

JANUARY 1985

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10-17-84	Bigelow Liptak Corporation This decision was missing a page in the October 1984 issue of Decisions.	CENT 84-24-M	Pg. 191

JANUARY

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

Secretary of Labor, MSHA v. Southern Ohio Coal Company, Docket No. WEVA 84-166, 84-94-R. (Judge Melick, November 27, 1984)

Secretary of Labor, MSHA v. U.S. Steel Mining Co., Inc., Docket No. PENN 84-49. (Judge Merlin, November 30, 1984)

Secretary of Labor, MSHA v. Jim Walter Resources, Inc., Docket No. SE 84-57. (Judge Merlin, December 3, 1984)

Secretary of Labor on behalf of Robert Ribel v. Eastern Associated Coal Corporation, Docket No. WEVA 84-33-D. (Judge Koutras, Order of December 13, 1984)

No cases were filed in which review was denied.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 2, 1985

ROBERT K. ROLAND	:	
	:	
v.	:	Docket No. WEST 84-46-DM(A)
	:	
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

ORDER

On August 15, 1984, the Commission granted the petition for interlocutory review filed by the Secretary of Labor. Following the solicitation of amicus curiae participation, the Commission, on October 24, 1984, issued an order establishing the briefing schedule in this case. The Secretary's brief was due within 25 days of the date of that order. On December 12, 1984, the Secretary filed a motion with the Commission seeking leave to file his brief out of time. The Secretary's motion states that although the Commission's briefing order of October 24, 1984, was received by the mail room of the Secretary's Office of the Solicitor, the order "was never logged as received, ... and none of the attorneys of record in the case ever received the order." The Secretary requests that, if his motion is granted, his previously filed petition for interlocutory review be treated as constituting his brief. Compare Commission Procedural Rule 72(a), 29 C.F.R. § 2700.72(a).

Upon consideration of the Secretary's motion, his requests to file his brief out of time and to treat his petition for interlocutory review as his brief in this matter are granted. On December 31, 1984, the Commission received from complainant Robert A. Roland a letter dated December 21, 1984, with attachments, which he designated as his brief. This letter is hereby accepted as Mr. Roland's brief. The amicus brief of the United Mine Workers of America must be received by the Commission on or before January 31, 1985.

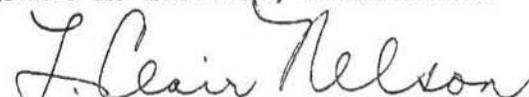
On December 10, 1984, Mr. Roland filed a motion requesting, among other things, immediate remand of the proceeding to the administrative law judge because of the Secretary's failure to file his brief. Mr. Roland's motion is denied. Mr. Roland's request for immediate monetary relief and damages will be considered by the Commission, along with other substantive issues presented by this case, at the appropriate time after completion of briefing.



Richard V. Backley, Acting Chairman



James A. Lastowka, Commissioner



L. Clair Nelson, Commissioner

Distribution

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 22, 1985

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
on behalf of I.B. ACTON	:	Dockets SE 84-31-D
GRADY ADERHOLT	:	SE 84-32-D
FREEMAN BUTLER	:	SE 84-33-D
JAMES L. CAMPBELL	:	SE 84-34-D
J.D. ELLENBURG	:	SE 84-35-D
W.D. FRANKLIN	:	SE 84-36-D
BILLY R. GLOVER	:	SE 84-37-D
TERRY PEOPLES	:	SE 84-39-D
WILLIAM REID	:	SE 84-40-D
CHARLES W. RICKER	:	SE 84-41-D
TERRY SHUBERT	:	SE 84-42-D
THEODORE TAYLOR	:	SE 84-43-D
MARVIN WISE	:	SE 84-44-D
CHARLES BLACKWELL	:	SE 84-45-D
ROBERT BURLESON	:	SE 84-46-D
HOUSTON EVANS, and	:	SE 84-47-D
KENNETH RANDAL COFER	:	SE 84-52-D
	:	
and	:	
	:	
UNITED MINE WORKERS OF AMERICA	:	
	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC.	:	

ORDER

On November 20, 1984, the Commission granted the petitions for discretionary review filed by the Secretary of Labor and the United Mine Workers of America ("UMWA") in Docket Nos. SE 84-35-D, -45-D, -47-D, and -52-D. Petitions for discretionary review filed by the Secretary, the UMWA, and Jim Walter Resources, Inc. ("Jim Walter"), in the remaining 13 dockets listed above were granted on December 26, 1984, and all briefing in the 17 dockets was stayed.

Because these dockets involve similar issues of law and fact and were consolidated below, we reconsolidate them on review. The following briefing schedule is established. On or before February 22, 1985, each

of the petitioners shall file opening briefs addressing the issues raised in their respective petitions for review. Thereafter, each party may file, on or before March 13, 1985, a brief in response to the arguments made in any opposing brief. Finally, any reply brief must be received no later than March 29, 1985. Jim Walter's request for oral argument is granted. Argument will be scheduled by further order upon completion of briefing.

For the Commission:


Richard V. Backley, Acting Chairman

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 3 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 84-192
Petitioner	:	A. C. No. 36-01471-03513
	:	
v.	:	Hritz Mine
TRENT COAL, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a motion to approve a settlement for the one violation involved. The originally assessed amount was \$6,000 and the proposed settlement is for \$6,000.

The citation was issued for a violation of 30 C.F.R. § 75.200 because the operator had not complied with the approved roof control plan which provides that before splitting is started on any pillar, all safely accessible roof and its entire perimeter shall be examined, and that if any roof defect is found at any place within the perimeter, full overhead support shall be installed as mining progresses. In this case a crack was detected at the pillar which was to be extracted. The crack extended for approximately 160 feet. The operator did not consider the crack to be a defect since the area was roof bolted, although not fully bolted. A roof fall occurred in the cited area resulting in two fatalities.

Based upon the foregoing information in the Solicitor's motion, I find the violation was of the utmost gravity and that the operator was highly negligent.

The Solicitor further advises that the operator had 16 assessed violations during the 24 month period preceding issuance of the subject citation. The period included 100 inspection days. Thus, the operator had a violation per inspection day ratio of 0.16 which according to the Solicitor represents a relatively favorable history of previous violations.

The Solicitor also states the operator and the mine had an annual production tonnage of 45,144, which indicates that the mine is relatively small and that the controlling entity is extremely small. The operator demonstrated good faith by achieving rapid compliance after notification of the violation. The cited area was abandoned and mining operations were begun one row of pillars in by the cited area. Employees were reinstructed concerning the approved roof control plan. Finally, the operator has paid the proposed penalty and continued its operations.

After a careful review of this matter I approve the settlement as appropriate under the six statutory criteria set forth in section 110(i) of the Act. Gravity and negligence call for a most substantial penalty. But the operator's small size and good history must be taken into account. The proposed settlement which is a high penalty for this operator represents a proper weighing of the statutory elements.

Accordingly the proposed settlement is Approved and the operator having paid this case is Dismissed.

A handwritten signature in black ink that reads "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

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Mr. Bruce W. Trent, President, Trent Coal, Incorporated, R.D. #1, Friedens, PA 15541 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JAN 4 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 83-56-M
Petitioner : A.C. No. 05-00417-05508
 :
 : Docket No. WEST 83-116-M
 : A.C. No. 05-00417-05512
 :
 v. : Docket No. WEST 84-18-M
 : A.C. No. 05-00417-05513
 :
 : Docket No. WEST 84-60-M
 : A.C. No. 05-00417-05518
 :
 STANDARD METALS CORPORATION, : Docket No. WEST 84-79-M
 Respondent : A.C. No. 05-00417-05523
 :
 : Sunnyside Mine

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Zach C. Miller, Esq., Davis, Graham & Stubbs,
Denver, Colorado,
for Respondent.

Before: Judge Carlson

Each of the docket numbers listed in the caption was originally scheduled for hearing sequentially, commencing October 31, 1984, at Denver, Colorado. When the first case was called for hearing, however, the parties announced that all issues in the five docket numbers involved in this proceeding were settled. ^{1/} The settled cases were therefore consolidated and the parties placed the terms of the settlements upon the record.

^{1/} Two other cases set for the same time were not settled; they proceeded to hearings on the merits, and are not dealt with in this decision.

Docket No. WEST 83-56-M involved two citations which arose from a heavy equipment accident. The Secretary agreed to dismiss Citation No. 2096842 for lack of sufficient evidence. The respondent agreed to withdraw its notice of contest to Citation No. 2096841, and to pay the full civil penalty of \$1,000.00 originally sought by the Secretary.

Docket No. WEST 83-116-M involved a single citation arising out of a use of smoking materials near explosives. The respondent agreed to withdraw its notice of contest and to pay the full civil penalty of \$600.00 originally sought by the Secretary.

Docket No. WEST 84-18-M involved a single citation relating to a defective hoist. The respondent agreed to withdraw its notice of contest and to pay the full civil penalty of \$2,000.00 originally sought by the Secretary.

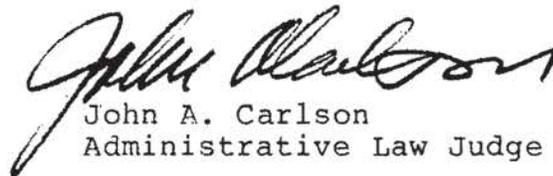
Docket No. WEST 84-60-M involved two citations arising from travelway falling hazards (Citations No. 2096626 and No. 2096628). The respondent agreed to withdraw its notice of contest to both, and to pay the full civil penalties of \$36.00 originally sought by the Secretary for each.

Docket No. WEST 84-79-M involved a single citation relating to a lack of safe access to a workplace. The respondent agreed to withdraw its notice of contest and to pay the full civil penalty of \$2,000.00 originally sought by the Secretary.

I conclude that the terms of the agreement are in accord with the purposes of the Federal Mine Safety and Health Act of 1977 and should therefore be approved.

Accordingly, all citations embraced in the five docket numbers are ORDERED affirmed except for Citation No. 2096842 in Docket No. WEST 83-56-M, which is dismissed with prejudice.

Further, respondent is ORDERED to pay, within 40 days of the date of this decision, a total \$5,672.00 for those citations which are affirmed.


John A. Carlson
Administrative Law Judge

Distribution:

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/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JAN 25 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 83-56-M
Petitioner	:	A.C. No. 05-00417-05508
	:	
	:	Docket No. WEST 83-116-M
	:	A.C. No. 05-00417-05512
	:	
	:	Docket No. WEST 84-18-M
v.	:	A.C. No. 05-00417-05513
	:	
	:	Docket No. WEST 84-60-M
	:	A.C. No. 05-00417-05518
	:	
STANDARD METALS CORPORATION,	:	Docket No. WEST 84-79-M
Respondent	:	A.C. No. 05-00417-05523
	:	
	:	Sunnyside Mine

AMENDED DECISION

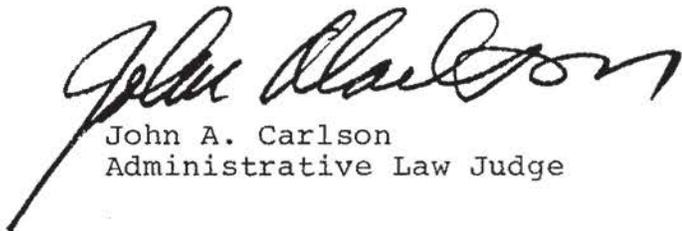
Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Zach C. Miller, Esq., Davis, Graham & Stubbs, Denver, Colorado.

Before: Judge Carlson

The decision issued on January 4, 1985 in this consolidated case requires amendment. In Docket No. WEST 84-79-M therein, the decision purports to impose a civil penalty of \$2,000.00. As disclosed in the transcript of proceedings, that figure is in error. By settlement recited upon the record, the parties agreed that the penalty should be \$1,000.00 and this judge found that amount appropriate.

Accordingly, the decision is amended and corrected to assess a penalty of \$1,000.00 for the single citation involved in Docket No. WEST 84-79-M; and the figure for the total penalty imposed is amended and corrected to reflect \$4,672.00 rather than \$5,672.00.

SO ORDERED.



John A. Carlson
Administrative Law Judge

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/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JAN 8 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 84-95-M
Petitioner	:	A.C. No. 45-02961-05503
v.	:	
	:	Cannon Mine
GILBERT CORPORATION OF	:	
DELAWARE,	:	
Respondent	:	

ORDER OF DEFAULT

Before: Judge Broderick

On August 24, 1984, I issued a Prehearing Order directing the parties inter alia to confer, and to exchange and send me by October 30, 1984, lists of witnesses and exhibits and stipulations for a potential hearing. Respondent did not reply to the order.

On December 7, 1984, I issued an Order to Show Cause directing Respondent to show within 15 days why it should not be held in default. Respondent did not reply.

Therefore, Respondent is found to be IN DEFAULT. IT IS ORDERED that the penalties proposed in the Assessment order attached as Exhibit A to the proposal in the total amount of \$336 are imposed as the final order of the Commission. IT IS FURTHER ORDERED that Respondent shall pay such penalties in the amount of \$336 within 30 days of the date of this order.

James A. Broderick
James A. Broderick
Administrative Law Judge

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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 8 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 84-340
Petitioner : A.C. No. 46-05806-03512
v. :
: No. 3 Mine
MAIDEN MINING COMPANY, :
Respondent :

ORDER OF DEFAULT

Before: Judge Broderick

On October 17, 1984, I issued a Prehearing Order directing the parties, inter alia, to confer, and to exchange and send me by December 14, 1984, lists of witnesses and exhibits, and stipulations for a potential hearing. Respondent did not respond to the order.

On December 18, 1984, I issued an Order to Show Cause directing Respondent to show within 15 days why it should not be held in default. Respondent did not reply.

Therefore, Respondent is found to be IN DEFAULT. It is ORDERED that the penalties proposed in the Assessment order attached as Exhibit A to the Petition in the total amount of \$214 are imposed as the final order of the Commission. IT IS FURTHER ORDERED that Respondent shall pay such penalties in the amount of \$214 within 30 days of the date of this order.


James A. Broderick
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 9 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 84-156
Petitioner	:	A.C. No. 15-13920-03516
	:	
v.	:	Docket No. KENT 84-168
	:	A.C. No. 15-13920-03518
PYRO MINING COMPANY,	:	
Respondent	:	Pyro No. 9 Wheatcroft Mine

DECISIONS

Appearances: Carole Fernandez, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
William Craft, Assistant Safety Director, Pyro
Mining Company, Sturgis, Kentucky, for Respondent.

Before: Judge Koutras

Statement of the Proceedings

These civil penalty proceedings were initiated 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). Petitioner seeks civil penalty assessments against the respondent for eight alleged violations of certain mandatory safety standards set forth in Title 30, Code of Federal Regulations.

Respondent filed timely answers contesting the alleged violations, and hearings were held in Evansville, Indiana on the merits of the citations. The parties were afforded an opportunity to file post-hearing written findings and conclusions, and while none were filed, all oral arguments made on the record during the hearings have been considered by me in the course of these decisions.

Issues

The issues presented in these proceedings concern the question of whether or not the cited conditions or practices

constitute violations of the cited mandatory safety standards, and whether or not the violations were significant and substantial ("S&S"). Additional issues raised by the parties are discussed in the course of these decisions.

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

The citations and violations which are in issue in these proceedings are as follows:

Docket No. KENT 84-156

Section 104(a) "S&S" Citation No. 2338191, was issued on February 21, 1984, and the condition or practice cited as a violation of 30 C.F.R. § 75.200, is described as follows:

The approved roof control plan (approved 9/16/83) and the tentative approved supplement (dated 12/19/84, see page 2), was not being followed in the No. 4 entry north-east mains in that at least one row of timbers on 5 foot centers was not maintained to the last open crosscuts in the north-east mains, mines an area of approximately 70 feet in which timbers had been spotted. Also timbers were not installed on 5 foot centers one crosscut inby the north-east mains belt drive for a distance of approximately 100 feet.

Section 104(a) "S&S" Citation No. 2338192, was issued on February 21, 1984, and the condition or practice cited as a violation of 30 C.F.R. § 75.202, is described as follows:

Approximately 100 timbers had been dislodged along the supply road, No. 3 entry in the north-east mains, and the main north, and had not been replaced.

