thus there was no imminent danger. There was also the fact that Mr. Dolges, an electrician, removed a burned wire from one of the three boxes on the penthouse wall but refused to tell the inspector about that when he was questioned. It was this missing wire which apparently led the inspector and the rest of the investigation team to suspect devious acts on the operator's part. I suspect that no citations would have been issued if

3/ The Secretary's brief appears to argue to the contrary, but it is clear that the citation was for failure to report the damage to the hoisting equipment rather than the fire itself.

Mr. Dolges had testified during the investigation. But all of these matters become unimportant if the damage to the hoisting equipment was not a reportable accident, because if it was not, there was no duty to maintain the accident scene in an unaltered state.

In my opinion, MSHA has failed to establish that the damage to the hoisting equipment was a reportable accident. Otis Elevator Company employees informed the Contestant that the hoist could be run immediately without further maintenance, but they could not guarantee further damage would not be done. In addition, there is no way to know how long it would have taken the operator to blow the motors dry and resume operation since the inspector halted the restoration operations by issuing his section 103(k) order. The order was issued at 9:30 a.m. but as stated before, it is unknown when and to what extent the hoist machinery was damaged by the firemen's water. And although the inspector stated that he issued his 103(k) order at 9:30 a.m., he also stated that when he earlier accused Mr. Gormish of destroying evidence, Mr. Gormish ceased further restoration operations. I hold that MSHA has failed to carry its burden of showing that this was a reportable accident. I further hold that there was no devious intent on the operator's part to hide any phase of this accident, but that it was merely trying to restore the penthouse to operating condition and thus protect its equipment from whatever deleterious effect might result from letting the hoist stay wet.

Citation Nos. 848844 and 848845 are vacated, and all proposed findings not included above are rejected.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 8, 1981

| | | |
|---|---|---|
| UNITED STATES STEEL CORPORATION, Contestant | : | Contest of Order |
| v. | : | Docket No. WEVA 81-33-R |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Order No. 894407 |
| | : | Mine No. 2 |

DECISION

Appearances: Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Contestant;
Barbara K. Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Chief Administrative Law Judge Broderick

Pursuant to notice, the above case was called for hearing on the merits on December 16, 1980, in Charleston, West Virginia. After the completion of the evidentiary hearing and after hearing arguments by counsel, I rendered a bench decision which is set forth below:

> This is a proceeding instituted by United States Steel Corporation under section 107(e) of the Federal Mine Safety and Health Act of 1977, seeking to have vacated an order of withdrawal issued pursuant to section 107(a) of the Act. The case was heard today pursuant to notice, today being December 16, 1980, in Charleston, West Virginia.
>
> At the conclusion of the testimony, the parties orally argued their positions on the record, and have waived the right to file written proposed findings of fact and conclusions of law.
>
> The issues are:
>
> 1. Did the practice which Inspector Walls stated existed in the subject mine, namely, the use of a shuttle car trailing cable to withdraw power for other equipment, did that practice exist as of September 9, 1980, in the subject mine?

2. The second issue, if so, was the practice an imminent danger, that is, could it reasonably be expected to cause death or serious physical harm before it could be abated?

The following are my findings of fact based upon the record made before me today and the contentions of the parties.

1. The Contestant, United States Steel Corporation, on September 8, 1980, was the operator of a coal mine known as the Gary District Mine No. 2 in the State of West Virginia, and was subject to the Federal Mine Safety and Health Act of 1977 in the operation of that mine.

2. Franklin Walls was a Federal mine inspector, Federal mine electrical inspector and was a duly authorized representative of the Secretary of Labor at all times pertinent to this decision.

3. On September 9, 1980, Inspector Walls inspected the Gary Mine No. 2 and issued Order No. 894407 under section 107(a) of the Act, alleging an imminent danger because of the practice described as, "the practice of providing power to other devices by means of equipment trailing cables."

4. I find that the evidence establishes that employees of United States Steel Corporation in the Gary Mine No. 2 did use trailing cables to provide power to other equipment in the mine. I am persuaded that this occurred because of the following factors: (a) placement of the holes in each set of holes which were found, which I find to have been approximately 10 to 12 inches apart; (b) the fact that the holes went through the entire cable, passing through the conductors and out the other side; (c) one of the holes in each set of holes was large enough so that the conductor was visible when the cable was flexed and corrosion was seen on the conductor.

For these reasons, I reject the evidence that the holes were caused by an ohmmeter or accidentally caused by the cable contacting a nail on a rib board, and I find affirmatively that they were caused by the driving of a nail or other instrument through the cable, the purpose of which was to provide power for other equipment in the mine.

There is no direct evidence that this occurred, but the inference is a reasonable and natural one from the evidence which I found.

A further question remains. Was this a practice? The evidence shows that two sets of holes were present in the same trailing cable, indicating that on at least two occasions this--what I have described--had occurred, namely, that power was drawn from the shuttle car cable to empower other equipment.

I find that these two occurrences establish a practice. This does not mean that the operator prescribed or condoned the practice. The question of fault or lack of fault on the part of the operator is not relevant to a determination of the propriety of the issuance of a 107(a) order.

So, I find and conclude that the practice charged in the withdrawal order did exist in the subject mine.

The remaining question is whether the practice was an imminent danger: I think the evidence is clear, and I find that if the practice were continued it could reasonably be expected to cause death or serious physical harm.

The company denies that the practice existed, but does not or has not submitted evidence to seriously contend that if the practice existed it was not imminently dangerous. The danger consisted essentially in the possibility of a miner receiving an electrical shock, an electrocution or the occurrence of a mine fire resulting from the baring of the power conductors in the cable.

The following are my conclusions of law:

1. I have jurisdiction over the parties and subject matter of this proceeding.

2. Inspector Walls properly issued Withdrawal Order No. 894407 on September 9, 1980, under section 107(a) of the Act. An imminent danger existed, namely, the practice of using a shuttle car trailing cable to provide power to other equipment by driving a nail or other device through the two conductors in the cable.

I find and conclude that this practice could reasonably be expected to result in death or serious physical harm before it could be abated.

I make no finding as to whether the condition or the practice described in the order constituted a violation of 30 C.F.R. § 75.512.

Therefore, I issue the following order: The contest of the order filed by Contestant United States Steel Corporation is denied, and the order of withdrawal is affirmed.

This decision will be issued in writing as I have given it orally following receipt of the transcript. The time for either party to file a petition for discretionary review with the Commission will begin to run from the date of the issuance of the written decision.

Thank you very much, ladies and gentlemen.

ORDER

The bench decision is AFFIRMED. Contest of Order No. 894407 issued September 8, 1980, is DENIED and the order is AFFIRMED.

James A. Broderick
Chief Administrative Law Judge

Distribution:

Louise Q. Symons, Esq., Attorney for United States Steel Corporation, 600 Grant Street, Room 1501, Pittsburgh, PA 15230

Barbara Krause Kaufmann, Attorney, Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104

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

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 9 1981

| | | |
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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Civil Penalty Proceeding |
| | : | Docket No. VINC 79-39-PM |
| Petitioner | : | A.O. No. 33-03313-05001 |
| v. | : | |
| | : | Quarry Division Quarry & Mill |
| ERIE BLACKTOP, INC., | : | |
| Respondent | : | |

## DECISION

Appearances: Edward H. Fitch IV, Attorney, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the petitioner;
James E. McGookey, Attorney, Sandusky, Ohio, for the respondent.

Before: Judge Koutras

## Statement of the Case

This proceeding was initiated by the petitioner against the respondent through the filing of a petition for assessment of civil penalties pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), proposing penalties for 12 alleged violations of certain mandatory safety standards promulgated pursuant to the Act. A hearing was held in Sandusky, Ohio, during the term July 29-30, 1980, and the parties appeared and participated therein. Although given an opportunity to file posthearing proposed findings and conclusions, the parties opted to waive such filings and none were filed. However, I have considered the arguments advanced by the parties in support of their respective cases during the course of the hearing in this matter.

## Issues

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

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

## Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

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

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

## Discussion

### Stipulations

The parties stipulated to the following:

1. Respondent has no prior history of violations under the Act.

2. Any penalty assessments made by me in this proceeding will not adversely affect the respondent's ability to remain in business.

3. The parties agreed to the authenticity and admissibility of all hearing exhibits, agreed that the inspector who issued the citations was acting within the scope of his authority as an MSHA inspector, and that he cited the alleged violations upon inspection of the mine.

4. Respondent is a small mine operator.

### Preliminary Procedural Matter

The petition for assessment of civil penalties filed in this proceeding states that "a copy of each citation and/or order for which a civil penalty is sought is attached hereto," and it also asserts that MSHA seeks penalty assessments "for each alleged violation set forth in attached Exhibit A." Exhibit A is an MSHA proposed assessment form which contains an itemized listing of 12 citations issued on May 4, 1978, and the citations are identified numerically as Citation Nos. 359236 through 359247. Citation Nos. 359236 through 359240 are listed as section 104(a) citations all of which are shown as issued on May 4, 1978. The remaining listed citations, Nos. 359241 through 359247 are all identified as section 104(b) orders of withdrawal, and they too are shown as being issued on May 4, 1978. However, copies of the 12 citations and seven additional orders numbered 359248 through 359254, dated May 16, 1978, were included as part of MSHA's civil penalty petitions.

The Commission's current rules, 29 C.F.R. § 2700.27(c), effective June 29, 1979, as well as the rule in effect at the time of MSHA's petitions were filed, 29 C.F.R. § 2700.24(b), require the Secretary to list the cited violations for which civil penalties are sought, and require that they be identified by number and date and the section of the Act or regulation allegedly violated.

In view of the apparent discrepancy and error in the listing and identification of seven of the 104(a) citations as 104(b) orders, and the omission of the orders from the itemized listing, MSHA's counsel was requested to clarify the matter so as to preclude any confusion as to the citations for which penalty assessments were being sought by the Secretary. Counsel stated that the itemized listing included as an exhibit to MSHA's petition resulted from an apparent computer error, that MSHA is seeking civil penalty assessments only for the 12 section 104(a) citations listed and included as attachments to the petition, and that the 104(b) orders included as attachments to the petition are relevant only to the extent that they reflect a lack of good faith compliance with respect to the asserted failure by the respondent to timely abate the seven citations to which they relate, and that the orders are relevant and material to this issue and should be considered in the assessment of any civil penalties for these citations (Tr. 20-21, 188-190).

In view of counsel's explanation and clarification, the parties were informed that I would consider MSHA's petition for assessment of civil penalties as a petition for assessment of penalties for the 12 cited 104(a) citations, and that the 104(b) orders were relevant for purposes of establishing any alleged lack of good faith compliance. Further, I denied respondent's motion to dismiss the seven citations erroneously identified as 104(b) orders on the ground that MSHA is free to amend its pleadings to conform to the evidence, that respondent has not been prejudiced since any civil penalty assessments would be levied by me de novo on the basis of the record adduced at the hearing, and that I considered the asserted computer error to be technical in nature (Tr. 23).

Testimony and Evidence Adduced by the Petitioner

Citation No. 359236 cites a violation of section 109(a) of the Act and states as follows: "An office sign was not posted on the office."

MSHA inspector Edward Cloud confirmed that he issued the citation in question (Exh. P-1) after observing that a trailer on the mine premises used as the mine office had no sign posted identifying it as an office. He had previously inspected the mine under the Metal and Non-Metal Mine Act and believed that it was the same trailer. Mine management accompanied him on the inspection and he always affords a mine representative an opportunity to accompany him, although small operators often choose not to because they would have to close the operation down. The trailer was the only structure which appeared to be an office, although there is a maintenance shop, a mill, and other structures on the premises. The trailer was parked by the weigh scales, a secretary worked there, and it is the first structure that one encounters after driving on the mine property.

Inspector Cloud stated that the respondent was negligent because he had previously visited the mine in April 1978, to explain MSHA's assessment procedures and to deliver copies of the new Act to mine management. He did not consider the violation to be serious and respondent abated the violation in good faith by purchasing and installing a sign designating the trailer as the mine office (Tr. 37-45).

On cross-examination, Mr. Cloud confirmed that his inspection of May 4, 1978, was the first one at the mine under the new Act and he confirmed his previous "courtesy visit" of April to explain the new law to mine management. He confirmed his belief that the trailer he observed on May 4 was the same one which he previously observed but he could not state whether it had just recently been brought to the mine.

Citation No. 359237 cites a violation of section 109(a) of the Act and states as follows: "A bulletin board was not provided for the office."

Inspector Cloud confirmed that he issued the citation (Exh. P-4) after he found that there was no bulletin board in the mine office. He observed no notices or copies of the regulations posted, and none of the interior trailer walls were designated or indicated to be a bulletin board. Since section 109(a) of the Act required a bulletin board and he observed none, he issued the citation. He believed the respondent was negligent because mine management had a copy of the Act. He considered the violation to be nonserious and abatement was achieved in good faith by the purchase and installation of a bulletin board (Tr. 74-77).

On cross-examination, Mr. Cloud indicated that he recalled making an inquiry about the bulletin board and that Company President Winkel confirmed the lack of a bulletin board. Mr. Cloud also indicated that if any portion of the mine office wall had been specifically designated or segregated as a bulletin board, with the required notices posted, he would not have issued the citation (Tr. 81-88).

Citation No. 359238 cites a violation of 30 C.F.R. § 56.11-1 and states: "A safe means of access was not provided from the elevated weigh scales to the elevated doorway at the east end of the office."

Citation No. 359239 cites a violation of 30 C.F.R. § 56.11-1 and states: "A safe means of access was not provided from the elevated weigh scales to the elevated doorway at the west end of the office."

Inspector Cloud confirmed that he issued the citation (Exh. P-7) after determining that a safe means of access was not provided from the elevated weigh scales to the elevated entrance door at the east end of the trailer office. The trailer was located adjacent to the weigh scales and both the trailer and scales were both approximately 4 feet off the ground and the distance between the two was approximately 3 feet. The only means of access from the scales to the door was by jumping or stepping across the 3-foot opening and the secretary working in the office advised him she had to jump across

from the scales to the door opening. He also indicated that he decided not to jump across to enter the office, but instead went to the rear of the trailer and climbed up one of the two door entrances to enter the office. He considered the operator to be negligent and considered the violation to be very serious because someone could be seriously injured if they were to fall through the opening and down the 4-foot elevated area. However, he was not aware that anyone had been injured by falling off. Abatement was achieved timely by the installation of a corrugated metal access way which was 3 feet wide and 4 feet long and he believed the respondent provided a more than adequate safe access (Tr. 54-71, 89-94).

On cross-examination, Inspector Cloud stated that at least three employees were on the premises on the day of his inspection, but he could not state with any certainty how frequently persons traveled the area from the scales to the trailer where no safe access was provided. At my request, he drew a sketch of the area (Exh. ALJ-1), and indicated that the normal route of traffic to the trailer office was from the parking area, across the weigh scales, and directly into the trailer through the doors. The rear doors were located around and behind the trailer down an embankment, and he did not believe that those doors were used as a regular means of access to the trailer (Tr. 99-114).

With respect to Citation No. 359239 (Exh. P-11), Inspector Cloud confirmed that he issued it as a separate citation because a safe means of access was not provided from the weigh scales to the trailer office doorway at the west end of the trailer and the parties stipulated that his testimony regarding this citation would in all respects be the same as that given for Citation No. 359238 (Tr. 114-117).

Citation No. 359240 cites a violation of 30 C.F.R. § 56.9-87 and states: "The 988 Caterpillar front-end loader was not equipped with an automatic, audible backup alarm."

Inspector Cloud confirmed that he issued the citation (Exh. P-13) after observing the 988 Caterpillar front-end loader operating in forward and reverse while hauling materials from the muck pile, and when it operated in reverse no alarm sounded. The machine operator advised him that a backup alarm had been installed on the rear wheel but had been knocked off. Upon inspection of the wheel, Mr. Cloud observed no alarm installed and he could not determine whether one had been installed. He was aware that an alarm had been installed on the loader in the past since he had previously cited the loader under the Metal and Non-Metal Mine Act and abatement was achieved by installing a backup alarm. The loader was a piece of heavy-duty mobile equipment, and since he observed no one serving as an observer, a backup alarm was required. The loader was the only piece of equipment operating in the pit area and he determined that the view to the rear was obstructed because of the fact that the machine engine is located behind the operator's cab, and while the operator can see to the rear right and left, the view directly behind him is obstructed by the engine. He did not sit in the operator's seat, did not look to the rear from the seat, but did

climb up the ladder and looked in the cab to determine whether a fire extinguisher and seat belts were installed.

Mr. Cloud stated that he observed no one in the vicinity of the loader, and he and company president John Wikel were the only ones present in addition to the loader operator. However, mine employees, such as the mill and crusher operator, and state and Federal mine inspectors, would have occasion to be in the area where the loader operated and would be exposed to a hazard of being run over by the loader. He believed the respondent was negligent and he considered the violation to be serious since anyone to the rear of the loader would not be aware that it was backing up without an alarm sounding. The loader is used to load materials from the pit to the crusher and is also used to move limestone materials around the area. Abatement was timely achieved in good faith by the installation of a backup alarm (Tr. 120-132).

On cross-examination, Inspector Cloud confirmed that the loader was in operation when he observed it and he indicated that the operator's seat is located in a cab which is located in front of the machine's engine. He could not recall the precise seat location and indicated that the cab ladder is approximately 6 feet high and that the loader is approximately 15 feet long. Based on his knowledge of such front-end loaders where the engine is mounted behind the operator's seat and cab, it was his belief that they all have obstructed views to the rear and he would cite them all for the lack of backup alarms (Tr. 133-139).

Citation No. 359241 cites a violation of 30 C.F.R. § 56.14-1 and states: "The flywheel on the secondary crusher was not guarded."

Inspector Cloud confirmed that he issued the citation in question (Exh. P-17) after observing that the crusher flywheel was unguarded. The rotating flywheel was approximately 4 feet in diameter and some 6 inches wide. It was located some 5 feet off the ground but was near a pathway where persons normally walked by while going to and from plant locations. The violation was serious because one could get their arm or clothing caught in the unguarded moving flywheel and serious injuries could result. Inspector Cloud observed no evidence or indications that maintenance was being performed on the flywheel (Tr. 160-170).

Regarding the abatement, Inspector Cloud stated that a guard was installed over the entire flywheel to abate the citation. However, he indicated that the respondent did not initially abate the condition within the time given and that Mr. Wikel told him that he was too busy to guard the flywheel, and that the plant was down for maintenance and testing. However, he observed a muck pile at the end of the conveyor belt which led him to believe that material was moved on the belt and that the plant was in production. Inspector Cloud stated that he did not believe that the respondent acted in good faith because he had to issue a withdrawal order to gain compliance. He also indicated that when he returned to the mine on May 25, 1978, respondent had shut the plant down and he could not recall whether the flywheel guard was in

place at that time, and he was not certain as to whether the citation was in fact ever abated (Tr. 174-182).

Inspector Cloud described the secondary crusher as a "portable plant" which is located on a flatbed mounted on wheels, and it can readily be moved around. He stated that his "rule of thumb" in citing guarding violations is that if an unguarded location is within 7 feet of one's reach, he requires a guard to be installed. He could not confirm that the pathway by the secondary crusher is in fact a normal travelway, but he was concerned that a maintenance man or electrician may have come in contact with the unguarded flywheel. He conceded that the crusher was accessible only from one side and also indicated that anyone walking on the platform above the flywheel would not be exposed to a hazard since he would be above it (Tr. 200-206).

Citation No. 359242 cites a violation of 30 C.F.R. § 56.11-2 and states: "The handrail on the elevated walkway at the secondary crusher was not in good repair."

Inspector Cloud confirmed that he issued the citation in question on May 4, 1978, after observing that a section of the handrail around the elevated walkway on the secondary crusher was missing and broken. The defective rail was approximately 10 feet long and was constructed out of pipe. The rail was some 15 to 18 feet off the ground and the walkway led to a work platform around the crusher (Tr. 4-9, July 30, 1980).

Inspector Cloud indicated that he gave the respondent a week to abate the citation, and when he returned to the mine on May 16, the condition was not corrected and he was forced to issue a withdrawal order after the respondent advised him that he was "too busy" to correct the condition. The condition was corrected by May 25 after the respondent welded the broken pipe back in place and the citation was terminated at that time (Exh. P-20).

Mr. Cloud identified the defective portion of the handrail as a broken weld and indicated that the plant was in operation on May 4, but was not certain that it was on May 16. The work area in question was a combined walkway and work platform, and while it was improbable that anyone could fall off the area, five employees and a maintenance man would have occasion to be in the area cited (Tr. 14-18, July 30, 1980).

Citation No. 359243 cites a violation of 30 C.F.R. § 56.11-1 and states: "The first section of the ladderway to the primary crusher was missing."

Inspector Cloud testified that he issued the citation on May 4 (Exh. P-23) after finding that the first section of the ladderway leading to the primary crusher was missing. In fact, he indicated that the bottom 4-foot section of the ladder had no concrete blocks in place or other means to allow an employee to readily step up and gain access to the working place on the crusher. The top of the ladder is affixed to the crusher platform and the bottom portion from ground level upward was missing, thereby making it

very difficult for the crusher operator to climb up on the crusher platform to reach his work station (Tr. 61-64, July 30, 1980).

Inspector Cloud stated that when he returned to the mine on May 16, the condition had not been corrected and this prompted the issuance of a withdrawal order. Mr. Cloud again stated that the respondent advised him he did not have time to abate the condition. However, when he returned to the mine on May 25, the missing section of ladder had been welded in place and the citation was accordingly terminated at that time (Tr. 64-66, July 30, 1980).

Citation No. 359244 cites a violation of 30 C.F.R. § 56.11-12 and states: "An inside handrail was not provided on the elevated walkway around the primary crusher."

Inspector Cloud confirmed that he issued the citation in question on May 4, 1978, after observing that there was no inside handrail along the elevated walkway around the primary crusher. Such a rail was required so as to prevent an employee from falling into the crusher opening. The walkway, or platform, is at the same level as the entrance to the crusher shanty. Mr. Cloud fixed May 11 as the abatement time but when he returned on May 16, the rail had not been installed and an order of withdrawal was issued. Abatement was finally achieved on August 17, when the respondent installed a 6-foot handrail constructed out of pipe material. Respondent's excuse for not abating the condition within the time initially fixed was that he was "too busy." Inspector Cloud indicated that similar crushers have been guarded by handrails and the probability of the crusher operator falling into the crusher was improbable (Tr. 67-74, July 30, 1980).

Citation No. 359245 cites a violation of 30 C.F.R. § 56.11-12 and states: "An inside handrail or barrier was not provided on the inside of the elevated operator's platform on the primary crusher."

Inspector Cloud confirmed that he issued the citation on May 4, 1978, after discovering that one side of the operator's shanty on the primary crusher was open and exposed on the left end looking from inside the shanty out toward the crusher. The open end did not contain a barrier or protection of any kind to prevent the crusher operator from falling through the opening some 15 to 18 feet to the ground. The condition was not abated within the time fixed, and Mr. Cloud had to issue a withdrawal order to gain compliance (Tr. 74-82, July 30, 1980).

Citation No. 359246 cites a violation of 30 C.F.R. § 56.14-1 and states: "The V-belts on the drive motor at the primary crusher were not guarded."

Inspector Cloud confirmed that he issued the citation on May 4 after observing that the three-fourths-inch V-belt located on the drive motor of the primary crusher was not guarded. The belt was approximately 4 feet long and was some 3 feet from the crusher ladder. He believed that anyone on the ground or on the ladder would be exposed to a hazard from the unguarded belt in question and the hazards included the possibility of someone being

struck or grabbed by the whipping action of the belt in the event it broke or being caught in the belt pinch point. He indicated, however, that one would have to deliberately stick his hand into the pinch point in order to be injured. He did not know whether maintenance was being performed on the drive motor on the day of the inspection. The citation was abated on August 17, when the respondent installed a metal guard around the entire V-belt location (Tr. 107-121, July 30, 1980).

Citation No. 359247 cites a violation of 30 C.F.R. § 56.14-1 and states: "The head pulley on the No. 2 belt conveyor was not guarded."

Inspector Cloud stated that he issued the guarding citation in question after discovering that the head pulley on the No. 2 conveyor belt was not guarded. The pulley was some 2 feet off the ground and he believed that the plant operator or maintenance man could come in contact with the pulley pinch point by walking near it. There was no barrier or fence to keep people away from the pulley and the wet surface area around it presented a hazard since someone could have slipped and fallen into the exposed pinch point. He believed the operator was negligent. The condition was not abated on May 16, and he issued a withdrawal order, but subsequently terminated it on May 25 when a guard was installed. Mr. Cloud conceded that there was no regularly visible traveled path for employees to walk on near the pulley in question (Tr. 129-146, July 30, 1980).

Respondent's Testimony and Evidence

Dean Wikel, respondent's secretary-treasurer, testified that the mine office was located in a trailer which had been moved to its location about a week or so before the inspection conducted by Inspector Cloud. Regarding the bulletin board citation, Mr. Wikel testified that he had ordered a board 2 weeks after the new law went into effect and that it was stored in the office when the inspector conducted his inspection. Due to the fact that he was in the process of moving into the trailer he had not mounted the board on the office wall as required by the inspector. Notices were posted on the wall of the trailer and he pointed the bulletin board out to Mr. Cloud. With regard to the mine office sign, Mr. Wikel stated that he was not aware of the fact that one was required, although he confirmed the fact that Mr. Cloud did give him a copy of the law during a previous mine visit.

Regarding the safe means of access citations at the weigh scales, Mr. Wikel confirmed that the distances an employee would have to stride from the scales to the office entrances at both of the cited locations were the same, and he believed they were somewhat less than a stride. Abatement was achieved by placing boards across the open gaps, supported by cement blocks. He believed the open gaps were less than 2 feet, and while he did not believe that the cited conditions presented a hazard, he conceded that it was possible that someone attempting to stride from the scales to the entrance of the office could have fallen and injured a leg.

Regarding the backup alarm citation, Mr. Wikel described the dimensions of the loader in question and stated that it was equipped with a rearview mirror, and since the operator's seat was elevated approximately a foot and a half higher than the rear-mounted engine, he believed that the operator could see anyone directly to the rear of the machine through the rearview mirror. He also indicated that no one would be to the rear of the machine during its normal operation and that "no one in his right mind" would approach it from the rear while it was in operation.

Mr. Wikel described the dimensions of the loader in question as 11 feet wide, 12 feet high and some 30 feet long. The backup alarm in question was mounted on the rear wheel of the loader, and he stated that the inspector insisted that it be maintained at that location and that he was not really concerned with rearview visibility. Mr. Wikel conceded that the loader which was cited was in fact equipped with an audible backup alarm prior to the inspection of May 4, and that it was installed on the left rear wheel. However, he also indicated that Inspector Cloud had previously cited a violation for the backup alarm, not because of any visibility problem, but because of his insistence that an alarm was required by law (Tr. 230-233).

Mr. Wikel did not dispute the fact that the flywheel on the secondary crusher was unguarded. However, he indicated that during the periods May 4, 16, and 25, 1978, the plant was not in full production and was in fact closed down. He identified Exhibit R-5 as a photograph of the flywheel in question and confirmed the fact that anyone walking by the flywheel location would have to walk around it to avoid it, and stated that while the crusher was not in full production, it was operated at times for testing and he did not believe that the flywheel had to be guarded while the plant was not in full production because no one would be around it. He indicated that he advised the inspector on May 4 that he was testing the crusher equipment to ascertain whether it was operating properly and also advised the inspector that he was not in full production. Employees were instructed to stay clear of the flywheel.

Mr. Wikel stated that he shut the plant down after receiving the 12 citations in question and that five were abated immediately. Since he was involved in the abatement of the five citations from May 4 to the 16th, and the plant was down, he could not work on abating the remaining seven. He did not intend to use the crusher until all of the citations were abated, and while he denied telling Mr. Cloud that he was "too busy" to abate the seven citations, it was possible that this was in fact the case. He was attempting to reopen the plant, while at the same time operating a blacktop business, and most of his work was directed to that business. He indicated that during May 1978, he was only producing, 25,000 tons of limestone annually, operating some 50 days a year, and that he did not operate on a full 5-day weekly schedule.

Regarding the handrail on the secondary crusher walkway, Mr. Wikel testified that the walkway was not in use and that a chain was installed across it to prevent anyone from entering it. He abated the citation by removing the

handrail and the walkway. He conceded that someone could crawl under the chain but that they could not step over it.

With respect to the primary crusher ladder citation, Mr. Wikel conceded that the distance from the ground to the first rung of the ladder was some 30 inches. He also indicated that the crusher itself was a foot higher off the ground than its tires and that he abated the condition by adding two additional steps which then measured 16 inches to the ground and he took the tires off the crusher and supported it by blocks. The condition cited resulted from the crusher being initially higher off the ground than its usual and normal elevation.

Regarding the lack of an inside handrail on the walkway around the primary crusher, Mr. Wikel stated that the crusher operator normally stays in the shanty while the crusher is in operation, leaves the shanty only to turn the crusher on or off, and he does not use the platform. Regarding the lack of a barrier or a railing on the operator's platform, he indicated that at one time it was protected by wooden two-by-fours and windows but that the windows were broken out by vandals. Mr. Wikel indicated that after the order of May 25 was issued, the condition was abated by his physically cutting off the walkway, and that since the walkway no longer was in existence, the inspector abated the original citation (Tr. 280).

On cross-examination, Mr. Wikel testified as to the efforts made by him to abate all of the citations issued by Inspector Cloud. He confirmed that he intended to "go down the list" of all citations and to make corrections as materials were received for this purpose. He also alluded to the fact that "we were very busy at the time" and that materials required for abatement were often received before abatement work could begin (Tr. 286). He conceded that he had copies of the regulations available to him but had never read them "cover to cover" (Tr. 288). He identified a photograph of the ladderway with the missing rungs (Exh., R-8), and testified as to his abatement efforts to correct the citation (Tr. 289-295).

Mr. Wikel identified Exhibit R-9 as a photograph of the V-belt pulley citation, and he indicated that the location of the cited belt is some 7 feet from where the man shown on the ladder is located. In the event the belt broke, he did not believe that the belt would reach the man on the ladder because the belt turns at a slow speed (Tr. 300). He conceded that no time was spent on abating this citation during the period May 4 and 16 (Tr. 300).

With regard to the citation concerning the alleged unguarded head pulley on the No. 2 belt conveyor, Mr. Wikel identified Exhibit R-10 as a photograph of the cited pulley location. He testified that a screening plant was located immediately above the pulley location, that no one is required to be under the plant, and that a person would have to crawl under the plant to reach the pulley location which was cited and that no one would do this (Tr. 312-315).

Mr. Wikel conceded that he probably made the statement that he "was too busy" to abate the unguarded pulley citation, but he believed that it was impossible for anyone to slip and fall into the pulley and that a person would have to make a deliberate effort to get caught in the pulley because the screening plant pretty much completely enclosed the pulley area and in effect served as a guard (Tr. 316-317). The area beneath the pulley was exposed for approximately a foot, but someone would have to deliberately reach under the area to get caught in the pulley (Tr. 317, 321).

## Findings and Conclusions

### Ruling on Order to Show Cause

On April 5, 1979, Chief Judge Broderick issued an order directing the respondent to show cause why it should not be defaulted for failure to file an answer to the petitioner's petition for assessment of civil penalties. By letter filed April 30, 1979, respondent's counsel answered the show-cause order and explained the circumstances surrounding the failure by the respondent to respond to the petition. At the hearing, the parties were afforded an opportunity to comment further on the show-cause order, and petitioner's counsel did not object to my ruling that the answer filed on April 30, 1979, satisfied Judge Broderick's show-cause order and that respondent should not be defaulted (Tr. 5-8).

### Jurisdiction

During opening statements, counsel for the parties raised an issue concerning MSHA's enforcement jurisdiction over the respondent's mining operation. Respondent's counsel was unwilling to stipulate as to the jurisdiction, and I reserved my ruling on this question pending the completion of the testimony and the filing of posthearing proposed findings and conclusions. Although given an opportunity to file additional written arguments and briefs, the parties declined to do so. Accordingly, my ruling on the jurisdictional question will be made on the basis of the present record.

The record reflects that MSHA's petition for assessment of civil penalties was filed on November 1, 1978, pursuant to the then-applicable Interim Rules of the Commission, 29 C.F.R. § 2700.24. The rules, which became effective March 10, 1978, 43 Fed. Reg. 10320, did not require an allegation of jurisdiction by MSHA as part of its initial pleadings. However, the current rules, which became effective on June 29, 1979, 44 Fed. Reg. 38226, do require a jurisdictional statement as part of the proposal for assessment of civil penalties, and respondent is specifically required to file any denial of jurisdiction, 29 C.F.R. § 2700.5(a). Since the petition in this case complied with the applicable rules of the Commission at the time of filing, I conclude that the failure to include a statement concerning jurisdiction did not render the petition procedurally defective.

Inspector Cloud testified that upon the effective date of the Act, he visited several mine operators sometime prior to May 4, 1978, including the

respondent, for the purpose of explaining the assessment program and other provisions of the law. He also indicated that respondent's mining operation had been previously inspected and regulated under the Metal and Nonmetal Mine Act, and that he personally had inspected the facility on four occasions prior to his May 4th inspection (Tr.38-39). He stated that he gave all operators within his area of jurisdiction copies of the new Act during these courtesy visits and explained the law to them (Tr. 67-69).

Mr. Cloud also testified as to the scope of respondent's mining operation, and he stated that approximately four employees were engaged in activities falling within respondent's mining operations over which he had jurisdiction. He indicated that the mine consisted of a quarry, a maintenance shop, an office trailer, and a scale house. He observed limestone being mined at the quarry pit area, and it was transported by a front-end loader to the crusher during the time of his inspection. He also observed other equipment such as a shovel and truck operating around the pit area, observed materials being moved along respondent's plant belt system, and generally described the operations which were taking place. He also alluded to a "blacktop" operation being conducted by the respondent on the premises which did not fall within MSHA's enforcement jurisdiction, however, the quarry pit, plant, and crushing operation did fall within his area of jurisdiction (Tr. 70-73, 81, 123, 133, 147-148, 174-176).

John Wikel, president, Erie Blacktop, Inc., testified that his company is a family-owned corporation, and that the mine consists of some 20 acres employing a total of 20 employees, most of whom are involved in activities connected with his blacktop operations. The limestone mining operation was operational "once in a while in 1978," and since April of 1980, the crusher has not been operational. Most of the mined limestone is sold to the Corps of Engineers for use in shore-erosion projects, and this entails the blasting of large blocks of limestone. The remaining stone is crushed and sold for driveways and roadways. It is also used for blacktop driveway projects as well as a base for roadways and driveways. His company delivers most of the materials, and while he denied that any of the mined material crosses state lines, he conceded that the Corps of Engineers used his products for erosion projects along the coast lines of the State of Ohio, and that he uses the telephone as part of his mining operations (Tr. 44-46, July 30, 1980). He estimated his annual production for the year 1980 to be 100 tons of materials, under 500 tons for the year 1979, and that 25,000 tons of limestone were mined in the year 1977. The limestone is used to maintain the shorelines and waterways of Lake Erie, and for shore-erosion projects (Tr. 47-48, 236-237, July 30, 1980).

Mr. Wikel also testified that his quarry operation employs four people, a secretary who handles the scales and the office chores, a loader operator and a plant operator, including himself and his father. He confirmed that Inspector Cloud had previously inspected his quarry prior to the enactment of the 1977 law. He also confirmed the fact that he had engaged in assessment conferences in the past with MSHA concerning assessments for citations

(Tr. 174-179, July 30, 1980). Mr. Wikel also confirmed that his mining operation is 5 years old, and that at the time of the inspection he had been operating for 2 years, and that prior to the 1977 Act, he had been cited for two or three violations (Tr. 262, July 30, 1980). He also conceded that he had ongoing mining operations for the years 1976 and 1977 but that the inspector had never "nailed him" for any violations (Tr. 263, July 30, 1980). He also confirmed that he began mining as early as 1975, but that the lack of capital and the expense involved in the purchase of a primary and secondary crusher prevented them from engaging in a fullscale operation at that time. He also admitted that "we cut a few corners and it caught up with us" (Tr. 264, July 30, 1980).

Petitioner's Exhibit P-37 is a mine profile indicating that the mine operated on a one-shift, 8-hour a day basis, employing four people, and that the operation was an open-pit, single-bench, crushed limestone operation, and this information remains unrebutted, except for Mr. Wikel's contention that he was operating at less than full production at the time the citations issued.