Section 104(a) "S&S" Citation No. 2338193, was issued on March 6, 1984, and the condition or practice cited as a violation of 30 C.F.R. § 75.200, is described as follows:

The approved roof control plan (approved 9/6/83, see page 15, see sketch for entries) was not being followed on the No. 3 unit, I.D. No. 003 in that the width of the No. 1 and 3 entries was in excess of 20 feet (25 feet wide) for a distance of approximately 10 feet in one location in each entry. These wide places were located just inby location no. 9+80 which is inby the last open crosscuts.

Section 104(a) "S&S" Citation No. 2338194, was issued on March 6, 1984, and the condition or practice cited as a violation of 30 C.F.R. § 75.400, is described as follows:

Accumulations of loose coal and coal dust (4 to 12 inches deep) was present along the ribs and mine floor of the nos. 1 through 6 entries and the last open connecting crosscut, beginning at location no. 9+80 and extending inby approximately 60 feet. No. 3 unit, I.D. No. 003, north-east parallels.

Docket No. KENT 84-168

Section 104(a) "S&S" Citation No. 2338198, was issued on March 8, 1984, and the condition or practice cited as a violation of 30 C.F.R. § 75.200, is described as follows:

The approved roof control plan (dated 9/6/83, see page 14, figures B or C and D) was not being followed on the No. 1 unit, I.D. No. 001 1st North panel in that the timbers had not been installed to within 240 feet of the tailpiece of the belt in at least one return entry and the supply entry, in that the timbering in the return (No. 6 entry) terminated 720 feet outby the tail of the belt minus 240 feet that had been timbered in the middle of this 720 feet distance. The timbering in the supply road terminated 660 feet outby the tail of the belt minus 180 feet that had been timbered in the middle of the 660 feet distance.

Section 104(a) "S&S" Citation No. 2338768, was issued on March 9, 1984, and the condition or practice cited as a violation of 30 C.F.R. § 75.400, is described as follows:

Loose coal and coal dust has been allowed to accumulate along the No. 2 long belt and along the No. 2 unit belt at numerous locations. This from 2" to 4" in depth.

Section 104(a) "S&S" Citation No. 2338769, was issued on March 9, 1984, and the condition or practice cited as a violation of 30 C.F.R. § 75.1725, is described as follows:

There are 33 bad rollers in the No. 2 long belt and the No. 2 unit belt. This is from the No. 55 crosscut in the long belt to the No. 15 crosscut in the No. 2 unit belt. These rollers were not turning in coal or coal dust.

Section 104(a) "S&S" Citation No. 2338770, was issued on March 9, 1984, and the condition or practice cited as a violation of 30 C.F.R. § 75.1722, is described as follows:

The No. 2 unit's belt head is not adequately guarded in that no guards were up on back side for take-up roller or drive rollers. Also, the guards on the starting box side are not installed so as to prevent a person from being caught in the roller.

Stipulations

Respondent stipulated that the No. 9 mine is subject to the Act, and that I have jurisdiction to hear and decide these cases (Tr. 4). Respondent also agreed that the inspectors who issued the citations are authorized and qualified inspectors, and that they did in fact issue the citations.

The parties agreed that at the time the citations were issued, the subject mine had an annual production of 379,316 tons, and that the parent corporation had an annual production of approximately three million tons (Tr. 4). The parties agreed that as to all of the citations in issue, the negligence level was moderate, and that the respondent exercised good faith in abating all of the citations within the time fixed by the inspectors (Tr. 4-5).

Petitioner's Testimony and Evidence

Docket No. KENT 84-156

The four citations at issue in this docket were all issued by MSHA Inspector James E. Franks during the course of his inspections of the mine on the days in question. With regard to Citation No. 2338191, Mr. Franks confirmed that he issued it after finding that certain roof support timbers had not been installed in accordance with the requirements of a supplemental roof control plan (exhibits P-2 and P-3). Mr. Franks stated that he relied on page two of the supplement, December 9, 1983 (Tr. 12).

Mr. Franks conceded that on the face of the citation form, he did indicate that the supplemental plan was approved on December 19, 1984. However, he explained that this was an error on his part, and that the plan supplement was approved in 1983 (Tr. 13).

Inspector Franks stated that he issued the citation because of the failure by the respondent to install timbers on five-foot centers from the last installed "I" beam to the last open crosscut (Tr. 31), and he maintained that the timbers should be installed before the "I" beams, and he gave his opinion as to how the timbers could be transported into the area for installation (Tr. 31-33). He confirmed that provision number three of the supplemental roof control plan was violated, and that the violation occurred at the number four entry (Tr. 36-39). He located the area by referring to a mine map provided by the respondent's representative (Tr. 41).

Mr. Franks testified that he considered the violation to be "significant and substantial" because of the fact that the number 9 coal seam in Kentucky has historically had bad roof conditions, and the fact that in the particular entry in question there had been a previous roof fall, and the rib and top had some broken places. He also relied on the fact that during the year 1984, there were 28 miners killed in roof falls nationwide (Tr. 11). He indicated that the cited area was an area where a belt examiner or timbering people would travel, and he confirmed that he observed two people working in the area at the time the citation issued (Tr. 11-12).

Mr. Franks confirmed that he relied on the National Gypsum decision guidelines for his "S&S" findings in this matter, and he also confirmed that he was aware of a May 1981 MSHA

memorandum issued by Acting Administrator Joseph La Monica concerning the application of the guidelines (Tr. 16, 19). Mr. Franks denied that his supervisor ever advised him to mark any citations "S&S," or that he was influenced by any statistics indicating the number of "S&S" citations issued in his district as compared to others (Tr. 20).

Mr. Franks stated that part of the area he cited was a belt and track entry where people would be traveling, and he considered the fact that the mine roof had some broken areas and that a roof fall had occurred in the past. Although there have been no fatal roof falls in the mine in question, he was aware of the fact that some 28 miners were killed during the year in roof falls nationwide (Tr. 22).

Mr. Franks conceded that the cited roof area was supported with roof bolts, and that he issued the citation because of the lack of the required additional roof support timbers (Tr. 24). The miners in the area were those who were doing the installation work on the roof support "I" beams (Tr. 27), and Mr. Franks believed there were three miners doing this work (Tr. 28-29). He also indicated that he has seen roof and rib cracks in the belt and supply entries, and that is why additional support is required. He characterized the roof as "uncertain," and indicated that a fall had previously occurred next to a belt drive (Tr. 57, 59).

Inspector Franks confirmed that he issued Citation No. 2338192, after traveling the supply road in the number three entry and observing approximately 100 roof support timbers knocked out along the roadway (Tr. 62). He confirmed that the dislodged timbers were at two supply road locations (Tr. 66), and he pointed them out on the mine map (Tr. 69-70). He also confirmed that the dislodged timbers were present in an area of some 2,000 feet along both supply road locations (Tr. 71-72).

Mr. Franks confirmed that the roof control plan required the timbers to be installed and maintained in an upright position to support the roof. Although the respondent could have used cross bars or truss bolts to support the roof at the cited locations, the respondent opted to use timbers (Tr. 80). Mr. Franks explained why he relied on section 75.202 (Tr. 80-82).

Mr. Franks believed that the majority of the dislodged timbers had at one time been set, but were subsequently dislodged. Since the cited working areas were not places where recovery work was being done, the respondent was required to reset the dislodged timbers (Tr. 75-76).

With regard to his "S&S" findings, Mr. Franks confirmed that he again relied on the National Gypsum guidelines. In his opinion, the conditions along the cited supply road were typical of conditions which have resulted in roof falls in other similar mine areas (Tr. 64). He testified that mantrips travel the area, and the roof in several places was broken (Tr. 67), and other roof areas had been truss bolted and timbered (Tr. 77). All of these factors, including the fact that people have been hurt in roof falls in the No. 9 mine, influenced his decision that the violation was "S&S" (Tr. 63-64).

Although the respondent disputed Inspector Franks' "S&S" finding with respect to Citation No. 2338193, it did not dispute the fact that the conditions described by Mr. Franks with regard to the wide entries constituted a violation of the mine roof control plan and mandatory safety standard section 75.200 (Tr. 83-84).

With regard to his "S&S" finding, Mr. Franks testified that the cited area was in a coal producing section where miners had to travel to cut and load out coal, or to drill and pin the roof (Tr. 86). He believed that by driving the entries wider than allowed by the roof control plan, a wider area of unsupported roof is exposed, thereby creating a hazard which could reasonably likely cause an accident (Tr. 85, 105-107).

Mr. Franks conceded that he was not aware of any roof falls in the mine caused by wide entries, but he indicated that the mine has had quite a few violations of the roof control plan, and that he believed there were 23 roof plan violations issued over a 17 month period (Tr. 87). He also alluded to an accident report which indicated that two people had been injured by a reported roof fall at the mine (Tr. 88). Mr. Franks indicated that from March 11, 1983 to September 30, 1984, 23 roof control violations were issued, and 12 were "of a serious nature, S&S" (Tr. 96).

Mr. Franks confirmed MSHA's policy guidelines concerning the application of section 75.201, with regard to the definition of the term "excessive width" (Tr. 92-93). He conceded that excessive widths are not prevalent on the cited section or in the mine, and he did not believe that this was a common practice (Tr. 93). Abatement was achieved by installing additional timbers to reduce the widths of the cited entries (Tr. 95).

Inspector Franks confirmed that he issued Citation No. 2338194, citing a violation of section 75.400, after observing accumulations of loose coal and coal dust along the ribs and floor of the number three coal producing unit (Tr. 114). He was unaware of any cleanup program in use by the respondent, and stated that he did not issue the citation for a violation of any such program (Tr. 113-117).

Mr. Franks testified that the cited accumulations extended "more or less continuous" for a distance of some 700 feet along the six entries in question, and for a distance of approximately 60 feet at the other cited location, at depths ranging from 4 to 12 inches (Tr. 128-132; 144). He had no reason to believe that the cited areas were not rock dusted, and he was of the opinion that the accumulations had been permitted to exist for some unspecified hours, but not days (Tr. 135).

Mr. Franks agreed that the roof must first be pinned before any work can take place in the cited entries. He testified that he observed no cutting machine cutting off any areas in order to facilitate pinning, and he believed that the crosscuts in the cited six entries had been traveled through. The lack of any pinning had nothing to do with the failure to cleanup the cited accumulations, and he indicated that the entries had already been pinned (Tr. 119-120).

Inspector Franks stated that he was not present when the conditions were abated, but when he returned to the section the next day, the accumulations had been cleaned up, and he did not know how much material was loaded out (Tr. 133).

Inspector Franks believed that the cited accumulations constituted an "S&S" violation because people were on the unit, the intent of section 75.400 is to prevent the accumulation of combustibles, and that it is common knowledge that there have been three or four fires and explosions in mines in West Kentucky, and that they are caused by accumulations of combustibles (Tr. 114). He also relied on the fact that the mine liberates methane, and that the loaders, roof bolters, and shuttle cars operating in the section do have electrical trailing cables (Tr. 115).

Docket No. KENT 84-168

With regard to Citation No. 2338198, the respondent conceded that the conditions cited by Inspector Franks regarding the lack of roof support timbers constitutes a violation of its approved roof control plan and mandatory safety standard

section 75.200 (Tr. 145). Respondent asserted that it is only contesting the inspector's "S&S" finding, and that in the absence of any loose or dangerous roof conditions, respondent does not believe that the violation is "S&S" (Tr. 145).

Mr. Franks stated that there were a total of 200 required timbers which were not installed in all of the areas which he cited, and he believed it would take approximately one day to install 100 timbers (Tr. 154).

Mr. Franks confirmed that the roof areas where the violations occurred had been roof bolted, and he conceded that he observed no "abnormal" roof conditions or "anything that I thought was about ready to fall and kill anybody," although he did see some roof cracks (Tr. 150). When asked whether the cited conditions would result in an injury, he replied as follows (Tr. 150):

A. I felt like the supply road is a -- or an area that a lot of people's wide open into, and I -- there's no problem with me saying to you that the supply -- I felt more strongly about the supply road than I did the return, because I felt like that's where the people are exposed. The -- so I believe that it's a -- could be a very serious injury, and I also believe that a injury could occur from there, especially the supply road.

With regard to his "S&S" finding, Mr. Franks testified that while some areas along the supply road and belt tail had been timbered, the areas which he cited had been skipped and were not timbered. He indicated that belt workers and rock dusters had to travel the supply road, and that several areas along the supply road had been supported with roof cribs or truss bolts. Roof falls have occurred along the supply road, and he roof had some cavities in it (Tr. 146). However, the cited returns would not have as much traffic, but rock dusting and belt examinations have to be made in those areas, and an examiner would have to travel those areas at least once a week (Tr. 147). There were ten people working on the unit at the time the citation was issued (Tr. 149).

Inspector Franks conceded that he gave the respondent from March 8, 1984, to March 12, 1984, to abate the conditions, and in response to a question as to whether he was concerned that this was a long time to correct conditions which he

believed could result in injuries, Mr. Franks stated that he is required to fix a reasonable time for abatement, and that this had no bearing on any "S&S" finding (Tr. 151). Mr. Franks also confirmed that he did not stop normal mining operations, and that his definition of "S&S" is "whether an injury is reasonably likely to occur if the violation were not corrected" (Tr. 151).

Inspector Franks testified that it appeared to him that the respondent started timbering in the middle of the supply road, hoping that an inspector would not walk back and look at the areas which were not timbered. He admitted that this was speculation on his part, and since he could not prove that it was true, he could not cite an unwarrantable violation (Tr. 152-153).

MSHA Inspector George W. Siria confirmed that he issued Citations 2338768 and 2338769 on March 9, 1984, on the No. 2 long belt. Citation 2338768 was issued after he observed accumulations of loose coal and coal dust approximately two to four inches deep at "numerous locations" along the belt. He indicated that the belt is approximately 70 crosscuts long, but that he did not count the exact number of locations where he found the accumulations (Tr. 221).

Mr. Siria confirmed that his supervisor, Inspector Hill, accompanied him during his inspection and that Mr. Hill was "evaluating him." Mr. Siria indicated that he started on one end of the belt, and was accompanied by mine superintendent David Steele, and that Mr. Hill started at the other end, accompanied by respondent's safety director, Donald Lamb. The two inspection "teams" met "at some location making these two belts" (Tr. 221).

Mr. Siria stated that 33 "bad rollers" were found along the same belt, and that is why Citation No. 2338769 was issued. He defined "bad rollers" as "either they're worn in two or they're frozen rollers, which create a friction on a belt that could cause a fire" (Tr. 222).

Mr. Siria stated that he considered both citations together in making his findings that they were both "S&S" violations, and he stated that "if this had been allowed to continue this way and not be corrected, the loose coal and coal dust would build up to the rollers, if it wasn't corrected, and this would cause a -- could very easily cause a mine fire" (Tr. 222). He confirmed that during a subsequent conference on the citations, he modified the citations to reflect that six persons, rather than 13, would be affected by the cited conditions (Tr. 223). He also indicated that the mine has a high velocity of air on the belt, and that in the event of a fire, it would be beyond control in a very short time (Tr. 225).

Mr. Siria testified that when he issued the citation, no one from mine management disputed his "S&S" finding. Although someone "probably" said something that the belt cleaner was supposed to clean the belt, he observed no one cleaning up any accumulations at the time of his inspection (Tr. 224), and no one advised him that anyone was in fact cleaning the belt (Tr. 226). Mr. Siria indicated that the accumulations were not "fresh," and he was of the opinion that they were present for more than two days (Tr. 230).

Mr. Siria conceded that he only walked 40 crosscuts along the belt which he cited, and that his supervisor, Mr. Hill, told him that he had observed accumulations of loose coal and coal dust along the remaining portion of the belt which he walked. Since the cited belts were two distinct belts, he and Mr. Hill discussed the possibility of issuing two separate citations, but since the belts "were in continuation," Mr. Hill believed that one citation would suffice (Tr. 226). The conditions that they both observed were incorporated in the one citation which Mr. Siria issued (Tr. 227). However, even if he were to disregard Mr. Hill's observations, Mr. Siria indicated that he would have still issued a citation for the accumulations which he personally observed (Tr. 230).

Mr. Siria conceded that he observed no belt rollers turning in coal dust at the time of his inspection. However, because of the high air velocity, had mining been allowed to continue, the accumulations would have reached the belt rollers because they are close to the mine floor (Tr. 228).

Mr. Siria stated that he is sure that someone was assigned to clean the belts, and he indicated that in a recent inspection of the belt "they're making a vast improvement on the belts, since the new superintendent took over" (Tr. 228).

Mr. Siria could not state how many belt rollers were stuck, or how many of them were worn (Tr. 229). He confirmed that he only observed 19 bad rollers, and that Mr. Hill observed the rest. He again explained that it was decided to incorporate their separate observations into the one citation which Mr. Siria issued (Tr. 236). Mr. Siria confirmed that Mr. Hill simply told him that "bad rollers" were present, but he could not recall the precise number given (Tr. 238).

Respondent's Safety Director, Donald Lamb, was called as a witness by the petitioner, and he testified as to the

events concerning Citation Nos. 2338768 and 2338769. Mr. Lamb confirmed that he was with supervisory Inspector Hill when he inspected one of the belts referred to in the citations issued by Mr. Siria. Mr. Lamb also confirmed that he observed the accumulations of coal and coal dust that Mr. Hill told Mr. Siria about, and while he did not know the number of bad rollers that Mr. Hill saw, Mr. Lamb did confirm that Mr. Hill brought these rollers to his attention (Tr. 286). In response to further questions, Mr. Lamb testified as follows (Tr. 287-288):

Q. Would you agree that there was an accumulation of two to four inches in depth along --

A. Yes.

Q. Would you agree that there were some bad rollers?

A. Yes.

Q. Okay. Mr. Lamb, would you agree that there was a violation, in this case, along the number two unit belt?

A. As a violation of loose coal or rollers?

Q. A violation of loose coal and a violation with regard to 75.1725, the rollers?

A. Yes.

Q. Do you agree, that in both cases, a violation existed?

A. I agree that there was loose coal, and I agree that there was stuck or bad rollers.

And, at (Tr. 289-291):

JUDGE KOUTRAS: Did Mr. Hill discuss anything with you about the rollers or the accumulations? Did he bring them to your attention while you were walking along?

THE WITNESS: Right.

JUDGE KOUTRAS: And this didn't come as a complete surprise to you, did it, that Mr. Hill had made these observations?

THE WITNESS: No.

JUDGE KOUTRAS: He was -- did he point out some rollers to you?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Did he point out some accumulations to you?

THE WITNESS: Yes.

JUDGE KOUTRAS: And he'd point out these things to you. "There's a roller there. There's a roller there. And there's some accumulations." He told you that, did he not?

THE WITNESS: That's right.

JUDGE KOUTRAS: Did he tell you he was going to issue a citation?

THE WITNESS: No.

JUDGE KOUTRAS: Or that these conditions violated anything?

THE WITNESS: Yes.

JUDGE KOUTRAS: What did he tell you?

THE WITNESS: He said that he would -- you know, that this was not right, and that it's going to have to be corrected.

JUDGE KOUTRAS: Okay. And then were you present when he met with Inspector Siria?

THE WITNESS: Right. We -- we --

JUDGE KOUTRAS: You all met together. Right?

THE WITNESS: -- came together. Right.

JUDGE KOUTRAS: And when you -- you were present when the two of them decided that -- that a citation should issue?

THE WITNESS: Yes.

JUDGE KOUTRAS: For both the rollers and the accumulations?

THE WITNESS: Right.

JUDGE KOUTRAS: You were there, right?

THE WITNESS: Right.

JUDGE KOUTRAS: And then Mr. Siria wrote both of these up and handed you a copy. Isn't that true? Your name's on the both of these. Did he serve these to you?

THE WITNESS: Yes.

JUDGE KOUTRAS: One each?

THE WITNESS: Right.

JUDGE KOUTRAS: Were you confused that -- that these citations were issued to you? I mean, was there -- let me back up a minute. Was there any question in your mind that the reason the citations were issued was because Mr. Siria and Mr. Hill, in combination, found similar conditions in the two areas that they had walked?

THE WITNESS: No. There was no confusion.

JUDGE KOUTRAS: No -- there's no confusion, is there?

THE WITNESS: No, there wasn't.

Mr. Siria confirmed that he issued Citation No. 2338770 after finding that the number 2 unit belt head had no guards on the back side at the pickup and drive roller locations, and that the guards on the starting box side were not installed so as to prevent a person from being caught in the roller. Mr. Siria observed no one at the cited belt locations, but since the belt head was not dirty, he assumed that someone had been there to clean up (Tr. 253).

Mr. Siria explained that the guards which were installed on the starting box side of the belt head "wasn't up good enough and close enough, evidently, to prevent a person from reaching into it and being caught in the rollers" (Tr. 253). He indicated that there "were spaces where a person could reach in," but he could not state how much an opening was

present. Since the back side of the belt head was not guarded at all, and since he believed that someone would have access to the location from both sides, he did not believe that the size of any opening on the guarded portion of the belt head is significant (Tr. 254).

Mr. Siria explained how the belt head functions, and he believed that someone could become entangled in the takeup or tandem rollers, and that "a person could easily fall into it while they're shoveling" (Tr. 261). He was aware that persons have been injured in the past in such incidents (Tr. 261). He reiterated that he observed no one cleaning the belt head while it was moving (Tr. 262).

Mr. Siria stated that even if he had observed someone cleaning up while the belt was stopped, he would have still issued a citation. He conceded that it was possible that clean up could have been conducted while the belt was shut down and that no one would have been exposed to moving belt parts (Tr. 262). With regard to the back side of the belt which was not guarded at all, he conceded that the only person who would be there would be someone who was cleaning or greasing the belt head. In the event of any greasing, the belt should be shut down, or guarded and provided with a grease hose so that no one could come in contact with moving parts (Tr. 263).

Mr. Siria believed that the violation was "S&S" because "this was a dangerous situation, when the drive rollers are exposed to anyone doing anything" (Tr. 265). He confirmed that he recently investigated a fatality involving an individual who was killed while greasing a belt which had not been locked. The belt started up and it "run him off the belt, and killed him" (Tr. 265).

Mr. Siria stated that there was a walkway on both sides of the belt head, that the area has to be cleaned up, and that the respondent's cleanup program requires that this be done. Under these circumstances, he was of the opinion that the backside of the belt head was a location which was required to be guarded (Tr. 272-273). Mr. Siria believed that the walkway or travelway was approximately four feet from the unguarded belt head, but he could not state how much room a person would have to travel between the area from the rib to the belt head, and he indicated that "It really didn't matter how much space was there. What mattered to me was it wasn't guarded" (Tr. 276).

Respondent's Testimony and Evidence

Cheryl McMackin, Safety Manager, confirmed that she accompanied Inspector Franks when he issued Citations 2338191

and 2338192, concerning the missing and dislodged timbers. She described the work being done in the area, and she indicated that coal was not being produced at the time of the inspection. She was not aware of any "reportable" roof falls in the area on the day of the inspection, and she described the roof conditions as "average." She did not consider the roof to be "bad top," and in her opinion, the fact that some roof support timbers were missing along the cited locations was not serious and could not cause an accident (Tr. 156-158).

Ms. McMackin confirmed that people were working in the cited locations "setting steel beams and hauling timbers." She asserted that the timbers are difficult to maintain, particularly when the unit is active, and she speculated that the timbers were probably knocked out by scoops. She also indicated that respondent prefers to wait until the unit is idle before "catching up" and installing roof timbers (Tr. 160).

Ms. McMackin interpreted "reportable roof fall" to mean falls which block a miner's passage, impede ventilation, those which occur above the anchorage zone of the roof bolts, or those which cause injuries (Tr. 161). She conceded that one cannot totally predict when a roof fall will occur, and she observed nothing to indicate that a roof fall was about to occur.

Ms. McMackin insisted that the cited areas were not ignored, and she believed that since the area was on the main entrance to the mine, the required timbering would have been done as work progressed further in the area (Tr. 164). She later stated that while timbering was not taking place at the specific locations cited by Inspector Franks, timbers would have been installed on the unit in general. She also alluded to the fact that other entries had to be timbered, and that preparations were being made to "set steel" in the cited entry (Tr. 165).

With regard to Citation No. 2338192, concerning the 100 dislodged timbers in the No. 3 north-east mains entry, Ms. McMackin confirmed that she was with Inspector Franks when he served the citation. She indicated that the dislodged timbers were not in any one concentrated area, but were "here and there" along the 2,000 distance in question. She indicated that the timbers were dislodged by equipment traveling through the area, and she observed that "It's easier for them to knock them to get to do the job they do, rather than to go around them" (Tr. 167).

Ms. McMackin confirmed that the roof areas along the cited supply road and entries were roof bolted in accordance with the roof control plan, and she did not believe that the

violation was significant and substantial (Tr. 167). She also confirmed that people are specifically hired and assigned to reset dislodged timbers, and that this is done on each shift on a daily basis (Tr. 168).

Although she reiterated that she saw no roof falls along the cited supply road, Ms. McMackin stated that she did observe several locations where roof materials had fallen down, but she would not classify these as "roof falls" (Tr. 168). She also observed evidence of roof "sloughing, or small pieces of dry rock" (Tr. 168). Although she estimated that the dislodgement of the estimated 100 timbers may have occurred over a period of two to three days, it was possible that an estimated 200 timbers may have been dislodged had the work continued for four days, but she did not believe this was likely (Tr. 169).

Rodney Head, training instructor, testified that he has mine foreman's papers issued by the State of Kentucky. He confirmed that he was with Inspector Franks when he issued Citation No. 2338193, concerning the wide entries on the No. 3 unit. Mr. Head estimated that 40 cuts of coal would be taken on an average production day, and that each cut is about ten feet. He believed that the 25-foot entries which were driven 5 feet wider than permitted constituted one cut of coal in each location, but he did not believe that driving the entries an additional width of five feet would cause any injuries. He described the roof conditions in both entries as "average to good," and he saw no evidence of any roof failure, cracks, or fissures (Tr. 173, 175).

With regard to Citation No. 2338194, Mr. Head confirmed that he was with Inspector Franks during his inspection, and he described the area where they traveled (Tr. 177-178). Mr. Head testified that the area had been "flagged" or endangered off because the line of crosscuts had not been timbered off all the way across the entries, and that "flagging" was required until the area was supported (Tr. 179).

Mr. Head stated that the cutting machine had "technically" cut through the line of crosscuts, and that coal would be naturally be scattered across the ribs. When asked whether these were in fact the conditions which prevailed at the time the citation issued, he relied "That's part of it" (Tr. 180). He stated that the ventilation on the section was excellent, that no methane was found at the faces, and that no ignition sources were present (Tr. 180).

Mr. Head conceded that methane is liberated in all mines, and he confirmed that equipment had been operating and traveling through the areas where the accumulations were found. He

estimated that the accumulations were the result of four hours of coal cutting time, and he explained that they resulted from trimming the crosscuts as they are driven. He confirmed that his understanding of the citation indicated that the accumulations existed for a distance of 360 feet along the six cited entries, but in his opinion they were the result of the normal mining cycle (Tr. 186). He estimated that it would have taken about five hours to complete all six entries, and in response to further questions stated as follows (Tr. 188):

JUDGE KOUTRAS: Now, let me understand again, Mr. Head, your contention is that these accumulations that the inspector cited resulted from the normal mining cycle, and that they had existed for approximately the number of -- the amount of time it would have taken to punch through that, you said five hours, possibly less, and in the normal course of business, all these accumulations would have been cleaned up?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Was all this explained to the inspector?

THE WITNESS: I can't say that it was. No, sir. Because I don't remember having the conversation.

JUDGE KOUTRAS: Do you recall him giving you the citation?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: But you don't recall any conversation that you may have had with him?

THE WITNESS: No, sir, not at the time he issued me the citation.

Inspector Franks was called in rebuttal with respect to Citation No. 2338194, and he indicated that the cited entries had been "supported" by roof bolts, but not timbered, and the roof control plan only requires that roof bolts be maintained within three feet of the rib. In his view, at this stage of the mining cycle, the cited accumulations should have been cleaned up, and as far as he is concerned

the law does not permit accumulations of loose coal and coal dust to remain in the mine for any amount of time (Tr. 200-201). Mr. Franks indicated that his practice is to look at the last open crosscut to determine how deep the entries have been driven, and if he finds that they have gone 35 to 40 feet, he does not take any action. However, if he finds that the last line of crosscuts are dirty, and the face is 60 feet inby, and there is no indication that any attempt has been made to clean up "I begin to get a little bit disturbed" (Tr. 202). In the instant case, he believed that no one attempted to clean the last line of crosscuts, and he did not expect the respondent to clean "right up to the face" (Tr. 203).

In response to respondent's questions, Mr. Franks stated that he did not know where the loader was located, and he reiterated that he issued the citation because two 30-foot mining cycles had been completed 60 feet into the face without any cleaning up (Tr. 204).

Donald Lamb, Director of Safety and Training, confirmed that he accompanied Inspector Franks during his inspection of March 8, 1984, when he issued Citation No. 2338198, for failure to install roof support timbers at the cited locations. Mr. Lamb agreed with Mr. Franks' contention that the roof control plan required that the timbers be installed. Mr. Lamb could recall no roof falls in the supply road, and he did not believe that the cited conditions would have resulted in serious injuries if normal mining operations were to continue (Tr. 192). He confirmed that rock falls have occurred at some of the respondent's mines, but that none of them could be considered as massive roof falls (Tr. 192).

Mr. Lamb agreed that Inspector Franks' assertion that there were about 100 timbers missing in the supply road, and 100 in the return "would be about right" (Tr. 196). He also agreed that Mr. Franks was probably concerned over the fact that with the number of missing timbers which were not installed, the stability of the roof would be compromised (Tr. 197), and in response to further questions, indicated as follows (Tr. 197-198):

JUDGE KOUTRAS: Do you agree with that's -- that's, probably, why he found -- found this one in particular to be S&S.

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Well, do you agree with his thinking on that, as the Safety Director or the Safety Manager, or --

THE WITNESS: Well --

JUDGE KOUTRAS: I mean, would you -- put yourself in his shoes. Would you put up with a mine operator having 100 timbers missing here and 100 over there and 50 dislodged here and -- notwithstanding the fact that the roof was bolted, there's absolutely no dribbling, and that it's as flat as this -- the roof is in -- in this hearing room we're having today. Would that be of some concern to you?

THE WITNESS: Yes, sir, it was.

JUDGE KOUTRAS: And -- but yet you say that's not S&S.

THE WITNESS: Well, could I --

JUDGE KOUTRAS: Yes. Oh, sure.

THE WITNESS: The timbers weren't going to be left at that position, you know, laying down or dislodged. And in the return, room necks were going to be driven, and, you know, places back in that position or in that spot could have been left there in order to go back and drive in that entry instead of putting timbers in, you know. There's sometimes situations which, you know, at that time the timbers were going to be put in or room necks were going to be driven in that area.

JUDGE KOUTRAS: Well, what about this particular citation, where what he, apparently, found was that there'd been certain areas that had been skipped. I mean, if people are traveling in these areas that have been skipped, if I could use that term, doesn't the absence of the roof timbers there, necessarily affect the stability of the roof? In other words, you don't have additional support in these areas.

THE WITNESS: Right. Now the areas which he was saying was skipped, was in the return, and that would have been traveled, probably, by one person --

JUDGE KOUTRAS: Once a week.

THE WITNESS: -- once a week.

JUDGE KOUTRAS: Okay. But even so, as to that one person, that could, possibly, cause a problem, couldn't it?

THE WITNESS: Yes.

All of the citations at issue in these proceedings were issued by the inspectors pursuant to section 104(a) of the Act, and in each instance the inspector made special findings that the cited conditions or practices constituted "significant and substantial" ("S&S") violations of the cited mandatory safety standards. Although the respondent has disputed some of the alleged fact of violations, and conceded others, it has contested and challenged all of the "S&S" findings made by the inspectors.