On the basis of all of the aforementioned evidence and testimony adduced in this proceeding, I am convinced that at the time of the inspection and issuance of the citations in question, respondent was operating a mine within the meaning of the Act, that limestone was in fact mined, crushed, processed, and sold commercially, and that it was used by the Corps of Engineers for certain erosion projects on Lake Erie, as well as for road and paving projects. Although the inspector conceded that respondent's blacktop business was not subject to MSHA's enforcement jurisdiction, I conclude and find that the open-pit and quarry-limestone mining operations were in fact mining within the meaning of the Act, and that these mining operations "affected commerce." I also take note of the fact that respondent's mining operations were regulated by MSHA under the Metal and Nonmetal Mine Act, and that respondent had never denied that it was subject to MSHA's enforcement jurisdiction. Under these circumstances, I conclude that petitioner has established by a preponderance of the evidence that respondent's mining operations are subject to MSHA's enforcement jurisdiction, and any suggestions to the contrary are rejected.

## Findings and Conclusions

### Fact of Violations

### Citation No. 359236

Section 109(a) of the Act requires that a conspicuous sign be posted designating the official mine office. The evidence adduced in this case establishes that such a sign was not posted, and Respondent has not rebutted this fact. The citation is AFFIRMED.

Citation No. 359237

Section 109(a) of the Act requires that a bulletin board be at the mine office or located:

> [A]t a conspicuous place near an entrance to a mine, and that it be placed in such a manner that orders, citations, notices and decisions required by law or regulations to be posted, may be posted thereon, and be easily visible to all persons desiring to read them, and be protected against damage by weather and against unauthorized removal.

The testimony and evidence establishes that the required bulletin board was not in fact installed in the mine office at a conspicuous place. Although the respondent had purchased a bulletin board in order to comply with the Act, it was apparently located on the floor against a desk and had not been permanently installed on the mine office wall so as to readily facilitate the posting of the required material. In the circumstances, I find that a technical violation occurred and the citation is AFFIRMED.

Citation Nos. 359238 and 359239

These citations allege violations of section 56.11-1 for the failure by the respondent to provide a safe means of access from both ends of the weighing scales to the trailer which served as the mine office. Access could only be gained by someone either jumping or taking a broad step from the edge of the scales for a distance of approximately 3 feet to the entrance doors of the trailer. The elevated area beneath the opening between the scale and the door entrances was approximately 4 feet to the ground below and the inspector was concerned that someone could fall beneath the opening while attempting to step or jump over the areas in question. Although the trailer had doors to the rear, the inspector did not believe they were used as the regular means of access to the trailer, and he believed the front doors were used for this purpose.

Respondent does not dispute the fact that an employee attempting to enter the trailer from the scales area would have to stride over the open space between the scales and the trailer door, and Mr. Wikel candidly conceded that someone attempting to do this could possibly fall into the exposed area and be injured. The standard requires that a safe means of access be provided to all working places. Respondent has not rebutted the fact that the mine office is such a working place, and that the normal means of access was from the scales, and I conclude and find that the trailer office falls within the broad definition of "working place" found in definitions section 56.2, and I further find that petitioner has established the violations by a preponderance of the evidence presented in this case. Accordingly, both citations are AFFIRMED.

Citation No. 359240

The citation here charges the respondent with failing to equip a front-end loader with an automatic audible backup alarm. The cited mandatory standard, section 56.9-87, states as follows:

> Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

Inspector Cloud conceded that he did not sit in the operator's seat or look to the rear of the cab to determine that the view to the rear was obstructed (Tr. 137-138). He also believed that all Model 988 Caterpillar front-end loaders, such as the one cited, as a class, have obstructed views to the rear and that his practice is to always cite section 56.9-87 when he encounters such equipment without a backup alarm. He conceded that he does not, as a matter of practice, or on a case-by-case basis, make any independent finding that the view to the rear is in fact obstructed (Tr. 138, 159). He also alluded to an MSHA directive dealing with the requirements for backup alarms on front-end loaders, but it was not produced during the hearing (Tr. 160). Respondent testified that since the operator's seat on the end-loader in question was elevated above the rear-mounted engine, the operator could observe anyone directly to the rear of the machine through the rearview mirror. Conceding that the loader had previously been cited by the inspector, and that one was installed to abate that citation, respondent maintained that the previous citation was not based on visibility problems, but was based on the inspector's belief that the law required it anyway (Tr. 230-233).

As I interpret the standard, the first sentence requires audible warning devices on heavy-duty mobile equipment. The second sentence requires the installation of an automatic reverse signal alarm which is audible above the surrounding noise level except that none is required when there is an observer present to signal when it is safe to back up. In this case, there is no evidence that an observer was present, and the exception does not apply. Therefore, the question presented is whether petitioner has established a violation even though the inspector did not ascertain whether the rear view from the end-loader in question was in fact obstructed. I think not. I conclude that as a condition precedent to proving a violation, petitioner must establish that the view to the rear was in fact obstructed; if it was not, no automatic reverse alarm was required.

In this case, it is clear that the citation issued because the inspector found no operative backup alarm installed on the piece of equipment in question. It is obvious that he was concerned about the lack of a backup alarm which is normally affixed to one of the rear wheels of the end-loader and which is activated automatically when the machine is placed in reverse (Tr. 131), and he conceded that had he observed someone acting as a flagman he

would not have issued the citation (Tr. 123). Since there is no evidence that the inspector established that the view to the rear was obstructed, I conclude that the petitioner has failed to establish a violation of the cited standard and the citation is VACATED.

Citation No. 359241

With regard to the lack of a guard on the flywheel of the secondary crusher, Inspector Cloud initially testified that the flywheel was some 5 feet off the ground and projected out some 4 to 6 inches from the crusher. He also testified that someone walking around the mill building would pass by and under the unprotected flywheel location and contact the exposed flywheel (Tr. 164-165). In describing the physical layout of the secondary crusher, he testified that the crusher and flywheel were mounted on a flatbed with wheels attached to it and that it is a portable piece of equipment which can be moved to different locations. However, he could not remember the width of the crusher or how far the flatbed or wheels extended out from the sides of the flywheel location (Tr. 200-201). When shown a sketch of the crusher prepared by respondent's witness (Exh. R-1), Mr. Cloud stated that he could not remember what it looked like (Tr. 201-202).

In response to questions from petitioner's counsel regarding the physical characteristics of the secondary crusher in question, Mr. Cloud could not remember whether the flatbed itself was wider than the crusher which was mounted on top of it, and he could not remember whether the flywheel itself or any other parts near it required to be serviced or lubricated (Tr. 216-217). He did state, however, that the crusher was only accessible from one side of the flatbed, and while someone could walk on the elevated platform on the same side of the crusher, they would not be exposed to the flywheel because they would be walking above it (Tr. 217).

In response to a question from me as to the theory of citing the respondent for the alleged unguarded flywheel location, Inspector Cloud responded that he uses a "rule of thumb" rule followed by some of his fellow inspectors which requires any unguarded piece of equipment within a 7-foot reach of anyone to be guarded (Tr. 212). Petitioner's counsel conceded that "if the evidence shows that this flywheel recessed 5 feet away from the edge of that flatbed truck, I submit nobody could fall into it" and "then it wouldn't need to be guarded" (Tr. 228).

In defense of the citation, respondent produced a photograph of the secondary crusher and flywheel location in question (Exh. R-5). Respondent does not dispute the fact that the flywheel was not guarded. Its defense to the citation is based on the fact that someone approaching the exposed flywheel would necessarily have to walk around it to avoid it because of the extension of the flatbed wheels. Respondent also defends on the basis of its assertion that the plant was not in full production when the citation issued and respondent did not believe he was required to guard the flywheel because no one was around it. These defenses are REJECTED.

The critical question in this case is whether or not the exposed flywheel was located in such a position or location as to expose someone approaching it to injury if he came into contact with it. Although the inspector could not remember any of the essential details necessary to enable him to make an informed judgment and apparently applied his "7-foot rule of thumb" in this case, the fact is that Photographic Exhibit R-5 clearly shows the exposed flywheel protruding from the edge of the crusher. Further, while it would appear that one passing by that location would have to walk around the flatbed wheels, the fact is that the flywheel was exposed to anyone passing by its unguarded location and respondent's witness Wikel candidly admitted that employees were warned to stay clear of it. In these circumstances, I am constrained to find that petitioner has established a violation in this case and the citation is AFFIRMED. However, I would urge petitioner to reexamine the practice of inspectors using their own written "rules of thumb" and to insure that they fully document all of the circumstances presented in a given case before automatically concluding that a particular piece of equipment needs to be guarded.

Citation No. 359242

This citation was issued after the inspector found a portion of the handrail on an elevated walkway at the secondary crusher to be broken and in disrepair. Section 56.11-2 requires that such areas be maintained in good condition, and, while a handrail was in fact provided, it was not maintained in good condition, and respondent does not dispute this fact. Respondent's defense is that the walkway was not in use and was protected by a chain across it. However, respondent conceded that someone could crawl under the chain and that it did not prevent anyone from using the walkway. I find that petitioner has established a violation and the citation is AFFIRMED.

Citation No. 359243

The testimony of the inspector regarding the missing bottom portions of the ladderway to the secondary crusher supports a violation of section 56.11-1. The missing portion prevented a person from readily and easily climbing the ladder and the missing portion was such as to present a possible mishap while one was attempting to climb the ladder. Respondent does not dispute the fact that at least 30 inches of the ladder were missing, and its defense is based on its abatement efforts. The citation is AFFIRMED.

Citation Nos. 359244 and 359245

These citations were issued after the inspector found that there were no handrails around the elevated primary crusher walkway or a barrier inside the open end of a shanty where the crusher operator was apparently stationed while operating the crusher. The respondent does not dispute the fact that handrails were not installed at the locations where the inspector believed they should have been, and its defense is based on the assertion that the operator usually remains in the shanty and only comes out to turn the crusher on and off. As for the lack of inside barriers, respondent asserts that windows and wooden framing were previously installed but were destroyed by vandals.

Section 56.11-12 requires that travelways through which men or materials may fall shall be protected by railings, barriers, or covers. It is clear from the testimony and evidence adduced in this case that the required protective barriers or railings were not installed so as to protect the crusher operator or others in the area from falling through the open end of the shanty or the walkway around the crusher. Although the area inside the shanty itself is technically not a travelway, the definition of that term as found in section 56.2 is broad enough to cover the area inside the shanty. The inspector testified that he considered the area a "travelway" even though he described it as a "platform" because the crusher operator and others walk back and forth along the area (Tr. 90). While I consider this to be a rather strained interpretation of the standard, I still believe that the intent of the protective barrier requirement is to prevent someone from walking or falling through and over the edge of the shanty opening, which in fact was a rather small and confined area of approximately 6 feet by 6 feet (Tr. 93). The citations are AFFIRMED.

Citation No. 359246

The inspector issued this citation after he determined that an unguarded V-belt on the drive motor at the primary crusher was not guarded. He described the location of the belt as some 3 feet from the crusher ladder, and stated that the belt was some 4 feet long. His concern was that someone could become entangled in the belt pinch point and that someone could have been struck by the belt if it broke.

The cited standard, section 56.14-1, requires that certain exposed moving machine parts which may be contacted by persons be guarded. The inspector's rationale in issuing the citation was to protect an employee from reaching into the exposed pinch point. In this regard, there was much confusion during the hearing as to the precise location of the cited belt in question. Respondent's witness Wikel produced a photograph of the location of the belt (Exh. R-9) and he was absolutely sure of its location. On the other hand, Inspector Cloud was unsure as to the location of the belt and could not state that the location shown in the exhibit was the belt which he cited (Tr. 306-311). Having viewed both witnesses on the stand during the course of the hearing, I find respondent's witness Wikel to be a credible and straightforward witness and find his testimony credible and I accept it in support of the location of the belt in question. Further, after viewing the photograph and reviewing the testimony of the witnesses, I fail to understand how anyone could come to the conclusion that someone climbing the ladder depicted in the photograph could come in contact with the exposed V-belt in question. Accordingly, Inspector Cloud's reliance on section 56.14-1 is simply not supportable and the citation is VACATED.

With regard to the inspector's assertion that someone could be struck by the whipping action of the belt in the event it broke, aside from the fact that I find his testimony in this regard to be less than credible and sheer speculation, if this was his concern he should have cited the proper standard, namely, section 56.14-2.

Citation No. 359247

The inspector cited a violation of section 56.14-1 after observing an unguarded head pulley on the No. 2 belt conveyor. The cited standard requires that such pulleys which may be contacted by persons and which may cause injuries to persons be guarded. In support of the citation, Inspector Cloud first testified that anyone could walk right up to the exposed pulley and that with loose clothing on could be pulled into the pinch point. He also testified that there were no obstructions to prevent anyone from reaching the pulley and that maintenance men, salesmen, and electricians would be in the area and would be exposed to the obvious hazard (Tr. 130-132). However, he could not recall the specific location of the pulley, the type of material moved on the belt, and could not recall the particular crusher where the pulley was located (Tr. 137-138), nor could he remember whether the conveyor had a lock-out device (Tr. 145).

Respondent's witness Wikel identified a photograph (Exh. R-10) as the conveyor belt cited by the inspector and he stated that Inspector Cloud was in error when he identified it as a head pulley. Mr. Wikel stated that the pulley was in fact the tail pulley and he conceded that it was the location which concerned the inspector (Tr. 312-313). Mr. Wikel described the pulley location and indicated that a screening plant extended beyond the unguarded pulley, and stated that someone would have to crawl under the screening apparatus to reach the pulley (Tr. 314). He also testified that the pulley was practically totally enclosed by the screening plant and he believed that it served the function of a guard since anyone crawling under the screening plant would have to reach in and under a 1-foot opening to contact the pulley (Tr. 316-317).

When called in rebuttal, Inspector Cloud stated that he could not recall whether a screening plant was installed at the pulley location in question, but he has observed similar screening plants attached to pulleys such as the one in question (Tr. 318). After viewing Photographic Exhibit R-10, Inspector Cloud conceded that one would have to reach under and upward over the screening plant to contact the pulley, expressed serious doubt that anyone stumbling or falling near the pulley location would come in contact with it, and indicated that no one would have any reason to be near the pulley location (Tr. 323).

Upon careful review and examination of the inspector's testimony in support of the citation, I cannot conclude that petitioner has proved a case. This is a classic example of the failure by an inspector to completely document his observations made at the time of the issuance of the citation so as to clearly and concisely support it if challenged later during a contest. Here, the inspector first testified that anyone casually walking by the exposed pulley could contact it and be pulled in by the action of the pulley catching on loose clothing. When confronted with the respondent's testimony and photograph of the pulley location in question, which I find credible, the inspector changed his position and testified that no one would have any reason to be near the pulley and even if he were it was highly unlikely that he would contact the pulley which was apparently

obstructed by a screening plant installed over most of it. The citation is VACATED.

Gravity

Citation Nos. 359236 and 359237 concerning the bulletin board and mine sign are nonserious violations and the inspector conceded this was the case. With regard to the safe access citations, Nos. 359238 and 359239, I conclude and find that these were serious. Failure to provide an easy and safe ramp for one to cross from the scales to the trailer which served as the mine office presented a hazard to anyone attempting to negotiate the open space between the two, particularly to the secretary whose day-to-day duties were in the office. Further, respondent conceded that it was possible for someone to slip and fall and be injured while attempting to stride or cross over the area in question.

With regard to the unguarded flywheel, Citation No. 359241, while it is true that one would have to walk around the flatbed to come into close proximity of the exposed unprotected and rather large flywheel, the fact is that respondent seemingly recognized the potential hazard involved since respondent had warned its employees to stay clear of the flywheel. While it may also be true that at certain periods when the crusher was down for lack of production, the exposed flywheel posed no hazard, it nonetheless remained unguarded during periods when production was going on. In these circumstances, I find that this violation was serious.

With regard to the handrail and ladder citations, Nos. 359242, 359243, 359244, and 359245, I find that all of these were serious violations. The defective railing which was corrected by being rewelded was in disrepair and not securely in place. Anyone walking by and grabbing the rail would have nothing secure to hold onto, and any chain which may have been in place would not have prevented one from entering the area. As for the lack of a barrier or railing at the exposed end of the crusher shanty, the inspector testified that the crusher was operating when he observed the condition and that the crusher operator was in the shanty. Although it may have been improbable that he would have walked off the exposed edge and fallen to the ground below, the area in question was rather confined and did present a hazard. The same could be said for the lack of a railing outside the shanty and along the travelway by the crusher. Failure to provide a railing at that location presented a hazard to the crusher operator. The missing bottom portion of the ladder which was cited made it difficult for one to step up and grab the ladder handrail and presented a possible slip and fall hazard. Further, while the testimony presented reflects that respondent's plant may have been out of production during certain periods of time, the fact is that when the conditions were cited by the inspector the crusher and plant were in production and respondent has not rebutted this fact.

Good Faith Compliance

Inspector Cloud agreed that the citations concerning the bulletin board, office sign and the lack of safe access to the mine office were all abated in good faith. Although the citations show May 11, 1978, as the time fixed for abatement, the inspector's next opportunity to return to the mine site was May 16, 1978, and that is when he terminated the citations after finding that the conditions cited had been abated (Tr. 118). Accordingly, as to Citation Nos. 359236, 359237, 359238, and 359239, I conclude and find that respondent exercised good faith in achieving compliance with the requirements of the law and regulations cited.

With regard to Citation Nos. 359241, 359242, 359243, 359244, and 359245, the record reflects that they were all initially issued on May 4, 1978, and that Inspector Cloud fixed May 11, 1978, as the date for the abatement of the conditions cited. The subsequent withdrawal orders were all issued on May 16, 1978, when Inspector Cloud returned to the mine and found that the conditions cited had not been corrected. In view of the fact that none of these citations were corrected, Mr. Cloud did not believe that the respondent acted in good faith to achieve compliance.

Mr. Cloud testified that when he returned to the mine on May 16, 1978, Mr. John Wikel advised him that he had been "real busy" and had not started on any repair work in connection with the outstanding citations, and after conducting a spot inspection he issued seven noncompliance orders. Mr. Wikel advised him at that time that the plant had been shut down for maintenance and that it was being tested rather than in full production. However, Mr. Cloud stated that he observed some muck and materials at the end of a conveyor belt and he determined that the plant was in operation and in production and that is why he issued the withdrawal orders (Tr. 175-176, July 29, 1980). Mr. Cloud also stated that Mr. Wikel did not produce any purchase orders indicating that any materials required for abatement had been purchased or ordered and simply told him that "they had been too busy" and his notes confirmed this statement (Tr. 178).

Mr. Cloud testified further that he returned to the mine subsequent to May 16, 1978, and believed that it was within the "next 60 days." At that time, he was advised that the plant was not in operation, conducted no further inspection and left the property (Tr. 182). He returned again several times during the next 30 days and was again told that the plant was still not in operation and each time he left without conducting additional inspections (Tr. 183). However, he later testified that when he returned to the mine on May 25, 1978, he inspected the mine and abated five of the outstanding orders after determining that the conditions had been abated, but he could not recall which two remained outstanding (Tr. 193).

The broken handrail on the secondary crusher was corrected by welding it back in place and the inspector terminated the order on May 25, 1978 (Tr. 15, July 30, 1980). The missing bottom rungs of the access to the crusher were corrected and that order was also terminated on May 25 (Tr. 65).

Regarding the handrail on the walkway and platform on the crusher, the inspector testified that it was not corrected on May 25, and that he subsequently abated the order on August 17, after repairs were made (Tr. 71). He also indicated that a piece of pipe and several posts were all that were required to make repairs, and assuming the materials were available, he believed the condition could have been corrected in a matter of hours (Tr. 70), but he had no way of knowing whether the condition may have been corrected prior to August 24 (Tr. 71). He also confirmed that Mr. Wikel advised him that the crusher had not been in operation from May 16 to May 25 (Tr. 73). As for the exposed end of the shanty which was not guarded by a handrail or barrier, that condition was not abated on May 25, but Mr. Cloud subsequently terminated the order on August 17 when he found that repairs had been made (Tr. 80).

Mr. Cloud testified that his next visit to the mine was on September 11, 1978, but he could not state whether the two outstanding orders had been abated. Moreover, he did find that a guard for the flywheel for the secondary crusher was not in place but was lying in a muck pile (Tr. 196). Petitioner's counsel conceded that he considered this incident as evidence that a guard had been constructed and does not establish noncompliance with the original citation (Tr. 197). As a matter of fact, respondent produced an original copy of the termination of the flywheel citation and order and it shows that the order was terminated by Inspector Cloud on May 25, 1978 (Exh. R-2).

Mr. Wikel stated that the reason the broken handrail on the secondary crusher was not repaired on May 16 was that the crusher was inoperative and the fuses were out and the motor was off. Under the circumstances, he did not believe he had to make the repairs since the crusher was inoperative. He advised the inspector that the crusher was down and the inspector advised him that it made no difference (Tr. 48-49, July 30, 1980). As for the purported statement made to the inspector that respondent was "too busy" to make the repairs, Mr. Wikel denied making them and stated that if they were made they were probably attributable to his father (Tr. 259). However, he also stated that during the time period in question, "it was very possible that we were too busy" (Tr. 261), and he went on to explain that all of his efforts were directed to his blacktop business and that the stone quarry end of the business was still in its infancy and new equipment was being purchased and installed (Tr. 262-265).

Respondent's witness Wikel testified that very little mining of materials took place in the years 1977 and 1978, and conceding that abatement may have taken as long as 60 days, Mr. Wikel attributed the delays to the fact that the crusher and plant were idle and out of production, and he did not believe that any violations could have occurred during these periods because of his belief that inspectors have no authority to inspect his operation when he is not in production (Tr. 235-239, July 30, 1980). He candidly conceded that some of the citations were not corrected until after May 25, and stated "to be honest with you, I guess I must have been out in left field some place, I felt we didn't operate, and I didn't see the safety factor" (Tr. 249). He also

stated that he decided to shut the operation down because he was unable to abate all of the citations on time and stated that the inspector did not discuss any abatement times with him and simply advised him that he "wasn't the Judge" (Tr. 251-252).

While it is true that the respondent failed to abate five of the citations within the time fixed by the inspector, the fact is that all of the cited conditions were ultimately corrected and the citations terminated. While failure to abate within the time fixed by the inspector would normally support a finding of lack of good faith on the part of the respondent, I conclude and find that the circumstances surrounding the citations in question as discussed above do not warrant any substantial increases in the penalties assessed by me simply because respondent failed to abate within the time initially fixed by Inspector Cloud. I cannot conclude that respondent is a reckless or irresponsible mine operator who deliberately sought to avoid compliance. While it is true that respondent was dilatory in achieving compliance precisely within the timeframe initially fixed by the inspector, the fact is that for the most part the inspector did not discuss abatement with the mine operator, made his own judgments in this regard, and even though he admitted that mine management had advised him that the plant was out of operation and nonproductive on several occasions when he returned to the mine, the inspector nonetheless sought to rely on the standard "too busy" excuse as the basis for his opinion that the respondent exhibited a total lack of good faith in achieving compliance.

In addition to the foregoing, I cannot ignore the fact that the record in this case supports a conclusion that there was a strained relationship between the inspector and mine management during the time periods in question, and this continued during the course of the hearing and was personally observed by me through the observations of the demeanor of the inspector as well as mine management during their testimony. It seems to me that voluntary compliance with the law can best be achieved through an atmosphere of mutual cooperation between an MSHA inspector and mine management rather than through continued adversary confrontations between the parties and I would hope that MSHA as well as mine management will consider this in any future encounters.

Negligence

During the course of the hearing, petitioner's counsel conceded that the circumstances concerning the citations in this case do not suggest flagrant, deliberate, or reckless disregard for safety, and counsel candidly admitted that it was altogether possible that the plant was in fact closed down and the equipment was not used after the withdrawal orders were issued (Tr. 59, 81). Further, after careful review and consideration of all of the testimony concerning the abatement of the citations in this case, I cannot conclude that the respondent was grossly negligent in failing to correct the conditions cited. To the contrary, I conclude and find that the citations which have been affirmed resulted from the failure by the respondent to prevent or correct the conditions which he should have been aware of, and its failure in this regard constituted ordinary negligence as to each of the citations in question.

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

The testimony and evidence adduced in this case supports a finding that respondent is a very small family-owned mine operator. The parties stipulated that any penalties assessed in this case will not adversely affect respondent's ability to remain in business and I adopt this as my finding on this issue.

History of Prior Violations

The parties stipulated that the respondent has no prior history of violations and I adopt this as my finding on this question and I have considered this in the assessments levied for the citations in question.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalties are reasonable and appropriate in the circumstances and they are imposed by me for each of the citations which have been affirmed:

| Citation No. | Date | 30 C.F.R. Section | Assessment |
|---|---|---|---|
| 359236 | 5/4/78 | 109(a)--Act | $ 5 |
| 359237 | 5/4/78 | 109(a)--Act | 5 |
| 359238 | 5/4/78 | 56.11-1 | 40 |
| 359239 | 5/4/78 | 56.11-1 | 40 |
| 359241 | 5/4/78 | 56.14-1 | 125 |
| 359242 | 5/4/78 | 56.11-2 | 50 |
| 359243 | 5/4/78 | 56.11-1 | 25 |
| 359244 | 5/4/78 | 56.11-12 | 125 |
| 359245 | 5/4/78 | 56.11-12 | 125 |
| | | | $540 |

On the basis of the foregoing findings and conclusions, the following citations are VACATED:

| Citation No. | Date | 30 C.F.R. Section |
|---|---|---|
| 359240 | 5/4/78 | 56.9-87 |
| 359246 | 5/4/78 | 56.14-1 |
| 359247 | 5/4/78 | 56.14-1 |

ORDER

The respondent IS ORDERED to pay civil penalties in the amounts shown above, totaling $540 within thirty (30) days of the date of this decision and order, and upon receipt of the same by MSHA, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

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James E. McGookey, Esq., Meuhlhauser, Lucal & Pfefferle, P.O. Box 790, Sandusky, OH 44870 (Certified Mail)

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 9 1981

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceedings |
| | : | Docket Nos. VINC 78-447-P |
| | : | VINC 79-12-P |
| v. | : | VINC 79-40-PM |
| | : | VINC 79-176-P |
| OLIVER M. ELAM, JR., COMPANY, INC., Respondent | : | VINC 79-177-P |
| | : | VINC 79-231-P |
| | : | LAKE 79-11 |
| | : | LAKE 79-110 |
| | : | LAKE 79-281 |
| | : | |
| | : | Elam Dock |

DECISION

Appearances: Linda Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner;
William H. Jones, Jr., Esq., Ashland, Kentucky, for Respondent.

Before: Judge Lasher

This proceeding arises under section 105(b) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in South Point, Ohio, on July 24, 1980, at which both parties were represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proferred by counsel during closing argument, I entered an opinion on the record. 1/ My bench decision containing findings, conclusions and rationale appears below as it appears in the transcript, 2/ other than for minor corrections.

> These proceedings arise upon the filing of petitions by the Secretary of Labor for assessment of several (16) penalties in the nine dockets involved. The Respondent raised a jurisdictional issue in its answer which subsequently has crystalized into this question: "Whether or not Respondents docking facility is a 'coal or other mine', as that term is defined in the Mine Safety and Health Act of 1977?" [30 U.S.C. §§ 802(h)(1) and 802(h)(2)].

1/ Tr. pp. 68-76
2/ Transcription of the hearing was performed by a new reporter necessitating substantial correcting of the record.

Section 802(h)(1) of the Act defines coal or other mine for the purpose of the Act generally. Section 802(h)(2) defines coal mine for purposes of titles II, III, and IV of the Act and I note specifically that title II thereof provides for various detailed statutory health and safety standards, in addition to the foregoing definition. The definition of "Work of preparing the coal", as provided in section 802(a) of the Act provides the statutory language which is to be interpreted in this proceeding. The parties have provided a stipulation which has placed into evidence a record of the answer of the Respondent to interrogatories propounded by Petitioner. In addition, the evidence and record consist of four photographs introduced by Respondent which show various activities being carried on at the Respondent's commercial dock some three years ago. In addition, the testimony of Inspector Thomas Luce was received on behalf of MSHA and the testimony of superintendent David Manning and Oliver M. Elam, Jr., president of Respondent, were received. The above, in addition to the official case file, constitutes the evidence and record upon which the prime jurisdictional issue is to be decided.

The Respondent is a small family corporation which does business as a commercial dock at Coal Grove, Ohio, in the vicinity of Ashland, Kentucky, and Ironton, Ohio. The Respondent has 11 employees who work interchangably between the dock and the construction aspect of the Respondent which, in essence, is an equipment rental business involving some 50 pieces of construction equipment including cranes, trucks, and bull dozers. Respondent usually has three of these employees present at its commercial docking facility on the Ohio River. The Respondent loads some 300,000 tons of coal during its busiest years and during the last two years has loaded approximately 200,000 tons of coal at this dock. In addition the docking facility loads other materials such as steel ingots, pipe, and the like, at this docking facility and the percent of tonnage loaded on to barges at this docking facility attributal to coal ranges from approximately 40 to 60 percent. Additional material is processed through the docking facility in a reverse direction, that is material is brought to the facility by barges from whence it is processed through the dock and loaded on to the trucks for delivery to its ultimate destination. The dock facility is utilized to unload tar pitch, which is a coal derivative and which is directly loaded from the loading bin on to barges without the use of a crusher which (itself) is part of the system of movement of material at the dock.

With respect to coal, Respondent does business with coal brokers, some four or five in number, who are not coal mine

operators and who arrange with Respondent to receive delivery of the coal on Respondent's premises and arrange with Respondent to load the coal on barges to deliver the coal to such customers as power plants and factories elsewhere.

Respondent has no business arrangements, contracts, or dealings directly with the coal mine operators who initially extract the coal nor does it have any arrangement with the customers who ultimately accept delivery of the coal off the barges at the point of the ultimate destination of the coal. The contract between the coal brokers and Respondent is not in writing and it does not have as any part of its basis an agreement by Respondent to crush the coal. The coal is indeed crushed by Respondent as part of its movement of the coal from the place on the premises where the coal is initially stockpiled to the barges. I find on the basis of the evidence that the only purpose the coal is crushed is for the Respondent's ease of loading. Stated another way, the Respondent crushes the coal in furtherance of its own business as a loading dock and as an accomodation to itself to avoid the problems raised (1) by coal falling off the conveyor belt and (2) by large pieces of coal falling into the loading bin which would necessitate going into the bin and manually breaking up the coal so that it can be expeditiously transported by another conveyor belt on to the barges. It also appears from the interrogatories submitted as part of this record that crushing the coal enables a larger amount of the same to be placed in a given space on the barges. Since Respondent is paid on the basis of so many dollars per ton I would infer from this record that it would be economically feasible for Respondent to load as much coal as possible on to each barge. There is no evidence that Respondent contracts to either wash, dry out, or size coal. Respondent contracts with coal brokers only to accomplish the loading of coal delivered to its premises by trucks on to barges and perhaps on occasions to accomplish the reverse process of unloading material from barges and loading on to trucks.

For purposes of this proceeding, the evidence indicates that the coal is first delivered to Respondent's premises by trucks which unload the same in stockpiles located on Respondent's premises. The coal goes into a bin where it proceeds ultimately on to a conveyor which delivers it to a crusher which is approximately 5 feet wide, 6 feet long, and 6 feet high. I note that at one point the inspector indicated that its measurements were 6 feet in each of the three respects. The crusher does not have screens or grates which are customarily used to size the coal and the crusher used by Respondent is an American Ring Crusher which breaks the coal essentially into one size after which the coal moves on a

conveyor belt on to a barge. The first conveyor belt described in this process is 35 feet long, and it leads from the bin to the crusher. The second conveyor belt from the crusher to the barge is approximately 150 feet long. While the size of the coal so crushed by Respondent may be acceptable to power plants or perhaps other ultimate users of the coal as an energy source, there is no indication that this is part of the business service which Respondent sells to anyone, that is, the coal brokers, the coal mine operators who extract the coal in the first place, or the ultimate consumers thereof.

In addition to the coal, the only other material which Respondent receives, processes, loads, or unloads at its docking facility having any relevance to the question of whether or not it is a coal mine is tar pitch. This tar pitch is delivered to Respondent's premises in the form of a pellet and is dumped directly into the bin from which it goes directly on to the barge without being moved through the crusher. It is clear that no coal is crushed which is not put on barges and only on one occasion in furtherance of a special contract with a glass company, was any uncrushed coal loaded onto barges at Respondents dock. The Respondent, which I would interject here, is a Kentucky Corporation, does not mine coal nor does it or any of its stockholders or officers own any mineral interest. Nor does it purchase coal for resale as a coal broker. At the dock, the Respondent does not furnish equipment, such as the front-end loader, for handling of coal. The coal is handled and weighed by employees of the various brokers.

Respondent has been engaged in this process of loading coal since approximately 1975. It has operated the commercial dock, however, unloading other materials, since 1966. The facility for loading coal previously described was put in in 1975 and the crusher was an integral part of this system from the beginning. The system was originally put in because a company in West Virginia, described by Superintendent Manning as a group of attorneys, wanted a place to load coal. After Respondent installed the loading system, the arrangement fell through and a year and a half elapsed during which time the crusher and the other coal loading system was not utilized. Ultimately, Respondent, which initially wanted to lease this facility, went into the business of loading coal.

To repeat for the purpose of clarity, Respondent is not paid to crush coal, to store it, to wash it, to dry it, or to size it. Respondent's employees are not represented by United Mine Workers of America or any other union, and these

employees are esentially engaged in all the duties and responsibilities invoked by the Respondents construction business and it's commercial loading business.

On the basis of the foregoing, I concude that the crushing of coal, as well as the storage of coal, on Respondent's premises are clearly incidental to its only function of loading this coal on barges. If Respondent is engaged in the crushing of this coal and using its loading business as a guise to mask it's doing business as a coal preparation plant, it is certainly carrying this out with a great degree of success. I find no evidence whatsoever that this is the case. This is bolstered by the fact that at Respondent's facility during the movement of the coal from the stockpiles to its final unloading point on the barge, there are no screens or grates which would size the coal or remove the impurities. Such would also be necessary to "blend" coal for special purposes.

The statutory definition of coal or other mine obtained in section 802(h)(1) of the Act contains three concepts. The first concept provides that a coal mine is an "area of land from which minerals are extracted in non-liquid form." The second concept provides for the inclusion of "Private ways and roads pertinent to such area." (This) refers back to the first definition which specifies that it's a given area of land from which minerals are extracted. The third concept refers to "lands, excavations, underground passage ways, shafts, slopes, tunnels and workings, structures, facilities, equipment, etc., on the suface or underground, used in either the work of extracting such minerals from their natural deposits used in either "the milling of such minerals or the work of preparing coal or other minerals, and includes custom coal preparation facilities." As indicated by MSHA's counsel, the question narrows to whether or not this Respondent is engaged in the work of preparing coal. The definition contained in section 802(h)(2) of the Act-which is confined to the purposes of titles II, III, and IV of the Act-is similar to that contained in the third concept of section 802(h)(1). After studying the same I conclude that again the same question arises, that is, whether or not the impact which Respondent's dock facility places upon the coal which is delivered there constitutes the work of preparing the coal so extracted. Section 802(i) defines the work of preparing the coal as, "The breaking, crushing, sizing, cleaning, washing, drying, mixing, storage, and loading of bitumonous coal, lignite, or anthracite and such other work of preparing such coal as is usually done by the operator of the coal mine."

First off, to state the obvious, it is clear that Respondent is not engaged in the extraction of coal, either underground or by strip mining, nor is its business purpose to prepare coal or to perform any of the functions which would be involved in preparing coal such as washing it, extracting the impurities, crushing it, sizing it, blending it, and the like. A contention and point made by MSHA is that the coal industry is "pervasively regulated." I do not construe this phrase to mean that all businesses which store or crush coal come within the purview of the Mine Safety and Health Act. For example, does the business which makes coal figurines or art objects become a coal mine because it stores coal or changes the size of the coal? Does a factory or other business which uses coal as a fuel, and which performs various physical functions on the coal, such as washing the coal, breaking the coal up, sizing the coal, and the like, become a coal mine? I do not think so. In order to accept the position of MSHA in this case and conclude that the commercial dock facility of the Respondent is a coal mine, the basis would have to be acceptable that the physical functions performed on the coal such as crushing, storage, loading, and the like, (alone) establish a business entity as a coal mine. I find that the reading of the statutory definition by MSHA in this case is hyper-technical. It represents a common fallacy in reasoning. To give an illustration, one may say a housecat is a four legged animal with two eyes and a tail, and an elephant is a four legged animal with two eyes and a tail; (that) some cats are gray, and some elephants are gray; and that accordingly, cats are elephants. * * * The fact that some person or business entity loads coal and stores coal and crushes coal and the fact that a coal mine may do the same thing, does not automatically make that person or business a coal mine. I have considered the excellent brief of MSHA in support of its motion for partial summary judgment in this matter wherein are cited numerous cases. Most of the cases cited, however, involved mine operators actually engaged in the removal of the coal from its place in the ground.