In support of the "S&S" findings, the inspectors relied on the guidelines established by the Commission's decision in Cement Division, National Gypsum Co., 3 FMSHRC 822, decided on April 7, 1981. One inspector also alluded to an MSHA memorandum issued by Acting Administrator Joseph A. Lamonica, issued shortly after the National Gypsum decision. Although the memorandum was not produced, and is not part of the record here, I believe the parties are aware of it, and that I may take official notice of its publication. It was issued on May 6, 1981, as CMS&H Memo No. 81-32-A (6033), and was directed to all MSHA Coal Mine Safety and Health District Managers, and it provides "guidelines" for determining whether a violation is "significant and substantial." I have included a copy in the case files for reference only, and have not relied on it to support any of my findings or conclusions with regard to the merits of the inspectors' "S&S" findings. My findings and conclusion in this regard are based on the evidence and testimony of record in these proceedings, as well as the precedent cases decided by the Commission, a discussion of which follow below.

The Commission first interpreted the statutory language "significant and substantial" in section 104(d)(1) of the Act in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), where it held as follows at 3 FMSHRC 825:

. . . [A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based on the

particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

In a subsequent decision issued on January 6, 1984, Mathies Coal Company, 6 FMSHRC 1 (January 1984), the Commission reaffirmed the analytical approach set forth in National Gypsum, and stated as follows at 6 FMSHRC at 3-4:

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

In U.S. Steel Mining Co., Inc., 6 FMSHRC 1573 (July 11, 1984), the Commission rejected the argument that any determination as to whether a significant and substantial violation exists should be limited solely to a consideration of the conditions as they existed at the precise moment of an inspection, and it reemphasized its holding in National Gypsum that the contribution of the violation to the cause and effect of a mine safety hazard is what must be significant and substantial.

In U.S. Steel Mining Company, Inc., 8 FMSHRC 1834 (August 1984), a case involving the failure by a mine operator to properly tag or otherwise identify certain trailing cable disconnecting devices, and the failure to properly secure an oxygen and acetylene cylinder, the Commission upheld Judge Broderick's findings that an accident or "incident" involving these cited conditions, as well as the resulting injury, was reasonably likely to occur. U.S. Steel did not contend that any injury occurring as a result of a trailing cable accident or the unsecured gas cylinders would not be of a reasonably serious nature. It's arguments centered on an assertion that the record before the Judge did not support his implicit findings that there was a reasonable likelihood that an accident and injuries would occur. At 8 FMSHRC 1836, the Commission noted in pertinent part as follows:

As to the four elements set forth in Mathies, we note that the reference to 'hazard' in the second element is simply a recognition that the violation must be more than a mere technical violation -- i.e., that the violation present a measure of danger. See National Gypsum, supra, 3 FMSHRC at 827. We also note that our reference to hazard in the third element in Mathies contemplates the possibility of a subsequent event. This requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. The fourth element in Mathies requires that the potential injury be of a reasonably serious nature.

Findings and Conclusions

Docket No. KENT 84-156 - Fact of Violations

Citation Nos. 2338191 and 2338192

The evidence and testimony in this case supports the inspector's findings concerning the missing and dislodged timbers. Failure by the respondent to adhere to its roof control plan, including the supplement thereto, constitutes a violation of section 75.200. Further the failure by the respondent to replace the dislodged timbers in question constitutes a violation of section 75.202. Accordingly, I conclude and find that the petitioner has established both of these violations by a preponderance of the evidence, and both citations ARE AFFIRMED.

The respondent's arguments in defense of Citation No. 2338191, concerning the erroneous date reference made by Inspector Franks with regard to the supplemental roof control plan IS REJECTED. The inspector explained that his reference to the year as 1984, rather than 1983, was a mistake, and the fact that he did not modify or correct his citation in advance of the hearing is not critical and has not prejudiced the respondent. Respondent's representative Craft had an ample opportunity to cross-examine the inspector, and Mr. Craft candidly conceded that he had no reason to believe that the inspector relied on an erroneous supplemental plan (Tr. 151).

I conclude and find that both of these violations were significant and substantial. While it is true that the roof was bolted, the failure to maintain and install the additional

roof support timbers required by the roof plan impacts on the stability of the roof. The evidence establishes that miners were required to travel and work in the affected areas, and since respondent's witness McMackin indicated that the cited areas were on the main entrance to the mine, this would increase the exposure hazard and potential for injury in the event of a roof fall. While there was no evidence of any massive roof falls in the cited areas, the inspector described the roof as "uncertain" and testified as to a past roof fall next to a belt drive. He also alluded to several places where he observed broken roof and ribs in the belt and supply entries. Ms. McMackin described the roof conditions as "average," and conceded that roof falls are unpredictable.

Inspector Franks observed no timbering work being done at the time of his inspection, and Ms. McMackin conceded that the dislodged timbers were apparently caused by equipment running into the timbers and that "this was easier" than going around them. She also alluded to the fact that respondent prefers to wait for an idle shift before "catching up" on its timbering work. In these circumstances, it seems obvious to me that the respondent failed to pay closer attention to its roof support plan when it initially failed to install the required timbers, and when it failed to reinstall the 100 or so timbers which had been dislodged. Given the roof conditions, and the fact that timbers were missing and dislodged, there existed a hazard of a possible roof fall in the cited locations. Further, given the fact that mantrips and miners traveled and worked in the cited areas, there is a reasonable likelihood that any fall of roof or rock would have inflicted injuries of a reasonably serious nature to the miners required to travel and work in the areas where the additional required roof support was lacking. Accordingly, the inspector's "S&S" findings as to both citations ARE AFFIRMED.

Citation No. 2338194

In defense of this citation, Mr. Craft argued that the respondent was following an MSHA approved cleanup program (Tr. 113, 116; exhibits R-1 and R-2). In support of this argument, Mr. Craft asserted that because of the amount of impurities in the coal, management would prefer to leave the coal along the ribs until the end of the 24-hour production shift, and then cleanup and load it out at the end of the shift (Tr. 121-122).

Mr. Craft acknowledged the fact that MSHA had advised the respondent that it does not approve mine cleanup programs of this kind, and that once the exchange of correspondence had taken place, the respondent simply filed the letters. He also acknowledged the fact that once this was done, the accumulations were allowed to exist until the end of the shift, and that the respondent made no attempts to hide anything (Tr. 123). In defense of this action, Mr. Craft asserted that since section 75.400-2, provides for cleanup programs, and since MSHA did not specifically approve or disapprove of the cleanup program in question, MSHA's silence could be relied on by the respondent as "implied consent" or approval of the plan (Tr. 124).

Mr. Craft argued further that the respondent should have been allowed 24 hours to cleanup the accumulations, and that since there is no evidence that the accumulations were not present for more than this period, the respondent was in compliance with its own cleanup program (Tr. 135). He also asserted that the cleanup program was "kept available" at the mine, but he did not know whether it was shown to Inspector Franks, or whether he asked for it (Tr. 136).

Inspector Franks testified that he did not cite the respondent for a violation of any cleanup program, and he confirmed that when he issued the citation he was not aware of the existence of any such program (Tr. 117).

The inspector's testimony with respect to the cited accumulations has not been rebutted by the respondent. As a matter of fact, respondent's witness Rodney Head agreed that the accumulations existed for a distance of 360 feet across the six entries in question, and he estimated that they remained there for approximately five hours. He considered the accumulations to be the result of the normal mining cycle, and he indicated that they would have been cleaned up in the normal course of business. He confirmed that he did not discuss the citation with Inspector Franks, and did not explain the circumstances concerning the accumulations (Tr. 188).

The respondent's reliance on the location of the loader and the existence of a mine cleanup program as a defense to the citation ARE REJECTED. Respondent has not established the significance or relevance of the location of the loader. As for the cleanup program, I believe it is clear that MSHA did not approve any plan that permitted the respondent to cleanup at any 24-hour intervals. Although section 75.400-2,

requires an operator to establish and maintain a program for regular cleanup and removal of coal accumulations and other combustibles, it does not require that any plan formulated by the operator be reviewed in advance and approved by MSHA. The regulation only requires that the plan be "made available" to MSHA or one of its inspectors. From an enforcement view, while I believe it makes little sense to require an operator to formulate a plan, with no MSHA oversight for its review and approval prior to adoption, I am constrained to follow the regulation as promulgated.

Section 75.400, requires that loose coal and coal dust be cleaned up and not permitted to accumulate. On the facts of this citation, the petitioner has established by a preponderance of the evidence that the cited accumulations existed for at least two mining cuts over a period of four or five hours, and that there was no evidence of any cleanup efforts being made by the respondent. Under the circumstances, I find that a violation has been established and the citation IS AFFIRMED.

I cannot conclude that the petitioner has established by any credible evidence that this violation was significant and substantial. Inspector Franks testified that in making his "S&S" finding he relied on the fact that the intent of section 75.400 is to prevent the accumulations of combustibles, that people were on the unit, that such accumulations cause mine fires and explosions, and that it is common knowledge that such incidents have occurred in mines in West Kentucky. He also alluded to the fact that the mine liberates methane, and that mine equipment with trailing cables would have been operating on the unit. In my view, such generalized statements may be made of any mine, and any such cited accumulations violation would automatically result in an "S&S" finding by the inspector.

On the facts here presented, Inspector Franks had no reason to believe that the area was not adequately rock dusted, and he saw no equipment in operation in the area. Further, while it may be true that coal accumulations present a potential for a fire if not removed or cleaned up while in the presence of, or exposed to potential ready sources of ignition, there is no evidence that such ignition sources were present. Although the inspector alluded to the fact that the area had been traveled through, and that loaders, bolters, and shuttle cars are equipped with electrical trailing cables, there is no evidence to support a conclusion that this equipment was not in compliance with any applicable

permissibility standards, or that there was anything wrong with the trailing cables or other electrical components. Further, there is no evidence concerning the lack of appropriate fire suppression devices, or the presence of any ready ignition sources. In addition, the petitioner has not rebutted the testimony by respondent's witness Head that the cited areas had been "flagged," that no methane was detected at the faces, and that the ventilation was excellent.

Inspector Franks candidly admitted that he was disturbed over the fact that the accumulations had not been cleaned up, and he apparently believed that section 75.400 requires that accumulations be removed from the mine immediately as they accumulate and the regulation does not allow them to remain for any amount of time. Although I have sustained that fact of violation on the ground that the accumulations existed as described by the inspector, and that they were allowed to accumulate for at least two cuts without any cleanup efforts, I cannot conclude that the inspector's "S&S" finding is supportable. In short, I cannot conclude that the petitioner has established that there were any ignition sources present which presented a reasonable likelihood of a hazard. Accordingly, the inspector's "S&S" finding IS REJECTED.

Citation No. 2338193

The cited conditions concerning the wide entries in question are supported by the testimony of Inspector Franks. Further, although the respondent disputed the inspector's "S&S" finding, it conceded that the wide entries constituted a violation of the roof control plan and section 75.200 (Tr. 83-84).

During the course of the hearing, Mr. Craft alluded to an MSHA policy interpretation and application of the term "excessive widths" as found in section 75.201. He quoted a portion of the policy indicating some 12 inch "tolerance" allowance for wide entries, and pointed out that the reference to "excessive widths" refers to those which are "prevalent or caused by poor mining practices." Mr. Craft implied that these policy interpretations afford him a defense to the citation (Tr. 92-93).

The respondent's arguments in defense to the citation ARE REJECTED. The respondent is charged with a violation of section 75.200, which requires that it follow its approved roof control plan. The applicable plan provision provided for entries to be driven no wider than 20 feet. The cited entries here were driven for widths of 25 feet. Under the circumstances, I conclude and find that the violation has been clearly established, and the citation IS AFFIRMED.

Inspector Franks conceded that he had no reason to believe that cutting the entries wider than permitted by the roof control plan was a common practice, or that the existence of such wide entries was prevalent on the section where the violation occurred. Further, the record reflects that abatement was achieved immediately by installing additional timbers to narrow the entries to the required widths. Inspector Franks issued the citation at 10:45 a.m., and abatement was achieved by 11:30 a.m. that same day. Given these circumstances, driving the two entries for an additional width of five feet at the two cited locations for a distance of some ten feet was not extensive, and it does not appear that many additional timbers had to be installed to reduce the otherwise supported entries to the required roof control plan widths. There is no evidence as to how long the condition existed, and the inspector was unaware of any roof falls in the mine caused by cutting wide entries. Further, there is no evidence as to the condition of the roof areas at the cited locations, nor is there any evidence that those locations were not roof bolted or otherwise supported.

In support of his "S&S" finding, Inspector Franks alluded to an accident report concerning a past roof fall, and he also mentioned some past violations of the roof control plan. However, there is nothing of record detailing all of these events, nor has any connection been established between those past events and the conditions cited by the inspector in this case. The inspector's reference to a prior roof fall accident is contrary to his testimony that any such falls have been caused by cutting wide entries. Absent any credible information as to all of these past events, I conclude and find that they are too speculative and general to support any "S&S" finding. Accordingly, I cannot conclude that the petitioner has established that this violation is significant and substantial, and the inspector's finding IS REJECTED.

Docket No. KENT 84-168

Fact of Violation - Citation No. 2338198

Although the respondent contested the inspector's "S&S" finding, it conceded that the lack of roof support timbers constituted a violation of the roof control plan and section 75.200 (Tr. 145), and it has not rebutted the inspector's testimony in this regard. Accordingly, the citation IS AFFIRMED.

The record establishes that while the roof was bolted, there were about 200 roof support timbers which had not been installed in accordance with the roof control plan at the

cited entries along a supply road. Although the missing timbers were not concentrated in one particular area and were at intermittent locations along the supply road at the locations described by the inspector, the missing timbers were at places where belt examiners and rock dusters had to travel and work. Further, while the inspector did not believe that the roof conditions were "abnormal," and saw no signs of any immediate roof falls, he did testify that there had been some roof falls along the supply road in question and that he observed some roof cracks and cavities in the roof areas which he cited.

The respondent's safety director Lamb did not disagree that the Inspector was concerned that the 200 missing roof support timbers compromised the stability of the roof along the roadway. He also agreed with the inspector's assessment that at least one person would be exposed to a hazard of a roof fall in one of the cited areas which were "skipped" and not supported by the required additional roof support timbers, and that this would pose a "problem."

Given the fact that some 200 roof support timbers were not installed along a supply road where miners were expected to travel and work, I conclude and find that roof fall hazard existed along the cited supply road in question, and that in the event of such a fall it was reasonably likely that the miners who traveled that road would suffer injuries of a reasonably serious nature. Accordingly, the inspector's "S&S" finding IS AFFIRMED.

Citation Nos. 2338768 and 2338769

In defense of these citations, Mr. Craft asserted that some of the conditions described by Inspector Siria on the face of the citation forms with respect to the cited coal accumulations and "bad rollers" were not in fact observed by Mr. Siria, but were purportedly observed by his supervisor, Inspector Hill. Mr. Craft stated that Mr. Siria relied on what Mr. Hill told him, and simply incorporated these purported observations as part of the citations which he issued (Tr. 232-233). Mr. Craft pointed out that Inspector Hill did not testify, and that he did not co-sign the citation forms (Tr. 234).

Mr. Craft's assertions regarding Inspector Hill's involvement with the citations are correct. I believe that any inspector, supervisor or not, should sign any citation which is jointly issued, and he should be prepared to support his conclusions that a violation has occurred. However, on the facts of this case, I cannot conclude that Mr. Hill's failure to sign the citation forms renders them procedurally defective. Further, I cannot conclude that Mr. Hill's failure to testify has prejudiced the respondent, and my reasons in this regard follow.

Respondent's safety director Lamb confirmed that he accompanied Inspector Hill during his inspection of the belt, and observed the same cited accumulations and bad rollers that Mr. Hill observed. Mr. Lamb candidly conceded that these conditions constituted violations of section 75.400 and 75.1725, and he agreed that the rollers were "stuck or bad," and that he was not surprised or confused by the citations (Tr. 287-288; 291).

Mr. Craft conceded that even if I were to strike down the portions of the citations attributable to Mr. Hill, the remaining conditions described by Mr. Siria support the violations (Tr. 244-245). He also commented that "if George (Siria) said it was there, it was there," and "I'm not questioning George" (Tr. 244-245).

With regard to the belt rollers citation, Mr. Craft pointed out that section 75.1725, requires an inspector to immediately remove unsafe equipment from service. He also pointed out that Inspector Siria gave the respondent three days to abate the cited conditions, and eventually terminated the citation a week later. Since the inspector did not immediately shut down the belt, and permitted the conditions to exist for about a week before terminating the citation, Mr. Craft implied that a violation has not been established, and that the inspector's "S&S" finding is not supportable.

The respondent's arguments in defense of the roller citation are rejected. The standard requires that stationary machinery and equipment such as belts and its component parts be maintained in safe operating condition. While it is true that the inspector did not order that the belt be taken out of service, it apparently was not running when he viewed it, and he saw none of the rollers turning in the coal accumulations. I take note of the fact that the citation was issued on a Friday, and the inspector fixed the abatement time as 8:00 a.m., the next Monday. Assuming the mine did not operate over the weekend, I find nothing to suggest that the inspector acted unreasonably, and the fact that he terminated the citation a week later tells me absolutely nothing. There is nothing of record to establish precisely when the belt rollers were replaced, and it is altogether possible that this work was done on the day fixed for abatement.

Although it is true that the inspector simply described the rollers as being "bad," and speculated that they were either "worn" or "frozen," respondent's safety director (Lamb), conceded the violation, and he confirmed that Inspector Siria's supervisor (Hill), pointed out the bad roller conditions to him. Although Mr. Lamb did not know

precisely how many rollers were bad, he did not seriously dispute Mr. Siria's guess that there were a total of 33 bad rollers. Mr. Lamb agreed that the cited rollers were "stuck or bad" (Tr. 288), and the rollers were replaced. Under the circumstances, I conclude and find that "bad," "worn," "stuck," or "frozen" rollers affect the safe operation of a belt, particularly where the belt rollers are in close proximity to accumulations of coal or coal dust, and failure to replace the defective rollers supports a conclusion that the belt was not maintained in a safe operating condition as required by section 75.1725.

In view of the foregoing, I conclude and find that the petitioner has established that the coal accumulation and bad roller conditions described on the face of the citations, including those attributable to Inspector Hill, did in fact exist, and that the violations occurred. Accordingly, both citations ARE AFFIRMED.

Although the inspector observed none of the stuck or bad rollers turning in the accumulated coal and coal dust under the belt, these rollers were a potential ignition source. The inspector's testimony that had the belt continued to be operated, the accumulations would have become worse and would have reached the rollers which were in close proximity to the mine floor remains un rebutted. His testimony that the high velocity of air on the belt line would "fan" a fire if one broke out, also remains un rebutted. The combination of bad rollers and coal accumulations along a belt line where the present air velocity is high presents a serious potential for a mine fire. Under the circumstances, I conclude and find that there was a reasonable likelihood of a fire hazard caused by defective rollers turning in coal accumulations, and that a fire would have endangered at least six miners who were on the section. Although the inspector should have detailed or noted how many defective rollers existed along the portions of the belt which he examined, and how many were present along the portion inspected by his supervisor, the fact is that the accumulations and bad rollers existed along both belt portions which were combined into two citations, and I conclude and find that the hazards were equally present along the continuous belt locations which were cited. Accordingly, the inspector's "S&S" findings as to both citations ARE AFFIRMED.

Citation No. 2338770

Mandatory safety standard section 75.1722(a), requires that all belt heads, including similar exposed moving machine

parts, which may be contacted by persons, and which may cause injury, be guarded. Subsection (b) requires that any guards which are in place at such a location shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. Subsection (c) requires that the guards are securely in place while the machinery is being operated, except in those instances where testing is being performed.

The respondent has not rebutted Inspector Siria's assertions that the number 2 unit belt head was unguarded at one location, and that the guard at the second cited location was inadequate in that it was not installed so as to prevent a person from being caught in the roller. Mr. Siria testified that the belt head was readily accessible to any belt shoveller or greaser, and that there was a travelway on both sides which provided access to the cited locations.

Mr. Siria's undisputed testimony is that the existing guard had some spaces or openings which would not prevent anyone from reaching in any getting caught in the belt rollers. Although he could not document the precise measurements of these openings, he believed that anyone could easily become entangled in the takeup rollers while cleaning or greasing the belt head. Although he conceded that he observed no one cleaning or greasing the belt head while it was moving, and that he did not know that the belt is in fact shut down when this work is done, he believed that someone was at the cited location because the belt head area had been cleaned up in accordance with the respondent's cleanup program, and there was no grease fitting or hose to facilitate greasing the belt head from a safe distance. All of these factors led him to conclude that someone had been the area doing this work, and that they were exposed to a potential injury near the unguarded and inadequately guarded locations.

During the course of the hearing, Mr. Craft argued that at the time the inspector viewed the cited conditions no one was exposed to any moving machine parts, and there is no evidence that the belt was running. Conceding the fact that a belt which is running necessarily involves "moving machine parts," and that a violation would occur if a guard is missing or inadequate, Mr. Craft suggested that a belt which is not running, and therefore has no "moving parts," does not expose anyone to any hazard (Tr. 267-269). Mr. Craft took the position that the cited belt head location would be required to be guarded "If there was anybody exposed to moving parts" (Tr. 269).

In a case involving the guarding requirements of section 77.400(a), a surface mining standard containing language identical to section 75.1722(a), the Commission affirmed a Judge's finding of a violation, and stated as follows in Secretary v. Thompson Brothers, 5 FMSHRC _____ (September 24, 1984), slip op. pg. 4:

The standard requires the guarding of machine parts only when they 'may be contacted' and 'may cause injury.' Use of the word 'may' in these key phrases introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility intended. We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. See, e.g., Great Western Electric, 5 FMSHRC 840, 842 (May 1983); Lone Star Industries, Inc., 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis.

Mr. Craft's arguments in defense of the citation are rejected. While the fact that the belt was not operating at the time the inspector observed the condition, and he observed no one in the area, may mitigate the gravity of the violation, I reject any notion that the inspector must first observe the belt in operation before he can cite a violation of section 75.1722. On the facts of this case, the inspector's testimony supports a strong inference that someone had been in the cited locations, and that in the normal course of mining, the belt would be running. While it is true that the inspector had no way of knowing whether any cleaning or greasing had in fact taken place while the belt was locked out or running, the respondent in this case offered no testimony or evidence on this citation and has not rebutted the inspector's testimony. I conclude and find that the petitioner has established a violation of section 75.1722, and the citation IS AFFIRMED.

The inspector's testimony concerning the inadequate guarding at one belt head location, and the total lack of guarding at the second location remains unrebutted. Given the proximity of the exposed unguarded belt head machine parts and rollers, and the fact that they were apparently readily accessible to anyone who may have been in the area, I conclude and find that petitioner has established that a hazard was present and that someone cleaning or servicing the belt could have become entangled in the unguarded rollers. In this event, I further conclude and find that it was reasonably likely that a person contacting these unguarded parts could suffer serious injuries. As the Commission stated in Secretary v. Thompson, supra, the guarding standard "imports the concepts of reasonable possibility of contact and injury; including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." Accordingly, the inspector's "S&S" finding IS AFFIRMED.

Additional Findings and Conclusions. Dockets KENT 84-156 and KENT 84-168.

Negligence

I conclude and find that the respondent in both of these proceedings knew or should have known of the violative conditions cited by the inspectors, and that its failure to take corrective action before the inspectors found the conditions is the result of its failure to exercise reasonable care.

Gravity

All of the conditions and practices cited in these proceedings concern violations of mandatory safety standards dealing with roof control, accumulations of combustible coal and coal dust, and equipment guarding. I conclude and find that they are all serious violations, including the ones which were found to be non-"S&S".

Good Faith Abatement

The parties stipulated that all of the conditions and practices cited as violations were corrected by the respondent within the time fixed by the inspectors. I agree, and I conclude that the respondent exercised good faith in abating the violations.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in business.

The parties are in agreement that at the time the citations were issued, the mine in question had an annual production of 379,316 tons, and that Pyro Mining Company had an overall coal production of approximately three million tons. I conclude that the civil penalties assessed by me in these proceedings will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

Exhibit P-1, is a computer print-out summarizing the mine compliance record for the period January 1, 1983 through February 20, 1984. That record reflects that the respondent paid civil penalty assessments totalling \$1,874 for 53 section 104(a) citations issued at the mine. Nine of the prior citations were for violations of the roof control requirements of section 75.200 and section 75.202; 16 were for violations of the clean up requirements of section 75.400; and one was for a violation of the guarding requirements of section 75.1722. I take particular note of the fact that with the exception of four of the section 75.400, citations, the remaining 22 citations were all "single penalty" violations for which the respondent paid penalties of \$20 each.

For an operation of its size, I do not consider the prior history of violations to be particularly bad. However, since most of the prior citations for the year or so in question deal with roof control and clean up, it seems obvious to me that the respondent needs to pay closer attention to these conditions.

MSHA's civil penalty criteria found in 30 C.F.R. § 100.3(c), states that "violations which receive a single penalty assessment under § 100.4 and are paid in a timely manner" will not be included as part of its computation of the mine operator's history of prior violations. Since I am not bound by these regulations, I have considered all of the citations shown on the computer print-out as part of the respondent's history of compliance, and I reject any notion that they may be ignored.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, the following civil penalties are assessed by me for the citations which have been affirmed:

Docket No. KENT 84-156

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2338191	2/21/84	75.200	\$ 100
2338192	2/21/84	75.202	125
2338193	3/6/84	75.200	50
2338194	3/6/84	75.400	85
			<u>\$ 360</u> Total

Docket No. KENT 84-168

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2338198	3/8/84	75.200	\$ 200
2338768	3/9/84	75.400	175
2338769	3/9/84	75.1725	175
2338770	3/9/84	75.1722	75
			<u>\$ 625</u> Total

ORDER

The respondent IS ORDERED to pay the civil penalties assessed by me in these proceedings within thirty (30) days of the date of these decisions. Payment is to be made to MSHA, and upon receipt of same, these proceedings are dismissed.


George A. Koutras
Administrative Law Judge

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slk

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 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 84-146
Petitioner : A.C. No. 36-04187-03501
v. :
: Penn Coal Co., Inc., Mine
PENN COAL COMPANY, INC., :
Respondent :

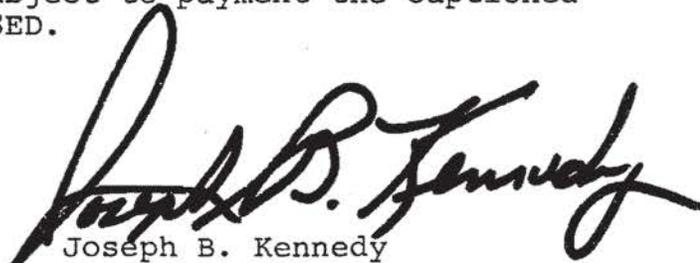
FINAL DECISION

Appearances: Janine C. Gismondi, Esq., Office of the
Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania, for Petitioner;
Ronald Thompson, President, Penn Coal Co.,
Inc., Philipsburg, Pennsylvania, for
Respondent.

Before: Judge Kennedy

The operator having advised that it waives its right
to challenge the tentative decision in this matter entered
October 26, 1984, it is ORDERED:

1. That the tentative decision be, and hereby is,
ADOPTED and CONFIRMED as the trial judge's
final disposition of this matter.
2. That the operator pay the penalty found
warranted, \$150, on or before Friday, February 1,
1985, and that subject to payment the captioned
matter be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

Distribution:

Janine C. Gismondi, Esq., Office of the Solicitor, U.S.
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/ejp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 10 1980

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 84-177
Petitioner : A. C. No. 15-10365-03509
v. : Marty Mine Nos. 16 and 17
MARTY CORPORATION, :
Respondent :

DECISION

Appearances: William Taylor, Esq., and Joseph Luckette, Esq.,
Office of the Solicitor, U. S. Department of Labor,
Nashville, Tennessee, for Petitioner;
Russell M. Large, Esq., Marty Corporation, Coburn,
Virginia, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* the "Act" for three violations of regulatory standards. The general issues before me are whether the Marty Corporation has violated the regulations as alleged, and if so, whether those violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, i.e., whether the violations were "significant and substantial." If violations are found, it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

Citation No. 2194200 alleges a violation of the standard at 30 C.F.R. § 77.1001 and states as follows:

A tree approximately 65 ft. in length, and approximately 27 to 30 inches in diameter, at the base, was observed, standing on the top edge of an approximately 12 ft. high, highwall. The wall [sic] was, observed working under the tree in question. An employee was observed working on a Michigan 475B front end loader, adjacent to this area. The area in question was located adjacent to the No. 4 pit of the 002 section. The employee and the front end loader were removed from this area. When the superintendent, Robert Christian, was notified of the violation, he stated that he was taking

corrective action, to have the tree in question removed, but no action was being taken to barricade [sic] or post this area. Robert Christian did stop all work adjacent to this area and started action to remove the tree in question, approximately 15 min. after notification of the violation.

The citation was amended on January 27, 1984, to add the following allegations:

The employee left the area, and the front end loader was removed from this area, before the foreman was notified of the violation. When the superintendent, Robert Christian, was notified of the violation, he stated that he had made an attempt to get a chain saw a few days prior to this date. He stated that he was taking action to have the tree in question removed. No action had been taken to barricade [sic] or post this area. Robert Christian did stop all work adjacent to this area, and started action to remove the tree in question, approximately 15 min. after notification of the violation.

The regulatory standard at 30 C.F.R. § 77.1001 reads as follows:

Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated materials shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection.

The essential facts are not in substantial dispute. It is primarily the interpretation to be given those facts that is at issue. MSHA Inspector Alvin Morgan was at the Marty Mine on January 19, 1984, for a regular inspection when he observed a number of trees on top of the highwall. According to Morgan the trees were not then a hazard but would become hazardous as the highwall deteriorated. Mine Superintendent Robert Christian agreed at that time to remove the trees.

Morgan continued his inspection at the Marty Mine on January 25, 1984, and observed a loader situated beneath one of the aforementioned trees. The tree was approximately 65 feet in height and about 27 inches to 30 inches in diameter at the base. Tree roots were exposed and the highwall had deteriorated. The tree was not restrained and no barricades were present. Particularly inasmuch as the mechanic was then working on the loader

beneath the tree, Morgan concluded that a "significant and substantial" hazard existed. The mechanic was working within range of the tree if it should have fallen and Morgan concluded that serious injuries were reasonably likely from branches striking the mechanic.

According to Mine Superintendent Christian, after Inspector Morgan had warned him about the trees on the highwall on January 19, he had directed his employees to stay away from the noted area and had all but one of the trees removed. Since they had been unable to bring down the remaining tree by use of a winch, he concluded that it did not present a hazard. No evidence was presented, however, as to when this effort was made and Christian acknowledged that the highwall was subject to freezing and thawing and therefore was unstable. It also appears that the mechanic working on the loader had not been warned of the danger because he services the mine only once a week and appeared unexpectedly. The citation was abated within several hours after Christian obtained a chain saw and had the tree cut down.

I find the inspector's assessment of the hazard to be the more credible under the circumstances. It is not disputed that the highwall was in a deteriorating condition as a result of daily freezing and thawing, that the roots of the tree were partially exposed and that the tree was within range of employees working in the area. In reaching this conclusion I have considered the mine superintendent's testimony that he had been unsuccessful in bringing the tree down with a cable and winch and the evidence that the mechanic was working on the side of the loader farthest from the highwall. However, since the removal efforts could have been made as many as seven days earlier, the testimony has little bearing on the stability of the tree on the date of the citation. Moreover while the mechanic may have been partially protected by the loader he was working on it may reasonably be inferred that he was also unprotected at times. Under the circumstances, I conclude that the violation was indeed "significant and substantial" Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984). I further find that the superintendent was negligent in failing to have the hazard removed or have the area barricaded to prevent employee access. Indeed he was able to locate a chain saw and remove the tree within 15 minutes after the citation.