I find the storage and crushing of coal by Respondent is purely incidental to it's engagement in an enterprise entirely unrelated to coal mining, and that Respondent does not come within the definition of a coal mine as that term is defined in the Act. Respondent's operation is to be distinguished from the situation where a coal mine operator actually engaged in extraction, milling or preparing coal as an integral part of its operation on the same premises (or on contiguous land) engages in the storage and crushing of coal. This finding, of course, does not leave the Respondent without safety and health obligations since the decision only relates to the jurisdiction of OSHA and MSHA. * * *

As counsel for Respondent has pointed out, and I believe rightfully, the question is where the line should be drawn. There appear to be three physical phases which must be considered. The first being the actual mining or extracting of the mineral from the ground; the second being the shipment of the coal from the premises where it is mined or to the place where it is consumed, and, third, the final destination or the point of consumption by the users of the products. In this case there is no business ownership, contractual relationship or any other connection between this commercial dock enterprise and the first phase, that is, the extracting of the mineral from the ground or the milling phase. I believe the line should be drawn at that point. I thus find that Respondent is not covered by the Federal Mine Safety and Health Act of 1977, since it is not a coal mine. I therefore order that all the citations contained in the nine dockets involved herein, there being 16 such citations or orders, be vacated. There being no merit to MSHA's petition, these nine proceedings are dismissed.

The Government's position and the Respondent's position were very well presented by both counsel who did, I believe an above-par job of representing their clients in these proceedings. This case ultimately will become an important case for the Commission to decide with respect to jurisdiction.

ORDER

The 16 citations contained in the nine dockets involved herein are VACATED.

Michael A. Lasher, Jr., Judge

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 12 1981

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Civil Penalty Proceeding |
| | : | |
| | : | Docket No. YORK 79-99-M |
| Petitioner | : | A.C. No. 30-00013-05003 |
| v. | : | |
| | : | South Bethlehem Quarry and Mill |
| CALLANAN INDUSTRIES, INC., | : | |
| Respondent | : | |

DECISION

Appearances: William G. Staton, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Harry R. Hayes, Esq., Albany, New York, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., the "Act"), alleging four violations of mandatory standards. The general issues are whether Callanan Industries, Inc. (Callanan), has violated the regulations as alleged in the petition filed herein, and, if so, the appropriate civil penalty to be assessed for the violations.

I. Contested Citations

Citation No. 204924 charges a violation of the mandatory safety standard at 30 C.F.R. § 56.5-50, specifically alleging that the employee operating the Ingersoll type CM-2 air track drill, was exposed to 660 percent of the permissible level of noise. According to the charges, personal hearing protection (ear muffs) was being worn but feasible engineering or administrative controls were not implemented to eliminate the need for such protection. The citation was issued on September 18, 1978, and the operator was given until October 13, 1978, to abate the condition cited. On June 8, 1979, a section 104(b) withdrawal order */ was issued requiring that the cited drill be withdrawn from service because "no apparent effort was made by the operator to implement feasible engineering or administrative controls to protect the employee" while operating the drill. The drill was thereafter withdrawn from

*/ Withdrawal orders are issued pursuant to section 104(b) of the Act only after a violation has been cited under section 104(a) and has not thereafter been timely abated.

service. The validity of this withdrawal order is not in itself at issue in this civil penalty proceeding. Insofar as the order concerned a failure to abate the cited violation, however, it may be relevant evidence under section 110(i) of the Act in determining the amount of any penalty.

There is no dispute that the cited drill emanated noise levels above those permitted by the cited regulation, and indeed, that the drill emanated noise at 660 percent of the exposure permitted by that regulation. Callanan's principle defense rests upon subsection (b) of the cited regulation which provides in part as follows: "When employees' exposure exceeds that listed * * *, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table." MSHA contends that feasible engineering and administrative controls existed which the operator failed to implement. Callanan maintains on the other hand that the proposed engineering controls are not feasible, emphasizing that such controls are not economically viable under the circumstances.

In determining the feasibility of the proposed engineering controls, MSHA concedes that both technological and economic considerations are relevant. The term "feasible" as used in a similar noise standard promulgated in regulations under the Occupational Safety and Health Act (29 C.F.R. § 1910.95(b)(1)) has been judicially construed to include economic feasibility. RMI Company v. Secretary of Labor, et al., 594 F.2d 566 (6th Cir. 1979); Turner Company v. Secretary of Labor, 561 F.2d 82 (7th Cir. 1977). In determining such feasibility, the court in RMI approved of the cost-benefit analysis employed by the Occupational Safety and Health Review Commission (OSHRC) in the case of Continental Can Company, 1976-1977 CCH OSHD ¶ 21,009, 4 BNA OSHC 1541 (1976). The OSHRC stated therein:

> [T]hat the standard should be interpreted to require those engineering and administrative controls which are economically as well as technically feasible. Controls may be economically feasible even though they are expensive and increase production costs. But they will not be required without regard to the costs which must be incurred and the benefits they will achieve. In determining whether controls are economically feasible, all the relevant cost and benefit factors must be weighed. [Citations omitted.]

In setting forth a general test to be followed in determining economic feasibility, the court in RMI stated as follows:

> The benefits to employees should weigh heavier on the scale than the cost to employers. Controls will not necessarily be economically infeasible merely because they are expensive. But neither will controls necessarily be economically feasible merely because the employer can easily (or otherwise) afford them. In order to justify the expenditure,

> there must be a reasonable assurance that there will be an appreciable and corresponding improvement in working conditions. The determination of how the cost benefit balance tips in any given case must necessarily be made on an ad hoc basis. We do not today prescribe any rigid formula for conducting such analysis. We only insist that the Secretary, and the OSHRC on review, weigh the costs of compliance against the benefits expected to be achieved thereby in order to determine whether the proposed remedy is economically feasible.

RMI, supra at pages 572-573. I find this test to be relevant and reasonable and in the absence of precedent from the Mine Safety and Health Review Commission I find it appropriate to adopt to the facts of this case.

The court in RMI, again citing OSHRC decisions on point, further concluded that the Secretary has the burden of proving both the technologic and economic feasibility of the proposed controls in showing that a violation of the noise standard has occurred. RMI, supra at p. 574. See also Administrative Procedure Act, section 7(d), 5 U.S.C. § 566(d), and Diebold, Inc. v. Marshall, 585 F.2d 1327, 1333 (6th Cir. 1978). I find similarly that MSHA has that burden here. MSHA in this case did indeed go forward with its evidence in this regard in its case-in-chief.

The precise question before me then is whether MSHA has met its burden of proving the feasibility of the controls proposed in this case. I find that it has not. I am not satisfied, first of all, with MSHA's cost estimate for the proposed engineering controls. While superficially the estimate of $2,672.78 does not appear to be unreasonable or unacceptable, upon closer examination I find that that estimate is too imprecise to allow a proper economic analysis. The estimate did not include the cost of a muffler, certain labor costs and the cost of transporting the subject drill between upstate New York and Joplin, Missouri, where the proposed retrofitting was to be done. Without more accurate figures, a true cost-benefit analysis cannot be made.

In any event, regardless of the accuracy of MSHA's cost estimates, I do not find on the facts of this case any reasonable assurance that there would be an appreciable and corresponding improvement in working conditions as a result of the proposed controls. RMI, supra, pages 572-573. While the manufacturer of the subject drill, the Ingersoll-Rand Equipment Corporation, indeed concluded that it could not be muffled at all, even MSHA's expert conceded that he did not know what specific degree of noise reduction could be achieved from his proposed controls and could only speculate that a 5-decibel improvement might be expected based on MSHA's experience with muffling other types of drills. He further conceded that Callanan's drill would not, even after the proposed alterations, meet permissible noise levels but that Callanan would still be required to implement additional administrative controls the feasibility of which I also find suspect. The expert based his conclusions on

the assumption that the drill operator would not even occasionally be required to work near the drill--an assumption that is not supported by the credible evidence. Thus, even after the suggested engineering controls would have been implemented at substantial cost, Callanan's employees would nevertheless still have no doubt been required to wear personal hearing protection while operating the drill. Thus the benefits of the proposed controls, if indeed there be any, remain highly speculative. There is clearly no reasonable assurance that the thousands of dollars MSHA would have Callanan spend for the proposed controls would realistically produce any corresponding improvement in working conditions. Under the circumstances, I find that MSHA has failed in its burden of proving the feasibility of the proposed controls.

Inasmuch as personal protection equipment (earmuffs) was admittedly being utilized by the exposed employee in this case and since the uncontradicted evidence from the tests performed by Doctor Iandoli, an audiologist from the Albany Medical Center, demonstrates that the sound levels within the employee's muffs would under ordinary operating conditions be within that set forth in the relevant tables, I conclude that there has been no violation of the standard. Citation No. 204924 is therefore vacated.

Citation No. 205343 charges one violation of the standard at 30 C.F.R. § 56.9-2. That standard requires that equipment defects affecting safety be corrected before the equipment is used. Here it was charged that the automatic reverse signal alarm on the company's No. 2 haul truck was not operating. Callanan concedes that the backup alarm was not functioning as alleged but claims that the truck driver found the backup alarm to have been working properly before the truck was used that morning and, therefore, argues that there was no violation. Under this construction of the standard, if defects affecting safety are discovered after the equipment is being used then there is no violation. I reject such a strained and restrictive construction of the standard. It is clearly contemplated by that standard that defects affecting safety which occur during the course of equipment operation must also be corrected before the equipment is used any further.

I find that Callanan was only slightly negligent, however, in failing to detect the faulty alarm here. Truck drivers had been instructed to check the functioning of the alarm at the beginning of each shift and at lunchtime and were paid a bonus to do so. The alarm cited in this case had been functioning at the beginning of the shift that morning. No one seems to know when it ceased to function and it could have stopped only moments before detection by the inspector. Callanan immediately took the truck out of service and paid an employee overtime to correct the condition. I find from the credible evidence that there was only minimal employee exposure to the anticipated hazard but injuries from a truck backing into an employee could of course be fatal.

Citation No. 205347 charges one violation of the standard at 30 C.F.R. § 56.14-35. That standard prohibits the lubrication of certain machinery while it is in motion unless it is equipped with extended fittings. It is here

alleged that the grease fitting on the east side of the No. 2 conveyor tail pulley was not extended so that the employee could safely grease the pulley bearing while the pulley was moving. There is no dispute that an employee did in fact grease the moving tail pulley at that location at least once a day but there is some dispute over the hazard presented by such a practice. Based on the photographs submitted by the operator, and the credible testimony of MSHA inspector Rezniak, it is clear to me that the cited practice constituted a hazard and the violation was therefore proven as charged. The credible evidence shows that the employee greasing the fitting would be required to extend his arms over the existing guard and in close proximity to the moving belt and tail pulley. It is my conclusion that the grease gun could in fact become engaged in the pulley possibly dragging the employee into the pulley or that the grease gun could be thrown back by the moving pulley into the arms or face of the employee. Under the circumstances, arm and head injuries would be likely. I find also that the hazard should have been obvious to the operator, particularly since the grease fitting on the opposite side of the pulley was extended as required by the cited regulation. The operator stopped the belt immediately after it was cited and replaced the fitting with an extended one.

II. Uncontested Citation

Citation No. 205346 charged one violation of the standard at 30 C.F.R. § 56.12-25. That standard requires that all metal-enclosing or encasing electrical circuits be grounded or provided with equivalent protection. The parties proposed to settle this citation with a reduction in penalty to $50. As reasons for the settlement, MSHA proferred that the cited ungrounded equipment was being used in a dry area, making it quite unlikely that the anticipated shock hazard would occur. It was further proferred that even should a shock occur it would be minimal, not causing serious injuries. As to all citations in this case, in addition to the negligence and gravity involved, I have considered evidence as to the size of the operator, the history of its violations and the demonstrated good faith of the operator in attempting to achieve rapid compliance. Under the circumstances, I find that the agreed penalty of $50 is acceptable.

ORDER

Citation No. 204924 is VACATED. The following penalties totaling $475 are to be paid within 30 days of the date of this decision.

| Citation No. | Penalty |
|---|---|
| 205343 | $125 |
| 205346 | 50 |
| 205347 | 300 |

Gary Melick
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041
(703) 756-6225

JAN 13 1981

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | Petitioner | Civil Penalty Proceeding<br>Docket No. LAKE 79-219-M<br>A.O. No. 33-01400-05001-R |
| v. | | |
| MECCO, INC., | Respondent | Mecco, Inc., Pit and Mill |

DECISION AND ORDER APPROVING SETTLEMENT

Petitioner filed a motion to approve settlement in this matter for $200. The amount originally proposed was $1,000. For the reasons set forth below, the recommended settlement is approved.

Citation No. 362018 was issued to Respondent on April 18, 1979, for an alleged violation of Section 103(a) of the Federal Mine Safety and Health Act of 1977 (the Act). That provision, inter alia, gives authorized representatives of the Secretary of Labor "a right of entry to, upon, or through any coal or other mine" for the purpose of "making any inspection or investigation under this Act * * *." MSHA alleged that on April 18 and 20, 1979, an authorized representative of the Secretary was denied entry to Respondent's premises.

The settlement motion filed by Petitioner and supporting affidavit filed by Respondent did not deny that the violation occurred. However, these documents asserted that the proposed settlement is warranted for several reasons. The parties detailed a long history of jurisdictional confusion at Respondent's facility between MSHA and the Occupational Safety and Health Administration (OSHA). Respondent claimed that both agencies claimed jurisdiction over its facility. Respondent believed that MSHA's jurisdiction was "limited to underground and open face pit type surface mines." Additionally, in the event MSHA had jurisdiction over facilities such as Respondent's, the company felt that the Supreme Court's decision in Marshall v. Barlow's Inc., 436 U.S. 307 (1978), required MSHA to obtain a search warrant before conducting inspections of mine property.

On August 3, 1979, Petitioner filed an injunctive action in the United States District Court for the Southern District of Ohio in an attempt to restrain Respondent from interfering with MSHA inspections at its site. After a series of conferences between the parties, a consent order was

approved by the Court in which Respondent agreed to permit MSHA inspections "upon and through those portions of its operation subject to MSHA jurisdiction," and not "interfere with, hinder or delay" such inspections. Respondent paid approximately $2,000 in attorney's fees in connection with this court case.

As this civil penalty case proceeded, Respondent repeatedly stated that it was under the impression the consent order entered in District Court had resolved this matter. In various conference calls between Respondent's president, MSHA's counsel, and the undersigned administrative law judge, Respondent was apprised that this is a separate proceeding from the District Court litigation. At this point, the parties proposed the $200 settlement.

The settlement motion and affidavit detailed the history of this case and Respondent's relationship with MSHA. The motion reviewed the various court decisions on the warrantless inspection issue, and highlighted the confusion and split of authority which faced Respondent when the subject inspections were attempted. Additionally, the motion discussed the jurisdictional disputes between MSHA and OSHA which had not been resolved as of the date of the subject inspection attempts. Finally, the motion discussed the six criteria in Section 110(i) of the Act. It is noted that Respondent is a small operator with no prior history of violating either MSHA regulations or Section 103(a) of the Act. The gravity of the offense is said to be moderate, and payment of the recommended settlement will not have any effect on the company's ability to remain in business. The parties further stated that Respondent's negligence was slight in view of the conflicting case law on the warrantless inspection issue and the jurisdictional dispute between MSHA and OSHA which existed at the time in question. Finally, the motion stated that the consent judgment in the District Court proceeding demonstrated Respondent's good faith in this matter.

In light of these factors, as well as the fact that Respondent has already paid almost $2,000 in attorney's fees in connection with the injunction action, I believe the proposed settlement should be approved.

ORDER

Respondent is ORDERED to pay $200 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 13 1981

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| SHARON A. PACE, | : | Complaint of Discrimination, |
| Complainant | : | Discharge, or Interference |
| v. | : | |
| | : | Docket No. SE 80-113-D |
| CONSOLIDATION COAL COMPANY, | : | |
| Respondent | : | Matthews Mine |

DECISION

Appearances: Dorothy B. Stulberg, Esq., Mostoller & Stulberg, Oak Ridge, Tennessee, for Complainant;
Louis R. Hagood, Esq., Arnett, Draper & Hagood, Knoxville, Tennessee, for Respondent.

Before: Judge Melick

This case is before me upon the complaint by Sharon A. Pace pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging that she was unlawfully discharged by Consolidation Coal Company (Consolidation). A hearing was held on November 13, 1980, in Knoxville, Tennessee, at which both parties, represented by counsel, appeared and presented evidence.

The issue in this case is whether Ms. Pace was unlawfully discharged by Consolidation in violation of section 105(c)(1) of the Act because of her alleged safety-related activities at Consolidation's Matthews Mine. Section 105(c)(1) reads in part as follows:

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

If the complainant proves by a preponderance of the evidence that she was engaged in a protected activity and that her discharge by the operator was motivated in any part by the protected activity then she has established a prima facie case under this section of the Act. Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 14, 1980).

It is undisputed that Ms. Pace, a general laborer at the Matthews Mine since July 31, 1978, was discharged from her job on March 28, 1980. She alleges in her pleadings that the discharge was motivated by the fact that she had been interviewed by an MSHA inspector at her home on February 22, 1980, in the course of his investigation of an alleged safety violation at the Matthews Mine. For purposes of this decision, I need not determine whether such activity is protected under section 105(c)(1) since I do not find from the credible evidence of record that Ms. Pace's discharge was motivated in any part by that alleged activity. Indeed, Ms. Pace conceded in her testimony that she had no evidence, and in essence could not therefore prove, that any company official had any knowledge at the time of her discharge, that she had been so interviewed by the inspector. 1/ Ms. Pace appears to suggest that although she has no evidence that any company official was aware at the time of her discharge of the February 22 interview, that administrative or official notice should be taken to establish that fact and presumably to also establish that her discharge was motivated by that fact. Not even the concept of official notice would, however, permit the creation of facts which have not been shown to have any existence. McCormick's Law of Evidence, Second Edition, 1972, § 357.

The only affirmative evidence on point comes from the testimony of the Consolidation officials who testified at hearing. The testimony of mine superintendent Ron Smith, the person who made the decision to discharge Ms. Pace, is particularly significant. That testimony, which I find to be completely credible, confirms that the official responsible for discharging Ms. Pace did so without knowledge of the alleged confidential interview Ms. Pace had with the MSHA inspector on February 22, 1980. It follows that Complainant's discharge could not have been motivated in any part by that alleged protected activity. Complainant has thus failed in her burden of proof. Pasula, supra.

I observe that, in any event, Complainant's discharge by Superintendent Smith on March 28, 1980, was the direct result of her committing an admittedly unprotected and dischargeable offense, i.e., sleeping on the job. As to this event, I accept the credible testimony of Mack Jones, a foreman for Consolidation for over 10 years. Jones testified that around 1:30 or 2 in the morning of March 28, as he was walking along the belt line, he saw a

1/ Ms. Pace observed at hearing that she was also interviewed by the inspector on January 15, 1980, inside the mine, but conceded that all the other miners on her section were similarly interviewed and she admits that only her confidential interview with the inspector on February 22, 1980, sets her apart from the others.

miner's light shining at the roof. As he moved closer, he saw someone leaning back against the rib with her eyes closed. He recognized that person as Complainant Pace. He watched her for a short time, concluded that she was asleep, then shined his light in her eyes a few times. She "jerked her head" and woke up. She admitted to Jones that she had been sleeping. Jones thereupon called outside to the mine office and set up a meeting with Superintendent Smith. According to Jones, Pace admitted several times at that meeting that indeed she had been sleeping. James Keller, Supervisor of Employee Relations, as well as Smith corroborated that Pace had indeed admitted sleeping on the job. It was at this time that Smith discharged Ms. Pace.

At hearing in this case, as at her arbitration hearing, Pace denied that she had been sleeping and denied admitting at the meeting in Smith's office that she had been asleep. In assessing the credibility of Complainant's testimony, the analysis given of her statements at the arbitration proceeding by arbitrator Thomas Phelan is worthy of consideration. See Pasula, supra, regarding the weight to be given such a determination. Phelan's analysis was as follows:

> As to the proof of the charge that the Grievant [Ms. Pace] was asleep, the case is a difficult one because there were only two people present when the offense was alleged to have been committed. One of them was the foreman and the other was the Grievant. That type of situation makes the credibility of the witnesses all important and requires that all of the surrounding circumstances be carefully examined to determine whether they lend support to either party's position. In the present case, the testimony relevant to the surrounding events on March 28 support the company's position. There was no question that there was a rule against sleeping in the mine, that the Grievant was aware of the rule and aware that she would be taken out of the mine if she was caught sleeping. Knowing that, she still put herself in a position where she could reasonably be assumed to be asleep by stretching out with her head back and not moving at all even when she said that she knew she was being watched by someone. Having assumed the position of someone asleep, it was entirely reasonable for the foreman to conclude that she was asleep. Then, when the foreman asked her, or even told her, of his conclusion, she did not deny it but just followed him out of the mine. Even if the Grievant had not admitted to being asleep at that point, the lack of a denial of the charge under the circumstances takes on significance.
>
> When the Grievant and foreman met with the superintendent there was a discussion of what happened in the mine and the testimony about that discussion is somewhat conflicting as would be expected. The company witnesses testified that the Grievant admitted twice that she had been asleep but the Grievant's testimony was to the effect that she denied having

made such admissions. However, at the 24-48 hour meeting, she concededly did not remember what she had said at the previous meeting and that concession weakens her testimony considerably because it makes it appear that her position was changing after she knew that the company was going to go forward with the discharge. Nobody comes to an arbitration hearing with a greater presumption of credibility and all of the testimony has to be weighed in light of the surrounding circumstances. Here, the circumstances support the testimony of the company's witnesses and their testimony was entirely believable. I find as a fact, therefore, that the Grievant actually was asleep in the mine at least for a short period of time.

After making my own independent evaluation of the evidence I find that I am in complete agreement with Arbitrator Phelan's considered analysis of credibility. I conclude therefore that indeed Ms. Pace was sleeping on the job. This offense admittedly being a dischargeable one independent of any protected activity, it is clear for this additional reason that the complaint herein must fail. The complaint is accordingly DISMISSED.

Gary Melick
Administrative Law Judge

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

JAN 13 1981

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, | CIVIL PENALTY PROCEEDING |
| v. | DOCKET NO. CENT 79-392-M |
| TEXAS LIME COMPANY, DIVISION OF RANGAIRE CORPORATION, Respondent. | A/O NO. 41-00072-05004 F |
| | MINE: Texas Lime Plant No. 2 |

DECISION

APPEARANCES:

Eloise Vellucci, Esq.
Office of the Solicitor
United States Department of Labor
555 Griffin Square Building, Suite 501
Dallas, Texas 75202,

For the Petitioner,

William R. Anderson, Jr., Esq.
Anderson & Anderson
P. O. Box 486
Cleburne, Texas 76031,

For the Respondent

BEFORE: Judge Jon D. Boltz

STATEMENT OF THE CASE

The Petitioner filed a complaint proposing that a penalty be assessed against the Respondent for its alleged violation of 30 CFR 56.14-1.[1] The cited regulation was issued under authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978). Attached and incorporated into the complaint was a copy of the citation dated February 19, 1979, in which the following was written:

> "There was a 72-inch section of steel cover missing from over the feed conveyor head pulley for the No. 5 storage bin, and an employee was fatally injured when he was caught in the conveyor."

---

1/ Mandatory. Gears; sprockets; chains; drive, head, tail, and take-up 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.

In its answer, the Respondent denies that there was a violation of the Act as alleged. It further affirmatively alleges, inter alia, that the deceased employee, on his own, and in violation of specific instructions, climbed to the area of the conveyor during inclement weather consisting of ice and sleet, and may have removed the 72-inch section of steel cover from over the conveyor belt and head pulley in order to get to the area where the conveyor belt was blocked.

## FINDINGS OF FACT

1. In the course of the operation of its business, Respondent's employees operate a vertical bucket elevator which carries crushed limestone used for the purpose of making quicklime and hydrate lime. The bucket travels vertically for a distance of approximately 60 feet, to a point where the material drops onto a horizontal conveyor belt. The conveyor belt then carries the material for a distance, to where it drops from the end of the conveyor belt into a large surge bin or tank.

2. Access to the top of the surge bin, where the conveyor belt delivers the rock, is by means of an attached metal ladder which extends down to ground level.

3. At the time of the accident, the entire length of the horizontal conveyor belt was covered by a rounded metal cover attached to the metal framework which supports the conveyor belt itself, except for the last section, which was 72 inches in length, extending from the head pulley back to the last metal cover over the conveyor belt.

4. On the night of the accident, February 16, 1979, the decedent told two fellow workers that he was going up to the surge bin in order to throw some dry dust on the head pulley because the conveyor belt was slipping during a rain and sleet storm.

5. The decedent's body was later discovered on its back on top of the conveyor belt with the left arm caught between the belt and the head pulley. The decedent's skull was fractured when it came into contact with the rounded metal rim located over the head pulley. The metal rim was a support for the 72-inch section of the conveyor belt cover, which was not in place at the time of the accident.

6. There were no eye witnesses to the accident.

7. After the accident, the metal cover or guard was found tied to a corner post on the work platform surrounding the head pulley and conveyor belt area where the accident occurred.

8. If the 72-inch section of the rounded conveyor belt cover or guard had been in place, decedent could not have been pulled in and on top of the belt the way he was, even if his arm had been caught in the belt.

9. The Respondent promptly abated the citation the day it was issued, February 19, 1979, by replacing the cover and welding it on over the conveyor belt. An extra open grill grid was installed across the bottom of the welded cover so that no one could reach into the conveyor belt.

10. The Respondent has a history of 14 assessed violations in the twenty-four month period preceding February 1979.

11. The Respondent employs approximately 100 persons, who collectively work approximately 814,472 man hours per year.

12. A monetary penalty would not impair Respondent's ability to continue in business.

## ISSUES

Three issues are presented:

1. Was the head pulley a moving part that might be contacted by persons and might cause injury?

2. If the head pulley should have been guarded and if the deceased employee himself removed the metal cover causing the head pulley to be unguarded just prior to the fatal accident, is the Respondent responsible for a violation of the cited regulation?

3. If the Respondent is found to have violated the regulation, what amount of penalty assessment should be ordered to be paid by the Respondent?

## DISCUSSION AND CONCLUSIONS

The head pulley is specifically mentioned in the cited regulation. It must be guarded if, while in motion, it might be contacted by persons and might cause injury. Admitted into evidence were photos and a drawing of the location where the fatality occurred. They show a work platform surrounding the area where the employees could walk once the area was reached by means of climbing the vertical metal ladder attached to the surge bin tank from ground level. Since workers would be expected to be in the area on the platform, it would be expected that they might come into contact with the head pulley and be injured thereby, unless the head pulley was guarded. Accordingly, I conclude that the head pulley should have been guarded.

The evidence is undisputed that the guard or metal cover was not in place when the accident occurred. The evidence is inconclusive as to whether the metal cover was off or in place when the decedent reached the area of his subsequent death. The MSHA inspector testified that he assumed the metal cover was not in place over the head pulley and conveyor belt before the decedent climbed to the area, because if the cover had been in place, the head pulley would not have gotten "so wet" from the rain and sleet, and thus would not have been slipping. On the other hand, the Respondent's witness testified that even with the belt cover in place there had been problems in the past with the belt slipping during extreme weather

conditions, such as freezing rain. Therefore, I find the evidence inconclusive as to the point of whether the metal cover guard was or was not in place before the decedent climbed to the conveyor belt on February 16, 1979. The decedent may have removed the cover himself in an attempt to get the conveyor belt to move properly. However, regardless of whether or not the guard was in place when the decedent arrived, it nevertheless was not in place when he died. Thus, the head pulley, for whatever reason, was not guarded in compliance with the cited regulation at the time of the decedent's death. The evidence also shows that it was very easy to remove this particular last 72-inch section of metal cover. As originally installed, the cover was bolted into position by four bolts, one on each corner. However, by the time of the accident, the cover was merely wired on and the bolts were no longer being used. Also, the decedent's supervisor admitted that he knew of the practice of employees in throwing dry dust or calcium on the pulleys to "get the belt going."

The Respondent argues in its post hearing brief that the decedent went to the platform area on his own and against the specific instructions of the supervisor. The decedent's station of work was at ground level and his duties did not require him to go to the top of the tank or to the belt conveyor where it emptied into the tank. Thus, the Respondent argues that there was no violation of the cited regulation because the decedent's own misconduct or negligence was the proximate cause of the accident. Respondent's argument overlooks the fact that the Federal Mine Safety and Health Review Commission has held that an operator's liability is not conditioned upon fault. The operator is required to see that violations do not occur, and if violations do occur, he is held liable. Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Eaton Sand and Gravel Company, (Docket No. PIKE 79-119 PM, June 25, 1980, Final Order August 4, 1980).

It is undisputed in the evidence that the decedent climbed to the top of the surge tank on his own and without the approval of his superior. His supervisor testified at the hearing that he instructed the decedent not to climb to the surge tank because it was dangerous and the ladder was frozen over with ice. I find that Respondent's evidence supports its pleading which affirmatively alleged employee misconduct, and I find this evidence mitigating in regard to the penalty to be assessed.

The citation should be affirmed.

## ORDER

The citation alleged herein is AFFIRMED and the Respondent is ordered to pay a civil penalty of $2,500 within 30 days of the date of this Decision for the violation of 30 CFR 56.14-1, as alleged.

Jon D. Boltz
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 14 1981

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceeding |
| | : | Docket No. LAKE 80-207 |
| | : | A.O. No. 33-01070-03066V |
| v. | : | |
| | : | Allison Mine |
| YOUGHIOGHENY AND OHIO COAL COMPANY, Respondent | : | |

DECISION

Appearances: Linda Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner;
Robert C. Kota, Esq., Youghiogheny and Ohio Coal Company, St. Clairsville, Ohio, for Respondent.

Before: Judge Edwin S. Bernstein

On November 19, 1980, I conducted a hearing pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 801 et seq., and 29 C.F.R. § 2700.50 et seq., and issued the following decision from the bench:

> My bench decision is as follows: On August 15, 1979, Gary R. Gaines, an authorized representative of the United States Secretary of Labor, issued Respondent Order of Withdrawal No. 825305, pursuant to Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977.
>
> The order alleged a violation of the mandatory safety standard at 30 C.F.R. § 75.1100-3. The order read:
>
> > The firefighting equipment was not maintained in a usable and operative condition along the No. 3 main haulage track of main east, between the Nos. 1 and 65 crosscuts, a distance of 4,000 feet. Only two water outlet valves were found to be in a usable and operative condition. Two outlet valves found were not functional. The rest of the outlet valves could not be found because they were completely covered with stone and coal, which had fallen from the roof and ribs.

The order referred to a condition in Respondent's Allison Mine in Beallsville, Ohio, on August 15, 1979.

MSHA's Assessment Office recommended the assessment of a penalty of $1,000 for the alleged violation. Respondent challenged the validity of the order and assessment of penalty. At the hearing today, the parties stipulated, and I find the following:

1. At the time that the order was issued, the Allison Mine constituted a coal mine, and its products entered and affected interstate commerce.

2. From 1969 until and including the present time, Respondent owned and operated Allison Mine.

3. Respondent and every miner employed in Allison Mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977 (the Act).

4. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

5. During calendar year 1979, Allison Mine produced 527,843 tons of coal and overall, Respondent produced 1,490,929 tons of coal. It is accurate to conclude that based upon this, Respondent is a medium-sized coal producer. The Secretary of Labor characterized Respondent as a medium-to-large producer, and Respondent characterized itself as a medium-to-small producer. I find that it is a medium-sized producer.

6. On or about August 15, 1979, Respondent produced 300 or more tons of coal per shift.

7. As indicated by Exhibit G-1, a computer printout during the two-year period from August 16, 1977, to and including August 15, 1979, Respondent paid for 741 violations of the Act. The parties stipulated, and I find, that this is a moderate history of violations of the Act and its regulations.

8. The violation alleged in the order was abated in good faith.

MSHA contends that at the time and place of issuance of the withdrawal order in question, Respondent violated the mandatory safety standard at 30 C.F.R. § 75.1100-3. That standard reads: "All firefighting equipment shall be maintained in a usable and operative condition. Chemical

extinguishers shall be examined every 6 months, and the date of the examination shall be written on a permit tag attached to the extinguisher."

The alleged violation is specifically based upon a violation of the standard at 30 C.F.R. § 75.1100-2(c). Subparagraph (1) of that section reads:

> In mines producing 300 tons of coal or more per shift waterlines shall be installed parallel to all haulage tracks using mechanized equipment in the track or adjacent entry and shall extend to the loading point of each working section. Waterlines shall be equipped with outlet valves at intervals of not more than 500 feet, and 500 feet of firehose with fittings suitable for connection with such waterlines shall be provided at strategic locations. Two portable water cars, readily available, may be used in lieu of waterlines prescribed under this paragraph.

Mr. Gary R. Gaines, the MSHA inspector who issued the order, testified for Petitioner. Paul Wright, the Allison Mine's foreman, and John Scopel, Youghiogheny and Ohio Coal Company's safety and security manager, testified for Respondent.

Inspector Gaines stated that on August 15, 1979, he inspected the No. 3 main haulage track of main east, between the No. 1 and No. 65 crosscuts at the Allison Mine. The distance between the No. 1 and No. 65 crosscuts is approximately 4,000 feet, and is intersected by 65 crosscuts.

He found only four outlet valves. Two of these valves were found to be in a usable and operational condition. The other two were not usable and operational. He could not find any other outlet valves. He concluded that these were buried by stone and coal that had fallen from the ribs. He testified that 30 C.F.R. § 75.1100-2(c) required outlet valves at intervals of not more than 500 feet, and that for this distance of approximately 4,000 feet, at least eight valves were required. He stated that he found no portable water cars in the area.

He testified that the haulage tracks were used to haul supplies, men, and materials, but were not used to haul any coal. He issued the order of withdrawal at 11:05 a.m. At about 2:05 p.m., he modified the order to allow resumption

of activity, because one water car had been brought onto the scene. He terminated the order on August 22, 1979, because Respondent then had two portable water cars.

During Mr. Gaines' testimony, the parties stipulated that there was a belt line parallel to the haulage tracks approximately 48 feet distant. Inspector Gaines stated that of the 65 crosscuts that intersected the length of the haulage track in question, only nine were passable. The others all were not passable because of coal and rock that had fallen from the roof and ribs and blocked passage through the crosscuts.

On cross-examination, he acknowledged that there was a portable fire extinguisher on the jeep that he used, and there may have been a second portable fire extinguisher in a vehicle in the area. He stated that there was loose coal along the track, but the area had been rock dusted.

He testified that the condition in question was especially serious because he found an excessive amount of air velocity along the track in question. He found between 270 and 322.5 feet per minute of air velocity upon testing with an anemometer. He indicated that another safety standard, 30 C.F.R. § 75.327-1 prohibits velocity in excess of 250 feet per minute, and that such excessive velocity could increase the spread of fire. He stated that among materials carried along the haulage track was hydraulic fluid in drums, some types of which are flammable.

Mr. Wright testified that there were adequate water outlets along the belt line. He stated that he believed that 35 crosscuts between the length of haulage track in question and the parallel length of belt line were open. However, on cross-examination, he admitted that some of these 35 crosscuts did not have bolted roof above them. He stated that there were two portable rock dusters and one foam machine in the area, and that all vehicles carried 10-pound fire extinguishers and some vehicles carried 15-pound extinguishers, and that a foam car, which was quite effective in fighting fire, could reach the No. 1 crosscut in about three to four minutes and could reach the No. 65 crosscut in about eight to 10 minutes. He admitted that wood products and oil, which were carried along the haulage track, could ignite and burn.

He stated that the area had been well rock dusted. He stated that although at the time that the order was issued the air velocity was quite high as the inspector testified, Respondent was in the process of buying mine doors, which

would and subsequently did bring the air velocity down to acceptable limits.

He further testified that in the event of a fire, air velocity could be short circuited by the installation of stops or check curtains. He testified that on August 15, 1979, he saw no black areas on the track. This indicated that rock dusting was performed in a satisfactory manner. He stated that he had worked at the mine for four years and that although outlet valves had been installed along the length of the track in question, they were not maintained during the four years that he was there.

John Scopel testified that he felt that subsection (c) of 30 C.F.R. § 75.1100-2 referred to coal haulage tracks, since the criteria of mines producing 300 tons or more were used. He stated that the more coal you haul on the track, the more you need firefighting equipment. He testified that the biggest hazard in igniting a fire is coal dust in suspension, combined with sparks of energized electrical equipment, such as trolley wires. On cross-examination, he conceded that the more coal you mine, the more supplies you transport to the face and the more traffic you have along a haulage track such as this.

Counsel for Respondent contended that 30 C.F.R. § 75.1100-2(c) applies only to haulage tracks used for hauling coal, and that since in the Allison Mine the tracks in question do not haul coal, Respondent need not comply with that section. He stressed that subsection (b) of the standard covered belt conveyors, and that a belt conveyor was used in this mine to transport coal.

I disagree with this contention. I think the plain meaning of this language is that all haulage tracks using mechanized equipment in the track or adjacent entry are covered. The word "all" was used. I am also guided by the fact that this statute and the regulations enacted thereunder are remedial in nature, and remedial legislation should be liberally interpreted.

The fact that subsection (b) sets forth standards with respect to belt conveyors does not detract from the fact that similar requirements are mandated with regard to haulage tracks. Had it been intended that only coal haulage tracks were to have been covered by subsection (b), that could easily have been indicated in that subsection. The fact is that the word "all" was used.

I therefore find that Respondent violated this subsection, and the standard at 30 C.F.R. § 75.1100-3. That latter section required that all firefighting equipment be maintained in a usable and operative condition, and, pursuant to the requirements of subsection (c) of 30 C.F.R. § 75.1100-2, the equipment there was not maintained in a usable and operative condition. The parties have stipulated that the mine in question produced 300 tons or more of coal.

I find that this haulage track in question, even though it hauled supplies, equipment, and men, and not coal, was covered. The testimony is not challenged that the distance in question, approximately 4,000 feet between the No. 1 and No. 65 crosscuts, lacked outlet valves at intervals of not more than 500 feet. There was no dispute to the inspector's testimony that he found only two operative valves, and that at least eight should have been provided in operative condition.

Furthermore, it is not disputed that there were no portable water cars in the area on August 15, 1979. Therefore, Respondent violated these provisions as alleged. I also find that the issuance of the order of withdrawal, pursuant to Section 104(d)(1) of the Act was appropriate. That section indicates that such an order should be issued if an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and that such violation is caused by an unwarrantable failure of the operator to comply with such mandatory health or safety standards.

I find that the operator should have known that it violated this standard. The haulage track had been provided with outlets in the past, but these were rendered inoperable, and many of them were buried by coal and rock. This indicates that, at least in the past, the operator contemplated using such a system. Although Respondent's counsel has effectively raised a question of interpretation of the standard, and has done a good legal job of arguing that point. If the operator had a question as to the interpretation as to the application of that standard, it could have and should have requested an interpretation of that standard from MSHA. There is no evidence that the operator attempted to clarify that provision.

Therefore, it should have known and it could have determined its responsibility, and its failure to do this constituted an unwarrantable failure as that term is defined in Section 104(d)(1) of the Act.

Having found a violation of the standard, the next question is the amount of penalty to be assessed. The criteria to be considered are contained in Section 110(i) of the Act. There are six criteria: (1) Size of the operator. I find that the operator is a medium-sized coal producer. (2) History of previous violations. I find that Respondent had a moderate history of previous violations. (3) Whether the operator was negligent. For the reasons that I have indicated, I find that the operator was negligent. (4) The effect on the operator's ability to continue in business. Although the operator has contended that it has lost approximately five million dollars, or will lose this amount for the calendar year of 1980, the operator has offered no evidence to support the contention that the assessment of a penalty in the approximate amount recommended by the Assessment Office would affect its ability to continue in business. The burden of proof on this issue is on the operator. I therefore find that the assessment of such a penalty would not affect the operator's ability to continue in business. (5) The demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. In accordance with the parties' stipulation, I find that the operator did abate this violation in good faith.

The sixth and last criterion has to do with gravity. With regard to gravity, the length of the track in question was 4,000 feet covering 65 crosscuts, a substantial length of track. The evidence is that there was loose coal about, that there was excessive velocity in the area, which would tend to blow coal dust about, and which could aggravate and increase the spread of a fire. In terms of gravity, the fact that this track was being used to haul men was quite serious, in that men trapped in a fire in this area could be killed or seriously injured. On the other hand, the area was well rock dusted. There was one and perhaps two portable fire extinguishers on vehicles in the area, and Respondent's evidence that there were two portable rock dusters in the area is not disputed. Additionally, a foam car could have reached the area in between three and 10 minutes. As to the evidence that there were waterlines along the belt conveyor, which was 48 feet parallel at its closest point, I do not find that this would have been too helpful, since most of the intersections between the belt conveyor and the haulage tracks were not readily accessible.

I find quite credible the inspector's testimony that only nine of those crosscuts could be safely traveled. The operator's witness seemed less certain of the point, and I credit the inspector's testimony.

Upon consideration of all of these criteria, I assess a penalty in the amount of $750 for this violation, and I uphold the withdrawal order that was issued. I will issue a written decision upon receipt of the transcript, accompanied with an order. Respondent will be required to pay the penalty assessed within 30 days of service of that written decision and order.

I hereby affirm this bench decision.

ORDER

Respondent is ORDERED to pay $750 in penalties within 30 days of the receipt of a copy of this Order.

Edwin S. Bernstein
Administrative Law Judge

Distribution:

Linda Leasure, Attorney, Office of the Solicitor, U.S. Department of Labor, 881 Federal Office Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

Robert C. Kota, Attorney for The Youghiogheny and Ohio Coal Company, P.O. Box 1000, St. Clairsville, OH 43950 (Certified Mail)

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 14 1981

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Civil Penalty Proceeding |
| | : | |
| | : | Docket No. LAKE 79-218 |
| Petitioner | : | A.O. No. 33-03300-03005 I |
| v. | : | |
| | : | Ann Strip No. 1 Mine |
| W. B. COAL COMPANY, | : | |
| Respondent | : | |

## DECISION

Appearances: Linda Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner;
R. Henry Moore, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Edwin S. Bernstein

On November 20, 1980, I conducted a hearing in Pittsburgh, Pennsylvania, to determine whether Respondent violated mandatory safety standards as alleged in two citations issued pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977 (the Act), and a withdrawal order issued pursuant to Section 107(a) of the Act.

The parties stipulated, and I find:

1. At the time that the citations and order were issued, Respondent operated, and continues to operate, the Ann Strip No. 1 Mine. This is a surface coal mine, the products of which enter and affect interstate commerce.

2. Respondent and the Ann Strip No. 1 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. I have jurisdiction over this proceeding.

4. During calendar year 1978, the mine produced 56,952 tons of coal and Respondent produced 118,476 tons of coal in all of its operations. Respondent has approximately 50 employees and is a small coal operator.

5. At all times pertinent to the issuance of the citations and order, Inspectors D. Ray Marker and Willard F. Poe were, and still are, authorized representatives of the Secretary of Labor.

6. Copies of the citations and order are authentic and were properly served upon Respondent. However, Respondent did not stipulate as to the truthfulness or relevancy of any statements in these documents.

7. The alleged violations were abated in a timely fashion. The operator demonstrated good faith in achieving abatement.

8. Respondent has a good history of prior violations.

9. The assessment of civil penalties will not adversely affect Respondent's ability to remain in business.

Richard J. Neal, Willard F. Poe, Lester R. Ohler, and D. Ray Marker testified for Petitioner. Melvin Anderson, Joseph Zalesky, Richard Lynch, George Pincola, and Max Sovell testified for Respondent. Alfred Haverfield testified for both parties.

Richard Neal testified that as of February 16, 1979, he had been employed by Respondent for about ten months. He was hired as a blaster, but he also operated drills, bulldozers, and pan vehicles. A pan vehicle is a track vehicle with blades which is used to spread and collect topsoil.

On the morning of February 16, 1979, Mr. Neal began work at 7 a.m. He had been operating a bulldozer for about 45 minutes when he broke a steering clutch and decided to switch vehicles. He did this without obtaining permission or informing anyone at W. B. He began operating a Model 631B pan vehicle, also known as a scraper. A scraper is equipped with a bowl, or pan, which collects dirt. The weather was cold that day, and it was drizzling freezing rain. Mr. Neal testified that he moved four or five loads of dirt along a particular road. In order to get to this road, Mr. Neal had to drive down a hill into a valley, and then up another hill. He did not recall whether there were berms 1/ on the side of the road at the time. On his last trip down the road, he turned the wheel to the right in order to make a turn. The road was icy and the machine started sliding to the left. Mr. Neal stated that he gave the machine a little more throttle, and when it regained its traction, it "shot across the other side of the road," hit an embankment, and flipped over.

When asked about the adequacy of the machine's brakes, Mr. Neal stated that when he started operating the scraper that day, the brakes felt inadequate to him. He also stated that by dropping the scraper bowl in the back of the machine, it was possible to stop the scraper without the brakes. He

1/ As defined in 30 C.F.R. § 77.2(d), a "berm" is "a pile or mound of material capable of restraining a vehicle."

added, however, that he was unable to do this at the time of the accident because he was carrying the bowl in a high position in order to clear a bump in the road. This made it impossible to drop the bowl quickly.

Mr. Neal admitted that he was not wearing a seatbelt at the time of the accident, but that the scraper was equipped with rollover protection.

He also said that he was generally assigned work by his foreman, Alfred Haverfield. He stated that Mr. Haverfield conducted safety meetings but Mr. Neal did not recall being instructed to wear a seatbelt. He did receive a safety booklet discussing the machine's operation, but he never read it.

On cross-examination, Mr. Neal testified that before February 16, 1979, he had operated the pan scraper for a couple of hours in November or December, 1978. He also operated it the previous July on a reclamation project. He said he had between 120 and 130 hours of experience operating a scraper for Respondent. Prior to coming to W. B., he had no scraper experience. At W. B., he spent most of his time operating a drill. When asked what he did with the safety manual he received, he said he probably threw it in a drawer at home.

Mr. Neal explained that he did not ask permission to use the scraper on February 16 because he did not see a supervisor nearby. He indicated, however, that there are radios on the site, including one in a nearby dragline. The radios could have been used to contact his supervisor or foreman. He stated that his foreman drove past him but he was not certain that the foreman saw him.

During cross-examination, Mr. Neal repeated that he knew about the bad brakes when he began work with the scraper. He also repeated that the machine could be stopped by dropping the bowl. He was asked about the bump which caused him to carry the bowl high, and indicated that he did not attempt to scrape it or smooth it out by dropping dirt.

Mr. Neal admitted to several inconsistencies between his testimony in this case and his testimony in a prior matter. He admitted that in previous testimony he had stated that he was instructed to keep the bowl where it could be used to stop the machine. He also had previously testified that he did not know if his wheels had locked up during the accident, while at this proceeding he testified that the wheels had to be spinning, although he did not see them spin. He said a vehicle such as this can be stopped on ice by lowering the bowl, but he added that the ice had been removed from this road early on the day of the accident, and he could have removed it himself with the scraper.

Alfred Haverfield was the mine foreman at the Ann Strip No. 1 Mine on February 16, 1979. He stated that he arrived at the mine around 6:15 or 6:30 a.m. After inspecting the road conditions, he ordered all road areas to be cleaned with dozers. He told Mr. Neal and George Pincola to do this.

They were instructed to cut the ice and muck and remove it from the area. He stated that he was not aware that Mr. Neal was operating a scraper, and that he did not see Mr. Neal that day until immediately after the accident. He did not recall how high the berms on the road were that day, but he disagreed with the suggestion that they were only six inches high. He could not recall whether the berm heights changed between February 16 and February 20, 1979. He testified that before February 16, 1979, W. B. tried to maintain berms approximately three feet high because the company had been advised by MSHA inspectors that a three-foot height would be adequate. Mr. Haverfield also stated that it is difficult to maintain berm heights because dirt constantly falls on a road. This causes the height of the road to increase relative to the height of the berms. An operator has to continually remove dirt from the road to maintain berms. If there is much dirt spillage, the operator may have to scrape the roads four or five times a day.

Mr. Haverfield testified that before each shift, mechanics inspect equipment visually and check the water and oil. He did not believe that they checked the brakes on this machine or that they usually check brakes before shifts because the machines are usually parked when they are checked.

He stated that the firm held weekly safety meetings, and that all employees were told to wear seatbelts. Before February 16, 1979, four or five employees had been fired for misuse and improper maintenance of equipment, mainly draglines. On cross-examination, he added that if an employee finds a defect in a machine, he is instructed to shut down the equipment and contact his foreman by radio. There are several radios in the area, including one in a dragline about 100 to 150 yards away from the accident site.

Mr. Haverfield reiterated that he did not give Mr. Neal permission to operate the pan scraper. W. B.'s policy is to forbid operators from changing machines without first notifying a foreman. Mr. Haverfield was in the process of bringing another man to the site to operate the scraper in question when he learned of the accident.

After the accident, Mr. Haverfield said he took Mr. Neal to the hospital. The men discussed the accident at that time. Mr. Neal told Mr. Haverfield that he had not been wearing a seatbelt, and that he had been carrying the bowl high. Normal procedure is to carry the bowl low. Mr. Haverfield stated that if Mr. Neal had carried the bowl low, he could have prevented the accident. Mr. Neal did not mention lack of brakes to Mr. Haverfield on the way to the hospital.

Mr. Haverfield also discussed Mr. Neal's prior experience with a pan scraper. Mr. Neal had previously spread topsoil in a reclamation area using this equipment, but that area had been relatively flat. On the morning of the accident, Mr. Neal was assigned to a dozer called a "push cat." Mr. Haverfield said he did not consider Mr. Neal to be an experienced scraper operator in the area he was working. He said the weather that morning was freezing rain, but no drying material had been dropped on the road.

Willard F. Poe, an MSHA coal mining inspector, inspected the W. B. site on February 20, 1979, along with Inspector D. Ray Marker. Mr. Poe found that the berms along the road where Mr. Neal had his accident were inadequate. He stated that a berm can be made of a mound of any material. The berm he observed was made either of soil or shale. The height of the berm ranged from six inches to 24 inches, and it ran for 50 to 60 feet along the road. MSHA's policy is that berms should be the height of the axle on the largest machine which travels the roadway. That would have been 42 inches for the berms in this area. He also stated that in this case both sides of the roadway were "outer banks," as that term is used in 30 C.F.R. § 77.1605(k). One side was the outer bank going in one direction, and the other was the outer bank going in the other direction. He therefore felt that both sides of the the road required berms.

On cross-examination, Mr. Poe stated that Mr. Neal's scraper was fully loaded at the time of the accident, and thus weighed about 50 to 60 tons. He did not know whether or not a berm of axle height would have restrained the scraper under the circumstances of this accident. He issued Citation No. 784603 for inadequate berms at 9 a.m. that day.

Leslie R. Ohler, another MSHA coal mine inspector, stated that he accompanied Inspector Marker on a visit to the hospital to see Mr. Neal on February 21, 1979. Mr. Marker conducted most of the interview with Mr. Neal. Upon leaving the hospital, the men determined that an imminent danger order would have to be issued for inadequate brakes on the scraper. They proceeded to the mine and inspected the scraper. They noted that some hydraulic hoses and air hoses were broken, and Mr. Marker told Mr. Ohler that an air valve leading to the scraper trailer had been turned off. This indicated to Mr. Ohler that no air was being pumped to the trailer. Mr. Marker also told Mr. Ohler that the push rods of the trailer's braking mechanism were inoperable. They were packed with ice and frozen dirt, and there was no indication that they had been moving. In Mr. Ohler's words, "There was no shiny place on it. It was rusted and sealed over." Mr. Ohler told Mr. Marker that he would have to issue the order, and Order No. 784405 was issued late that morning.

Inspector D. Ray Marker was MSHA's next witness. He stated that he visited the mine on February 21, 1979, with Inspector Ohler. They inspected the scraper which had been in the accident. Mr. Marker noted that the valve which supplied air to the rear brakes was "across line," or in the "off" position. He also noticed that several brake lines were severed, and that the gooseneck of the vehicle was cracked. He found frozen brown dirt around the push rods, and saw no shiny marks on the rods. This indicated to him that rods were not operating. He concluded that the rear brake system had been inoperative for "quite a while."

On cross-examination, he stated that during a preshift inspection, a qualified person should check equipment to see if it is safe. He stated that he did not know when the air valve was turned off on the vehicle, when the hoses were broken, or when the gooseneck was damaged. He could not state

whether or not these things happened during the accident. He also could not say whether the dirt that he found around the push rods accumulated during the accident or prior to it. He stated that it could have gotten there during the accident.

He stated that a pan scraper can be stopped by dropping the bowl, and on reasonably level ground, the brakes should be able to stop it. On a slope, however, it is more difficult for brakes to stop a scraper. This is especially true when the scraper is loaded. Speed can also affect the brakes' ability to stop the scraper. He said the grade on this road was about 14 percent, and that proper brakes could stop a scraper on such a road. He added that the bowl would be less useful on icy roads.

Mr. Marker stated that the violation was abated on June 11, 1979. This was the first time Respondent informed MSHA that the machine had been repaired.

On cross-examination, Mr. Marker stated that he and his wife own the land which W. B. mines and receive monthly payments from W. B. Mr. Marker first stated that he had no discussions with, or complaints about, W. B. concerning royalty amounts. However, he subsequently admitted that, in a previous proceeding, he had testified that he made such complaints. He explained that he had problems with the dates that he received the royalty checks. The checks sometimes came a day late, he said. He also had problems with W. B.'s watering the road in front of the property. He stated he once had an excellent relationship with W. B. Now, he described it as "better than poor," but not good. He stated, "It's not my fault." He denied that he had ever asked W. B. for a job.

Melvin Anderson, another scraper operator, was Respondent's first witness. He testified that he was sick on February 16, 1979, but on February 15, the day before the accident, he used the scraper in question. Asked about the condition of the vehicle's brakes, he stated, "They were, I guess, what you would call adequate brakes." He did not list the brakes as being bad on his timesheet, but he added that it is not his habit to use the brakes. Instead, he usually uses a hand lever to lower the bowl for stopping. He stated that the bowl can be raised as much as two feet when empty, but that when the bowl is full, he normally operates with the bowl six to eight inches off the ground.

Joseph Zalesky testified that at the time of the accident, he serviced and repaired heavy equipment, including the vehicle in question. He has had about 22 years of extensive experience in repairing this type of machinery. He stated that he now works for, and is part owner of, a company known as Rebuild, Inc. He was working at W. B.'s facility on the day of the accident.

Mr. Zalesky first saw the scraper shortly after the accident, when it was lying at the bottom of a pit. He uprighted the scraper with the help of dozers and a loader. He steered the vehicle as it was being pulled from the pit. Upon examining the brake gauge, he noticed that it had about 110 pounds

of pressure. The indicator was in the green, or satisfactory, area. He also noted that it had adequate braking power at the time to steer it. However, he noted that the gooseneck area of the vehicle had been damaged, and that several brake lines had been broken. He could not state whether or not the brakes were in good condition at the time of the accident. He was not able to test the brakes and determine whether some of these lines broke during the accident or had broken previously.

Mr. Zalesky also stated that he had repaired the vehicle in early February, and had found the brakes to be adequate at that time.

Richard Lynch, W. B.'s superintendent since it began operations 7-1/2 years ago, testified that he has 32 years of experience operating heavy equipment, including pan scrapers similar to the one at issue. He stated that he and Mr. Haverfield assign employees to their jobs, and that Mr. Neal was assigned to a Caterpillar bulldozer on February 16, 1979. Before the accident, he did not see Mr. Neal operating the scraper in question. He stated that the road was "generally smooth and frozen," and that freezing rain was falling at the time of the accident. In his opinion, the accident was caused because Mr. Neal was driving too fast and locked all four wheels when he applied the brakes and skidded. Mr. Lynch noticed some skid marks, and the scraper bowl was in a high position. He concluded that the wheels had locked as a result of braking because if they had not locked, he would have seen tread marks.

He also stated that a bowl should be carried no higher than necessary. By carrying the bowl low, the operator can stop quickly, as well as maintain a smooth road. He stated that the normal method of stopping such a vehicle is to drop the bowl slightly. Mr. Neal's big mistake was in carrying the bowl high. This created a high center of gravity and made the machine tip more easily. It also prevented him from lowering the bowl quickly to stop the vehicle. With respect to the bump that Mr. Neal testified prevented him from keeping his bowl low, Mr. Lynch stated that the bump could have been removed very easily, or else the operator could have filled up the area by dropping dirt. In Mr. Lynch's opinion, if Mr. Neal had dropped his bowl, he would have been able to stop the scraper.

Mr. Lynch testified that W. B. stressed maintaining berms, but he added that berms could change very quickly depending on the type of work which was being done. He stated that the company has tried to maintain berms at axle height since the accident. Before the accident, they were never told of a specific height. He stated that even if the berm in question had been axle height, the vehicle would have rolled over, and might have rolled over more than it did.

Mr. Lynch asserted that W. B. instructs its operators to wear seatbelts. This is because the company does not want MSHA to penalize it, and does not want its employees to be hurt.

He also stated that it is against W. B.'s policy for an operator to switch vehicles without permission. He would not have given Mr. Neal permission to use the scraper on the day in question. Caterpillar Tractor, the manufacturer of this vehicle, says it generally takes about a year for an individual to become proficient in the operation of a pan scraper. This is only an average, however. Some men take more time, and some take less.

He also stated that under the company's policies, if an operator finds his brakes to be inadequate, he is supposed to tell either his supervisor or a mechanic. Mr. Neal was within 200 feet of a dragline where there was a radio, and he could have informed someone before using the scraper.

Mr. Lynch also took issue with a statement made by Inspector Marker. He said Mr. Marker had asked him for a job, but was turned down.

On cross-examination, Mr. Lynch stated that on February 16, 1979, he arrived at work around 6:15 a.m. and inspected the work areas. He did not notice the bump on the road which Mr. Neal mentioned. He stated that the berms on the righthand side were about three feet high where the accident occurred.

He also said that he believes Mr. Neal had a total of four to five days of pan scraping experience. He explained that Mr. Neal worked the pan scraper one to two hours a day after his normal duties, which usually involved operating a drill. W. B.'s employees are paid based on the total number of hours worked, and the hourly rate on the highest paid machine worked. Since operating a scraper pays more than operating a drill, Mr. Neal would put in for a full day operating a scraper, even though he may have actually operated one for only one or two hours. Thus, although on the accident report Mr. Neal said he had about three weeks of experience operating a pan scraper, Mr. Lynch said that in terms of total hours he had no more than four to five full days.

Finally, Mr. Lynch testified that prior to February 16, 1979, he asked an MSHA inspector what was adequate height for berms. The inspector did not tell him, and Mr. Lynch concluded that "adequate" meant adequate to restrain a vehicle. He felt that three feet was an adequate height for a berm.

George Pincola, a bulldozer operator for W. B. and a union secretary, has worked for the company for over three years. When Mr. Neal was using the pan scraper, Mr. Pincola used a bulldozer to help load the scraper. He stated that he never switched machines without notifying a mechanic or foreman because this is against company policy and could be dangerous. He also stated that he never carries a bowl over six to eight inches off the ground because that way if he wants to stop suddenly he can easily drop the bowl. He stated that in operating this type of scraper, he never trusts the brakes. In his opinion, if Mr. Neal had dropped the bowl, he would definitely have been able to stop the vehicle.

Max Sovell, W. B.'s general manager, testified that his duties include both operating and safety responsibilities. He stated that W. B.'s relationship with Mr. Marker is not good. Mr. Marker has not been satisfied with W. B.'s method of mining, and he does not feel W. B. pays him large enough royalties. W. B. apparently pays Mr. Marker less than it pays two adjoining land owners, and Mr. Marker complained. Mr. Sovell said Mr. Marker once filed a complaint with the Office of Surface Mining which resulted in a citation being issued against W. B. Mr. Marker also complained about the timeliness of his monthly royalty checks, which are due on the 25th of each month. On one occasion, a check arrived on the 26th, and Mr. Marker told W. B. it had violated its lease and had to get off his property.

Mr. Sovell stated that it is the company's policy that employees are not supposed to switch machines without authorization. If an employee discovers a safety problem, such as inadequate brakes, he is supposed to immediately notify his supervisor or a mechanic. Furthermore, it is company policy to have all employees wear seatbelts and the company has a 10- to 20-minute safety meeting each week. Seatbelts and the unauthorized use of vehicles have been discussed at these safety meetings. Mr. Sovell testified that due to his violations of company rules, Mr. Neal's employment was terminated around March 19, 1979. He added that the damage to the scraper cost the company approximately $30,000, and that the company has fired other employees for damaging equipment.

He said he had never seen MSHA's inspection manual, in which the agency specified a height for berms, until about 30 days before the hearing, when his lawyers showed it to him. He also stated that between the accident and the inspection, nothing was done to reconstruct the berms.

Inspector Poe was recalled, and testified that on February 20, 1979, he saw W. B. stripping and working on the road in question. The height of the berms at that time varied between six and 24 inches.

Citation No. 784603

MSHA alleged that Respondent violated the mandatory safety standard at 30 C.F.R. § 77.1605(k). That standard reads: "Berms or guards shall be provided on the outer bank of elevated roadways." The citation read:

> The berms provided for the elevated haulage roadway were inadequate in that the berms ranged from 6 to 24 inches in height for a distance of approximately 50 feet in length. The axles for the Caterpillar 631B scrapers traveling this roadway measured approximately 42 inches in height. A serious non-fatal accident occurred on this roadway when a Caterpillar 631B scraper (Serial No. 13G3145) traveled off this elevated roadway and overturned.

I find that on February 20, 1979, Respondent was in violation of this standard. The road in question was an elevated roadway. Both banks could be

considered "the outer bank" because there were drops on both sides of the roadway. 2/ Although on February 20, 1979, when Inspector Poe issued the citation, there were berms along the road, I find that the berms were between six and 24 inches in height. I find Inspector Poe's testimony in this regard more reliable than contradictory testimony that the berms were 36 inches high. There was a lack of consistency among Respondent's witnesses with respect to the 36-inch height, and I was quite impressed by Inspector Poe's testimony. I thought he was much more knowledgeable about the height of the berms at the time. I also credit his testimony that there was work going on on February 20, when he was at the site.

I agree with Respondent that MSHA's requirement that berms be axle height, or 42 inches in this case, was not binding on W. B. because the company had no knowledge of the requirement. However, implicit in the standard is a requirement that the berms be of reasonable height to offer protection. This is clear from the definition at 30 C.F.R. § 77.2(d). Mr. Lynch testified that a satisfactory height, in his opinion, would have been three feet. Even if I accept this figure, I find that the height of the berms at the time the citation was issued was less than three feet. At points it was as low as six inches. Therefore, the berms were not of sufficient height. I note that Mr. Lynch testified that at the time of the accident, the berms were about three feet high, but I do not believe he testified that the berms were that height on February 20. Therefore, I find that the berms were not adequate on February 20.

The operator was negligent since it was aware that berms of six to 24 inches were unsatisfactory. However, I recognize that the height of such berms changes constantly, and I therefore find W. B.'s negligence was not great. As to gravity, inadequate berms can lead to an accident. I do not believe Mr. Neal's accident would have been prevented by berms 36 inches or even 42 inches high. I credit the testimony of Respondent's witnesses that Mr. Neal improperly operated his scraper, and probably would have been thrown off the road even if the berms were of satisfactory height. Nevertheless, the gravity here is reasonably serious.

I also note that the operator is a small operator, that it has a good history of prior violations and that it achieved rapid abatement of this violation. Therefore, I assess a penalty of $500 for this violation.

Citation No. 784404

This citation was issued for an alleged violation of the mandatory safety standard at 30 C.F.R. § 77.403a(g). That standard reads: "Seatbelts

2/ The Commission recently voted in an open meeting to affirm a decision by Chief Judge Broderick holding that both sides of a roadway could be considered the "outer banks." See 4 Mine Reg. & Productivity Rept. No. 42 at 1 (1980). As of this writing, the Commission has not issued a written decision in the case, MSHA v. Cleveland Cliffs Iron Co., Docket No. VINC 79-68-PM.

required by § 77.1710(i) shall be worn by the operator of mobile equipment required to be equipped with ROPS by § 77.403(a)." 30 C.F.R. § 77.1710(i) requires "[s]eatbelts in a vehicle where there is a danger of overturning and where roll protection is provided." The citation read: "Seatbelts were not being worn by the operator of the Caterpillar 631B scraper, Serial No. 13G3145. This condition was determined during a serious nonfatal accident investigation. The Caterpillar 631B scraper was equipped with a roll over protective structure referred to as ROPS."

The testimony of Mr. Neal and of Respondent's witnesses indicated that Mr. Neal was not authorized to operate the scraper, and he chose to operate the vehicle entirely on his own. This finding does not, of course, eliminate Respondent's liability. The actions of employees are attributable to their employers. Therefore, I hold that Respondent violated the standard. However, under these circumstances, I find that the operator's negligence was minimal. Therefore, I assess a penalty of $10 for this violation.

Order No. 784405

On February 21, 1979, Inspector Marker issued this order pursuant to Section 107(a) of the Act based upon a finding of imminent danger. The order read: "The Caterpillar 631B scraper, Serial No. 13G3145, was not equipped with adequate brakes (section 77.1605(b)). It was determined during a serious nonfatal accident investigation that at the time of the accident the scraper was being operated with inoperative brakes."

I find that this order was proper at the time it was issued. The evidence is clear and undisputed that when Inspector Marker examined the vehicle after the accident the brake lines were severed and the brakes were in a defective condition. Whether this occurred during the accident or previously does not matter. The fact is that unless this vehicle was repaired, it could not be used without placing the operator in imminent danger. Therefore, the order was appropriate.

The order also alleged a violation of 30 C.F.R. § 77.1605(b), which provides in part: "Mobile equipment shall be equipped with adequate brakes * * *." The additional question, therefore, is whether before the accident the operator was in violation of this mandatory safety standard, and if so, what civil penalty should be assessed.

The witnesses who testified about the brakes were Mr. Neal, Mr. Anderson, and Mr. Zalesky. Mr. Neal stated that in the course of his operation of the scraper, in which he made approximately four runs before the accident, he found the brakes to be poor. Mr. Anderson stated that on the day before the accident, the brakes were adequate. Mr. Zalesky stated that after the accident he found the brake pressure to be sufficient although the brake lines were broken in spots. The net effect of Mr. Zalesky's testimony is that he is in no position to state whether or not on February 16 the brakes were satisfactory. The only evidence that the brakes were not satisfactory was Mr. Neal's testimony. In contrast, Mr. Anderson said that on the previous

day, the brakes were in good condition. I find that Mr. Neal's testimony is rather weak. Mr. Neal has been shown to be inexperienced in the operation of this scraper and I am not certain that in the confusion surrounding the accident, his ability to observe and recall was sufficiently accurate. There were also inconsistencies between Mr. Neal's testimony at this hearing and his testimony at an earlier hearing. I do not find Mr. Anderson's testimony that the brakes were in good condition on the previous day, and Mr. Zalesky's testimony that the brakes had been checked out earlier that month, to be outweighed by Mr. Neal's testimony that the brakes were not working. Mr. Neal's testimony is also somewhat suspect because he stated that he found the brakes to be unsatisfactory when he started the machine and yet continued to use it. His actions seriously undermine his testimony. Therefore, Petitioner has not proven that on February 16, 1979, the brakes were unsatisfactory as alleged. This citation is vacated.

ORDER

Respondent is ORDERED to pay $500 in penalties within 30 days of the date of this Decision in satisfaction of Citation No. 784603, and $10 in penalties within 30 days of the date of this Decision in satisfaction of Citation No. 784404. Order No. 784405 is AFFIRMED, but the citation alleging a violation of 30 C.F.R. § 77.1605(b) is VACATED.

Edwin S. Bernstein
Administrative Law Judge

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JAN 14 1981

| | | |
|---|---|---|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Civil Penalty Proceeding |
| | : | Docket No. LAKE 80-210-M |
| Petitioner | : | A.O. No. 11-00151-05001 |
| v. | : | |
| | : | Mine: St. Clair Quarry and Mill |
| OGLE COUNTY HIGHWAY DEPARTMENT, | : | |
| Respondent | : | |

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Walter Z. Rywak, Esq., Ogle County Assistant State's Attorney, Oregon, Illinois, for Respondent.

Before: Judge Edwin S. Bernstein

The Secretary of Labor petitioned for the assessment of civil penalties totaling $142 for the following four violations of MSHA standards:

| Citation Number | 30 C.F.R. Standard | Proposed Penalty |
|---|---|---|
| 356901 | § 56.14-1 | $ 32 |
| 356902 | § 56.9-87 | $ 44 |
| 356903 | § 56.14-1 | $ 32 |
| 356904 | § 56.14-1 | $ 34 |
| | Total: | $142 |

In various prehearing conferences, the parties agreed that the sole issue separating them was whether or not Respondent is covered by the Federal Mine Safety and Health Act of 1977 (the Act), the authorizing statute for the regulations listed above. The parties requested that this issue be decided on the basis of joint stipulations of fact and cross motions for summary decision filed in accordance with Commission Rule 64, 29 C.F.R. § 2700.64. 1/ The parties also proposed that if I find Respondent is covered by the Act, the case be settled for the full $142 amount recommended by Petitioner.

1/ In an Order dated November 17, 1980, the parties were directed, inter alia, to file cross motions for summary decision and supporting briefs no later than December 15, 1980. No motion or brief has been received from Respondent. Therefore, this case will be decided on the basis of Petitioner's brief and the arguments made by Respondent in various earlier submissions.

The parties stipulated, and I find:

1. I have jurisdiction over this matter and will decide whether Respondent is covered by the Act. Respondent reserves the right to appeal this decision.

2. Respondent, a subdivision of the State of Illinois, operates an open pit called the St. Clair Quarry and Mill, located at Lime Kiln Road off Highway 64, two miles west of Oregon, Illinois, on land leased from Mr. Henry St. Clair.

3. Respondent employs a "single bench" mining method to produce limestone. This limestone is crushed, broken and used to maintain the Ogle County Highway System.

4. In connection with this pit, Respondent owns and uses a crusher and a Caterpillar end loader, and uses county highway trucks. It also utilizes between three and five employees, and produced 11,000 tons of limestone in 1979.

5. Respondent's facility has been inspected since 1979 by the U.S. Department of Labor. Prior to 1979, the facility was inspected, beginning in 1972, by the U.S. Department of the Interior.

6. On November 28, 1979, MSHA Inspector Charles Ambrose conducted an inspection of Respondent's worksite and issued the four citations listed above. On February 6, 1980, MSHA proposed a total of $142 in penalties for these citations.

7. Respondent is not contesting the citations or the penalties in this matter. The only issue in dispute is whether Respondent is covered by the Act.

The Interstate Commerce Issue

Respondent contended that "it is not subject to the Act because [its] activities are purely intrastate and do not affect interstate commerce." In order to decide on this question, it is necessary to examine the constitutional underpinnings of Federal jurisdiction over the mining industry.

Article I, Section 8, Clause 3 of the Constitution gave Congress the power to "regulate Commerce * * * among the several States * * *." The U.S. Supreme Court has a long history of upholding Federal regulation of ostensibly local activity on the theory that such activity may have some effect on interstate commerce.

In Wickard v. Filburn, 317 U.S. 111 (1942), the Court upheld a Federal law regulating the production of wheat which was "not intended in any part for commerce but wholly for consumption on the farm." Id. at 118. The Court stated that:

> [E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect".

Id. at 125.

In 1975, the Court elaborated on this idea, stating that "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." Fry v. United States, 421 U.S. 542, 547 (1975). More recently, the Seventh Circuit Court of Appeals relied upon Wickard when it said that the commerce clause "has come to mean that Congress may regulate activities which affect interstate commerce." United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979) (Emphasis in original.)

These principles have often been relied on by the lower courts in ruling on the coverage of the present Act and its predecessor, the Federal Coal Mine Health and Safety Act of 1969. 2/ One leading case is Marshall v. Kraynak, 457 F. Supp. 907 (W.D. Pa. 1978), aff'd, 604 F.2d 231 (3d Cir. 1979), cert. denied, 444 U.S. 1014 (1980). There, the Court upheld the applicability of the 1969 Act to a small mine which was owned and operated entirely by four brothers. No other personnel had worked there for at least seven years and the brothers had no intention of hiring other employees in the future. The brothers contended that all of the coal which they mined was sold and consumed within the State of Pennsylvania and did not involve interstate commerce. Id. at 908. The defendants admitted, however, that more than 80 percent of their production was sold to a paper processing corporation which was "actively engaged in interstate commerce." Id. at 909. The Court held that

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2/ Section 4 of the 1969 Act, which was substantially unchanged by the 1977 Amendments Act, provided:

"Each coal mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act."

Section 3(b) of the 1969 Act, which was not amended by the 1977 Amendments Act, defined "commerce" as:

"[T]rade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof."

It is clear that in enacting mine safety legislation, Congress intended "to exercise its authority to regulate interstate commerce to 'the maximum extent feasible through legislation'." Secretary of the Interior v. Shingara, 418 F. Supp. 693, 694 (M.D. Pa. 1976), quoting S. Rep. No. 1055, 89th Cong., 2d Sess. 1 (1966), reprinted in (1966) U.S. Code Cong. & Ad. News 2072.

"the selling by the defendants of over 10,000 tons of coal annually to a paper producer whose products are nationally distributed enters and affects interstate commerce within the meaning of * * * the Act." Id. at 911.