Order No. 2197746 charges a violation of the regulatory standard at 30 C.F.R. § 77.404(a) and alleges as follows:

The operator has failed to provide a safe means of access to or from the cab of the Cat. 988B front end loader, Serial No. 50W2406, cleaning coal in the No. 2

pit of the 002 section. The loader operator has no safe means to exit the front end loader in case of an emergency, in that the left side boarding ladder was missing. The door to exit the loader cab is located on the left side of the cab. When the Superintendent, Robert Christian, was notified of the violation, he removed the front end loader from service. During the discussion with the Superintendent, he states the boarding ladder had been removed several days prior to this date. The highwall in the No. 2 pit of the 002 section varied in height from approximately 40 ft. to approximately 50 ft. in height.

The cited standard requires in relevant part that mobile machinery and equipment be maintained in safe operating condition and that machinery or equipment in an unsafe condition be removed from service immediately.

There is no dispute that on February 1, 1984, the cited loader was missing its access ladder on the left side, that the only exit door from the cab was on the left side and that the cab was located about 10 feet above ground. According to Inspector Morgan turbo fires from oil leaks on loaders such as the one at bar were common and indeed "fairly frequent." Without the boarding ladder on the left side a machine operator exiting in an emergency would, according to Morgan, find it necessary to jump the 10 feet to the ground thereby subjecting himself to permanently disabling fractures. This testimony is not disputed and it supports a finding that the violation was "significant and substantial" and a serious hazard. Inasmuch as the mine superintendent knew that the ladder was missing and allowed the loader to continue operating, I find that the violation was caused by the mine operator's negligence. The violation was abated within 1-1/2 hours when a ladder was removed from another loader and bolted onto the cited loader. It is not disputed that there had been prior violations for missing boarding ladders at the Marty Mine.

The third order at issue, Order No. 2197797, alleges a violation of the regulatory standard at 30 C.F.R. § 77.1103(d). The order reads as follows:

Several bales of straw was [sic] observed, stored under a mobile trailer, that contained two flammable liquid storage tanks, approximately 2000 gallons capacity each. The mobile trailer was identified as a flammable liquid storage area with two signs on the right side of the trailer and one sign on the front which read (No Smoking) (Flammable) (Danger no smoking or open flame within 50 feet). The mobile trailer in question was located at the oil storage area of the

001 section. Tire tracks adjacent to the mobile trailer indicated this area was traveled frequently.

The cited standard reads as follows: "Areas surrounding flammable liquid storage tanks and electric substations and transformers shall be kept free from grass (dry), weeds, underbrush, and other combustible materials such as trash, rubbish, leaves and paper, for at least 25 feet in all directions."

Mine Superintendent Robert Christian acknowledged that the bales of straw were in fact located beneath the cited trailer but alleged that he was unaware at that time that they had been placed under the trailer. He alleged at hearing that an independent contractor responsible for land reclamation had placed them there without his knowledge. While also conceding that two oil tanks were in fact on the trailer as cited, he claimed that those tanks were empty.

Robert Brahnam, an engineer for the Marty Corporation, testified that he observed the straw bales after they were cited. It was raining at the time and when he removed the bales they were "thoroughly soaked." According to Brahnam the oil tanks on the trailer were empty and had contained only lubricating oil.

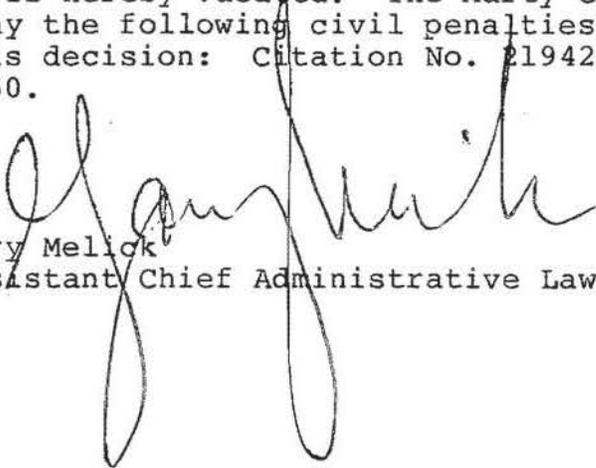
Inspector Morgan testified that the mine superintendent had told him at the time of the citation that the storage tanks had contained diesel fuel and were "almost" empty. Morgan explained that even if the tanks had in fact been empty there would have been an even greater danger of explosion from residual fumes than from a full tank.

In light of the undisputed evidence that the bales of straw were "thoroughly soaked," however, it appears that the material may not have been combustible as required by the cited standard. Accordingly the order must be vacated.

In determining the amount of penalties warranted in this case, I am also considering that the mine operator is relatively small in size and has only a moderate number of violations preceding the violations at issue. The cited conditions were abated in a timely and good faith manner. At hearing the operator presented evidence concerning its financial status to the extent that it was required by its creditors to pay in cash. The evidence is not sufficient, however, to support a finding that the penalties imposed herein would affect its ability to stay in business. Under the circumstances, I am assessing the following penalties: Citation No. 2194200 - \$250, Order No. 2197746 - \$150. Order No. 2197797 is vacated.

ORDER

Order No. 2197797 is hereby vacated. The Marty Corporation is hereby ordered to pay the following civil penalties within 30 days of the date of this decision: Citation No. 2194200 - \$250, Order No. 2197746 - \$150.



Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

William Taylor, Esq., and Joseph Lockette, Esq., Office of the Solicitor, U. S. Department of Labor, 801 Broadway, Room 280, Nashville, TN 37203 (Certified Mail)

Russell M. Large, Esq., General Counsel, Marty Corporation, P. O. Box 310, Coburn, VA 24230 (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 11 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 84-48
Petitioner	:	A.C. No. 11-00609-03511
	:	
v.	:	Captain Mine
	:	
ARCH OF ILLINOIS, INC.,	:	
Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Brent L. Motchan, Esq., St. Louis, Missouri, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns civil penalty proposals 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), seeking civil penalty assessments for three alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations.

The respondent filed an answer contesting the proposed penalties, and a hearing was held in St. Louis, Missouri, on October 11, 1984. The parties waived the filing of post-hearing proposed findings and conclusions. However, all oral arguments made by counsel on the record during the course of the hearing have been considered by me in the adjudication of this case.

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, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised are identified and disposed of where appropriate in the course of this decision. Included among these issues is the question as to whether the cited violations are "significant and substantial."

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 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.

Stipulations

The parties stipulated to the following (Exhibit P-R-1):

1. Respondent Arch of Illinois was known as Southwestern Illinois Coal Corporation prior to November 28, 1983.
2. The respondent owns and operates the Captain Mine, which is a strip mine producing bituminous coal.
3. The Commission has jurisdiction in this case.
4. On September 28, September 29, and September 30, 1983, MSHA Inspector Laverne Hinckle conducted inspections of the Captin Mine, and he issued the three citations which are in issue in this proceeding.

5. The respondent demonstrated good faith by abating the conditions described in the citations within the time allowed by the inspector.
6. During the calendar year prior to the issuance of the citations involved in this case the Captain Mine had a production of approximately 3,234,936 tons of coal.
7. During the calendar year prior to the issuance of the citations involved in this case the entity controlling the Captain Mine had a production of approximately 6,854,467 tons of coal.
8. If violations of the MSHA standards are found in Citations 2201879, 2324823, and 2324824, payment of the penalties assessed by the MSHA Office of Assessments would not affect the ability of the respondent to remain in business.
9. During the 24 month period preceding the issuance of the violations involved in this case, the respondent paid a total of 49 assessed violations. Twenty-five (25) of those forty-nine (49) paid violations were \$20.00 single penalty assessment violations.

Discussion

Section 104(a) "S&S" Citation No. 2201879, issued on September 28, 1983, cites a violation of 30 C.F.R. § 77.505, and the condition or practice cited is described as follows:

The 440 VAC 3 phase cable serving a generator type welder in the garage building, 3rd bay from the south wall was not equipped with a proper electrical fitting where it entered the fused disconnect. The jacket insulation was not in the fitting and the energized phase conductors were in contact with the disconnect enclosure.

Section 104(a) "S&S" Citation No. 2324823, issued on September 29, 1983, cites a violation of 30 C.F.R. § 77.604, and the condition or practice cited is described as follows:

The 25,000 VAC trailing cable serving the 2570 dragline was not being adequately protected from damage by mobile equipment in that it had been covered with unconsolidated rock 4 to 6

inches in depth and then crossed by rubber tired equipment at least two times. The tire marks crossed the rock cover in two separate places. The trailing cable was energized at the time of this observation.

Section 104(a) "S&S" Citation No. 2324824, issued on September 30, 1983, cites a violation of 30 C.F.R. § 77.604, and the condition or practice cited is described as follows:

The trailing cable supplying 440 VAC, WYE connector, resistance grounded power to a water pump behind the 181 loader in the 5671 pit was not being protected from damage by mobile equipment in that it had been run over in two places. The cable had tire marks on it and was impressed into the roadway in two locations. The cable was energized at the time of this observation.

Procedural Rulings

1. In its answer and notice of contest filed in this case, respondent raised an objection concerning the issuance of Citation No. 2201879 (improper cable fitting on a welding machine disconnect electrical box). Respondent's objection is an assertion that the inspector failed to allow respondent's representative to accompany him during the inspection when he detected the cited condition. The objection was withdrawn by counsel at the hearing (Tr. 12-13). Under the circumstances, I have not considered it.

2. At the close of MSHA's case in chief, respondent's counsel moved for a directed verdict as to the inspector's "S&S" findings concerning all three of the citations issued in this case. For purposes of the motion, although counsel conceded the fact of violations as to all three citations, he also indicated that he would leave that for my determination (Tr. 132-133). Counsel then amended his motion to include a request for vacation of all three citations on the ground that MSHA had not established a prima facie case that the cited conditions or practices constituted violations of the cited standards (Tr. 135). After consideration of the arguments in support of the motion, as amended, it was denied (Tr. 135).

3. During the hearing, respondent's counsel raised an objection when MSHA's counsel called Mr. Jerry Collier as a witness. The objection was based on the assertion by counsel that MSHA's counsel Carmona had not advised him in advance of the hearing that he intended to call Mr. Collier as a witness (Tr. 213).

Respondent's counsel was reminded of the fact that during the discovery period in this case, MSHA's counsel indicated to him that he had made no final determination as to whether or not he would call additional witnesses (Tr. 215). MSHA's counsel Carmona indicated that he made a telephone call to counsel Motchan's office to advise him that he intended to call Mr. Collier, but that he had received no response to his call (Tr. 216).

After consideration of all of the arguments made on the record, including a proffer made by MSHA's counsel with respect to the proposed testimony by Mr. Collier, I rejected the respondent's objections, and I did so on the ground that the witness was available for cross-examination, and that respondent's counsel made no showing that he was prejudiced (Tr. 219).

Petitioner's Testimony and Evidence

Laverne Hinckle, testified that he has been employed as an MSHA coal mine inspector for eleven years, and he testified as to his duties, training, and responsibilities. He confirmed that while he holds no college degrees, he has three years of course study in electrical engineering at the University of Illinois, and that his prior work experience was as a chief electrician with several coal companies and the Westinghouse Corporation.

Mr. Hinckle confirmed that he inspected the mine on September 28, 1983, and that he issued the citations which are in issue in this case. With regard to Citation No. 2201879, he confirmed that he issued it after he observed that a nut which was installed on the electrical cable fitting on the welder disconnect box in question was not in place, and that the cable which entered the fitting location was "backed out" of the enclosure and that one of the insulated phase wires was in contact with the box.

Mr. Hinckle stated that he believed the citation was "significant and substantial," and that he did so after following the guidelines set forth in the National Gypsum decision. He also believed that there was a potential for an accident in the event of a fault condition, and in the event of a phase conductor failure.

With regard to Citation No. 2325834, Mr. Hinckle confirmed that he observed the trailing cable covered over with loose rock fill material, and he indicated that respondent's

employees Fred Wagner and Tom Rushing agreed with him in this regard. He confirmed that photographic exhibits R-7, R-8, and R-9 accurately portray the cable in question. He also conceded that he was in error when he stated that the rock material was four inches to six inches, and that it actually ranged from "zero inches to four inches."

Mr. Hinckle stated that he observed tire marks on the trailing cable in question, and that the respondent's representatives agreed that this was the case. He also confirmed that after testing the cable, he found that it had not been damaged.

With regard to Citation No. 2324824, Mr. Hinckle identified photographic exhibits R-10 and R-11, as the cable which was run over, and he believed that it was run over by a Michigan rubber-tired payloader. He believed that the negligence was high because mine management should have discovered the condition and taken action before he did.

Mr. Hinckle confirmed that in making his "significant and substantial" findings, he followed MSHA's policy guidelines set out in a District 8 policy memorandum dated January 7, 1977, exhibit P-4. He conceded that his concern over a piece of equipment running over a cable was the potential for damage which may result from equipment constantly running over a cable, and he agreed that the language of the standard has personally caused him much difficulty in trying to interpret it (Tr. 42-43). Mr. Hinckle confirmed that he relied on MSHA's manual guideline and the memorandum by his district manager to support his citations, and MSHA's counsel stated that it was MSHA's position that the cited cables should have been protected by one of the methods detailed in those guidelines and interpretations (Tr. 44-47).

Inspector Hinckle confirmed that the 25 KV cable was inspected with a Megger instrument after it was deenergized, and since no damage was detected, the respondent was permitted to place the cable back into service. He did not require the respondent to use any of the means detailed in the guidelines to protect the cable from being run over again, and the inspection of the cable was sufficient action to warrant the abatement of the citation (Tr. 47-48; 56-57).

With regard to the 440 VAC WYE water pump power cable, Inspector Hinckle believed that it had been run over by a rubber-tired Michigan Payloader, which weighs approximately 20 tons, but that he was not sure (Tr. 60-62). Abatement was achieved by deenergizing the cable, inspecting it, and testing it electrically. It was then permitted to be placed back into service (Tr. 65).

During a bench colloquy with the inspector regarding his application of any "S&S" guidelines, he explained his understanding of the term "S&S" as follows (Tr. 54-55):

JUDGE KOUTRAS: Had it not -- had you not issued the citation, the practice would have continued; is that correct?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: So any citation you issue theoretically would be S and S, wouldn't it?

THE WITNESS: No, sir.

JUDGE KOUTRAS: If you follow that particular logic to the letter?

THE WITNESS: May I give an example that comes to mind?

JUDGE KOUTRAS: Okay.

THE WITNESS: Each piece of mining equipment underground is required to have a methane monitor on it, 75.313.

JUDGE KOUTRAS: Okay. Okay.

THE WITNESS: Okay, at the time an inspector finds a methane monitor which has malfunctioned for one reason or another and he cites this condition, at the same time he checks with his hand-held monitor. If he finds no gas, that citation is not S and S.

JUDGE KOUTRAS: Not S and S?

THE WITNESS: No, sir. The thinking here is that if it were allowed to continue and there was no gas, then there would not be reasonably likely anyone would be injured as a result of that methane monitor not being functioning.

JUDGE KOUTRAS: Now what if I were to tell you that an inspector in another district office with that same analogy would mark that citation S and S, notwithstanding the fact that he found no gas, on the theory that methane could be encountered at any time and, therefore, it is still and S and S?

THE WITNESS: May I make another --

JUDGE KOUTRAS: Go ahead.

THE WITNESS: I think that we are, you and I, certainly are discussing one of the major problems that we have in our enforcement activities in the United States today. We are not consistent.

During his subsequent testimony on cross-examination concerning four prior citations issued by two other inspectors from the same district office in 1982 and 1983 concerning violations of section 77.604, for equipment running over trailing cables, (exhibits P-7 through P-10), Inspector Hinckle stated as follows (Tr. 113):

Q. I do not see that any of these four violations, and they all involve the same standard, 77.604, have been marked significant and substantial.