A similar case was Secretary of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1976), involving a mine which was operated entirely by two brothers, Edward and Frederick Shingara. In the words of the Court, "Edward [went] underground, while Frederick [did] the hoisting." Id. at 694. The Court found that the fruits of their labor were sold as follows:

> The Shingara coal is sold primarily to Calvin V. Lenig of Shamokin, Pennsylvania who resells it, along with other coal which he has gathered, to Keystone Filler and Manufacturing Co., Inc. of Muncy, Pennsylvania and Mike E. Wallace of Sunbury, Pennsylvania. Keystone Filler combines the Shingara-Lenig coal with others in order to achieve a particular ash content, dries the mixture, and grinds it into a powder which is shipped to customers outside of Pennsylvania.

Id. The Court stated that "[a]lthough the activity in question here may seem on first examination to be local, it is within the reach of Congress because of its economic effect on interstate commerce." Id. The Court compared the facts of the case to the facts in Wickard and concluded that "the Shingara coal mining activity, which has an even more direct impact on the coal market, also 'affects commerce' sufficiently to subject the mine from which it emanates to federal control." Id. at 695.

In both Kraynak and Shingara, the coal in question was being sold to parties who were engaged in interstate commerce. In other mining cases, such facts were not shown, but the courts nevertheless utilized the seminal Wickard decision to find that the activities in question "affected commerce." Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979), involved a specific agreement between the owner of a coal mine and his buyer that the latter would sell the coal only within the state and not place any of it into interstate commerce. In holding that interstate commerce was still affected, the Court went back to the following passage from Wickard:

> It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if reduced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.

478 F. Supp. at 7, citing 317 U.S. at 128. Using this rationale, the Kilgore Court found that:

> [I]t is inescapable that the product of the defendant's mine would have an affect [sic] on commerce. The fact that the defendant's coal is sold only intrastate does not insulate it from affecting commerce, since its mere presence in the intrastate market would effect [sic] the supply and price of coal in the interstate market.

478 F. Supp. at 7. See also Marshall v. Bosack, 463 F. Supp. 800, 801 (E.D. Pa. 1978) ("The Act does not require that the effect on interstate commerce be substantial; any effect at all will subject [the operator] to the Act's coverage.")

I am aware of only one case where a Court held that a mine did not affect commerce within the meaning of the Act. Morton v. Bloom, 373 F. Supp. 797 (W.D. Pa. 1973), involved a one-man mine which had no employees. The coal which the defendant produced was sold "exclusively within Pennsylvania." Id. at 798. The Court held that this operation was not the type which Congress intended to cover when it enacted the statute. Id. More significantly, the Court found itself unable to conclude "that defendant's one-man mine operation will substantially interfere with the regulation of interstate commerce." Id. at 799. Even under the Wickard standard, the Court stated that the mine was "one of local character in which the implementation of safety features required by the Act will not exert a substantial economic effect on interstate commerce." Id.

I have carefully reviewed the Court's reasoning in Bloom, and I conclude that it should not be followed in the instant matter. First, I do not believe the Court properly considered all of the possible means by which the Bloom operation could have affected interstate commerce. At one point in the opinion, the Court noted that the "defendant does use some equipment in his mine which was manufactured outside of Pennsylvania * * *." 373 F. Supp. at 798. The Court found that this did not bring the defendant's mine within the ambit of the commerce clause since the purchase of this equipment was "so limited that its use would be de minimis." Id. This reasoning, in my view, runs directly contrary to the Supreme Court's statement in Mabee v. White Plains Publishing Company, 327 U.S. 178, 181 (1946), that the de minimis maxim should not be applied to commerce clause cases in the absence of a Congressional intent to make a distinction on the basis of volume of business. And, as the Court noted in Bosack, the Mine Safety Act does not require that the effect on interstate commerce be substantial. See 463 F. Supp. at 801.

Secondly, and perhaps more importantly, the Court in Bloom did not consider the effects which many one-man coal mining operations, taken together, might have on interstate commerce. Going back once again to the Wickard case, the Supreme Court held that even if the wheat in question was never marketed, "it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce." 317 U.S. at 128.

After a careful review of the facts stipulated by the parties, and the relevant case law on the interstate commerce issue, I find Respondent to be covered by the Act.

Decision and Order Approving Settlement

As stated above, the parties agreed that if Respondent is covered by the Act, they would settle the case for the full $142 amount proposed by MSHA. The settlement motion submitted by the parties contained an analysis of the six criteria in Section 110(i) of the Act as they relate to each of the citations. Specifically, the parties' motion stated that each violation resulted from ordinary negligence on the part of Respondent, and that Respondent "took extraordinary steps to gain compliance" by remedying each of the situations giving rise to the citations listed above. In light of this information, I find that the proposed settlement is sufficiently substantial to effectuate the purposes and policies of the Act and I approve it.

ORDER

Respondent is ORDERED to pay $142 in penalties within 30 days of the date of this Order as follows:

| Citation No. | | Penalty |
|---|---|---|
| 356901 | | $ 32 |
| 356902 | | $ 44 |
| 356903 | | $ 32 |
| 356904 | | $ 34 |
| | Total: | $142 |

Edwin S. Bernstein
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 14 1981

| | | |
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| WHITE PINE COPPER DIVISION, COPPER RANGE COMPANY, Applicant | : | Contest of Order |
| | : | Docket No. LAKE 80-236-RM |
| v. | : | |
| | : | Order No. 298441 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | February 19, 1980, as modified |
| | : | White Pine Mine |

## DECISION

Appearances: Ronald E. Greenlee, Esq., Clancey, Hansen, Chilman, Graybill & Greenlee, P.C., for Applicant;
Gerald A. Hudson, Esq., Office of the Solicitor, U.S. Department of Labor, Detroit, Michigan, for Respondent;
Harry Tuggle, Safety Director, for the United Steelworkers of America.

Before: Judge Edwin S. Bernstein

## STATEMENT OF THE CASE

This is a proceeding filed under Section 107(e) of the Federal Mine Safety and Health Act of 1977 (the Act) by White Pine Copper Division, Copper Range Company (White Pine or Applicant), to review an order of withdrawal issued by an inspector of the Mine Safety and Health Administration (MSHA or Respondent). The order was issued under Section 107(a) of the Act for an alleged imminent danger at the White Pine Mine. I conducted a hearing on October 28, 29, and 30, 1980, in Ironwood, Michigan. Bruce Haataja, the MSHA inspector who issued the withdrawal order, William Carlson, an MSHA mining engineer, and William W. Lutzens testified for MSHA; Al Goodreau, Brian McGunegle, Joe Maher, Wally Olkkonen, and William Dorvinen testified for White Pine; and John Cestkowski and Dale Sain testified for the United Steelworkers of America (the Union or Steelworkers).

The issue before me is whether or not Withdrawal Order No. 298441, dated February 19, 1980, and its modifications, dated February 22, 1980, and February 25, 1980, were proper. 1/

1/ Order No. 298441 read as follows:
"A violation of a mandatory standard was not observed. This order is issued to forbid persons from entering the test area in Unit 56 until it is

## FINDINGS OF FACT

At the hearing, the parties stipulated, and I find:

1. White Pine Mine is owned and operated by Applicant, White Pine Copper Division, Copper Range Company.

2. White Pine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. I have jurisdiction over this proceeding.

4. The subject order and modifications were properly served upon Applicant by a duly authorized representative of the Secretary of Labor. These documents may be admitted into evidence solely for purposes of establishing their issuance.

Applicant's witnesses testified about the background of the bolt removal program which resulted in the issuance of the order. 2/

Brian McGunegle, White Pine's superintendent of technical services, has a bachelor's degree in mining engineering, and a master's degree in rock mechanics, as well as a good deal of experience in mining engineering at White Pine and elsewhere. He stated that the White Pine Mine had been in operation since the early 1950's, and that about 80 to 90 percent of the mined area had roof bolts. The roof, or back, of the area known as Unit 56 was sandstone which was relatively stable and strong. Early in 1980, the company decided to conduct a test involving the removal of roof bolts in one area of Unit 56. The purpose of the test was to determine if mining could be performed at White Pine without the use of roof bolts. He stated that the roof bolts in Unit 56 were four-foot bolts on four-foot centers. They had

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fn. 1 (continued)
established the test area is stable. This area is closed to all persons except those selected to perform the test duties and inspection."

The first modification read:

"A violation of a mandatory standard was not observed. This action is taken to modify Order No. 298441, dated 2-19-80. A fall of ground occurred in N101 & N98 & W25 intersection in Unit 56 test area immediately following removal of roof bolts. This area is closed to all persons and no further work shall be performed until roof support has been installed. * * *"

The second modification read:

"This action is taken to modify Order 298441, dated 2-19-80. No more roof bolts shall be removed from the areas that are already bolted unless supplemental support is provided. That support shall be on the same centers as existing bolts. Only after the roof bolt removal program is completed shall the supplemental support be removed."

2/ Although MSHA's witnesses testified first at the hearing, in the interest of clarity the testimony of Applicant's witnesses will be synopsized first.

been used "as a matter of habit," and were installed in this area in the latter half of 1979, when the area was mined. He stated that the area had an excellent back and that the operator expected little difficulty when the bolts were removed in the southern part of the test area. Farther north, however, where there was a roof fault, it was expected that some loose rock would fall.

The test began on February 5, 1980, when the first roof bolts were removed. The company decided to use two experienced foremen to do the actual bolt removal. The safeguards that were utilized included use of retreat mining, 3/ convergence data, 4/ borescope holes, 5/ warning lights and gauges, 6/ and roof sounding. 7/

Mr. McGunegle stated that loose rock is not an unusual condition, and can be present regardless of whether bolts are in the roof. On cross-examination, he insisted that the area was basically stable, although there was loose rock near the faults. He stated that bolts can support some loose rock, but that beyond that, in a "massive competent" sandstone area such as this, they serve no function.

Mr. McGunegle stated that on February 7, 1980, two days after the test began, he went to the local MSHA office with Julio Thaler, the mine superintendent, and Albert Osenich, White Pine's safety director. The men briefed MSHA inspector William Carlson about the test which they had begun two days earlier. Mr. Carlson expressed concern that the test area was not representative of the general roof conditions in the mine, and that the miners would not accept the results of the test. Other than that, however, Mr. Carlson indicated no disapproval at the meeting.

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3/ In retreat mining, the mining operation, or in this case the bolt removal, proceeds in an outby direction so that the men doing the work were backing away from the area where bolts had been removed. The men were thus operating under supported roof.

4/ Convergence data is gathered by taking measurements with a device called an "extensometer rod" to determine the distance from the floor to the roof. These measurements are taken at periodic intervals and compared to determine whether there is any downward movement of the roof. These rods are capable of measuring roof sags as small as 1/1000 of an inch. Mr. McGunegle stated that generally, a roof which is unstable will start to move downwards and this movement will be reflected in the convergence data. He also testified that he had personally taken some convergence readings in this area, and had assisted in retrieving bolts from unbolted areas.

5/ The use of borescopes, or stratascopes, involves drilling holes in the roof and shining a light into the holes to examine for signs of shifting or other instability. Steel tape measures may also be inserted into such holes to feel for separations in the roof layers.

6/ Gauges and warning lights are attached to extensometer rods to detect any sagging in the roof and measure the amount of sag.

7/ Sounding involves striking the roof with a bar and listening for a hollow or "drummy" sound which would indicate an unstable roof.

Applicant's next witness was Joe Maher, White Pine's director of mine planning and engineering. Mr. Maher also has a degree in mining engineering. At the time of the test in Unit 56, he was in charge of ground control at White Pine. He gave testimony similar to Mr. McGunegle's concerning the taking of convergence data at various reference points via an extensometer. He agreed that this data monitors roof changes at 1/1000 of an inch increments. He explained that convergence data is gathered by a team of technicians and that graphs are compiled. He stated that there was always convergence going on to some degree, and that the amount of convergence varies throughout the mine. It is therefore important to look for departures from established trends, such as increases in the rate of convergence in a particular area.

Mr. Maher explained that a mechanical roof bolt performs the functions of suspending material from higher strata, keystoning, 8/ and inducing interbed friction within roof strata. He stated that the test site in Unit 56 had been selected because its structure was "massive sandstone [with] no bedding planes and shale," and the company felt it could get by with fewer bolts in this area. The men did not think the bolts were needed for the purposes of helping interbed friction or keystoning. Mr. Maher felt that the majority of roof bolts contributed nothing to the support of the roof, but that a small percentage contributed either by suspension or keystoning.

Mr. Maher stated that informal discussions were held in early or mid-January, 1980, concerning performing the test in this area. It was decided to use a Joy pneumatic roof bolter which had a canopy and which allowed the operator to work 10 to 12 feet from the end of the boom. Mr. Maher stated that signs were placed at all entries to the area. The signs read: "Restricted Area - Authorized Personnel Only." Mr. Maher selected two foremen to perform the test. He emphasized that they would be retreat mining and using warning lights, dial gauges, and roof sounding. They also periodically trimmed any loose roof. The men proceeded in a cautious manner, working slowly, keeping detailed records, and keeping track of any loose roof that came down.

Mr. Maher agreed with Mr. McGunegle that in the southern portion of the area, there was a massive roof with little or no loose. The men expected little trouble with the roof there. Upon removal of the roof bolts, there was no roof sag, and only a few small pieces of ground fell. He regularly visited the area, and was prepared to visit it daily if convergence data revealed a possible problem. Since convergence did not occur in the southern area, he visited it every other day.

In the northern part of the area, there was no convergence from February 5 until February 21, 1980. On February 21, there was a large roof fall. Mr. Maher stated that the reason for the fall was that the roof bolts

8/ "Keystoning" is a term used to denote the use of a bolt to hold up a block of roof and "key" it to other such blocks.

had been holding that large piece up. He stated that he visited the test area on March 13 with Mr. Carlson, and on April 1 with another MSHA inspector, Wally Lutzens.

Mr. Maher also stated that he had telephoned Mr. Lutzens on February 7 to inform him of the test and the procedures. Mr. Lutzens expressed concern about safety and recommended the use of temporary supports. Mr. Maher did not use temporary supports because he felt they would prevent him from measuring roof movements after the bolts were removed. Mr. Maher felt his method was safe, and temporary supports would create problems. He was particularly concerned that in removing such supports, the men would have to drag them out of the area and possibly dislodge other supports. He reiterated that based upon available convergence data he felt the roof was stable. However, he admitted that at the point where the large piece of rock fell, there was no indication in the convergence readings that the roof might come down. He stated that the fall was in the immediate roof and not in the main roof, and he repeated that there must be convergence before a fall. This was, in his words, a "physical law."

Wally Olkkonen testified that he was involved in the test from start to finish, operating the roof bolter, taking notes, and keeping records. He repeated the list of safety precautions which the crew utilized, including the use of light gauges, dial gauges, roof sounding, observation holes, and retreat mining. He stated that the operator of the roof bolter was always under bolted ground when manipulating the controls. He stood under the machine's three-foot-square canopy. The other man on the crew was behind the bolter under bolted roof, but not under a canopy. The machine's boom extended out 10 to 12 feet. Mr. Olkkonen added that the men were required to retrieve the removed bolts, the lights, and the gauges, and that this required them to go under unbolted roof. He stated that he never had any indication of convergence, and that no warning lights came on during the process. He kept a warning gauge and light in front of him and behind him.

Mr. Olkkonen felt that removing bolts was easier than installing them, since removal is a one-step process. In installing bolts, a hole has to be drilled first, and then the bolt has to be installed.

He also stated that in one area where he had noted loose rock, he sprayed the edge of the loose with white paint. This was between W-21 and W-23 at N-98 near the intersection of 98 and 23. 9/ Although this was an area of suspected loose, it did not fall. At N-101, between W-25 and W-27, there were two areas of loose which fell on February 20. This was a faulted area, and the men anticipated loose coming down. When they sounded it with a bar, there was a drummy sound.

9/ The coordinates used in this Decision are taken from the mine map which was admitted into evidence as White Pine's Exhibit 5.

The men also got a drummy sound in the area at W-25 and N-98. Visually, Mr. Olkkonen could see a couple of low-angled faults. The two faults intersected, and there were two areas of loose which overlapped each other. Looking from the side, there was a wedge-shaped, low-angled fault. The men started removing the bolts at the southwest corner of the intersection on February 21 and worked backwards. As they worked across the first piece of loose, they were expecting it to fall. It did not fall, however, until they had removed the bolts from the second, larger piece of loose. Mr. Olkkonen reasoned that the two pieces were keyed together. The section of roof which fell was approximately 20 feet by 28 feet, and varied between six and 24 inches in thickness.

On cross-examination, Mr. Olkkonen was asked whether roof falls sometimes happen very rapidly. After some hesitation, he answered, "Well, it depends on what kind of roof fall you are talking about." He described the February 21 fall as slow and controlled. With respect to the other area which he had marked as faulted, he understood that it was barred down, but he was unsure of this.

William Dorvinen, who has been employed by White Pine since 1956, testified that he operated the roof bolter for nine days, including the period from February 19 to February 21, 1980. He also testified about the various safety precautions which were taken during the bolt removal process. His testimony was consistent with Mr. Olkkonen's concerning where the men on the crew stood while the bolts were being removed. He added that the machine's operator was 12 to 15 feet behind the bolt that was being worked on, and that the other man was about 22 feet away from it. He stated that bolts were removed a row at a time, from right to left, where the back seemed good. If the back did not seem good, they removed one bolt at a time and retrieved it before proceeding. In the nine days that Mr. Dorvinen was on the project, he detected no separation from his examination of borescope holes, and he never saw a safety light come on or observed any convergence in the dial gauges. He stated that Mr. Olkkonen kept daily notes, and the company's rock mechanics took convergence readings. These men also told Mr. Dorvinen that there had been no convergence. When he heard a drummy sound in the roof, the men were more cautious, and anticipated the back to fall as they removed the bolts.

Mr. Dorvinen was present at the February 21 fall near the intersection of N-98 and W-25. The men had sounded the roof and heard a drummy sound. They decided that the loose would fall. He added that he told MSHA inspector Bruce Haataja that they expected it to fall. Before removing the bolts, they drilled and checked borescope holes. They set one gauge and light between the front of the machine and the boom, 10/ and they set another gauge and light behind the machine. They removed the bolts from right to left, moving the gauge and light as they removed each bolt. The warning light behind them

10/ Mr. Dorvinen stated that normally the men would place a warning light and gauge in the unbolted area. Here, however, because of the less secure roof, they placed the light and gauge between the boom and the machine.

was the only source of light in that area, since the area was dark, and the men constantly glanced at it to see if it had come on. He noted that on the north side there were separation lines where the ground had moved.

When the loose piece came down, he jumped back. He noted some sagging before they removed the last two bolts. He also stated that the thinnest part of the loose was located near where the last bolt was removed, i.e., closest to where the men were standing. He asserted that he never felt he was in danger at any time during his nine days in the area.

On cross-examination, Mr. Dorvinen stated that there were no discussions with Mr. Haataja that day with regard to stopping operations or with respect to continuation of the program after the fall. He testified that work was stopped after the fall only because it occurred at or near the end of the working shift. 11/ He also stated that there was other mining activity in Unit 56, approximately 300 feet to the north of the test site.

When cross-examined by the Union representative, Mr. Dorvinen agreed with Mr. Olkkonen that bolt removal was safer than bolt installation, and that ground falls are predictable through convergence readings. He also said that if the large piece of ground had fallen on the machine it would have only shaken up the machine's cab. He added that he had not been in the test area since February 21, 1980.

Albert Goodreau also testified for Applicant. Mr. Goodreau is a safety engineer at White Pine who has been with the company for eight years. His primary duty is to accompany MSHA inspectors on the mine property. He testified that he was served with the withdrawal order on February 19, 1980. The first modification was issued to another White Pine official, a Mr. Butson, on February 22. The second modification was issued to Mr. Goodreau on February 25.

MSHA's first witness was Bruce Haataja, the MSHA inspector who issued the withdrawal order and modifications. He was assigned to inspect the test area by his supervisor, William Carlson. Mr. Carlson told Mr. Haataja there was a possibility of someone getting hurt in the test area as the bolts were being removed from the roof.

Mr. Haataja stated that the bases for his conclusion that an imminent danger existed was that the back was unsupported, that it was drummy in some places, and that the roof had fallen in three areas. The roof in these areas was faulted. He testified that when he arrived at the test site on February 19, he found that warning signs had been put up by White Pine to keep everyone but authorized personnel out of the area. Mr. Haataja added MSHA's "Keep Out" signs to the company's signs.

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11/ Mr. Dorvinen explained that in this unit, as elsewhere in the mine, there were three shifts, and work went on seven days a week. However, the bolt removal was done only during one shift, which ran from 7:00 a.m. to 3:00 p.m.

He stated that when the two foremen were removing roof bolts, they always stood behind and in the vicinity of the roof bolter. With the boom of the bolter extended, the men were 10 to 15 feet behind the bolts being removed. The machine's operator was under a protective canopy. Mr. Haataja said that the men were using dial gauges and warning lights, and that he never saw a light go on that day, nor did he see any significant convergence indicated on the dial gauges. He admitted that he did not personally sound the roof with a trimming bar, and that he did not observe a ground fall on February 19, although he did see some fallen ground on the floor. The inspector was not sure when this loose came down.

Before issuing the withdrawal order, he did not go to the rock mechanic's office and review available convergence data. He stated that he was unaware of any rock instability found by the rock mechanics as of February 19. At one point, he was asked, "[Y]ou didn't have any indication on the day you issued that order that there was anything in the test area that was unstable, did you?", and answered: "I don't know * * * we didn't have time to get convergence readings in there to make the decision. The roof bolts were removed. That condition right there was unstable."

Mr. Haataja visited the test area again on February 20 and 21. At about 12:15 p.m. on February 21, he observed the large roof fall. He issued the first modification to the withdrawal order at 7:00 a.m. on February 22. He was asked whether the men who were working in the area told him that it was going to fall, and answered, "They may have." He was also asked why he waited approximately 20 hours after the fall to issue the modification. The inspector answered, "I wanted to discuss the situation with my supervisor." He was then asked, "In other words, you didn't think at the time you observed this fall of ground that the people who were engaged in the operation were in such danger that they should stop operations right then and not continue to remove another roof bolt?" He answered: "Well, if I didn't issue the order at the time, I guess I didn't."

Mr. Haataja also stated that after the roof fall, he did not tell the men to stop work. On recross-examination, he testified that in the three or four days that he was in the test area (between February 18 and February 22), he never observed any kind of peel-back of the roof. When the roof fell on February 21, it hit the roof bolter, but Mr. Haataja did not recall the equipment being damaged. Further, although the inspector was close to the fall, no loose came down in the immediate area where he was standing.

William Carlson, a supervisory mining engineer for MSHA, testified that there was a meeting in his office on February 7, 1980, concerning the White Pine test program. The meeting was attended by Mr. McGunegle and two other White Pine officials. These men briefed Mr. Carlson about the test, and informed him that the bolt removal had already begun. Mr. Carlson expressed some concern that this type of test was unusual and he assigned Mr. Haataja to follow the program and observe the bolt removal. On cross-examination, he recalled making this assignment after he received a telephone call from

Mr. Cestkowski, on behalf of the Union. Mr. Carlson stated that he was surprised to hear from Mr. Cestkowski, since there had always been cooperation between management and the Union concerning "anything out of the ordinary," and things had always gone smoothly. Mr. Cestkowski indicated that the Union was never consulted about this test. MSHA is required to respond to any such complaint, whether it comes from a miner or from a representative of miners. In response to Mr. Cestkowski's call, Mr. Carlson sent two inspectors to check the test site on February 15. These men, Inspectors Spencer and Stile, found the area to be dangered off and did not issue any orders. Mr. Haataja was assigned to follow through on their initial inspection.

Mr. Carlson testified that the Union complaint indicated MSHA should obtain some data on the test; the complaint did not allege imminent danger. He stated that he cannot cite a metal-nonmetal operator simply for changing its roof control plan unless he observes a violation of a standard. He admitted, however, that the concept of mining without support was unusual for this unit, which had always been supported with roof bolts.

William Lutzens, an MSHA mining engineer, testified that on April 1, 1980, he visited the test area. He stated that the area is composed mainly of sandstone with some exposed shale near a fault which traverses the area. This fault is on the northern side of the test area. The roof near the fault was disturbed, fractured, and less competent than the roof in the southern side of the test area. Mr. Lutzens recommended that the operator install and remove temporary supports in a "leap-frog" manner to protect the workers. 12/

On cross-examination, Mr. Lutzens conceded that White Pine generally had a very good ground control program. In his opinion, ground control is "a little bit of an art rather than a science," and the White Pine people are good practitioners of the art. He stated that his recommendation to remove the bolts in a leap-frog fashion was based upon a roof control standard for coal mines (30 C.F.R. § 75.200-14), and what he considered to be "good mining practice." He admitted that he never actually observed the bolt removal process in the test area.

Mr. Lutzens stated that roof bolting generally has three purposes: (1) to support unsupported particles; (2) to increase friction between layers and prevent sliding; and (3) to key irregular fractures. Mr. Lutzens said that aside from the large fault at the northern side of the test area, there were approximately 11 smaller faults. He stated that one of these, a wishbone fault which he counted as two faults, might possibly be considered unsafe. He stated that during an April 1 examination, he got a drummy sound from the roof and saw some half-moon areas in borescope holes. This usually indicates

12/ "Leap-frogging" involves the installation of temporary supports near the roof bolts. After the bolts are removed, the supports are pulled away with chains. This procedure would be followed row by row as the workers proceeded backwards, in an outby direction.

strata slippage. However, he also stated that the convergence data indicated stable roof. While this is generally a good indication of stability, it is not infallible, he said.

John Cestkowski testified on behalf of the Union. He stated that he has been employed at White Pine for the past 21 years, and is the president of the local union. He also serves as chairman of the underground safety committee, the surface safety committee, and the general safety committee. He was first advised of the test on the morning of February 5, 1980, by Julio Thaler, the mine superintendent. He told Mr. Thaler that the Union opposed the test and would protest it. He was concerned that the bolt removal might cause a cave-in which could extend to other mining fronts where people were working, and endanger miners in these areas. Mr. Cestkowski reasserted his opposition to the test at a meeting with management officials held on February 13, 1980. He stated that he called Mr. Carlson around February 13 or February 14 and requested an investigation of the test site to determine if the test was being performed safely.

He testified that the company's warning signs were in big, bold letters and were larger than the danger signs placed by MSHA. However, he felt that the advantage of having MSHA's smaller signs was that the company's signs sometimes fell down or were removed. There was no evidence, however, that the company's signs in the test area were removed.

Mr. Cestkowski disagreed with Mr. McGunegle's contention that 10 to 20 percent of the mine was unsupported. In his opinion, 98 to 99 percent of the mine had some sort of roof support. He knew of no other situation in which White Pine had ever removed any roof bolts, and since 1960, he had never seen any area in White Pine without roof support. He also took issue with previous testimony concerning the reliability of convergence data in predicting roof falls. Mr. Cestkowski noted that on April 23, 1980, there was a fall of ground in Unit 95, where miners were working, and he indicated that convergence data had not been helpful in predicting that fall.

Finally, Mr. Cestkowski disputed the company's contention that it is safer to remove bolts than to install them. He stated that when you remove bolts you do not know what will happen when the bolt comes out. On cross-examination, he stated that the piece of rock that fell in Unit 56 was sandstone. He added that if this rock had hit the roof bolting machine, it would have torn the machine's canopy off or tipped the machine over.

Dale Sain also testified for the Union. He has been a miner at White Pine since 1956. He is a Union committeeman and member of the Union's executive board. He testified that in Unit 95, where he works, there had been a roof fall in April 1980, and that prior to the fall the rock mechanics had read convergence points and said nothing about the readings. This led Mr. Sain to believe that the convergence data indicated a safe roof, and his foreman told him that the convergence did not indicate there would be a fall.

Mr. Sain also stated that he had several hundred hours of experience operating a roof bolter of the type that was used in removing the bolts in

Unit 56. Based on this experience, he testified that a two- to three-ton chunk of rock hitting the machine could flip it over. He added that he knew of one fatality which occurred in 1957 under this type of ground. On cross-examination, however, he stated that the company was not using convergence data, warning lights, or dial gauges at that time.

Mr. Sain disputed the company's contention that 10 to 20 percent of the mine was unsupported, and agreed with Mr. Cestkowski that 98 to 99 percent of the mine was supported. He disagreed that it was safer to remove bolts than to install them. He explained that when a miner is installing bolts, he is usually about 10 feet away from solid rock, whereas in bolt removal the entire area is open.

White Pine recalled Al Goodreau as a rebuttal witness. Mr. Goodreau stated that he was familiar with the facts and circumstances surrounding the roof fall in Unit 95. The information which he collected on that incident revealed that at 2:30 p.m. on the day in question, the warning lights came on, and the dial gauges indicated that the roof had sunk 12/1000 of an inch. The warning lights and gauges were reset, and at 2:40 p.m., the lights went on again. The gauges indicated that the roof had come down 18/1000 of an inch. The lights and gauges were reset once more, and at 2:55 p.m., the gauges indicated that the roof had come down a total of 54/1000 of an inch. The roof caved in shortly after that, at approximately 3:05 p.m.

## CONCLUSIONS OF LAW

Section 107(a) of the Act reads:

> 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 cause such imminent danger no longer exist. * * *

The Commission's predecessor, the Interior Board of Mine Operations Appeals, set up the following test to determine whether a particular situation constitutes an imminent danger:

> [W]ould a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that,

> if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

Freeman Coal Mining Corporation, 2 IBMA 197, 212 (1973), aff'd sub nom., Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F.2d 741, 745 (7th Cir. 1974). See also Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, 523 F.2d 25, 32 (7th Cir. 1975). The test of imminence is objective, and "the inspector's subjective opinion need not be taken at face value." 2 IBMA at 212. However, the applicant in a proceeding such as this one bears the burden of showing by a preponderance of the evidence that imminent danger did not exist. Lucas Coal Company, 1 IBMA 138, 141-42 (1972); Carbon Fuel Company, 2 IBMA 42 (1973). In this case, I believe White Pine has sustained this burden.

The company showed that although roof bolt removal is an intrinsically dangerous process, the procedures which it adopted and carried out did not present an imminent danger either on the date of issuance of the initial withdrawal order or on the dates when the first and second modifications were issued. These procedures included dangering off all entrances to the test area with large, conspicuous signs that read, "Restricted Area - Authorized Personnel Only." The testimony was that the signs were larger than the "Keep Out" signs that MSHA added after the imminent danger order was issued. The test area selected by the operator had a thick sandstone top. A sandstone top is more stable than a slate top. The men selected to remove the bolts were experienced and highly trained foremen. They appeared to be knowledgeable in safety techniques and were extremely cautious in removing the bolts. They proceeded in a retreat manner, while visually inspecting the area, sounding the roof, and using warning lights and dial gauges. They had the benefit of maps which indicated that the southern part of the area had no significant faults, although the northern part had a large fault. White Pine established 19 convergence points in the test area, including one at each intersection. Convergence readings were regularly taken to determine if there was any downward movement of the roof. The miners used a roof bolting machine which had a 10- to 12-foot long boom, and a three-foot-square metal canopy. One miner was protected by the canopy; the other miner stood at the rear of the machine, under supported roof. Warning lights and dial gauges were placed in front and in back of the machine. The men regularly observed these gauges.

MSHA entered the picture when representatives of the company visited the office of Inspector Carlson on February 7, 1980. They briefed him about the test even though they were not obligated to obtain MSHA's permission. Mr. Carlson did not object to the test, although he had some doubts about the reaction of the miners to the test. When the Union heard about the test, it complained to MSHA. MSHA investigated the complaint, as it is required to do. MSHA then became concerned about the test and Inspector Haataja issued the withdrawal order. The order did not curtail the test, but superimposed MSHA's

warning signs over the signs of the operator. There was no basis for issuing this order. The testimony of Inspector Haataja does not support the contention that an imminent danger existed at the time.

The first modification was issued after the February 21 roof fall described in the testimony. The evidence was that this modification was not issued until February 22, the day after the fall, and only after Mr. Haataja conferred with his supervisor, Mr. Carlson. I do not believe Mr. Haataja considered this situation to be an imminent danger on his own. If he had, he would have modified the order immediately after the fall. Apparently, he considered this a debatable matter. In fact, one of the foremen, Mr. Dorvinen, testified that Mr. Haataja did not indicate after the fall that he was going to modify the order, and that the inspector did not comment one way or the other. There was no additional justification given for the issuance of the second modification.

Admittedly, the February 21 roof fall was substantial. However, the evidence was that the company had anticipated it from visual observations and soundings. They knew that there was a fault in the area. The precautions that White Pine took at that time were reasonable to protect the safety of the men involved. Therefore, I hold that the order and its modifications were improperly issued.

ORDER

Withdrawal Order No. 298441, dated February 19, 1980, and its modifications of February 22 and 25, 1980, are VACATED.

Edwin S. Bernstein
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 14 1981

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| ITMANN COAL COMPANY, | | : | Contest of Order |
| | Contestant | : | |
| v. | | : | Docket No. WEVA 80-166-R |
| | | : | |
| SECRETARY OF LABOR, | | : | Order No. 657832 |
| MINE SAFETY AND HEALTH | | : | November 29, 1979 |
| ADMINISTRATION (MSHA), | | : | |
| | Respondent | : | Itmann No. 3 Mine |
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| SECRETARY OF LABOR, | | : | Civil Penalty Proceeding |
| MINE SAFETY AND HEALTH | | : | |
| ADMINISTRATION (MSHA), | | : | Docket No. WEVA 80-380 |
| | Petitioner | : | A.O. No. 46-01576-03051 V |
| v. | | : | |
| | | : | Itmann No. 3 Mine |
| ITMANN COAL COMPANY, | | : | |
| | Respondent | : | |

DECISION

Appearances: Karl T. Skrypak, Esq., Pittsburgh, Pennsylvania, for Itmann Coal Company;
Stephen Kramer, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor.

Before: Judge Edwin S. Bernstein

The hearing in these consolidated proceedings was held on July 24, 1980, and November 18, 1980, in Charleston, West Virginia. Both the contest proceeding and the penalty case relate to Order No. 657832, which was issued to Itmann on November 29, 1979, for an alleged violation of 30 C.F.R. § 75.301. That standard provides in pertinent part: "The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and in any pair or set of rooms shall be 9,000 cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute." The order alleged:

> The quantity of air reaching the intake end of Cabin Creek 6-Panel Longwall (040 Section) was only 7,350 CFM as measured with a smoke cloud; anemometer would not turn sufficiently to read the air quantity. The evening shift foreman stated that he was taking the intake air reading in the crosscut between the No. 1 and 2 entries and that he thought that this was the same place where the day shift foreman and fireboss was [sic] taking their readings. The crosscut was the wrong place to take the intake air reading in that it includes belt conveyor ventilation air. All foremen are trained in ventilation controls and practices annually and should have known this was the wrong location to take intake readings to the pillar line. The tail of the longwall was not cutting out into the tail or return air entry, and the tail of the longwall line was blocked with coal and rock. Two small holes were present leading into the return entry but was [sic] blocked with a roof fall. The return entry had at least two roof falls present in the entry blocking the flow of air. The operator and his agent were aware of the roof falls and should have been aware of the coal blocking the return air entry. The operator should have exercised more caution in determining the quantity of air reaching the intake end of the pillar line in Cabin Creek 6-Panel, a section which liberates methane when coal is being cut. Air reading and other evidence indicates that the air in this section has been low for a significant period of time.

Itmann argued that the existence of less than 9,000 cubic feet a minute (CFM) does not automatically constitute a violation of the standard. The company contended that MSHA must also prove that the operator failed to take certain remedial steps before a citation or order can be issued. MSHA strongly opposed this position, arguing that the regulation is violated anytime air volume dips below the required 9,000 CFM.

Findings of Fact

At the hearing, the parties stipulated:

1. Itmann Coal Company is the owner and operator of the Itmann No. 3 Mine, located in Wyoming County, West Virginia.

2. The Itmann No. 3 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, and I have jurisdiction over these proceedings.

3. The inspector who issued the subject order and termination was a duly authorized representative of the Secretary of Labor.

4. Copies of the subject order and termination are authentic and may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevancy of any statements contained therein.

5. The appropriateness of the penalty, if any, to the size of the operator's business should be determined based upon the fact that in 1979, the Itmann No. 3 Mine had a total output of 535,357 tons. Mine No. 3-A produced 388,481 tons and Mine No. 3-B produced 146,876 tons. The controlling company, Itmann Coal Company, had a total output of 1,627,963 tons in 1979.

6. The history of previous violations should be based upon the fact that Itmann had a total of 439 assessed violations in the preceding 24 months, during which period there was a total of 856 inspection days.

7. The alleged violation was abated in a timely fashion, and the operator demonstrated good faith in attaining abatement.

8. The assessment of civil penalties in these proceedings will not affect the operator's ability to continue in business.

9. In addition to the order which is the subject of these proceedings, Order No. 662681, dated March 4, 1979, and Citation No. 255612, dated January 30, 1979, were issued under Section 104(d)(1) of the Act.

## ISSUES

The issues in these proceedings are:

1. Whether the operator violated 30 C.F.R. § 75.301 as alleged;

2. Whether the alleged violation was caused by an unwarrantable failure of the operator to comply with the standard;

3. Whether a written copy of the subject order was served on the operator with reasonable promptness; and

4. If a violation is found, what civil penalty should be assessed taking into account the six criteria in Section 110(i) of the Act. In order to make a determination on this issue, it is necessary to determine whether and to what extent the operator was negligent, and the gravity of the alleged violation.

During the first day of the hearing, James Bowman testified for MSHA, and Donny Coleman testified for the operator. Mr. Bowman is the MSHA inspector who issued the subject order. He testified that on November 29, 1979, he was told by his supervisor at MSHA's Pineville, West Virginia, office that MSHA had been notified about a possible ventilation problem at the Itmann No. 3 Mine. Mr. Bowman was the resident inspector at the mine during the time in question. He immediately went to the mine to check on the condition, arriving there at around 3:15 or 3:30 p.m. He first examined certain records which the operator was required to keep concerning its ventilation program, and issued a citation to the operator for failing to examine a particular return entry for proper ventilation. He then traveled into the mine, accompanied by Itmann's safety engineer, Donny Coleman. The two men went to an area known

as the Cabin Creek 6 Panel. This was an area where longwall mining was taking place, but there were no miners at the panel when Mr. Bowman arrived. The inspector began making a ventilation inspection of the area, which is depicted in Operator's Exhibit No. 2 (a copy attached to this decision as an appendix). In this area of the mine, retreat mining was taking place. This means that coal was being cut in an outby direction with the longwall machine. There was a roof fall in the second crosscut outby the longwall face which caused an air blockage. In the first crosscut outby the face, there was an accumulation of rock or gob. The latter crosscut was open and a man could walk through the area. There was no blockage of air in that first crosscut. Mr. Bowman and Mr. Coleman took several air readings at the intake end of the pillar line near the head of the longwall machine. This point is marked with a circled "X" on Operator's Exhibit No. 2 and is located below and to the left of the point marked "Head." The inspector first made an anemometer check in order to determine the velocity of air moving through the area. He obtained a reading of 55, which he ignored since MSHA's inspection procedures do not allow readings below 100 to be used. Mr. Bowman then took a smoke cloud test, designed to measure the volume of air moving through the area. He obtained a reading of 7,350 CFM. The regulation requires 9,000 CFM in such situations. Finally, Mr. Coleman made an anemometer check and obtained a reading of 55. The two men did some calculations and came up with a figure of 7,448 CFM based upon the anemometer readings. Regardless of which figure is used, Itmann's counsel agreed that the reading was below the required air volume.

Mr. Bowman then got into a discussion with Itmann officials concerning the proper point at which the readings should be taken. The Itmann officials contended that the ventilation reading should have been taken in the first crosscut outby the face, where the gob was. This was because there was a split point between that crosscut and the intake end of the pillar line. At the split point, some of the air which came through the crosscut was diverted towards the pillar line and some of it was diverted in another direction. The Itmann officials felt that if the readings had been taken in the crosscut before the air flow reached the split point, the readings would have shown them to be in compliance with the regulation.

Mr. Bowman, Mr. Coleman, and another Itmann official, Mr. Woods, then crawled across the longwall face to the tail of the longwall. Mr. Bowman discovered that there was a "panhandle" of uncut coal at the tail which had been formed during the mining process by not allowing the longwall shear to cut completely across the face. By reducing the distance which the shear traveled on each pass across the face, a solid block of coal about 20 feet long had been created at the tail. There were two small blast holes in this piece of coal. Mr. Bowman felt that this panhandle reduced the amount of air which traveled across the face, and that this was one reason why the air at the split point near the longwall head was diverted away from the intake end of the pillar line. He was told that the panhandle was created so that the longwall machine could not cut into an adjacent area where a roof fall had occurred. This roof fall can be seen on the left of Exhibit No. 2.

The inspector returned to the other side of the longwall and took an air check immediately outby the split point, where the rest of the air was diverted. He found that between 6,000 and 6,250 CFM were moving through that area.

Mr. Bowman then took a reading at the "total intake" point marked on Exhibit No. 2. This reading was approximately 14,200 cubic feet of air per minute. Putting these two readings together, Mr. Bowman was convinced that a violation existed. He testified: "Through subtraction, you can tell by that that you are going to have low air at the intake end of the pillar line, and that doesn't even take off where the leakage that you get through the other checks and stoppings."

The inspector stated that he issued the order verbally at 1640 hours on November 29, 1979, by informing Mr. Coleman and Mr. Woods of its issuance. He stated that it was normally not his procedure to issue orders in writing until he reached the surface of the mine. He also stated that the abatement of the order was issued at 2130 hours, also verbally. Mr. Bowman could not remember whether he issued the written order on that day or on the following day. He stated that in situations where he does not have printed order forms with him, he ordinarily writes the order on a yellow slip of paper and leaves it with the operator. However, he did not believe he followed this procedure in this situation.

The inspector abated the order after the operator used explosives to remove the panhandle and leveled the rock in the crosscut immediately outby the longwall head. Mr. Bowman then obtained an air reading of approximately 9,700 CFM. The operator also cut a stall chute, which is a small mining entry at the tail end of the longwall perpendicular to the face, which maintained the proper ventilation until the men got past the roof fall at the tail end.

Mr. Bowman testified that in his opinion this was an unwarrantable failure violation for several reasons. First, the operator was required to conduct a preshift examination of the working face and to take an air reading at the intake end of the pillar line. Mr. Bowman felt that the day shift boss had taken the air reading in the wrong location and was aware of the situation at the tail end of the longwall face. Mr. Dickerson later told Mr. Bowman that he had made his preshift examination approximately one hour before Mr. Bowman arrived at the scene. Second, Mr. Bowman was told by the mine foreman, Jim Justice, that there were roof falls in the area which were affecting the ventilation to the face. Mr. Bowman also felt that the operator was taking his preshift readings in the wrong area because even after the violation was abated, he obtained a reading of approximately 9,700 CFM, significantly less than any of the readings which were recorded in the preshift examiner's report book.

According to Mr. Bowman, this mine liberates approximately 1,600,000 cubic feet of methane in a 24-hour period. This information was obtained from laboratory analyses of air samples taken in the mine. He added that when he was on the section, he made several methane checks and detected concentrations

as high as one-half percent. Mr. Bowman felt that the lack of ventilation in the area could have contributed to a methane buildup in an area which was inaccessible due to the roof falls. This could have led to a "severe explosion," and Mr. Bowman discussed several possible ignition sources in the area. In addition to this hazard, Mr. Bowman felt that the lack of proper ventilation in the longwall area contributed to excessive concentrations of respirable coal dust in the atmosphere.

On cross-examination, Mr. Bowman repeated that there were no men working in the section when he made his air measurements. He also reiterated that the order was issued and abated verbally, but he was still unsure as to exactly when he issued the written order.

Respondent's first witness was Donny Coleman, an Itmann safety official. He stated that around 3:00 p.m. on November 29, 1979, Mr. Bowman arrived at the mine and informed Mr. Coleman that he wanted to investigate something in the mine. Since the miners on the day shift were coming out of the mine at that time, it was close to 4:00 p.m. before the men could go down into the mine. They proceeded to the Cabin Creek 6 Panel on the longwall section, arriving there around 4:15 or 4:20 p.m.

Mr. Coleman stated that Mr. Bowman took an anemometer reading and a smoke cloud reading. On the basis of the smoke cloud reading, he determined that there were approximately 7,350 CFM present at the intake end of the pillar line. Mr. Bowman also told Mr. Coleman that based upon the anemometer reading and certain mathematical calculations, he found approximately 7,448 cubic feet of air per minute in the area. Mr. Coleman testified that Ernie Woods, another Itmann official, then took two air readings, one at the intake end of the pillar line, and the other outby that point in the crosscut through which the air passes just before it reaches the split point. The points where Mr. Woods took his readings are marked "A" and "B", respectively, on Exhibit No. 2. Mr. Coleman did not testify as to the results of the readings which Mr. Woods took. He did state, however, that there was considerable discussion as to where the "total air intake" reading should be taken. He disagreed that the proper place to take such a reading was the place designated on Exhibit No. 2 by Mr. Bowman. Mr. Coleman felt that this reading should be taken just before the split point where Mr. Woods had taken his "B" reading.

Mr. Coleman denied that Mr. Bowman ever told him that a Section 104(d)(2) order was being issued. He stated that he had been with Mr. Bowman on several previous occasions when the inspector had issued such an order, and that it was Mr. Bowman's custom to hang a red tag on the area affected by the order. Mr. Coleman stated that this procedure had been followed by Mr. Bowman on seven or eight occasions in the one-year period prior to November 29, 1979. Mr. Coleman also discussed the "panhandle" which was created by the longwall machine. He stated that on each pass of the longwall shear across the face, the shear would be stopped a few feet short of the tail end, thus creating a stump of coal. The purpose of allowing this panhandle to develop was to keep the machine from cutting into the area of the roof fall at the tail end of the

face where rock could fall in on the machine. Mr. Coleman disagreed with Mr. Bowman as to the width of the panhandle at the time of the inspection. Mr. Coleman contended that the block of coal was only four to six feet wide at that time. He stated that the panhandle would later be removed with explosives and the area shoveled out. In this manner, proper ventilation to the face area would be maintained.

Mr. Coleman also discussed the fact that the operator was required by law to check the face area every two hours for sufficient air flow and for methane. He stated that the day shift foreman would not continue to mine in that area if the air readings fell below 9,000 CFM or if the methane content exceeded one percent.

Throughout his testimony, Mr. Coleman maintained that he was never told by Mr. Bowman that a Section 104(d)(2) order was being issued. However, he did state that after Mr. Bowman took his first air reading showing the air flow to be below 9,000 CFM, Mr. Bowman stated: "This could be an order." Mr. Coleman denied that Mr. Bowman ever stated that he actually was issuing an order. He also denied that a written order was issued to the operator that evening. He added that Mr. Bowman was at the mine for approximately five hours on the following day, November 30, and still did not issue a written order. Finally, around 3:30 p.m. on that day, Mr. Bowman stopped by the mine on his way home and issued a written copy of the order in question, as well as two miscellaneous citations.

Itmann's next witness was Harry Farmer. At the time the order was issued, Mr. Farmer was the general superintendent of the Itmann No. 3 Mine. He testified that the order was not issued on the evening of November 29, when Mr. Bowman first inspected the Cabin Creek 6 Panel. He said Mr. Bowman returned to the mine the following morning for a follow-up inspection of the panel. Again, according to Mr. Farmer, no order was issued, although the possibility of an order was discussed by Mr. Bowman and Mr. Farmer. Mr. Farmer further testified that Mr. Bowman left the mine to change clothes and returned there around 3:00 or 3:30 p.m. It was at this time that company officials first received a copy of the order.

David Bailey, the superintendent of the Itmann No. 3 Mine, testified that Inspector Bowman arrived at the mine at 2:00 or 2:30 p.m. on November 29, 1979, and told company officials that he wanted to go into the mine. Donny Coleman accompanied the inspector. By way of telephone, Mr. Bailey later learned that Mr. Bowman was checking on a possible ventilation problem at the Cabin Creek 6 Panel. However, he was not informed of the issuance of any unwarrantable failure order, and none of the procedures which the company established in such situations were put into effect. Mr. Bailey testified that although no verbal or written order was issued that night, the men did discuss the possibility of an order for an unrelated violation near the longwall panel. It was not until around 3:00 p.m. on November 30 that Mr. Bailey learned that an order was issued relating to the ventilation situation at the panel. At that time, Mr. Bowman came to the mine in his street clothes with a written copy of the order.

Mr. Bailey further testified that he was informed of a low air volume reading of approximately 7,200 CFM in the area of the Cabin Creek 6 Panel. He stated that the foreman of the day shift, which came out of the mine shortly before Inspector Bowman went in, had shot the panhandle at the tail end of the longwall. This was after the day shift had completed its required ventilation checks. Mr. Bailey felt that even if the ventilation dropped to 7,200 CFM, the company was not in violation of the standard because no coal was being mined at that time. He added that normal ventilation was restored when the next shift cleaned up the coal that accumulated when the panhandle was shot.

Mr. Bailey also read several excerpts from company records which indicated that the ventilation in this section of the mine around the time in question was never low, and that there was no evidence of a methane problem. Based on this data, he concluded that there was no basis for the inspector's allegation that there were low air readings in the section for any period of time, or that there was a methane problem in the section. He also stated that the proper place to take an air reading in this section was in the first crosscut outby the longwall face (marked "B" on Exhibit No. 2).

Jerry Dickerson testified that he was the shift foreman on the November 29, 1979, day shift. He stated that around 2:30 p.m. that afternoon, he recorded an air reading of 12,600 CFM at the intake end of the longwall. This reading was taken in preparation for shooting the panhandle which had formed at the longwall tail. He shot the block of coal around 3:20 p.m., and then crawled approximately 500 feet back across the face to the longwall head. He stated that he was not required by law to take any more air readings. Since it was near the end of the shift, he told Ernie Woods, the shift foreman on the evening shift, to clean up the coal which Mr. Dickerson had shot.

Mr. Dickerson also testified that the proper place to take a "total intake air reading" in this type of section was the point marked "B" on Exhibit No. 2, and the proper place to take an intake reading for purposes of 30 C.F.R. § 75.303 was the point marked "A" on this exhibit. He added that he got the 12,600 CFM reading at point "A."

Asked if he knew or should have known that the air was inadequate when he left the mine, Mr. Dickerson replied: "There is no way that I could tell the difference" in the air flow.

Itmann's final witness was Ernie Woods, who was the section foreman on the longwall evening shift on November 29, 1979. Before going into the section, he was contacted by Mr. Dickerson, who told him about the need to clean up the coal at the tail of the longwall. He stated that he arrived at the section around 4:45 p.m. on that afternoon and found Inspector Bowman and Mr. Coleman were already there. Mr. Woods was informed by Mr. Bowman that there was insufficient air on the section and Mr. Woods began to take anemometer readings. He got a reading of 6,800 CFM and told his men to check the ventilation curtains to make sure they were in place. He then crawled to the tail end of the longwall with Mr. Bowman and discovered the loose coal

which Mr. Dickerson had shot on the previous shift. After approximately an hour to an hour and a half of shooting and shoveling the coal at the tail, Mr. Woods was able to reestablish a sufficient air flow. This was at around 6:45 or 7:00 p.m.

Mr. Woods stated that Mr. Bowman did not tell him about the issuance of an unwarrantable failure order and that he did not hear Mr. Bowman tell anyone else in the immediate area or within hearing range about such an order. During the period when he was cleaning up the coal, the face conveyor of the longwall was operating. Mr. Woods stated that Mr. Bowman would not have allowed the men to run this electrical equipment if they were shut down for an unwarrantable failure order. On cross-examination, however, he admitted that MSHA inspectors allowed the operator to run conveyors during the abatement of accumulation violations so that accumulations could be removed. Mr. Woods agreed with Mr. Dickerson that the place to take a "total intake" reading was the point marked "B" on Exhibit No. 2, and the "intake on the head" point was marked "A."

Inspector Bowman was recalled as a rebuttal witness for MSHA. He disagreed with the testimony of Itmann's witnesses concerning the effect which the shot fired by Mr. Dickerson had on the ventilation. Mr. Bowman believed that such a shot would increase rather than decrease the amount of air flowing across the face, since it would spread the material around and open up the area.

With respect to the actual issuance of the withdrawal order, Mr. Bowman stated that he issued it verbally on the section and that he was "reasonably sure" that he issued it in writing that night. He noted that Citation No. 657833, which would be the next citation in the inspector's book of consecutively numbered forms, was issued on the evening of November 29. He also identified Citation No. 657834, saying it was issued around 1:20 p.m. on November 30, 1979.

Donny Coleman was recalled as a rebuttal witness for Itmann. He reiterated his earlier testimony that he was not given a copy of the written order until approximately 3:30 p.m. on November 30. However, he also testified that Citation Nos. 675833 and 657834 were served to him at the same time.

Fact of Violation

I find that Itmann violated 30 C.F.R. § 75.301 as alleged. The company did not challenge the inspector's finding that the flow of air at the point marked "A" on Exhibit No. 2 was less than the 9,000 CFM required by the regulation. I also find that this was the proper place to determine the "quantity of air reaching the intake end of [the] pillar line" within the meaning of the standard.

Itmann argued that this finding alone does not automatically mean that the company violated Section 75.301. At the hearing, Itmann cited "the spirit

of the law that runs through the Section 75.300's, which is the subpart D of the regulations dealing with the ventilation * * *." Counsel for Itmann attempted to draw a comparison between Section 75.301 and Section 75.308, dealing with methane accumulations in face areas. Specifically, he argued that a violation of Section 75.308 exists only "if a mine operator, upon becoming aware of the presence of 1.0 volume percent or more of methane at a working place," fails to take a series of remedial actions. These include making immediate changes or adjustments in the ventilation of the mine, cutting off electrical equipment, stopping all work in the affected area, taking precautions to prevent other areas of the mine from becoming endangered, and withdrawing miners from areas where the methane content is 1.5 percent or higher. Counsel argued that the same criteria should be applied in determining if a violation of Section 75.301 occurred.

I have reviewed Itmann's argument on this point and find it is without merit. The comparison between Section 75.301 and Section 75.308 does not withstand analysis. Section 75.308 reads as follows:

> If at any time the air at any working place, when tested at a point not less than 12 inches from the roof, face, or rib, contains 1.0 volume per centum or more of methane, changes or adjustments shall be made at once in the ventilation in such mine so that such air shall contain less than 1.0 volume per centum of methane. While such changes or adjustments are underway and until they have been achieved, power to electric face equipment located in such place shall be cut off, no other work shall be permitted in such place, and due precautions shall be carried out under the direction of the operator or his agent so as not to endanger other areas of the mine. If at any time such air contains 1.5 volume per centum or more of methane, all persons, except those referred to in section 104(d) of the Act, shall be withdrawn from the area of the mine endangered thereby to a safe area, and all electric power shall be cut off from the endangered area of the mine, until the air in such working place shall contain less than 1.0 volume per centum of methane.

In brief, this standard provides on its face that specific remedial actions must be taken when methane concentrations reach a certain level. The standard does not say that a violation occurs as soon as such levels of methane are detected. In sharp contrast, the relevant part of Section 75.301 provides that "the minimum quantity of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute." [Emphasis added.] The language of this regulation is mandatory, and there are no qualifications on it. Therefore, I reject Itmann's argument and find that a violation of Section 75.301 occurred.

The Unwarrantable Failure Issue

In Eastern Associated Coal Corp., 3 IBMA 331, 356 (1974), the Interior Board of Mine Operations Appeals stated that an unwarrantable failure finding

must be upheld where, "on the basis of the evidentiary record, a reasonable man would conclude that the operator intentionally or knowingly failed to comply or demonstrated a reckless disregard for the health or safety of the miners." [Emphasis in original; footnotes omitted.] Similarly, in Zeigler Coal Company, 7 IBMA 280, 295-96 (1977), the Board held that an inspector should make a finding of unwarrantable failure "if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions, or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care."

In this case, I do not believe MSHA has sustained its burden of showing that Itmann's violation of the standard was unwarrantable. I find the air blockage which resulted in the ventilation problem was caused by Mr. Dickerson's shooting the panhandle at the end of the day shift. He stated that before the shot, he obtained an air reading of 12,600 CFM, but that he did not take an air reading after shooting the coal. When Mr. Woods' shift came on, the air was down to 6,800 CFM. The men on Mr. Woods' shift immediately went about the task of cleaning up the panhandle area and restoring a proper air flow. Based on this sequence of events, I do not believe the violation of the standard was intentional or knowing or that it demonstrated a reckless disregard for the safety or health of the workers. I accept Mr. Dickerson's testimony that the reduction in air flow was not noticeable without taking an anemometer reading. I further find that Mr. Woods did not have enough time to take his regular preshift reading before being told by Inspector Bowman of the problem. In short, while a violation of the standard occurred, the operator was, at the most, ordinarily negligent. Under these circumstances, the unwarrantability finding must be vacated.

Issuance of the Order

Section 104(a) of the Act provides that citations must be issued "with reasonable promptness." Inspector Bowman stated that he issued the order verbally to Mr. Coleman and Mr. Woods at 4:40 p.m. on November 29, 1979. He was unable to recall when he issued the written order. Mr. Coleman testified that the inspector told him the situation could be an order, but not that it was an order. Mr. Woods did not recall any discussion of an order at the site. The earliest time when the parties can be said to agree that the written order was issued was around 3:00 p.m. the next day, November 30.

Regardless of what transpired underground on November 29, I believe the order was issued with reasonable promptness. The testimony concerning the oral issuance of the order is conflicting, but I do not believe that 24 hours is an undue period of time to elapse before the issuance of a written order. Such orders are carefully scrutinized by operators for the correctness of the information contained therein. In my view, Mr. Bowman wanted to be sure the order was issued on an appropriate form and that the information in it was correct. He undoubtedly realized that a contest proceeding such as this might result, and that the order which he issued would be an important document in such a proceeding. I also do not believe Congress intended that the "reasonable promptness" standard be construed strictly against MSHA. The last

sentence of Section 104(a) reads: "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." Therefore, I find that the validity of the order is not affected by the method in which it was issued.

Civil Penalty to be Assessed

As stated above, Itmann was negligent in allowing the ventilation in the relevant area to drop below the required minimum. The gravity of the violation was serious since a methane buildup could have occurred and resulted in an explosion. Itmann is a large operator and the assessment of a civil penalty in this matter will not affect its ability to remain in business. The parties stipulated that during the 24-month period preceding the issuance of this order, there were a total of 856 inspection days during which the company had a total of 439 assessed violations. Based upon the criteria in 30 C.F.R. § 100.3(c), I find this to be a good prior history. The violation was abated in good faith.

In light of these considerations, I assess a penalty of $1,000 for this violation.

ORDER

Order No. 657832 is AFFIRMED insofar as it alleges a violation of 30 C.F.R. § 75.301. The order's finding that this violation resulted from an unwarrantable failure of the operator to comply with the standard is VACATED. Itmann is ORDERED to pay $1,000 in penalties within 30 days of the date of this Order.

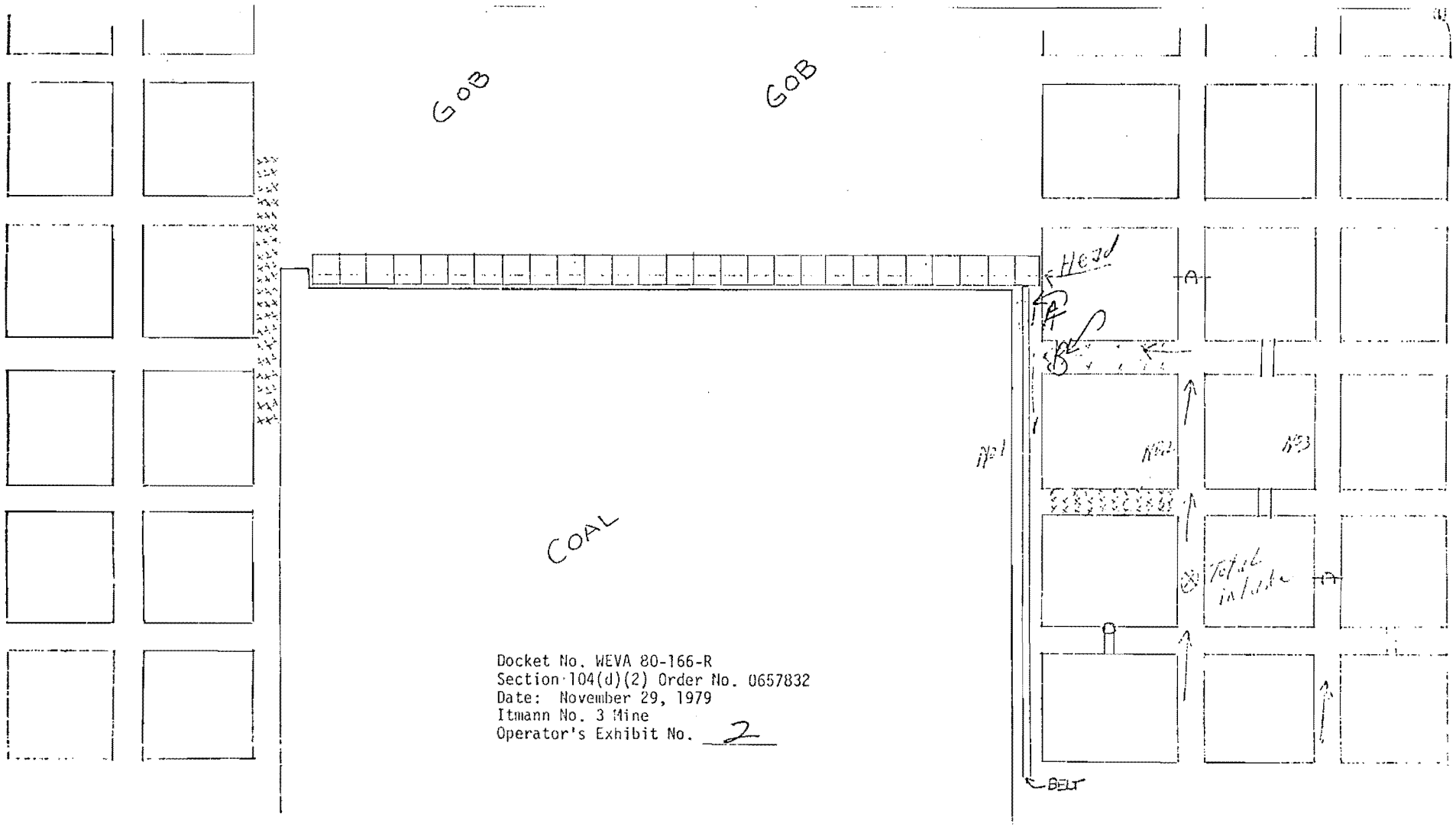
Edwin S. Bernstein
Administrative Law Judge

Distribution:

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

Stephen Kramer, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

APPENDIX




Docket No. WEVA 80-166-R
Section 104(d)(2) Order No. 0657832
Date: November 29, 1979
Itmann No. 3 Mine
Operator's Exhibit No. 2

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 14 1981

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | Petitioner | Civil Penalty Proceeding<br><br>Docket No. WEST 80-20-M<br>A/O No. 04-00010-05014 V |
| v. | | |
| RIVERSIDE CEMENT COMPANY, | Respondent | Crestmore Mine and Mill |

DECISION

Appearances: Theresa Kalinski, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner, MSHA;
Jerry E. Hines, Esq., Gifford-Hill and Company, Dallas, Texas, for Respondent, Riverside Cement Company.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the government against Riverside Cement Company. A hearing was held on Tuesday, December 16, 1980.

The alleged violation was of section 57.14-1 of the mandatory standards. Section 57.14-1 provides that: "Gears; sprockets; chains; drive, head, tail, and take-up 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." The citation, which was issued on May 9, 1979, provides the following:

> An area approximately 5 foot by 4 foot due to a material spillage buildup below conveyor belt No. 104 was used as a passageway near an unguarded take-up pulley with the pinch point of the bend pulley accessible. The return area (lower) of the conveyor belt was not covered or guarded to protect employees when using this area as a passageway.

At the hearing, the parties entered into the following stipulations (Tr. 23):

> 1. The operator is the owner and operator of the subject mine.

2. The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The administrative law judge has jurisdiction of this case.

4. The inspector who issued the citation was a duly authorized representative of the Secretary.

5. A true and correct copy of the subject citation was properly served upon the operator.

6. Copies of the subject citation and termination of the violation in issue are authentic and may be admitted into evidence for the purposes of establishing their issuance, but not for the purpose of establishing the truthfulness or relevancy of any statements therein.

7. The imposition of a penalty will not affect the operator's ability to continue in business.

8. The alleged violation was abated in good faith.

9. In overall terms, the operator has a moderate history of violations. In addition, the operator has a sizable history regarding this particular standard, but the interpretation of this standard has been a matter of honest dispute between the parties, and on some occasions in the past, the presiding judge, after hearing, has vacated citations based upon the standard, which decisions were not appealed, but rather were accepted by MSHA. Finally, there has been no citation at the Crestmore Mine and facility of this standard for the past year.

10. The operator's size is large.

Testimony was given by the inspector who issued the citation and by the operator's safety engineer. The inspector testified that on the day of the inspection he saw that both the take up and the bend pulleys were unguarded while the belt was running (Tr. 5-6). He observed that the bend pulley was approximately 4-5 feet above the ground and that to cross underneath this pulley a person would have to bend over and could become entangled in the pulley (Tr. 7). The inspector believed the area under the conveyor and bend pulley had been used as a passageway because he had seen footprints in the area (Tr. 6). He stated that he generally cited all unguarded pulleys unless employees could not become entangled in the pulley because of height or other circumstances. The decision to cite a particular condition is based upon his individual judgement and not on any pre-existing guidelines (Tr. 14-15).

The safety engineer who accompanied the inspector testified that the area under the belt and pulley is not used as a walkway; the footprints in

the area were due to the fact that the belt had been replaced less then one week prior to the inspection (Tr. 18-19). He stated that approximately 70 feet from the pulley assembly there was a crossover, and that the belt itself ended approximately 80 feet from the pulley assembly (Tr. 21-22). The engineer acknowledged that there was no barrier to prevent employees from going under the belt at the cited area (Tr. 21). At the close of his testimony, he stated that a recent change in management has led to an improved attitude towards safety at the company and to improved relations between MSHA and the operator (Tr. 24-25). When recalled to the stand, the inspector stated that the walkway over the belt was not in place on the date of the inspection and that no other way existed for crossing the belt (Tr. 16).

I find that a violation of the mandatory standard occurred.

Both pieces of equipment are clearly covered by the cited standard. Take up pulleys are specifically mentioned in the standard and the bend pulley is a "similar exposed moving machine part." Furthermore, the testimony given at the hearing by both the inspector and the operator's witness demonstrates that these parts may be contacted by persons and consequently may cause injury. As I have stated before, "[i]t is not necessary under this mandatory standard to establish precisely the probability of injury or of contact by individuals. It is enough that there may be contact and that there may be injury." Magma Copper Company, DENV 79-320-PM et al. (August 9, 1979).

Although a serious violation occurred, the parties have agreed that the interpretation of this particular standard has been a matter of dispute between the parties. As already set forth I myself have, in the past, vacated citations issued to this operator based upon this standard. Furthermore, at the hearing the parties stipulated that there have been no citations based upon this standard at this facility in the past year. I believe these factors reduce the elements of negligence and fault that might otherwise be present.

Based upon the foregoing and taking into account all the statutory criteria a penalty of $100 is assessed.

ORDER

The operator is ORDERED to pay $100 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

Theresa Kalinski, Esq., Office of the Solicitor, U.S. Department of Labor, 300 North Los Angeles Street, Los Angeles, CA 90012 (Certified Mail)

Jerry E. Hines, Esq., Gifford-Hill and Company, Inc., 8435 Stemmons Freeway, P.O. Box 47127, Dallas, TX 75247 (Certified Mail)

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 14 1981

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Civil Penalty Proceeding |
| | : | Docket No. WEST 80-21-M |
| Petitioner | : | A/O No. 04-00010-05015 V |
| v. | : | |
| | : | Crestmore Mine and Mill |
| RIVERSIDE CEMENT COMPANY, | : | |
| Respondent | : | |

DECISION

Appearances: Theresa Kalinski, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner, MSHA; Jerry E. Hines, Esq., Gifford-Hill and Company, Dallas, Texas, for Respondent, Riverside Cement Company.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Government against Riverside Cement Company. A hearing was held on Tuesday, December 16, 1980.

The alleged violation was of 30 C.F.R. 57.12-8. Section 57.12-8 of the mandatory standards provides that:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

The citation, which was issued on May 14, 1979, set forth the following condition:

> The trailing cable of the clinker stacker was not connected through proper fittings at the main junction box. The trailing cable was entered through the door of the junction box and the door fastened against the cable. The cable

is energized and east belt was running. 440 v. Should a short circuit occur on the stacker electrical system which was energized it could be a fatal hazard to three employees who were cleaning the trailer walkway or other employees when attempting to mount the stacker.

At the hearing, the parties entered into the following stipulations (Tr. 2, 33):

(1) The operator is the owner and operator of the subject mine.

(2) The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(3) The administrative law judge has jurisdiction of this case.

(4) The inspector who issued the citation was a duly authorized representative of the Secretary.

(5) A true and correct copy of the subject citation was properly served upon the operator.

(6) Copies of the subject citation and termination of the violation in issue are authentic and may be admitted into evidence for the purposes of establishing their issuance, but not for the purpose of establishing the truthfulness or relevancy of any statements therein.

(7) The imposition of a penalty will not affect the operator's ability to continue in business.

(8) The alleged violation was abated in good faith.

(9) In overall terms, the operator has a moderate history of violations. In addition, the operator has a small history regarding this particular standard.

(10) The operator's size is large.

Testimony was given by the inspector who issued the citation and by the operator's safety engineer. The inspector testified that on the day of the inspection he observed the clinker stacker power cable attached inside the clinker stacker junction box and that the cable exited the box through the box's door (Tr. 10). He stated that this was not the way in which cables typically enter junction boxes since such cables normally enter junction boxes through proper fittings (Tr. 10). The cable itself was not winding and unwinding from a reel, as is usually the case (Tr. 25). Rather, the cable was laying on the ground following the stacker, and was tied to the stacker by a rope (Tr. 7-9). The inspector's concern was that the movement of the stacker could cause the rope to break, creating a situation where the weight of the cable would cause the edge or the door of the junction box to cut into

the cable, creating a shock hazard (Tr. 12). The inspector testified that if the cable were cut and the ground and the fuses were not working properly the junction box and the stacker itself could become energized (Tr. 12-13). The inspector felt that if the cable had entered the junction box through insulated bushings then the likelihood of any damage to the cable would have been significantly lessened (Tr. 28). The safety engineer testified that a new reel for the cable was scheduled to be installed the next day (Tr. 32). The rope used to fasten the cable to the stacker circled the cable several times, preventing persons from pulling on the cable, which could break the connections inside the junction box (Tr. 30). He further testified to the type and quality of the cable (Tr. 30), and stated that there was both a grounding wire for the cable and a circuit breaker for the stacker, so that if a short were to occur the power would be cut off, regardless of how the cable was cut (Tr. 30-31).

I find that a violation of the mandatory standard occurred.

The regulation at issue here, 30 C.F.R. 57.12-8, requires that cables enter the metal frames of electrical compartments "only though proper fittings." Based upon the evidence I find that the way this cable entered the junction box did not constitute "proper fittings" and that therefore a violation occurred.

I further find the operator exhibited ordinary negligence because it should have known that this cable was not entering the junction box in the proper manner. Further, although any potential accident would be serious, the likelihood of an accident occurring is somewhat remote because of the chain of events that would have to occur before a person could be injured.

In light of the foregoing and taking into account all the statutory criteria a penalty of $150 is assessed.

ORDER

The operator is ORDERED to pay $150 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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Jerry E. Hines, Esq., Gifford-Hill and Company, Inc., 8435 Stemmons Freeway, P.O. Box 47127, Dallas, TX 75247 (Certified Mail)

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 16 1981

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Civil Penalty Proceeding |
| | : | |
| | : | Docket No. CENT 79-403-M |
| Petitioner | : | A/O No. 41-01643-50005 |
| v. | : | |
| | : | Beneficiation Mine |
| LONE STAR STEEL COMPANY, | : | |
| Respondent | : | |

## DECISION

Appearances: Richard Collier, Esq., U.S. Department of Labor, Dallas, Texas, for Petitioner;
Donald W. Dowd, Esq., Lone Star Steel Company, Lone Star, Texas, for Respondent.

Before: Judge Stewart

The above-captioned case is a civil penalty proceeding brought pursuant to section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter, the Act). The hearing in this matter was held on May 7, 1980, in Dallas, Texas. A posthearing brief was filed by Respondent on June 30, 1980. Proposed finding of facts and conclusions of law inconsistent with this decision are rejected.

Inspector Michael Sanders issued Citation No. 153483 on June 7, 1979, pursuant to section 104(a) of the Act. He cited a violation of 30 C.F.R. § 55.9-2 and described the pertinent condition or practice as follows: "The hoist brake on the Marian 183 dragline would not "hold" the bucket suspended in the air with a normal load of material while loading trucks. The operator had to make a complete cycle of drag, hoist and dump without stopping."

Section 55.9-2 reads as follows: "Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used."

This citation was issued in the course of an inspection conducted by Inspector Sanders at Respondent's Lone Star Pits and Plant on June 6 and 7, 1979. This mine is an open-pit, surface strip operation.

The specific piece of equipment involved was a Marian 183 dragline. This dragline was used primarily to excavate ore and load it into haulage

trucks. The dragline boom was estimated by the inspector to be 65 feet in length. Its bucket had a capacity of 10 yards. Estimates of the weight of a fully loaded bucket ranged from 15 to 25 tons.