A. I picket up on that, too. I noticed that as well.

Q. So did they apply a different standard than you did?

A. No, of course not.

Q. Can you explain this then why is yours significant and substantial and theirs are not?

A. The only explanation I have is they based their evaluation on the set of circumstances that they observed at the time they cited the violation and I based my judgment on a set of circumstances that might have been, as far as I know, totally different at the time I observed this violation that I cited. In other words, I was not at -- I was not with either one of these men so I cannot --

Q. Well, it just seems strange to me that they have violations again for going over trailing cables. They say they're not significant and substantial and you say that yours are.

A. I based my judgment on the set of circumstances that I observed at the time I cited the violation.

Q. Don't they?

A. I can't answer for them, sir.

When asked how many times a cable would have to be run over before he would consider this practice as "S&S," Inspector Hinckle replied that "once would make it significant and substantial" (Tr. 115-116). He indicated that his position would be the same regardless of the fact that an examination and testing of the cable indicated that it had not been damaged (Tr. 116-118).

Mr. Hinckle testified that he believed both cables had been run over sometime during the shift on the same day of his inspections (Tr. 123). When asked to explain a statement attributed to him in a reply to an interrogatory prepared by MSHA's counsel that "the cable continued to be handled by several miners while it was energized after it was run over by heavy equipment," Mr. Hinckle conceded that he had no evidence to support any such statement, but that "by practice oftentimes this is true" (Tr. 124). He also conceded that at the time he observed the cited conditions he observed no one handling any energized cables (Tr. 130).

Respondent's Testimony and Evidence

Cliff Higgerson, confirmed that he is employed by the respondent as the mine electrical superintendent. He testified as to his background and experience, and confirmed that he has MSHA certified electrician papers. With regard to Citation No. 2201879, he stated that in the event one or two of the cable phase wires touched the connector box in question, no hazard would exist because the box is grounded. He did not believe that the violation was "significant and substantial, and he confirmed that the cable connector and box is required to be checked once a month (Tr. 136-139).

With regard to Citation No. 2324824, concerning the water pump cable, Mr. Higgerson confirmed that he observed the cited cable, and that after it was tested, no damage was detected. He also confirmed that the cable is moved by the crew, and that it is checked for damage daily and monthly. He was of the view that simply because the cable was run over, this did not amount to a "significant and substantial" violation. He also indicated that in the event normal mining operations were continued, the cable condition would have been discovered and that this would not be a significant and substantial violation.

With regard to Citation No. 2324823, regarding the 25 KV trailing cable, Mr. Higgerson confirmed that photographic exhibits R-10 and R-11 accurately depict the cable in question. He did not believe that the violation is "significant and substantial" simply because the cable was run over. He indicated that the cable which was in use was stronger and safer than the minimum type cables required to be used at the mine.

Tom Rushing, respondent's safety director, testified as to his background and experience, including 20 years at the mine in question. He confirmed that he holds mine foreman's papers and numerous MSHA training certificates. He identified photographic exhibits R-1 through R-6 as the welding machine box in question (Tr. 159-162).

With regard to Citation No. 2324823, Mr. Rushing identified photographic exhibits R-7 through R-9 as the cable in question. He stated that he observed no damage to the cable and saw no one handle the cable. He indicated that the cable is normally handled at least two times during each daily shift, and he stated that the location at which the cable was run over was not a roadway or haulage way and was not intended as a mobile equipment cross-over. He also indicated that the rock material which covered the cable was not intended to protect the cable from being run over, but was intended to protect it from rock materials falling on it when the dragline boom swings around (Tr. 163-166; 172-173).

With regard to Citation No. 2324824, Mr. Rushing confirmed that he was with the inspector at the time this condition was observed, and he identified photographic exhibits R-10 and R-11 as the cited water pump cable in question. He also confirmed that he observed the tire tracks, but that he observed no one handle the cable. He stated that the location where the cable was observed was not intended as a mobile equipment cross-over point, and he indicated that the respondent does not make it a practice to run over cables, and that anyone found doing so is subject to being disciplined (Tr. 167-168).

Ted Hansen, testified that he is employed by the Anaconda Wire and Cable Company as manager of mining marketing. He stated that he is a 1964 graduate of Marquette University, with a degree in electrical engineering, and that he has taken several post-graduate courses in management. He testified as to his prior experience as a process, development, and research engineer with Anaconda. He also indicated that he headed the research laboratory which was engaged in research concerning cable studies into compression cut resistance. He discussed several cable tests he conducted, and he confirmed that he published six technical papers concerning trailing cables, three of which dealt with the reliability of cable shielding. He also confirmed that he holds five patents for cable design, and has written a book on the subject.

Mr. Hansen stated that his company has supplied the respondent with trailing cables for several years and that

he is familiar with the trailing cables which were cited by Inspector Hinckle in this case, and that he contributed to their design.

Mr. Hansen identified physical exhibit R-12 as the exact type of cable cited by the inspector with respect to the dragline citation, and physical exhibit R-14 as the type of cable cited in connection with the water pump cable citation. Based on the testimony and evidence adduced in this case, Mr. Hansen was of the opinion that running over the cables by rubber-tired equipment did not pose a significant and substantial mine safety hazard.

Mr. Hansen described several tests which he conducted with respect to the types of cables in question in this case, and these included hydraulic pressure applied to the test cable, equipment running over it, and rods being inserted into the cables to simulate damage. He also described the physical characteristics of the cables, including the manner in which they are manufactured with reliable shielding and grounding devices. In his opinion, running over such cables would not cause any damage, and he believed the only way such cables could be damaged was in the event a piece of equipment with "crawler treads" ran over the cable and cut into it (Tr. 180-191).

Mr. Hansen described in detail two cable tests which he conducted, and as to a third one he stated in pertinent part as follows (Tr. 182-183):

* * * In addition to those two tests, we finally went to a less scientific type of a test where we simply put the cables out near our receiving docks and let our -- our trucks normally coming to our plant just run over the cables day in and day out. These trucks would weigh as much as 50,000 pounds and it would take anywhere from 1,000 to 5,000 cycles before we'd even bother to look at the cable to see if it's been injured yet. And usually after these number of cycles there is little damage to the conductors or the cable at all. Our purpose in doing this is to compare the new design with a reference design that we are satisfied with.

Mr. Hansen referred to physical exhibit R-12, which is a piece of 25 KV trailing cable of the exact type cited by Inspector Hinckle, and he explained in detail its physical characteristics, including the grounding conductors and protective shieldings (Tr. 185). He also explained the differences in the shielded trailing cables used in surface mining as compared to the unshielded low voltage cables generally used in underground mining (Tr. 187-188).

Mr. Hansen stated that the cable shielding system is effective in taking any faults to ground, and that it is the safest cable that can be designed (Tr. 188). He explained further as follows (Tr. 188-192):

A. And along these lines is MSHA has tested our cables with this particular type of shielding with what they call the nail test. And that is where they actually drive a nail through the shield wires into the conductor and the grounding system produces a ground fault that will trip the relays without providing any shock hazard to the person who's standing there holding the nail while it's being driven through to the conductors. That was a design criteria and we have performed that test on all of these cables.

Q. When I asked the inspector to state the facts he relied on to come to the conclusion that the alleged violation was significant and substantial, he stated that the cable could have been internally damaged, a short circuit was possible while the cable was energized. Can you tell me how a short circuit would occur in that and then what would happen if a short circuit occurred?

A. If -- when or if the insulation was ever damaged to the point where it would fail dielectrically, the short circuit would have to be phase to ground. In this kind of a circumstance, there is just simply no way you could have a phase to phase fault. And the significance of that is that the phase to ground system has relays and neutral resistance that will limit the amount of energy that is expended in such a ground fault. * * *

* * *

JUDGE KOUTRAS: Well, as I recall the inspector, Mr. Hinckle, when you were asking him some questions, Mr. Motchan, didn't he indicate that through the use of his own diagram which I've marked as Exhibit ALJ-1 that should the shielding on one of the phase conductors which is the three that you've just described here become damaged through constantly being run over or for whatever reason, should two of those come together it would short this particular cable out. Isn't that what he said?

MR. MOTCHAN: I believe he said that yes, if these --

JUDGE KOUTRAS: Yes.

MR. MOTCHAN: -- two conductors --

JUDGE KOUTRAS: If those two came together --

MR. MOTCHAN: Right.

JUDGE KOUTRAS: -- that would cause a problem with the cable.

MR. MOTCHAN: Right.

THE WITNESS: That -- that cannot happen with this design.

JUDGE KOUTRAS: Okay. And you -- excuse me just one second. And you say the only time it can happen is if it's a phase to ground type of thing rather than the two conductors phase to phase; is that correct?

THE WITNESS: The only kind of faults you can have with this is the phase to ground fault.

JUDGE KOUTRAS: And how would that happen with that cable that's sitting there in front of you?

THE WITNESS: It would happen if somebody would drive a nail through the insulation into the -- into the conductor or it will happen when a rope is tied around it and maybe they try to move fifteen hundred feet of it in one pull and they pull the jacket apart and subsequently pull the -- and damage the shielding into the insulation. But then it would be a phase to ground fault. And that's usually the way these cables fail.

JUDGE KOUTRAS: Okay.

THE WITNESS: I don't personally know of a cable ever failing from a truck running over it.

JUDGE KOUTRAS: Do you know of any cables that have failed by -- by equipment running over it?

THE WITNESS: Only when a D9 or a similar type vehicle with those treads run over it, then it cuts it in two.

JUDGE KOUTRAS: You mean the tank type crawler treads?

THE WITNESS: Yeah.

JUDGE KOUTRAS: And that would be a cutting process --

THE WITNESS: Yes.

JUDGE KOUTRAS: -- rather than a deterioration caused through crushing and that sort of thing?

THE WITNESS: That's right.

Q. Well, what would happen if there was a phase to ground fault on this?

A. It would produce a ground fault current of the magnitude that would trip a ground fault relay.

Q. Okay. The relay being tripped I would take it that someone touching the cable would not be in danger?

A. No. You could be holding this cable during this fault process and you'd be lucky if you knew that a fault was taking place.

Lloyd R. Brown, testified that he is a full Professor of Electrical Engineering at the Washington University, St. Louis, Missouri, and he confirmed that he holds an A.B. degree in mathematics and physics, and a B.S. degree in electrical engineering from the University of Missouri. He also holds M.S. and Phd. degrees in electrical engineering from the Washington University. He stated that he has been a professor in electrical engineering for the past twenty years teaching undergraduate courses at the Washington University.

Dr. Brown testified as to the citation concerning the breaker box fitting citation, No. 2201879, and he confirmed that he took the photographs which are a matter of record in this case, exhibits R-1, R-3, R-4, R-5, and R-6 (Tr. 207).

Dr. Brown testified that even if the insulation had come off one of the phase wires and one of the wires came into contact with the enclosure, there would be no shock hazard to someone touching the enclosure. He explained his opinion as follows (Tr. 207-208):

Q. If the insulation came off the phases, one or more phases, and they, in fact, touched the enclosure, would there be any shock hazard to someone touching the enclosure?

A. No, way. May I elucidate on that?

Q. Yes, phase.

A. This is a grounded box. Even if the system were grounded, all you would do would be to trip the breakers back at the main which in no way could you maintain a short on this box for any period of time. But of a secondary nature is this is what you call a floating delta system. There's nothing grounded on it. It's kind of like hauling a flashlight up here. There's batteries in that flashlight but you're not getting shocked off of it. If you were to touch it to ground, nothing more would happen. One wire to ground wouldn't make any difference at all. It would have just grounded one corner of this floating delta.

Q. What happens if two of the conductors touch?

A. Then you've got a phase to phase short which again will trip the breakers back at the main.

Q. Now would somebody or could somebody be electrocuted by touching the enclosure if one or two of the phases touched?

A. Absolutely no way. There's no way you can get electrocuted on that box.

With regard to the two cited trailing cables, Dr. Brown testified as follows (Tr. 208):

Q. Let me go into the other two citations involving the trailing cables. Did you view the cable at the mine?

A. I viewed samples -- oh, yes, the -- the actual cable I couldn't swear was the same cable. We went out in the field and saw -- saw the unit in operation.

Q. Did you look at the 25 KV cable and at a two KV cable?

A. We did. I did.

Q. From what you've heard today and your own knowledge, do you feel there -- that the conditions as existed in either one of the citations involving the trailing cables significantly and substantially contributed to a mine hazard?

A. I don't see any way that they could have caused anybody to get electrocuted.

And, at Tr. 210-211:

JUDGE KOUTRAS: * * * based on what you've heard today to you have any reason -- any opinion as to whether or not it was significant and substnatial and do you understand what the concern of the inspector -- of Inspector Hinckle is and what the concern of MSHA seems to be with regard to running over a cable of this kind, Doctor Brown, with equipment? Do you have any perception of what that concern might be?

THE WITNESS: Well, it's my impression that the concern is that somebody handling the cable afterwards might get a, certainly if not a lethal shock, one that would be physically damaging to them.

JUDGE KOUTRAS: And do you say that there's no -- there's no cause for alarm, that maybe MSHA is over-reacting here or just what?

THE WITNESS: Well, my -- my feeling is, Judge, that you've got a phase -- each one of these for which has its own individual grounded shield. I don't see any way that you can get a fault in here that you're not going to get a phase to ground

shield that even if the ground fault equipment were not operating it still would blow the breaker back in the distribution system. And I think I heard a term that I just can't believe. There's no way that I can see that that equipment could ever get energized. You would have to literally break every one of these grounds completely sheared and still maintain the integrity of one of these phases in order to get your equipment energized which just looks to me to be impossible. You've got these outside grounds, you've got each individual shield around it, every one of those would have to be cut and yet maintain one of these and somehow get it tied to the machine which it isn't to start with. The -- the whole concept is, excuse the term, ridiculous.

JUDGE KOUTRAS: And what -- now you've heard some of the witnesses from the operator's point -- standpoint in this case have voiced some concern about the practice, if you will, or some concern about mobile equipment crossing over this. What, from their point of view, is their concern?

THE WITNESS: I would be more concerned that if it got damaged you would have downtime and physical failures rather than loss of life. Certainly I think if you went over this a few times with a D9 cat I could visualize that you're going to have some failures in there.

JUDGE KOUTRAS: And you're saying that those failures would -- would necessarily trigger the -- the inherent safety features of this thing and would either de-energize the equipment or put the -- put the cable out of commission?

THE WITNESS: That's correct, and somebody's going to have to go repair it.

JUDGE KOUTRAS: Or replace it or --

THE WITNESS: Or replace it, that's correct.

Petitioner's Rebuttal

Jerry Collier, MSHA Supervisory Electrical Engineer, Vincennes, Indiana, testified as to his background and

experience, and confirmed that he holds a B.S. degree from the West Virginia Institute of Technology in Montgomery, West Virginia (Tr. 219-221). He testified that he did not participate in the inspections which were conducted by Inspector Hinckle in this case, but that he was familiar with the conditions or practices cited by the inspector (Tr. 222). He confirmed that with regard to section 77.604, MSHA's District 8 follows the enforcement policies set forth in the district manager's memorandum and the manual guidelines set out in exhibits P-4 and P-14 (Tr. 222).

During the course of the questioning of Mr. Collier, and in response to my questions concerning the theory of MSHA's case with respect to the two trailing cable citations, MSHA's counsel responded as follows (Tr. 225-226).

JUDGE KOUTRAS: Mr. Carmona, let me understand something first basically about the theory of MSHA's case here. Is -- are you holding the operator here accountable for failure to adequately trench or otherwise guard this cable from being damaged? Are you charging them -- is MSHA's position here that they failed to follow the policy?

MR. CARMONA: They failed -- our position is that they failed to follow the policy and they failed to use any other method that is safe because they didn't -- they didn't have procedures that provided protection to the cables.

JUDGE KOUTRAS: And that's because the inspector saw the tracks on the cable?

MR. CARMONA: Well, he saw it at the time. That's happened before. It's not only once.

JUDGE KOUTRAS: And yet the abatement here to this day the operator still hasn't -- you know, I'm still a little in never-never land about the abatement. How were these two citations abated?

* * * *

JUDGE KOUTRAS: I got the impression that the two citations were issued because the inspector saw that -- evidence that a piece of mobile equipment had run over it. He saw the tracks; correct, Mr. Carmona?