In June of 1979, Respondent hauled ore both with its own trucks and with those of contractors. When empty, each of Respondent's trucks weighed 70 tons. The cab on each of Respondent's trucks was protected from above by a canopy. This canopy was designed to withstand heavy impact and was constructed of the same material as the truck bed - that is, "M-1 steel" with a tensile strength of 100,000 pounds per square inch. The canopies also provided roll-over protection up to two times the weight of the truck. Elliot Dressner, Respondent's assistant superintendent in charge of mining, and John Irwin, Respondent's manager of safety at the times pertinent herein, testified that they believed these canopies could withstand the impact of a falling, fully loaded bucket. Operators of Respondent's trucks were permitted to remain in their cabs while ore was being loaded into their trucks. Because the trucks owned by contractors were not equipped with canopies or other such overhead protection, operators of those trucks were required to stand away from their vehicles during loading.

The dragline was in operation loading ore into a haulage truck when observed by the inspector. He estimated that the dragline mined and loaded 25 to 30 truckloads of ore per day.

The loading sequence was as follows: The bucket was lowered to the ground, dragged along the ground to collect material, hoisted, swung over the bed of the haulage truck and released. The truck was positioned so that the bucket swung over the back corner of the bed. Normally, the bucket was released over the center of the truck bed. The operators of the dragline were instructed not to allow the bucket to be suspended over a haulage truck's cab.

During his examination of the dragline, the inspector asked the dragline operator to hoist the bucket and hold it in midair. The operator responded that the hoist brake would not hold the bucket. The inspector then had the operator of the dragline test the hoist brake four times - once with a fully loaded bucket, once with a bucket halfway loaded, once with a small amount and, finally, once with an empty bucket. On each occasion, the hoist brake failed to hold and the bucket fell to the ground.

The hoist brake was a manually activated external or check brake. When such a brake is applied, it contacts and "squeezes" the hoist drum. The diameter of the drum was 70 inches. Its width was approximately 11-3/4 inches. At the time the citation was issued, the brake lining was approximately 2 inches off center of the drum. The inspector believed that the brake failure might have been due to this slight misalignment. The testimony of Respondent's witnesses established that the misalignment was not the cause of the brake failure, but rather that it had been caused by a faulty brake adjustment. The brake had been adjusted too tightly, resulting initially in constant drag and overheating. Operation of the brake in this condition

caused the formation of a glaze. Even if the hoist brake is properly adjusted, the presence of such glaze will cause the brake to slip. To abate the condition, vinegar was applied to cut the glaze and the brake was readjusted.

A foreman was assigned to supervise the operation of the dragline. Although his main job was to stay with the dragline and he was on the machine several times a day, he was not constantly at the dragline or at the dragline site. His duties entailed "trips back to the shop" and "other chores involving a water truck on the haul road and things like that." He remained in radio communication at all times.

Roland Adams, Respondent's relief foreman during the pertinent times, had operated the dragline on occasion during the two days immediately prior to June 7, 1979. The brake was functioning properly at these times.

Safety procedures in effect at the time required that the operator of the dragline "check brake adjustment before attempting to load", recognizing that improperly adjusted brakes presented a "potential" accident or hazard. John Irwin testified that the operator's running of the dragline without the brake was in contravention of a job safety rule. Elliot Dressner testified that the improper adjustment had not been reported to mine management and that the failure to do so was contrary to the training and instruction given a dragline operator.

The inspector testified that he observed two conditions during this inspection which could have contributed to the hazard presented by the inoperative hoist brake. A drag bucket has a series of chains of large size hooked up in harness fashion. These chains are secured to the bucket with pins of approximately 1-1/2 to 2 inches in diameter. One of these pins was worn three-fourths of the way through; the second was worn halfway through. He also testified that he observed a separation of 1 inch in one of the links of these chains.

Violation of 30 C.F.R. § 55.9-2

The record clearly establishes that the violation of 30 C.F.R. § 55.9-2 occurred as alleged. The hoist brake on the Marian 183 dragline was defective on June 7, 1979, when observed by Inspector Sanders. A glaze had formed on the brake lining, and, as a result, the brake could not hold the bucket suspended in midair or halt the bucket's downward descent. This brake failure constituted an equipment defect within the meaning of the mandatory standard.

Respondent's argument that the equipment was not defective but only improperly adjusted is rejected. The record establishes that the brake had been adjusted too tightly. As a consequence, the brake overheated and caused a glaze to form on the lining. The glaze was the immediate cause of the failure of the brake to hold and constitutes a defect within the meaning of the standard. Respondent's identification of the cause of the defect in no way changes the fact that such defect existed.

Respondent also argued that the failure of the inspector, and hence of the Petitioner, to correctly identify the cause of the brake defect amounted to a failure to prove that an equipment defect affecting safety existed. This argument is also rejected. Again, it was conclusively established on the record that the hoist brake would not function properly and, thus, that it was defective. The inspector's erroneous conclusion as to the cause of the defect does not undermine the correctness of his conclusion that the brake was defective. The absence of an operative hoist brake affected safety. Respondent recognized that "improperly adjusted brakes" presented a hazard. Certainly, a completely inoperative brake would present an even greater hazard.

The procedures in effect and equipment used minimized the risk of injury if an accident were to occur in the course of normal operations. Typically, the bucket was swung over the rear corners of the truck bed, not the cab. Drivers of contractors' trucks were required to step away from the vehicle during loading. Drivers of Respondent's trucks were permitted to remain in the cab of their vehicles because of the protection afforded by a canopy which extended over the cab. While these procedures and protective canopies lessened the probability that the defective hoist brake would lead to injury in the course of normal operations, they did not eliminate the hazard. Although it may not have been absolutely necessary to use the brake during the normal loading sequence, there was still the possibility of situations in which the use of the brake would become necessary. For instance, employee or contractor inadvertence or the existence of a related mechanical defect might make necessary an immediate interruption of normal loading operations, including suspension of the bucket. The mitigating factors reflect on the gravity of the equipment defect. The gravity of the violation, the degree to which safety was actually affected, is specifically at issue in the determination of the appropriate civil penalty.

Respondent advanced two additional invalid arguments in support of its contention that the citation should be vacated. In the first of these arguments, Respondent contended that Petitioner must prove a compliance with 30 C.F.R. § 55.9-1 before it could prove the occurrence of a violation of 30 C.F.R. § 55.9-2. Section 55.9-1 reads as follows:

> Mandatory. Self-propelled equipment that is to be used during a shift shall be inspected by the equipment operator before being placed in operation. Equipment defects affecting safety shall be reported to and recorded by the mine operator. The records shall be maintained at the mine or nearest mine office for at least 6 months from the date the defects are recorded. Such records shall be made available for inspection by the Secretary of Labor or his duly authorized representative.

Respondent submitted "that management is under no duty to correct an equipment defect under 55.9-2 unless it has been made known to management under 55.9-1." Respondent also asserted that the citation should be dismissed because it was

the result of isolated misconduct on the part of an employee. This argument, which Respondent styled the "isolated employee misconduct defense," was comprised of three elements:

(1) An isolated, brief violation of a standard by an employee;

(2) Misconduct was unknown to the employer;

(3) Misconduct was contrary to both employer instructions and to a company work rule that had been uniformly enforced.

The gist of Respondent's assertions is that it should not be held liable for the violation of 55.9-2 because it was without fault.

Section 110(a) of the Act reads, in partinent part, that "[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of the Act, shall be assessed a civil penalty * * *." The language of section 110(a) is clear. The imposition of liability upon Respondent for a violation need not be premised on the fault of Respondent or its knowledge, constructive or actual, of the condition or practice constituting such violation.

Respondent asserted that 30 C.F.R. § 55.9-2 failed to pass constitutional muster on two closely related grounds. First, the standard was "violative of the Fifth Amendment of the United States Constitution because it is so facially vague and indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application." Secondly, it was asserted that the regulation suffered from "vagueness as applied." That is, the standard "in its application to Respondent under the circumstances of this case was violative of the Fifth Amendment to the United States Constitution because a reasonably prudent man familiar with the circumstances of the industry would not know that the cited standard was designed to guard against the condition cited." These arguments are without merit.

Section 55.9-2 was intended to eliminate a wide range of hazards and was drafted with as much exactitude as possible. Though general in its wording and scope, it prohibits only conditions or practices which are unacceptable in light of common understanding and experience of those working in the industry. It is set out in terms with which the ordinary person in the industry exercising common sense was able to understand and comply.

Respondent's argument that the mandatory standard suffered from "vagueness as applied" is also without merit. An inoperative hoist brake is defective equipment within the meaning of the regulation. Certainly, a reasonable man in the mining industry would have corrected the hoist brake before using the dragline. Moreover, Respondent recognized the necessity of maintaining the brake in working order. Under company work rules, it was the dragline operator's responsibility to inspect the brake prior to use. As Respondent noted in its posthearing brief, "specific safety rules of the company promulgated under the overall safety program of the company" required that the

dragline operator report the condition to management and discontinue use of the hoist. Respondent specifically listed improperly adjusted brakes as a potential hazard in its job safety procedure. Respondent clearly recognized that the condition was an equipment defect affecting safety.

Statutory Criteria

Section 110(i) of the Act requires that the following criteria be considered in the assessment of a civil penalty:

> [t]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The parties offered stipulations regarding each of these criteria except for Respondent's negligence and the gravity of the violation.

Negligence

It was not established that Respondent knew or should have known of the condition. Roland Adams, Respondent's relief foreman, had operated the dragline on the 2 days prior to the issuance of the citation and found that the brakes were in good working order. It is probable that Adams was on the dragline at the beginning of the shift during which the citation was issued. However, the point in time at which the brake became inoperative was not established. Moreover, it was not established that the lack of an operative hoist brake would have been observable by management during a normal loading sequence. The inference cannot be drawn that Adams, or any other member of mine management, knew or should have known of the condition. The operator of the dragline had actual knowledge that the brake was defective. However, it was not established that he was a member of mine management. His knowledge cannot be imputed to Respondent.

The record also showed that Respondent had a safety program, a part of which required that the dragline operator inspect the hoist brake and adjust it if necessary.

In view of the above, it is found that Respondent was not negligent in its failure to comply with the requirements of the standard.

Gravity

The absence of an operative hoist brake presented a serious safety hazard. It was probable that the need for use of the hoist brake would arise and that, because of the inability of the brake to hold the bucket suspended, that an accident would occur. It is evident that normal operations could continue

without the need to resort to use of the brake. Nevertheless, the possibility existed that the inadvertence of an employee or contractor or the existence of a related mechanical defect might make necessary the immediate interruption of normal operations, including suspension of the bucket. The possibility of human inadvertence cannot be considered to have been remote. Inspector Sanders estimated that the loading of haulage trucks took place from 25 to 30 times per day. Moreover, dragline operations were not supervised constantly. The foreman who supervised the dragline made several trips a day "back into the shop" and was responsible for "other chores involving a water truck on the haul road and things like that," remaining only in radio contact. An employee or contractor might easily contravene company safety rules, just as the operator of the dragline did in this instance, and place himself in jeopardy.

With regard to the possibility that a mechanical defect might give rise to a situation in which the use of the hoist brake would be necessary, the inspector actually observed defects in the chain which secured the bucket to the dragline. The inspector believed that it could reasonably be expected that the chain or pin would break completely because of these defects and, if such a break occurred, use of the hoist brake would very likely be necessary.

Respondent's evidence, at best, would support a finding that the risk of serious injury was low if an accident were to occur in the course of normal operations as long as established procedures were being followed. Individuals would either be within a cab protected by a canopy or standing outside the immediate area. John Irwin and Elliot Dressner thought that the protective canopies could withstand the impact of a fully loaded bucket. Although this testimony was unrebutted, it does not rule out the possibility of a serious accident. Nevertheless, in view of the high tensile strength of the steel from which they were constructed, it is accepted for the purposes of this decision that the canopies could withstand the impact of a fully loaded bucket. The canopies would, therefore, provide the operators of Respondent's vehicles with a measure of protection in the course of normal operations.

A further measure of protection was provided by the standard operating procedure. The bucket was hoisted over the backend of the haulage vehicles. If proper procedure were followed, the bucket would at no time be suspended over the cab of a vehicle.

However, just as an instance of employee or contractor inadvertence or mechanical defect might cause an accident, these occurrences could give rise to a situation in which an individual subjected himself to the risk of serious injury or fatality. As noted above, the possibility of human inadvertence was not remote and mechanical defects were observed in the bucket and chains by the inspector. It is found, therefore, that it was probable that an accident and injury would occur.

If injury were to occur, in view of the weight of the bucket, such injury would be expected to be serious or fatal.

## STIPULATIONS

At the hearing, the parties stipulated the following:

Jurisdiction exists and Respondent is engaged in business affecting interstate commerce. Respondent has no history of violations under the particular standard cited. The size of Respondent for the year 1978 for the entire company was 284,804 man-hours. For the mine involved, the size was 141,104 man-hours. This makes Respondent a medium-size employer. The assessment of a penalty herein will not affect Respondent's ability to continue in business.

These stipulations were accepted at the hearing by the Administrative Law Judge and are incorporated as part of the Findings of Fact herein.

## ASSESSMENT

In consideration of the findings of fact and conclusions of law rendered above, it is found that an assessment of $100 is appropriate for the violation of section 55.9-2 under the criteria contained within section 110 of the Act.

## ORDER

It is ORDERED that Respondent pay the sum of $100 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

Distribution:

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Donald W. Dowd, Esq., Lone Star Steel Company, Highway 259 South, Lone Star, TX 75668 (Certified Mail)

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 16 1981

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | | Civil Penalty Proceeding |
| | Petitioner | Docket No. CENT 80-86-M |
| v. | | A/O No. 34-00598-05001 |
| MIDWEST MINERALS, INC., | Respondent | #30 Quarry & Plant |

DECISION

Appearances: Eloise Vellucci, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas for Petitioner;
Richard Atkinson, Midwest Minerals, Inc., Pittsburgh, Kansas, for Respondent.

Before: Judge Stewart

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (MSHA), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereinafter the Act), 1/ to assess civil penalties against Midwest Minerals, Inc., (hereinafter Midwest). A hearing was held at Miami, Oklahoma, on November 3, 1980. Petitioner called one witness. Respondent called two witnesses. At the outset of the hearing, the parties entered into the following stipulations on the record:

1/ Sections 110(i) of the Act provides:
"(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, wehther the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."

The parties stipulate and agree that the number of man hours for the company, Midwest Minerals, is 141,401. The man-hours for the particular mine in question were 9,029. We have stipulated and agree that these figures represent a small-sized mine. There is no history of violations for the particular mine in question for the 24 months preceding the citation. The proposed penalty would not have any effect on the operator's ability to continue in business.

The decision rendered orally from the bench at the hearing is reduced to writing below as required by the Rules of Procedure of the Federal Mine Safety and Health Review Commission, 30 C.F.R. § 2700.65.

The stipulations being that the man hours for the company are 141,101, and the man hours for the particular mine are 9,029 and that these figures represent a small-sized mine, I so find that the size of the operator is small.

There being no history of prior violations, I find that the history of Respondent is good.

In view of the Respondent's concession that the proposed penalty would have no effect on the operator's ability to continue in business, I therefore find that the penalty in this case will have no effect on the operator's ability to continue in business.

Citation No. 167323 was issued on August 7, 1979, by MSHA inspector Smith. The condition or practice noted on this citation states, "The stacker tail pulley has no guard. Two employees work near the area daily." The citation cited a violation of 30 CFR 56.14-1, which reads as follows: Mandatory. Gears, sprockets, chains, drive, head, tail and take-up 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."

The evidence has shown that the equipment in question is a tail pulley; one of the specific types of equipment that is required to have a guard by the mandatory standard. The evidence has also established that the tail pulley may be contacted by persons and that the contact may cause an injury to persons. Respondent has introduced five photographs, marked Exhibits 1 through 5, showing in general the condition of a piece of equipment. The photographs were taken approximately one year after the citation. Exhibits 1 through 3 show that the drive pulley is guarded but that there is no guard at the tail pulley. Inspector Smith has acknowledged that the drive

pulley guard was in place at the time of the inspections, but he testified that there was no guard around the tail pulley. Respondent's witness has testified that these photographs shown in Exhibits 1, 2 and 3, were taken at a time when the tail pulley guard on the inby side was tempoparily removed for the purpose of taking the photographs. It was then replaced on the tail pulley. Respondent's Exhibit No. 2 shows a guard in the nature of a piece of belt on the outby or far side of the frame of the equipment as the equipment is viewed from the direction shown in Exhibit 2. The inspector has testified that this guard was not in place at the time he issued the citation and there has been no other testimony refuting this statement. Therefore, I find that the guards were not in place on the tail pulley at the time of the inspection as alleged by inspector Smith. The respondent has asserted that many inspections had been made by inspectors by the Bureau of Mines, by MESA and by MSHA and this condition had never be cited previously. Inspector Smith has testified that he is unable to venture a statement as to why no citations were previously issued. While this may be material to the issue of negligence it is not controlling on the issue as to whether or not there was a violation. It has been established that the tail pulley was not guarded on August the 7th, 1979, that the pulley could be accidentally contacted by persons working in the area and that the conditions might result in an injury. I therefore find that a violation of 30 CFR 56.14-1 has been established.

The testimony has shown that the pinch point is at the bottom of the pulley and that the bottom of the pulley is about six inches above the buildup of material. The inspector has testified that a person working or walking in the area within two or three feet of the belt itself could very easily slip and fall into this pinch point. The Respondent's argument that the area is guarded by location has been fully considered. While there is some protection from the location, it is still evident that it is possible for a person to accidentally be injured by the belt at its pinch point with the pulley. The frequency and amount of shoveling that must be done in this area has not been established by the testimony. Nevertheless, two persons work in this area and it is possible for them to be injured by the unguarded pulley. I will accept the statement in closing argument that belt dressing is no longer applied and that belts are prevented from slipping by a friction type material placed on the pulley. Since it has not been established by the testimony that belt dressing need be frequently applied, I will find that it is improbable that a person would be seriously injured or that death would result as a result of the unguarded pulley.

The testimony of inspector Smith has established that the absence of the guard on the tail pulley was open and obvious. Respondent has acknowledged and the testimony has established that the operator knew that there was no guard at this point. The operator was of the opinion that the tail pulley was adequately guarded by location and by components of the equipment. It has established that the equipment has run in this condition for many years and that it has not previously be cited for this violation. Although it has been established that an injury could occur, I will give the operator credit for good faith in this respect for not placing a guard around the equipment and find that any negligence on the part of the operator is slight.

The Secretary stated for the record that the employer exercised extreme good faith and had done everything in its power to correct the violation for which it was cited. In view of MSHA's concession that the operator exercised good faith in abating the citation, I find that the operator did exercise good faith in attempting to abate the violation after notification of that violation.

In view of the foregoing findings of fact and conclusions of law, I find that an appropriate assessment for this violation in consideration of the six statutory criteria is the amount of $30.00.

ORDER

The bench decision assessing a penalty of $30 is affirmed. Respondent is ordered to pay Petitioner the sum of $30 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

Distribution:

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Richard Atkinson, Midwest Minerals, Inc., P.O. Box 412, 709 North Locust, Pittsburgh, KS 66762 (Certified Mail)

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. KENNECOTT COPPER CORPORATION, Respondent. | JAN 19 1981<br><br>CIVIL PENALTY PROCEEDING<br>DOCKET NO. CENT 79-273-M<br>A/O NO. 29-00014-05001<br><br>Mine: Kennecott Concentrator |

DECISION

APPEARANCES:

Richard L. Collier, Esq., Office of the Solicitor, United States Department of Labor, 555 Griffin Square, Suite 501, Dallas, Texas 75202
for the Petitioner,

J. C. Robinson, Esq., Dickson, Young & Robinson, 212 North Arizona Street, Silver City, New Mexico 88061
for the Respondent.

Carlson, Judge:

This proceeding, brought under Section 105 of the Federal Mine Safety and Health Review Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter the "Act"), arose out of an inspection conducted by one of petitioner's representatives on April 23, 1979 at respondent's mine near Hurley, New Mexico. As a result of the inspection, one citation was issued charging respondent with a violation of 30 C.F.R. 55.15-5[1].

On July 29, 1980, counsel submitted stipulations of fact. These stipulations are now approved and therefore, for the purposes of this litigation, establish the following as true: 30 C.F.R. 55.15-5 was in fact violated; the worker committing the violation was an employee of an electrical sub-contractor (Gardner & Zemke) to Burns Construction, the primary contractor; under the terms of the contract between respondent and Burns, the latter functioned as an independent contractor, performing all work, and furnishing and exercising exclusive control over the conduct of

1/30 C.F.R. 55.15-5 provides:

Mandatory. Safety belts and lines shall be worn when men work where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

The citation alleges that an employee of Gardner Zemke, an electrical sub-contractor, was signaling another worker while standing on the outside edge of a building, 50 feet above the ground; the ledge was not bounded by handrails, and the employee was not wearing a safety line.

its own employees. The stipulations further establish the sole issue to be decided in this case: Whether respondent, an owner-operator of a mine, may be held responsible for violations committed on its premises by employees within the exclusive control of an independent contractor.

The Federal Mine Safety and Health Review Commission answered this question affirmatively in Secretary of Labor, Mine Safety and Health Administration (MSHA), v. Old Ben Coal Company, 1 FMSHRC 1480 (October 29, 1979), explaining that

> [w]hen a mine operator engages a contractor to perform construction or services at a mine, the duty to maintain compliance with the Act regarding the contractor's activities can be imposed on both the owner and the contractor as operators. This reflects a congressional judgment that, insofar as contractor activities are concerned, both the owner and the contractor are able to assure compliance with the Act. Arguably, one operator may be in a better position to prevent the violation. However, as we read the statute, this issue does not have to be decided since Congress permitted the imposition of liability on both operators regardless of who might be better able to prevent the violation Id. at 1483.

Several other decisions affirm the Commission's position that the Secretary is authorized under the Act to proceed against either the contractor or the mine owner[2].

Although the Old Ben decision upheld the Secretary's policy of citing the mine owners in all cases involving independent contractor violations, it did so on the ground that the policy promoted uniformity and, to that extent, fairness; the Commission indicated, however, that it would strike down the policy if it became apparent that the policy was based on administrative convenience. Responding to the Commission's admonition, the Secretary promulgated new regulations establishing procedures for direct enforcement against independent contractors. These regulations became effective on July 31, 1980. On Augut 4, 1980, the Commission established

2/In National Industrial Sand Association v. Marshall, 601 F2d 689 (3d Cir. 1979), the Third Circuit Court of Appeals interpreted the legislative history of the Act as indicating that

> Congress was clearly concerned with the permissive scope of the Secretary's authority, not with the mandatory imposition of statutory duties as independent contrators. Id. at 703.

See also Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Republic Steel Corporation, (Docket No. IBMA 76-28, April 11, 1979); Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Kaiser Steel Corporation, (Docket No. DENV 77-13-P, May 17, 1979); Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Monterey Coal Company, (Docket No. HOPE 78-469, November 13, 1979).

interim procedures to guide the disposition of cases pending before the Commission at the time the new regulations became effective. Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Pittsburg and Midway Coal Mining Company, (Docket No. BARB 79-307-P, August 4, 1980). These procedures formed the basis for an order issued in the present case on September 16, 1980, directing the Secretary to inform this judge within 30 days whether he would continue to prosecute only the mine owner, or prosecute the independent contractor, or both. By November 24, 1980, no response had been received; an order to show cause was therefore issued. On December 8, 1980, the Secretary notified this judge, by letter, that he intended to proceed only against respondent. On December 29, 1980, respondent filed a motion to dismiss the proceeding on the ground that the Secretary's unduly delayed response indicated that the policy of uniformally citing mine owners had been based on administrative convenience.

Respondent's motion to dismiss is denied. The term "administrative convenience" as used in the Old Ben decision refers to the pursuit of broad policy objectives rather than to the conduct of an individual attorney in attending to the details of a particular case. The motion might have been more pursuasive had it been filed before the order to show cause was issued and promptly answered.

The merits of the case are controlled by the Old Ben decision. The Pittsburg and Midway decision appears to signal a shift in the Commission's position; however, until the Commission clearly establishes a new position, the Old Ben decision must be followed.

That decision, while approving an "interim policy" of citing mine owners for independent contractor violations, expressed concern that the policy not serve as a pretext for administrative convenience; it states specifically that continuation of the "interim policy" provides evidence that it is based upon "improper considerations of admiminstrative convenience". For this reason, I would adopt the approach taken by Judge Boltz in Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Phillips Uranium Corporation, Docket No. CENT 80-208 (October, 1980). The proposed penalty of $345.00 will therefore be reduced significantly.

ORDER

Accordingly, respondent is ordered to pay a civil penalty of $19.00 within 30 days of this decision.

John A. Carlson
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 21 1981

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceedings |
| | : | Docket No. LAKE 80-393-M |
| | : | A/O No. 20-01569-05006-R |
| v. | : | |
| | : | Docket No. LAKE 80-394-M |
| EDWARD KRAEMER & SONS, INC., Respondent | : | A/O No. 20-01569-05007-R |
| | : | Sibley Quarry & Mill |

DECISION APPROVING SETTLEMENT
AND
ORDERING PAYMENT OF CIVIL PENALTY

Appearances: Allen H. Bean, Esq., Office of the Solicitor, U.S. Department of Labor, Detroit, Michigan, for Petitioner;
Willis P. Jones, Jr., Esq., and James A. Climer, Esq., Jones, Schell & Schaefer, Toledo, Ohio, for Respondent.

Before: Judge Cook

Proposals for penalties were filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (Act) in the above-captioned proceedings. Answers were filed and prehearing orders were issued. Subsequent thereto, the parties filed a joint motion requesting approval of a settlement and for dismissal of the proceedings.

Information as to the six statutory criteria contained in section 110 of the Act has been submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

The proposed settlement is identified as follows:

A. Docket No. LAKE 80-393-M

| Citation No. | Date | Section of Act | Assessment | Settlement |
|---|---|---|---|---|
| 298343 | 10/16/79 | 103(a) | $200 | $100 |

B. Docket No. LAKE 80-394-M

| Citation No. | Date | Section of Act | Assessment | Settlement |
|---|---|---|---|---|
| 298201 | 3/26/80 | 103(a) | $200 | $100 |

The motion states, in part, as follows:

> The parties submit that the penalty reductions shown above are warranted and consistent with the criteria described in Section 110 (i) of the Act because of the arguments presented in the letter dated October 20, 1980 from Willis P. Jones, Jr., attorney for respondent, a copy of which is attached hereto and made a part hereof. The issue of MSHA's right to conduct inspections of respondent's Sibley Quarry under the Act was resolved in Marshall -vs- Edward Kraemer & Sons, Inc., (ED, Mich) Civil Action No. 80-70604, by the entry of a Stipulation and Order, copies of which are attached hereto and made a part hereof. The parties herein state that this Motion does not modify or affect any agreements set forth in the Stipulation and Order entered in Civil Action No. 80-70604, United States District Court, Eastern District of Michigan, Southern Division.

The referenced letter dated October 20, 1980, states, in part, as follows:

> As part of the continuing efforts on behalf of both parties to amicably settle the Proposal for Civil Penalty in the above-captioned cases, I submit to you the following reasons why I believe that the Assessments of $200.00 for each citation should be reduced to $100.00 per citation for a total of $200.00. So that our position is clear, I would point [out] to you that any admissions and/or representations, if any, which are made in this letter are made in connection with settlement negotiations and as such are not to be considered as admissible evidence under the Federal Rules of Evidence.
>
> 1. On October 16, 1979 when Respondent allegedly denied Petitioner's representative the right of entry to Respondent's Sibley Quarry and Mill for purposes of conducting an inspection under the Act, Respondent's representatives who allegedly denied entry were acting upon the advice of legal counsel. Counsel's advice in this regard was to the effect that attempts by MSHA inspectors to conduct inspections on Respondent's property without a search warrant was a violation of Respondent's rights and protections against warrantless searches embodied

in the Fourth Amendment to the Federal Constitution. The advice of Respondent's counsel was based upon the case of Marshall -vs- Barlows, INC., 98 S. Ct. 1816 (1978) wherein the Supreme Court found that warrantless inspection [sic] by OSHA violated a business operator's Fourth Amendment rights. Even though the Barlow's case involved OSHA, Respondent submits that because of the similarities in the purposes of OSHA and MSHA, the Barlow's decision throws the Constitutionality of warrantless search provisions of MSHA into considerable doubt. Additionally, as of October 5, 1979, the case of Nolichuckey Sand Company, Inc. -vs- Marshall, was under advisement before the Sixth Circuit Court of Appeals. Nolichuckey involved the question of whether or not the warrantless search provisions of MSHA were unconstitutional under the Fourth Amendment. As of October 10, 1979, Respondent had no way of knowing that Nolichuckey had been decided adversely to the operator on October 5, 1979. Last, District Courts of Wisconsin and New Mexico had held that the warrantless search provisions of MSHA were unconstitutional under the Fourth Amendment.

For these reasons, Counsel felt as of October 10, 1979, that the issue of the Constitutionality of MSHA's warrantless search provisions was open to question. For these reasons, counsel for Respondent submits that Respondent's representatives were making a good-faith assertain [sic] of Respondent's rights when they requested a search warrant of MSHA inspectors on October 10, 1979. Under the Penalty Assessment provisions of 30 CFR Section 100.03 [sic] Respondent submits that it is entitled to a reduction of the proposed penalty due to the Respondent's lack of history of previous violations, Respondnet's [sic] lack of negligence, the small likelihood of Respondent's violation resulting in injury to miners and the fact that Respondent's request for a search warrant was in good faith.

2. On or about March 26, 1980, Petitioner alleged in [Citation No. 298201], that Respondent violated the [Act] by refusing to allow Respondent's employees to wear noise and dust monitoring devices. As of March 26, 1980, Respondent was once again acting on advice of counsel. Counsel's advice to Respondent was based upon the case of Plum Creek Lumber Company -vs- Hutton, 608 F2d 1283 (Ninth Circuit 1979.) This

case involved the right of OSHA inspectors to hang and/or attach noise and dust monitoring devices to employees of a business being inspected. The Court found that OSHA provided no authority for the hanging of such noise and dust monitors. Again, Counsel for Respondent submits that even though OSHA and MSHA are different [Acts], their similarities of purpose and the fact that MSHA has no provisions explicitly requiring operators to allow the hanging of monitoring devices on their employees makes it questionable whether or not MSHA inspectors have the right to hang such monitoring devices. On this basis, Counsel for Respondent submits that Respondent was once again making a good-faith ascertain [sic] of its rights under the Constitution when it denied MSHA inspectors the right to hang dust and noise monitoring devices on its employees on March 26, 1980.

Further, Respondent submits that the attachment of the noise and dust monitoring devices constitutes an unnecessary safety hazard to its employees. It is a universally accepted rule of industrial safety that persons working around or near machinery with exposed moving parts should not wear jewelry, chains, loose keys or other loose apparel. This principle is set forth by the National Safety Council in Accident Prevention Manual for Industrial Operations, Seventh Addition [sic] (1974) at pgs. 699, 828, 830, and 1004. Respondent submits that accurate noise and dust measurements can be taken by means other than attaching noise and dust monitoring equipment to employees working around moving machinery. See: Accident Prevention Manual for Industrial Operations, Supra, at 1247-1248.

Because of Respondent's good-faith ascertain [sic] of its rights and its lack of intent to hinder MSHA in sections [sic], Respondent's Counsel once again submits that under the guidelines of 30 CFR Section 100.03 [sic], Respondent is entitled to few or no penalty points for history of previous violations, negligence, gravity of violation and good-faith.

For the foregoing reasons Edward Kraemer & Sons, Inc. feels that it is entitled to a reduction of at least $100.00 for each citation involved in these proceedings.

The referenced proceeding in the United States District Court for the Eastern District of Michigan, Southern Division, was disposed of by an order of dismissal issued by United States District Judge John Feikens on September 10, 1980. The proceeding was dismissed pursuant to the following stipulation:

> It is hereby stipulated and agreed by the parties as follows:
>
> 1. The defendant will not deny authorized representatives of the Secretary of Labor entry to, upon and/or through the Sibley Quarry in Trenton, Michigan, for the purpose of carrying out inspection or investigation under the provisions of the Federal Mine Safety and Health Act of 1977, nor interfere with, hinder or delay said authorized representatives in the conduct of such investigation, all subject to the qualifications stated in paragraph [sic] 2 and 3 hereof.
>
> 2(a) During the course of any such inspection or investigation, if the defendant claims it believes that the wearing of audio dosimeters, personal dust sampling devices or similar devices by any of its employees would represent a risk of injury to said employee, the plaintiff will not require that said monitoring device(s) be worn by the employee.
>
> 2(b) Instead, the monitoring device will be placed at a location mutually agreed upon in accordance with the following criteria:
>
> (1) the device will be placed so that it is located as closely as possible to simulate the location of the orfice(s) [sic] of the employee's head during the monitoring period which represents the most significant access point for the contaminant or other hazard being tested for.
>
> (2) The device will not be placed anywhere where it would constitute a potential safety hazard or would impede the normal movement of workers and/or equipment in and about the area.
>
> (3) The Defendant will not challenge the results of monitoring obtained in accordance with the criteria stated in paragraph 2(b) hereof on the ground that the results do not demonstrate the employee's actual exposure because of the location of the monitoring device(s)

providing agreement as to location as described in 2(b) hereinabove.

2(c) If the parties cannot agree on a mutually agreeable location for the placement of the monitoring device(s) the Plaintiff may pursue either of the following options:

(1) The Plaintiff shall have the right to place the monitoring device(s) at a location that plaintiff believes satisifies the criteria of paragraphs 2(b)(1) and (2) and the parties agree that the issue of the compliance of the placement of the sampling device(s) with the criteria of paragraphs 2(b)(1) and (2) shall be the subject for review by the Mine Safety and Health Review Commission (or its Judge.

(2) The plaintiff shall have the right to place the monitoring device(s) on a Mine Safety and Health inspector(s) who shall reasonably emulate the movements of the employee(s) to be monitored. Defendant will not challenge the results of the monitoring so obtained on the grounds stated in paragraph 2(b) above as long as the inspector(s) wearing the monitoring device(s) reasonably emulate the movements of the employee(s) to be monitored.

3. Defendant reserves the right to refuse to consent to a warrantless inspection of the subject mine in the event a final decision (a decision is not final until action by any court having power of review has been precluded or concluded) of the Sixth Circuit Court of Appeals or the U.S. Supreme Court upholds the right of the operator of an open quarry to insist that inspections provided for under the provisions of the Federal Mine Safety and Health Act of 1977 be made only pursuant to a duly authorized search warrant.

4(a) The execution of this stipulation is without prejudice to the right of either party hereto to litigate the issues raised in the Second, Third and Fourth Defenses in Defendant's Answer in any other current or any subsequent litigation, including litigations between the parties hereto. However, it is not the intent of this paragraph to grant the parties any additional procedural or substantive rights in any such action.

4(b) The execution of this stipulation is without prejudice to the right of either party to litigate in any

current or subsequent litigation, including litigation between the parties, the issue of whether the plaintiff can require that audio dosimeters or personal dust sampling devices be worn by an employee during the course of an inspection under the Act. The execution of this stipulation is not to be construed as an admission on this issue in any such litigation by either party hereto.

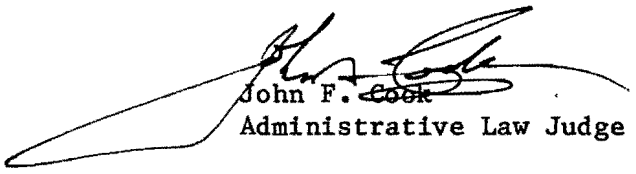
5. Pursuant to the provisions of Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, this action is hereby dismissed, with each party to bear its own court costs.

The reasons given above by counsel for 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.

ORDER

Accordingly, IT IS ORDERED that the proposed settlement, as outlined above, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that Respondent, within 30 days of the date of this decision, pay the agreed-upon penalty of $200 assessed in these proceedings.



John F. Cook
Administrative Law Judge

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Administrator for Metal and Nonmetal Mine Safety and Health, U.S. Department of Labor

Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 21 1981

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceeding<br><br>Docket No. LAKE 80-385<br>A/O No. 33-02624-03106 |
| v. | : | |
| | : | Powhatan No. 7 Mine |
| QUARTO MINING COMPANY, Respondent | : | |

DECISION

ORDER TO PAY

This case consists of a petition for the assessment of civil penalties for two alleged violations of the Act. The Solicitor has filed a motion to approve a settlement for one of the two citations.

Citation 1009643 was issued for an alleged violation of 30 CFR 75.316. On September 8, 1980 a hearing was held in Secretary of Labor v. Nacco Mining Company, Quarto Mining Company and The North American Coal Corporation, LAKE 80-251, et al. in which the same provision of respondent's dust control plan at issue in this citation was litigated. In those cases a decision dated September 22, 1980 held invalid this provision of the dust control plan. The decision in LAKE 80-251 is dispositive of this citation.

Citation 9938290 was issued for a violation of 30 CFR 70.100(b). The parties have proposed a settlement of $150 for this violation. After having reviewed this citation I approve the recommended settlement.

ORDER

Citation 1009643 is hereby VACATED and the petition to assess a civil penalty is DISMISSED insofar as it concerns this citation.

The operator is ORDERED to pay $150 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 27 1981

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Civil Penalty Proceeding |
| | : | Docket No. WEVA 79-112-P |
| Petitioner | : | A.C. No. 46-01459-03025 V |
| v. | : | |
| | : | Birch No. 2-A Mine |
| ISLAND CREEK COAL COMPANY, | : | |
| Respondent | : | |

## DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Marshall S. Peace, Esq., for Respondent.

Before: Judge William Fauver

This proceeding was brought by the Secretary of Labor under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for assessment of civil penalties for alleged violations of mandatory safety standards. The case was heard in Charleston, West Virginia. Both parties were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

## FINDINGS OF FACT

1. At all pertinent times, Respondent, Island Creek Coal Company, operated a coal mine known as the Birch No. 2-A Mine in Nicholas County, West Virginia, which produced coal for sales in or substantially affecting interstate commerce.

2. Respondent used a retreat mining method at the Birch No. 2-A Mine, which involved driving a series of rooms, about 20 feet wide and 80 feet long, into the coalbed. Pillars of coal would be left standing to support the roof until the area was fully developed. Coal would then be removed from the supporting pillars in a pattern until the roof caved in, leaving a gob area. About eight mining cycles, in four shifts, were required to drive through six rooms into a new crosscut.

3. The mining sequence in the retreat method was roof bolting, cutting, drilling, blasting, and loading. After the roof was bolted, the face would be cut with a cutting machine before the coal was blasted. Undercutting and overcutting involved making horizontal cuts along the bottom and top of the face so that the coal would separate evenly from the face following the blast. Undercutting and overcutting also relieved the coal seam from overburden stresses. After cuts, the cutter would pull out and a drill would be brought in to drill holes for the explosives.

4. Cutting was also performed to shear loose ribs and overhanging brows that often accompanied retreat mining. An overhanging brow is a rib that is not aligned at right angles with the roof and that extends over the travelway. A loose or cracked overhanging brow can create a serious hazard to miners in the area. Removal is typically done by cutting underneath the overhang and then shearing it vertically. Normally, before an overhang falls there is a warning noise accompanied by loose, falling material. About once every shift, loose ribs and overhangs are cut down as part of the regular mining cycle and it is often necessary to shear the same areas several times.

5. On August 24, 1978, Mr. McClung, a shuttle car operator, pointed out an overhang on the corner of the No. 3 room to William Bradey, the cutting machine operator, and Bradey sheared it off. Bradey had sheared this overhang on more than one occasion before this.

6. Loose ribs and overhangs are prevalent in the Birch No. 2-A Mine. Shuttle car operators customarily notify section foremen of loose overhangs observed while traveling through an area of the mine. The shuttle car operators generally make 40 to 50 trips each shift; however, none had passed through the 4-right off east main section on August 25, 1978.

7. On August 25, 1978, Eugene Cook, Respondent's section foreman in the Birch No. 2-A Mine, arrived underground with his crew at the 4-right off east main section between 8:20 and 8:30 a.m. The shift began at 8:00 a.m. Before entering the mine, Cook reviewed the report of William Bayles, the fireboss on the previous (third) shift. The report made no reference to overhanging brows. Normally, if a problem arises between shifts, the fireboss would note the problem and alert the foreman on the following shift. No mining is performed on the third shift.

8. On August 25, Cook preshifted the belt haulageway and face areas while the crew remained in the dinner hole. Cook's preshift examination did not cover all areas between the last open crosscut and the next crosscut outby. He traveled through the last two open crosscuts and observed loose overhangs in two locations (designated as #1 and #2 on Respondent's Exhibit No. 1). One of the locations was the same area reported by the shuttle car operator on August 24, 1978. Cook returned to the dinner hole at about 8:40 a.m. and told William Bradey to shear off the loose overhangs. One of them was dangered off because of a "scrap cut," which referred to an area that has not been cleared adequately. The rest of the crew were told to move equipment,

scale tops and move cables and curtains so that the ribs and overhangs could be sheared. They would not be working in the vicinity of the cutting machine while performing these tasks.

9. On August 25, 1978, federal mine inspector Henry Baker arrived at Respondent's Birch No. 2-A Mine at 7:15 a.m. After checking mine records on the surface, Inspector Baker traveled to the 4-right off east main section and at about 9:30 a.m. began checking the faces of rooms 1 through 6 and the travelways and roadways by the docking point. No coal was being mined and no equipment was being loaded. Inspector Baker observed a cutting machine, a loading machine, two shuttle cars, a coal drill and a roof-bolting machine; however, he did not inspect any of the equipment.

10. Inspector Baker observed numerous overhanging brows and unsupported ribs in the Nos. 1 through 5 rooms, in the last open crosscut and in the first two crosscuts outby the last open crosscut. These conditions were observed in each room about every 10 feet on both sides of the room. Some of the overhangs ranged from 2 to 4 feet and over 1 dozen of the overhangs were loose and cracked.

11. By visual observation, Inspector Baker determined that the overhanging brows were loose and cracked. He estimated the size of the overhangs instead of using a measuring stick because the coal seam was about 11 feet and he was unable to reach and prod the roof.

12. The inspector determined that the condition was dangerous and that Respondent's section foreman was aware or should have been aware of the condition. About 10 men worked in the area and all of them would be exposed to the hazard of falling roof or ribs during normal mining cycles.

13. On August 25, 1978, Inspector Baker issued Order of Withdrawal No. 53415 to Respondent, which reads in part:

> Loose, unsupported ribs, coal, and unsupported overhanging coal brows were present at numerous locations along the shuttle car roadways in the 4-right off east main section, section 031-0, beginning in the second line of open crosscuts outby the faces and extending inby in all areas in the number 1 to number 5 rooms.

The cited condition was abated by 5:00 p.m., by taking down the overhanging brows.

14. Between July 11, 1978, and August 25, 1978, Respondent received 12 citations charging violations of 30 C.F.R. § 75.202.

## DISCUSSION WITH FURTHER FINDINGS

Based on the order of withdrawal issued on August 25, 1978, the Secretary has charged Respondent with a violation of 30 C.F.R. § 75.202, which provides:

> The operator, in accordance with the approved plan, shall provide at or near each working face and at such other locations in the coal mines as the Secretary may prescribe an ample supply of suitable materials of proper size with which to secure the roof of all working places in a safe manner. Safety posts, jacks, or other approved devices shall be used to protect the workmen when roof material is being taken down, crossbars are being installed, and in such other circumstances as may be appropriate. Loose roof and overhanging or loose faces and ribs shall be taken down or supported. Except in the case of recovery work, supports knocked out shall be replaced promptly.

The basic issue as to the charge is whether Respondent failed to take down or support loose, overhanging ribs and brows.

The Secretary argues that the overhanging brows and loose ribs observed by Inspector Baker on August 25, 1978, created a risk of serious injury or death to miners working in the area. The Secretary contends that there were over 1 dozen loose, overhanging brows that were cracked and broken away from the main ribs, that Respondent had not supported the overhanging brows and ribs, and that Respondent was not in the process of shearing the overhangs when the inspector arrived. The Secretary argues that the cited condition was known or should have been known by the operator because the overhangs resulted from mining coal over at least four producing shifts.

Respondent argues that the cited standard requires that loose overhangs and ribs be taken down and that during the preshift examination the mine foreman observed only two loose overhangs that needed to be taken down. Respondent contends that at the time of the inspection, production had not begun and the cutter was shearing the loose overhangs that had been observed by the foreman during the preshift examination. Cook testified that when he preshifted the cited area he observed only two serious overhangs that required action and that he told Bradey, the cutter, to shear them off. Bradey testified that when the inspector arrived, he had already begun to cut one of the overhangs (designated as #2 on Respondent's Exhibit No. 1) and the other one (designated as #1 on Respondent's Exhibit No. 1) had been dangered off.

Respondent also argues that the inspector failed to identify specifically which of the cited overhangs were loose and that the inspector's conclusion that the overhangs were cracked and loose was based only on visual observation. Respondent contends that the inspector was unable to determine the size of the overhangs or whether the overhanging brows were dangerous without being close enough to measure the overhangs and conduct sound and vibration tests.

I credit the inspector's testimony in estimating the number and size, and in appraising the danger, of the overhangs he observed on August 25, 1978. I find that Inspector Baker's examination of the cited area was more extensive than the foreman's preshift examination and that the inspector's opinions, which were based on visual observation, are reliable. I find that a visual

examination in an 11-foot coal seam is a proper method of inspection and that it was not necessary that he measure and prod the overhangs to estimate their size or to determine whether they were cracked and loose.

At the time of the inspection on August 25, 1978, the shift had not yet begun to produce coal and the cutter had already begun to shear an overhang in one of the locations observed by the foreman during the preshift examination. The other overhang observed by the foreman was in a dangered off area and, therefore, posed no immediate danger. I credit the testimony of the cutter, William Bradey, that he was shearing an overhang when the inspector arrived. However, the foreman had not issued instructions to cut down the other overhangs (which were later discovered by the inspector). The evidence indicates that production would have begun without first cutting such overhangs down. I find that this condition constituted a violation of 30 C.F.R. § 75.202 and a serious hazard to the miners. Respondent was negligent in failing to correct or danger off this condition before the federal inspection on August 25.

## CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and subject matter of the above proceeding.

2. Respondent violated 30 C.F.R. § 75.202 by failing to remove or support loose ribs and overhanging brows as alleged in Order of Withdrawal No. 53415.

3. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of $2,500 for this violation.

## ORDER

WHEREFORE IT IS ORDERED that Island Creek Coal Company shall pay the Secretary of Labor the above-assessed civil penalty, in the amount of $2,500, within 30 days from the date of this decision.

William Fauver
WILLIAM FAUVER, JUDGE

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 28 1981

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | Civil Penalty Proceeding |
| | : | Docket No. SE 80-66-M |
| | : | A.O. No. 09-00017-05005 H |
| v. | : | |
| | : | Blue Ribbon Quarry |
| DOVE CREEK GRANITE COMPANY, INC., Respondent | : | |

## DECISION

Appearances: Michael Hagan, Attorney, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the petitioner; John Strong, Elberton, Georgia, for the respondent.

Before: Judge Koutras

## Statement of the Proceeding

This proceeding concerns a proposal for assessment of a civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with one alleged violation of mandatory safety standard 30 C.F.R. § 56.15-5.

Respondent filed a timely answer and notice of contest and a hearing was convened on November 25, 1980, in Athens, Georgia. The parties waived the filing of written proposed findings and conclusions, but were afforded an opportunity to present oral arguments in support of their respective positions. A bench decision was rendered which is herein reduced to writing as required by Commission Rule 65, 29 C.F.R. § 2700.65.

## Issues

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

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

## Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

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

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

## Discussion

Citation No. 099053, August 22, 1979, 30 C.F.R. § 56.15-5 states as follows: "Clarence Thornton and Julius Langston were drilling a lift hole using a 12 inch piece of channel iron for a working platform. The platform was just above water which was about 30 feet deep. Neither man was wearing safety line or life jacket."

### Stipulation

Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission (Tr. 7).

### Testimony and Evidence Adduced by the Petitioner

MSHA inspector Tom Hubbard confirmed that he issued the citation and withdrawal order after inspecting the mine and discovering two men who were in danger of falling off a 12-inch wide channel iron. He noticed that the channel iron had a 2-inch lip running along either side of its approximate 10-foot length (Tr. 13). One side of the channel iron was on the quarry wall and the other end was resting on a pile of submerged stone or quarry bottom. The section of the iron on which the men were standing was suspended over water which vibrated when the men moved on the iron. According to the workmen, the water was 30 feet deep. Mr. Hubbard himself took a 15-foot pole and unsuccessfully attempted to touch bottom with it. Upon questioning the two men, Mr. Hubbard determined that neither could swim (Tr. 14-15).

Mr. Hubbard testified that the men were using a jackhammer drill which released oil during use. This oil, he concluded, would make the walking surface of the channel iron slippery. The 2-inch lip on the iron was also thought to provide a tripping hazard. Since the men could possibly drown if they fell, Mr. Hubbard felt that the men should have been tied down or have worn safety belts while performing the operation (Tr. 15-17).

Inspector Hubbard testified that Mr. Thornton, the foreman, was aware that the men were working without safety belts or lines, although a reasonable peson should have known of the danger. After Mr. Hubbard issued the 107(a) withdrawal order, the operator withdrew the men and sent them to town to purchase the proper equipment (Tr. 17-18).

In response to bench questions, Mr. Hubbard testified that on the day following the issuance of the withdrawal order, there was full compliance with the safety requirements. He reiterated the fact that the reason he issued the original citation and withdrawal order was because of the danger of falling or drowning, and not because the operator used a channel iron as a work platform. Mr. Hubbard stated that it was not unusual to allow water to fill up part of a nonworking quarry, because it could always be pumped out at a later date. At the time of the citation, he found this to be a working quarry (Tr. 18-22).

Testimony and Evidence Adduced by the Respondent

Respondent attempted to introduce two sworn affidavits, but these were rejected because it was not shown that the affiants were unavailable (Exhs. R-1, R-2). Respondent conceded the fact of a violation, but then referred to the company's financial statements as evidence of its unstable financial condition (Exh. R-3). The defense rested its case on the fact that the company was no longer in business (Exh. R-4, Tr. 25-27).

## Findings and Conclusions

Fact of Violation

Respondent is charged with a violation of 30 C.F.R. § 56.15-5 which requires men to wear safety belts and lines when there is a danger of falling. Respondent concedes, and I find, that allowing men to work on a channel iron where there was a danger of falling, without providing safety belts and lines, violated this regulation.

Good Faith Compliance

The record supports a finding of good faith compliance with the withdrawal order. The inspector testified that the men immediately ceased working and were sent to buy ropes. The next time he visited the site, the workers were securely tied down (Tr. 17-18).

Gravity

The evidence establishes that this was a serious violation. Since the water was at least 15 feet deep, and neither man could swim, there was a good possibility of drowning.

Negligence

I find that this violation was a result of ordinary negligence. A reasonable man would have recognized the danger and would have required the workers to wear safety belts and lines.

History of Prior Violations

Respondent's record indicates that there was no significant history of prior violations warranting an increase in the assessment (Exh. P-2).

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

The evidence indicates that the quarry was run by a small operator (Exh. P-2), and petitioner agreed that this was the case (Tr. 8). Both parties agree, and I find, that the respondent is no longer in business. Further, I am persuaded by respondent's financial records that the mine operated at a loss in 1979, and petitioner does not dispute that this was in fact the case (Tr. 9).

## Penalty Assessment

On the basis of the foregoing findings and conclusions made in this proceeding, a civil penalty of $100 is assessed for Citation No. 099053, issued on August 22, 1979, for a violation of 30 C.F.R. § 56.15-5. I conclude that since the mine operator is no longer in business, a $500 penalty will serve no useful deterrent purpose, but due to the gravity of the violation, I believe that an assessment of $100 is appropriate.

## ORDER

Respondent is ORDERED to pay the civil penalty assessed by me in the amount of $100 within thirty (30) days of the date of this decision. Upon receipt of payment by MSHA, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 28 1981

| | | |
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| MABEN ENERGY CORPORATION, | : | Contest of Citation |
| Contestant | : | |
| v. | : | Docket No. WEVA 80-437-R |
| | : | |
| SECRETARY OF LABOR | : | Citation No. 653368 |
| MINE SAFETY AND HEALTH | : | May 19, 1980 |
| ADMINISTRATION (MSHA) | : | |
| Respondent | : | Maben No. 3 Mine |

DECISION

Appearances: James M. Brown, Esq., File, Payne, Scherer & Brown, Beckley, West Virginia, for Contestant; Stephen P. Kramer, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia for Respondent.

Before: Judge Melick

Hearings were conducted in this case on September 17, 1980, in Beckley West Virginia following which I issued a bench decision. That decision, which appears below with some modification, is affirmed at this time.

This case is before me under Section 105(d) of the Federal Mine Safety and Health Act of 1977. Maben Energy Corporation (Maben) is contesting Citation No. 653368, a citation issued under the provisions of section 104(d)(1) 1/ on May 19, 1980, by MSHA Inspector James Ferguson for a violation of the standard at 30 C.F.R. § 75.316, i.e. a violation of Maben's methane and dust control plan. Maben does not question that the cited violation did occur and contests only the special finding of "unwarrantable failure" made in connection therewith.

1/ Section 104(d)(1) provides in 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."

The standard cited facially requires only that the operator file and have in effect a methane and dust control plan approved by the Secretary. The standard has been construed however as requiring also that the operator comply with its approved plan. Zeigler Coal Company, 4 IBMA 30 (1975), aff'd, 536 F.2d 398 (D.C. Cir. 1976). It is specifically charged in this case that Item No. 7 on page 2 of the operator's plan was violated because there was no perceptible movement of air in the cross cut left off of the No. 4 entry of 7 Left 013 section. That part of the plan requires that if a blowing system of ventilation is used, as the evidence shows was used in this case, the minimum amount of air at the end of the line curtain must be 3,000 cubic feet per minute. It has been stipulated that at the time the citation was issued on May 19, that that minimum amount was not met.

The issue before me is whether this violation was the result of the unwarrantable failure of the operator to comply with the law. A violation is a result of "unwarrantable failure" if the violative condition is one which the operator knew or should have known existed or which the operator failed to correct through indifference or lack of reasonable care. Zeigler Coal Company, 7 IBMA 280 (1977).

According to the testimony of Mr. Fred Ferguson, superintendent of the Maben No. 3 mine, this mine and in particular this section that we are talking about today had a history of deficient ventilation and, in fact, on occasion -- and I got the impression, not infrequently -- was less than the required 3,000 cubic feet of air per minute. I conclude from that history that management was on notice that special precautions were required that might not otherwise be called for to keep the working areas of that section properly ventilated. Superintendent Ferguson indeed conceded that because of this known history he had given section foreman Campbell the special duty to keep him currently informed as to what areas could safely be worked.

Now, it is essentially undisputed that as part of his on-shift inspection section foreman Campbell went to the cited No. 4 entry between 7:30 and 7:55 of the morning in question and at that time thought that he felt a "perceptible" movement of air on his face and hands. In spite of the fact that Campbell was aware of the recurring problem of air deficiency in this section and that there was only a "perceptible" movement of air that morning he made no effort to determine whether that working place in fact had sufficient ventilation.

Inspector Ferguson's testimony is undisputed that when he arrived at the No. 4 entry where men were installing roof bolts there was dust in suspension and absolutely no movement of air. Since the vanes on his anemometer would not move for lack of air velocity he released smoke from a chemical smoke tube. The smoke did not move in any direction. According to mine superintendent Ferguson this test was made between 7:30 and 8:00 that morning. Since section foreman Campbell made his determination of only "perceptible" air in the same entry during that same time (between 7:30 and 7:55 that morning) it is reasonable to infer that there was indeed an obviously deficient flow of air when Campbell made his inspection. Campbell therefore knew or should

have known of that deficiency. If indeed he detected only perceptible air movement it was incumbent on him to verify the adequacy of that air before allowing his men to work there. He was apparently also failing to comply with the company policy of verifying the air flow in this section. His failure to do so and to correct that condition through indifference or lack of reasonable care shows that the violation was the result of "unwarrantable failure" to comply with the law. The actions and negligence of foreman Campbell are of course imputed to the operator.

I also conclude that the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety and health hazard under section 104(d)(1) of the Act. The absence of ventilation at a working face could result in the buildup of explosive methane gas and coal dust and cause a respirable dust health hazard to the miners. The citation herein is therefore affirmed, and the contest dismissed.

Gary Melick
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 28 1981

| | | |
|---|---|---|
| RANGER FUEL CORPORATION, | | Contest of Order |
| | Contestant | |
| v. | | Docket No. WEVA 79-218-R |
| | | |
| SECRETARY OF LABOR, | | Order No. 0660570 |
| MINE SAFETY AND HEALTH | | June 8, 1979 |
| ADMINISTRATION (MSHA), | | |
| | Respondent | Beckley No. 2 Mine |

SUMMARY DECISION

This case involves one citation charging a violation of section 103(f) of the Federal Mine Safety and Health Act of 1977 (the Act). Section 103(f) reads in part:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection [103](a) * * *. [O]ne such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection.

In Kentland-Elkhorn Coal Corporation, 1 FMSHRC 1833 (November 30, 1979), appeal pending No. 79-2536 (D.C. Cir., December 21, 1979), the Federal Mine Safety and Health Review Commission interpreted the section 103(f) so-called walkaround pay provision to apply to section 103(a) "regular" inspections only. In reaching this decision, the Commission relied on its reasoning in Helen Mining Company, 1 FMSHRC 1796 (November 21, 1979), appeal pending No. 79-2537 (D.C. Cir. December 21, 1979). In Helen Mining Company, the Commission held that a miner was not entitled under section 103(f) to walkaround pay for spot inspections pursuant to section 103(i) of the Act and noted that compensation was due only for a miner's accompaniment of a Federal inspector during a section 103(a) "regular" inspection. The Commission concluded therein that "regular" inspections were those described in the third sentence of section 103(a) of the Act, i.e., the four required annual inspections of underground mines and the two required annual inspections of surface mines.

There is no disagreement between the parties in this case that the inspection giving rise to the citation at bar was a spot inspection and not a "regular" inspection within the framework of the Kentland-Elkhorn and Helen Mining decisions. There is, therefore, no issue before me as to any material fact. Under the circumstances, I find as a matter of law that the Ranger Fuel Corporation did not violate section 103(f) of the Act as charged in the citation at bar.

Accordingly, Citation No. 660570 is VACATED and the civil penalty proceeding, Docket No. WEVA 79-218-R, is DISMISSED.

Gary Melick
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JAN 28 1981

| | | |
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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Civil Penalty Proceeding |
| | : | Docket No. DENV 79-389-PM |
| Petitioner | : | A.C. No. 05-00354-05003 |
| v. | : | |
| | : | Climax Mine |
| CLIMAX MOLYBDENUM COMPANY, | : | |
| Respondent | : | |

DECISION

Appearances: James Cato, Esq., Assistant Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, Kansas City, Missouri, for Petitioner;
Rosemary Collier and Chalres W. Newcom, Esqs., Climax Molybdenum Company, Golden, Colorado, for Respondent.

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Denver, Colorado, on September 9, 1980, at which both parties were represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, I entered an opinion on the record. 1/ My bench decision containing findings, conclusions and rationale appear below as it appears in the record, aside from minor corrections.

> This proceeding arises upon the filing of a petition for an assessment of civil penalty by the Secretary of Labor against the Respondent seeking a civil penalty for the violations alleged in Citation No. 331748 issued July 28, 1978, and alleging a violation of 30 C.F.R. § 57.9-3. The authority for this proceeding is vested by section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a).
>
> Originally, there were four violations involved in this docket, two of which were amicably settled by the parties

1/ Tr. 217-231.

previously, and one of which (No. 331729) was vacated upon motion of counsel for Petitioner and the Secretary of Labor at the commencement of the hearing. One citation remains. The citation in question, No. 331748, was issued by inspector James L. Atwood, a duly authorized representative of Petitioner, who described the allegedly violative condition or practice as follows: "The 28 motor pulling the muck train in 614 X cut did not have an adequate braking system; four of the five braking cars used were inoperative. When the operator set the air brakes, the brakes failed to close."

30 C.F.R. § 57.9-3 is a mandatory safety standard set forth under the general "loading, hauling, and dumping" standard relating to surface and underground mines. It provides that "powered mobile equipment should be provided with adequate brakes." The general issue to be decided, and indeed the sole factual issue, is whether or not the braking system on the muck train in question was adequate.

I find initially that the safety standard in question is not so vague or ambiguous as to be unenforceable. In the abstract, it appears that it is possible to clearly establish by probative evidence whether or not a braking system is adequate or not even though the standard does not provide for specific minimum stopping distances for various types of equipment or trains. I would stipulate, however, that the regulation is not a model to be emulated in terms of detail or clarity and that it does invite further elucidation. On the other hand, not all standards are subject to perfect description, and whether or not brakes are sufficient or not is properly one for a subjective evaluation based upon the evidence submitted to the finder of fact.

The citation was issued during the first regular inspection of the Climax Mine of Respondent under the 1977 Act. Inspector Atwood observed at the 614 crosscut a muck train consisting of 21 cars which was being pulled by engine No. 28. The citation was issued at 9:20 a.m. (on July 28, 1978), and set forth a termination date of August 2, 1978, at 1600 hours. Thus, an abatement time in excess of 5 days was established. Inspector Atwood examined the train again on August 3, 1978, at which time he extended the compliance time to 1:45 p.m. on August 3, 1978. On August 4, 1978, the inspector terminated the citation noting that new brake shoes were installed and the brakes were holding on the three braker cars on the No. 28 motor train.

During his inspection on July 28, Inspector Atwood visually observed the brakes on the locomotive (sometimes referred to as the "motor") and the five braker cars. He asked the motorman to set the brakes while he went under each car and checked

the brakes. He noted that on four of the braker cars, the brakes did not function on some, and that on some of the brakes the linkage had been bent where the shoes had not contacted the wheel. Thus, there was one good braker car, in the sense that it had an operable braking system on all four of its wheels, out of the five total braker cars which were placed immediately behind the motor on the 21-car train. The inspector indicated that, as to the four cars which were inadequate, at least two wheels of the four on each car had brakes which did not function properly. He indicated that one of the braker cars, and possibly two, did not have operable brakes on all four wheels. The inspector took hold of some of the brake shoes and shook them indicating the degree of looseness. He expressed the opinion that the brakes were not capable of stopping the muck train because there was not sufficient tension on the brake band or linkage.

The inspector also testified that routinely during the course of the daily operation of the muck trains the brakes would have been checked. One of those occasions is when the operator picks up the train; another occasion is when the train is reloaded. And other evidence in the record, I note, indicates that the trains are checked frequently--one of the points being at a derailing point near the crusher.

The inspector indicated with respect to the seriousness of the violation that the train would have traveled downgrade to the crusher from the point where he observed it approximately 1 mile from the crusher; that the downgrade ran approximately a quarter of a mile to the crusher; and that the train, had it been unable to properly stop, could have derailed or struck persons walking along the track or maintenance personnel repairing the rails. His opinion was that such an accident could result in a fatality. He also indicated that there are personnel who work in the drifts and that there is traffic on the rails.

There are two production levels in the Climax Mine, the storke and the 600 level. When the alleged violation was observed by the inspector, the train was on the 600 level and, according to the inspector, "appeared to be empty." The inspector indicated that the downgrade which commenced approximately a quarter of a mile before the crusher was a 6-percent downgrade. This was an estimate by the inspector who first testified that he did not know the percent of the downgrade.

The record indicates that the braking system on the train consisted of the following: On the motor were air brakes backed up by a "dead man," which automatically sets the brakes should the locomotive operator faint or otherwise become incapable of operating the air brakes. In addition, on the

motor is a dynamic brake system which operates off the electrical system and which can be used to slow up the train. The use of braker cars had been in effect at the Climax Mine for approximately 15 years. The purpose of braker cars is to assist in the stopping of the trains.

Various interpretations with respect to the purpose of the braker cars was provided by the Government inspector, who testified on behalf of the Petitioner, and by the three witnesses presented by Respondent. Based upon all of their testimony, I find that the braker cars, at least in theory, have the following purposes: (1) to help the actual stopping or slowing down of the trains of which they are a part; (2) to help decrease the wear on the brakes of the motor behind which they are placed in the train; and (3) to provide an additional braking system should the braking system on the motor braker become inoperable. I would footnote that the third of Respondent's witnesses, Mine Master Mechanic Harry Anderson, indicated that the main reason the use of braker cars is being continued is to minimize wear on the locomotive itself. He also indicated that had the Respondent's safety manual been updated the use of braking cars might have been changed or discontinued. This latter testimony, which I find to be gratuitous, is rejected, the hard fact being that for 15 years the use of braker cars has continued. Considering the requirement for them in the Respondent's safety manual, and considering the (obvious) purposes of the braker cars, I conclude that they do constitute a braking contribution on any individual train which must be considered within the totality of the braking power to determine whether or not there is an adequate braking system.

Respondent presented convincing evidence that the greatest grade on the 600 level was one of 0.45 percent. That is less than one-half of 1 percent and to be contrasted with the 6-percent grade estimated by Inspector Atwood. A 1-percent grade would indicate a 1-foot gradient every 100 feet. I infer that that is not a particularly steep grade. The inspector defined what adequate brakes should be as "enough to do the job," which in the context of the facts of this case would be enough to stop a loaded muck train on a downgrade in the 600 level of the mine. I note that it was at this point in his testimony that he indicated that he did not know the percent of the downgrade and that it was later on that he ventured the 6-percent estimate. The inspector indicated, in explanation as to why he gave the Respondent 5 days to abate the alleged violation, that he was aware that the company knew of the bad brakes and was aware that it would have to operate (the train) at a slower speed. The inspector also

said that a motorman would not use the dynamic system of braking in the locomotive alone to stop a train because it would take too long. He also pointed out that if the brake shoes did not work properly on the air brake system the same deficiency would apply to the deadman system. The inspector estimated the maximum speed which a loaded muck train might travel to be 15 miles per hour. Respondent's evidence indicated that the maximum speed would be 4 to 5 miles per hour. Inspector Edward Machesky, a rebuttal witness for the Petitioner, estimated the maximum speed would be 8 to 10 miles per hour. Inspector Atwood, as I previously noted, believed the train to be empty when he observed it and indicated that it would take 2 or 3 times as much distance to stop a loaded train as an empty train. Based upon the evidence submitted by Respondent, which I accept in the following particulars, I find that the inspector's opinion that the brakes were inadequate was based in part upon the following erroneous assumptions:

(1) That the downgrade in proximity to the crusher was 6 percent. The Respondent's evidence in this respect I find to be the more persuasive and I find that the maximum grade in the 600 production area was .45 of 1 percent.

(2) The inspector also mistakenly believed the train was empty at the time he observed it, which I gather the Petitioner has accepted as erroneous. In any event, I find on the evidence of record that the train was fully loaded at the time.

The inspector's opinion can also be subject to a final criticism in the sense that if he considered the alleged violation to be of a high degree of gravity, why would a 5-day abatement have been granted? On the other hand, he did partially explain the granting of such a period based upon his understanding that the Respondent would, presumably, automatically slow down the speed of the trains. However, he also testified that he obtained no promise or commitment from any of Respondent's personnel to take certain remedial action immediately. There was no assurance that the train would not proceed fully loaded down the incline to the crusher. Although it is impossible to be certain from the evidence of record, the probability is that the train, after it was observed by the inspector, would have proceeded to the crusher - which Respondent's witnesses indicated was approximately a mile and a quarter from the place of observation by the inspector.

There is testimony in the record with respect to the effect that fully operational braking systems on the braker cars would have on the distance it would take to stop the

train. One estimate by Respondent's witness was that it would stop the train under certain circumstances in some 30 feet less distance than if the braking system was to be done only by the locomotive itself. One of Respondent's witnesses, its general mine foreman in July 1978 who is now retired, Lee Walker, did indicate what I construe to be an admission that not all the brakes were working at the time the citation was issued. He testified that the brakes in the braker car directly behind the locomotive were working properly but that the brakes in the next car were not working, and that the brakes in the remaining cars (that is the Nos. 3, 4 and 5 cars) were only partially working. He went on to indicate--which I find to be somewhat in contradiction to his earlier testimony--that once the train got underway the brake shoes would fit tight against the wheels. That is, while the train is static or not moving the brake shoes may be loose, but once the train becomes dynamic or moving this would have the effect of causing the brake shoes to set more closely against the wheels. This same explanation was advanced in more technical detail by Mr. Anderson, Respondent's mine master mechanic. However, I felt that Mr. Walker's testimony was revealing in the sense that his testimony changed from the initial statement that the brakes on various of the braker cars were not working to the explanation that the shoes would get tight once the train began moving. I should state that I thought that the latter position was not one of explanation but more one of induced change as he was testifying. This finding and analysis on my part is somewhat critical to my final determination. The reason it is critical is that the hard evidence and the persuasive evidence and the evidence upon which this dispute must be ultimately resolved rests upon the opinions of the various persons who have testified here today. There have been considerable inconsistencies and contradictions in the record as well as lengthy testamentary discourse which in the long run led nowhere. The opinions of various individuals when weighed and analyzed become the determinant of whether or not the powered mobile equipment in question was provided with adequate brakes at the time the inspector issued the citation. I therefore conclude that despite the three errors, which I enumerated, in the inspector's testimony his opinion should be credited. It is somewhat bolstered, and I think actually very significantly bolstered, by the testimony of Mr. Walker when the same is finally analyzed. This acceptance of the inspector's opinion in turn is founded upon a finding that four of the five braker cars had, to some extent, faulty braking systems. I infer from the facts that if such braker cars are on a muck train to begin with and have been used there for many, many years without the Respondent's taking them off, they certainly must have some purpose. The obvious purpose of any braking system

is, in any context, to stop movement of a vehicle. This is the primary safety factor on any moving vehicle. Since I find that one of those cars had an entirely inoperable braking system and that the remaining three were possessed of brakes which on at least two wheels were not operable, I conclude that the train was not provided with adequate brakes. In this context, I note that safety standards are not designed to cover ideal situations. There must be overkill so that when accidents do happen and when other systems do fail there is a backup or an alternative to the occurrence of a hazard which the standard is designed to avoid. I have no doubt that at least on a level run the train in question could be stopped by the locomotive or motor-braking system. On the other hand, the evidence of record clearly establishes that the braking systems of the braker cars would shorten the distance in which that train could be stopped should the need arise. And the braker cars also provide, I find, a possible alternative braking source should the braking system on the motor fail as the result of any cause other than an impairment of its air system which also seats the braking systems on the braker cars.

I thus conclude that a violation of 30 C.F.R. § 57.9-3 was committed as described by the inspector in the citation.

The statutory penalty assessment factors which must be considered have to a great extent been resolved by stipulations and agreement of the counsel for the parties. I find that this is a large mine operation on the basis that it has a total of 3,000 employees, some 1,600 to 1,700 of which work underground, and that such was the case in 1978. I also find that the Respondent produces some 48,000 tons of molybdenum ore every day, 30,000 tons of which are produced at the underground mine. The Respondent, at the time of the commission of the violation, had a history of 107 violations, two of which involved the same safety standard as that involved here today. I find that the Respondent proceeded in good faith to achieve rapid compliance with the safety standard after being advised of the violation by the inspector. I find that the Respondent has the economic ability to pay any penalty which I might assess in this case without jeopardizing its ability to continue in business. * * *

There remains to be considered the factors of negligence and gravity. I am unable to find any evidence of gross negligence on the part of Respondent or any specific act of negligence or failure to discharge any specific responsibility that it has under the Act or otherwise which can be attributed to it by any action or nonfeasance of its supervisory personnel. There was no Government rule in effect at the time of the violation, as I understand it, which required certain checks of those practices.

The question arises whether or not ordinary negligence should be inferred from the commission of a safety violation by an employer. There is considerable state law to the effect that ordinary negligence can be and should be inferred from the mere commission of a safety violation. I believe that in this case the finding of ordinary negligence would be academic as I do not believe the penalty should be increased or otherwise changed one way or the other on the basis of negligence. There is just an absence of criteria in the record which would govern or guide any judgment along that line. So I make a finding in this case of no negligence.

With respect to the seriousness of the violation, I previously set forth the inspector's testimony in that respect. There is no question but that a train accident, because of the multi-ton weight and the impetus and movement of the same, is fraught with the possible occurrence of serious bodily injury to anyone involved in a derailment or to anyone being hit by a runaway train. On the other hand, the inspector's view of the seriousness of the violation is dramatically tempered by his failure to issue an imminent danger order. I therefore find that this was only a moderately serious violation under all the circumstances.

Summing up then, the factors of size of the operator would call for an increase in the size of any penalty. On the other hand, the moderate history of violations which the Government concedes is not extraordinary for an operator of this size, is in mitigation of such an increase. Additionally, the good faith abatement of the violation by the operator and the fact that the operator was not negligent in this case militate for a lowering of the penalty. * * * Weighing those factors, a penalty of $100 is assessed. 2/ I would note that had I found negligence and had I found a higher degree of seriousness, a penalty in the $3,000 range would have been entertained.

ORDER

The Respondent, for Citation No. 331748, is ORDERED to pay a penalty of $100 to the Secretary of Labor within 30 days from the issuance of this decision.

Citation No. 331729 is VACATED.

Michael A. Lasher, Jr., Judge

2/ Petitioner's initial proposed assessment was $66.00.

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