MR. CARMONA: Yes. Well, he has to have some evidence that the -- the cable has been subject to some damage.

JUDGE KOUTRAS: Yes, I know but -- but in the description of one cable where it was lying with unconsolidated rock, are you telling me that the inspector was of the view that he thought that the cable was there to be protected from being run over? And that he thought that that protection was inadequate? What if he'd have found 12 inches of unconsolidated rock? Would the citation have issued in this case?

MR. CARMONA: If it had been determined that it was run over, the cable, the citation would have been issued because MSHA does not consider that a proper protection. MSHA is talking about trenches that can be -- protect the cable.

JUDGE KOUTRAS: Yes, but the -- but the policy only requires that protection at designated roadways and cross overs, doesn't it?

MR. CARMONA: Well, what -- is the place at which the cable is supposed to be crossed over they're going to cross over but the cable has to have protection.

Counsel Carmona asked Mr. Collier asked Mr. Collier to explain MSHA's policy, and he responded as follows (Tr. 226-227):

A. Yes. Of course, the reason for the policy memorandum back in 1977 was because of questions from our inspectors in the first place about how to -- about how to interpret and enforce that particular regulation, 77.604.

Mr. Collier's interpretation and application of MSHA's enforcement policy with regard to section 77.604, including "S&S" violations, is reflected in the following testimony (Tr. 230-237).

JUDGE KOUTRAS: The mine operator installs a pump and he runs a thousand foot trailing cable right by the pump. There's absolutely no mobile equipment at all working in there in the normal course of a shift.

THE WITNESS: Yes, uh-huh.

JUDGE KOUTRAS: What is he required to do to protect that cable in the event some guy just happens to drive by in a truck and goes over the cable and leaves some marks that the inspector sees?

THE WITNESS: He's not required to do anything in a case like that.

JUDGE KOUTRAS: He's not required to do anything?

THE WITNESS: No, huh-huh.

JUDGE KOUTRAS: At what point in time is he required to do anything?

THE WITNESS: At the point in time that he decides that he wants to pass over that cable.

JUDGE KOUTRAS: So the driver, then, if he decides he wants to run over the cable, he either has to suspend it, build a bridge or dig a trench?

THE WITNESS: No. I wouldn't say the driver. The operator in our opinion would be responsible for doing whatever's necessary to protect that cable.

JUDGE KOUTRAS: Now the driver decides to go over the cable and leaves some telltale tracks and the inspector comes in and finds it, he's going to give them a citation, isn't he?

THE WITNESS: Yes, sir. Uh-huh. .

JUDGE KOUTRAS: Now what if the -- that -- what if that is, in fact, the case, that it was not a duly designated cross over point? How, in a practical way, does the mine operator go about insuring the integrity of that cable? Are the -- is the equipment man required to stop, call the mine operator and tell him look, I want to cross this cable. Come over and do something. Send a crew out here to suspend it or trench it or --

THE WITNESS: Well, sir, it'd be hard for me to speak to that. I can't dictate, you know, how they set their manning system and how they make their decisions at which point in time they're going to take action to --

JUDGE KOUTRAS: Do you see the --

THE WITNESS: -- protect cables or comply with the regulation?

JUDGE KOUTRAS: Do you see the picture of the cable there in -- with the water pump?

THE WITNESS: Yes, that would be this one right here, these two?

JUDGE KOUTRAS: Yeah, how do you think that piece of equipment came to run over that cable? That looks to me like it's down in a gulley and there's a big -- what's that big pipe running over it. What would a piece of equipment be going in -- does that look like a regular cross over or a roadway to you or what?

THE WITNESS: Well, again, it might not be a regular roadway or a regularly used cross over point but I would consider the fact that equipment was required to pass over it I would consider it at that point to be a roadway.

JUDGE KOUTRAS: But you used the word was required. Required means that somebody tells them this is a -- what if some fellow just decided to go over that cable in a truck because he didn't know any better? He was taking a short cut. You say he was required to do it. Now required meaning to get to the other side of the road you have to drive over it or --

THE WITNESS: Okay, well, if I were in -- making the inspection, I would issue a citation to the operator for not adequately protecting the trailing cables.

JUDGE KOUTRAS: And how would you go about making the determination whether that violation on that hypothetical was S and S?

THE WITNESS: Number one would be my experience with fatality investigation work and what I know by reading reports from other areas about what's happened in other areas that have created fatalities. You take like this cable right here for example, if I might speak of that. Whenever that -- whenever material is placed over the top of that

cable, you don't -- in the first place, you don't know whether there's been a splice made in that cable. One of the witnesses got up here and he talked about how strong this cable is and I'm sure it is strong. But unfortunately when it's put into operation things happen to it that cause people to have to make splices in it. It's been our experience in the past that people will not always put these shielding wires back over the top of the splice. They will not always connect the ground wires where they make the splice. And eventually the grounding system comes open. We have no way of knowing what's -- what's inside or underneath the material that's used to cover the cable.

JUDGE KOUTRAS: Well, let me ask you this. Let's assume, for example, that an operator installs twenty-five hundred foot of trailing cable to a dragline and he just uncrated.

THE WITNESS: Uh-huh.

JUDGE KOUTRAS: And it has absolutely no splices in it.

THE WITNESS: Uh-huh.

JUDGE KOUTRAS: And an end loader runs over it and you see the tracks. Are you telling me that based on your experience that you're going to mark that citation S and S?

THE WITNESS: Yes, sir, I think I would. Yes.

JUDGE KOUTRAS: On -- and how would you support the S and S finding? On what evidence or what thinking would you --

THE WITNESS: The fact that we know that even though we have circuit breakers that protect the systems, based on the testing that we've done we do know that breakers fail, number one. We have a lot of other protective features, like ground monitors. And we find these cut out quite a bit to where they're not actually monitoring -- what the ground monitor is used for is to monitor the continuity of the ground conductors in the cables, okay. And we find these cut out to the point where they're not performing their function.

JUDGE KOUTRAS: Now on the facts of this case now there's no evidence that this cable had any splices in it that was ever examined. As a matter of fact, after it was run over, it was tested and found to be absolutely in good working order.

THE WITNESS: Uh-huh.

JUDGE KOUTRAS: And also in the -- with regard to four other citations issued by other inspectors citing the very same condition, they didn't mark those S and S.

THE WITNESS: Uh-huh. Well, Judge, I also have to go by the MSHA guidelines, you know, on how we determine S and S. And if it's reasonably likely that if the condition goes uncorrected, and to me it is reasonably likely that something could happen, the sequence of occurrences could take place to result in somebody getting hurt or killed.

JUDGE KOUTRAS: In your experience have you ever known cable of this kind to cause any injuries or fatalities in a surface mining operation?

THE WITNESS: Not -- not this particular -- in a surface mining operation?

JUDGE KOUTRAS: No, that particular type of cable?

THE WITNESS: No, sir. No, sir.

JUDGE KOUTRAS: Then what experience would you rely on then to find that running over this particular type cable would be S and S?

THE WITNESS: Well, I can relate to you a fatality that happened underground. Now whether you'll accept it or not, I don't know.

JUDGE KOUTRAS: No.

THE WITNESS: But it resulted -- it resulted in a fatality and what had happened the person that was electrocuted he was in the process of moving in a large heavy steel compartment. He got the compartment on top of the cable. Now here's the sequence of events that I'm talking about. A splice

had been made in that cable. There was no shielding on top of the splice. Whenever that box damaged the -- the cable, and it did, in fact, damage the cable, the splice -- at the splice, it energized the frame of the box and electrocuted the fellow.

JUDGE KOUTRAS: Well, now what kind of cable was that? Was it this --

THE WITNESS: That was an SHD --

JUDGE KOUTRAS: Was it this kind?

THE WITNESS: -- GC cable. It wasn't a 25 KV cable. It was a five KV cable.

JUDGE KOUTRAS: But you introduced three or four other things into your -- not your hypothetical, into the incident of the fellow getting electrocuted --

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: -- which was no shielding --

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: -- it had been spliced and it had been broken and it had been damaged.

THE WITNESS: Yes.

JUDGE KOUTRAS: Now how can you take those three or four factors and equate that to a 25 -- brand new KV cable that's been run over once and say that based on your experience with the other thing that this is going to be -- that this is S and S?

THE WITNESS: Well, there again, if we look at it from our written guidelines concerning how we determine S and S, and if that condition goes uncorrected, if we leave that situation where we permit that act or that running over the cable with the equipment from now on, then I would say that these other conditions could take place.

JUDGE KOUTRAS: Do you know whether MSHA has any thoughts about amending the standard to specifically -- your policy seems to be if you run over a cable that's a violation of the standard?

THE WITNESS: Uh-huh, yes.

JUDGE KOUTRAS: On what theory?

THE WITNESS: The fact that the cable's not adequately protected.

(Pause.)

THE WITNESS: To answer your question about do I think that we will eventually revise that, I happen to be a part of the rewrite committee right now that is rewriting the Part 75 regulation. It's my understanding that shortly after this we'll start on the 77, Part 77, and just based on what I've heard today, there's no question about it. We're going to have to rewrite that standard.

With regard to the contactor box citation, Mr. Collier stated that in the event the insulation wears off of an energized conductor and a ground or high resistance fault occurs in the system, and the bare wire comes in contactor with the frame of the box, a short circuit would result, and if anyone touched the box, he becomes part of the circuit and could be electrocuted (Tr. 242). However, he conceded that four other occurrences would have to take place before any electrocution hazard would be present, and he explained what they were (Tr. 242-244). He explained further as follows (Tr. 244-246):

JUDGE KOUTRAS: Do you think that Mr. Hinckle decided this was S and S based on all these other things that possibly could have happened here or do you think he just was of the view that since it wasn't on a proper fitting that even though -- that it's a citation plus it was S and S because --

THE WITNESS: I don't -- I really don't think I can answer that.

JUDGE KOUTRAS: Well, you saw the photographs of the box.

THE WITNESS: Yes.

JUDGE KOUTRAS: When would these other things come into play? Do you know what -- what's in this -- what's in this circuit besides that one box?

THE WITNESS: No, I don't know other than the fact that we have a circuit that comes from transformers --

JUDGE KOUTRAS: All right.

THE WITNESS: -- through the shop area and into this box. We've got several parts of the circuit that -- circuit that is exposed there. And there again you could have wiring in conduit. I don't know. I didn't see it.

JUDGE KOUTRAS: What would --

THE WITNESS: But if you -- if you do have wiring in conduit then these are places where faults can occur and set up this second ground condition that I'm talking about.

JUDGE KOUTRAS: Well, would -- do you think that you'd have to go into that and see whether that was, in fact, present before you can come to the conclusion that you -- that it would be S and S because an electrocution would be possible?

THE WITNESS: It would support your case but the fact -- there again, the fact that it has happened before. We see so many things that have happened over the years in mining to cause people to get electrocuted.

JUDGE KOUTRAS: What about in this --

THE WITNESS: These bear on our minds.

JUDGE KOUTRAS: What about in this case just on -- if all you had was that one box there and nothing else was present in that particular circuit --

THE WITNESS: Uh-huh.

JUDGE KOUTRAS: -- that could cause an additional fault that would escalate or elevate this to the hazardous condition that you feel could result?

THE WITNESS: Uh-huh. If -- if that bare -- if that insulated conductor became bare and contacted the frame of the box, and the other things were not there, there would be no hazard.

JUDGE KOUTRAS: And is it possible that that -- that those other possibilities were not present when this citation was issued?

THE WITNESS: Yes.

JUDGE KOUTRAS: And if that was the case, would you still mark it S and S?

THE WITNESS: Yes, I would. I would still mark it S and S based on what I know can happen.

JUDGE KOUTRAS: But if the things that you know can happen weren't present in this hypothetical, why would this particular one be S and S?

THE WITNESS: Well, there again, if I let that condition just sit the way it is from now on --

JUDGE KOUTRAS: Uh-huh.

THE WITNESS: -- I'm going to assume that these other things can take place.

JUDGE KOUTRAS: Well, how can they if you haven't added anything to the circuit?

THE WITNESS: Well, sir, I mean circuitry can break down just through aging.

Findings and Conclusions

Fact of Violations

Citation Nos. 2324823 and 2324824

The parties are in agreement that the inspector did not personally observe any mobile equipment running over the cited dragline and water pump trailing cables. The only evidence available to the inspector during his inspection were the visible tire tracks over the cables in at least two locations, and the concession by the respondent's representative who was with him that the cables had in fact been run over (Tr. 29, 38, 62). At the hearing, respondent's counsel produced several photographs taken shortly after the citations were issued depicting the tire tracks on or over the cables, and he conceded that the cables had been run over (exhibits R-7 through R-11; Tr. 40-41). Although counsel agreed that running over cables is not a good practice, he maintained that assuming that the violations are sustained, the inspector's "significant and substantial" (S&S) findings are not supportable (Tr. 39, 41).

Mandatory safety standard 30 C.F.R. § 77.604, provides as follows:

Trailing cables shall be adequately protected to prevent damage by mobile equipment.

MSHA's policy interpretation concerning section 77.604, is set forth at page III-241, March 9, 1978, MSHA Surface Manual (exhibit P-14), as follows:

Trailing cables shall be placed away from roadways and haulageways where they will not be run over or damaged by mobile equipment. Where trailing cables must cross roadways and haulageways they shall be protected from damage by:

1. Suspension over the roadway or haulageway;
2. Installation under a substantial bridge capable of supporting the weight of the mobile equipment using the roadway or haulageway; or
3. An equivalent form of protection.

When mobile equipment is observed running over unprotected trailing cables a violation of section 77.604 exists.

In addition to the policy interpretation, MSHA's counsel produced a copy of a January 7, 1977, district manager's memorandum addressed to all District 8 inspection personnel, informing them that where trailing cables cross roadways traveled by equipment, the cable must be protected by suspension, substantially constructed crossovers, or by burial in trenches dug across the roadway (exhibit P-4). This memorandum does not advise that running over an unprotected cable constitutes a violation of section 77.604.

MSHA's policy guidelines concerning the application of section 77.604, specifically refers to trailing cables located at roadways and haulageways. Since the two cited cables in question were not located at designated roadways or haulageways, the application of these policies in this case is questionable. In any event, I find the inspector's reliance on these policies in support of the citations to be contradictory. In both instances, even though the guidelines relied on by the inspector

requires that trailing cables be suspended, bridged, buried, or be provided with "an equivalent form of protection," he did not require that any of these protective measures be implemented as a condition precedent to the abatement of the citations. Once the cables were inspected and found to have sustained no damage by being run over, the inspector allowed them to be immediately put back into service (Tr. 47-48; 56-57; 65). He explained his interpretation and application of the guidelines as follows (Tr. 48-50):

JUDGE KOUTRAS: Why wasn't it -- why wasn't the operator in this case required to suspend it in the air, substantially construct a cross-over or bury it in a trench to comply with the '77 guidelines?

THE WITNESS: Well, I don't think that would -- I don't think I -- I don't believe I have the authority to require this, particularly after, you know, they already know about it. They --

JUDGE KOUTRAS: Do you mean to tell me that the inspector goes out there to the Captain Mine today and sees a trailing cable out there that's energized, and it's being used, it's not adequately protected, that he can't issue a citation unless he has some evidence that something has rolled over it?

THE WITNESS: That's our -- that's our guidelines from our manual, sir.

JUDGE KOUTRAS: Does that make sense? The standard says trailing cables shall be adequately protected to prevent damage by mobile equipment, and that's what it says. I go out there and I see this cable and it's not buried, it's not suspended, nothing's done to it, it's just exposed out there. There's all these trucks running around, scrapers, loaders, and there's this cable sitting out there, energized to a dragline, and it's not adequately protected. Why does an inspector have to see the tire marks? Or why does he have to see a piece of mobile equipment running over it before he can issue a citation? Would you agree that a cable out there that doesn't -- that doesn't comply with the memo is adequately protected?

THE WITNESS: No, sir.

JUDGE KOUTRAS: So that's a violation, isn't it?

THE WITNESS: Yes, sir, but I believe that if I issued paper on that -- in the case we're discussing that I would be right here again because I believe I've got to have evidence before I can issue a citation.

* * *

JUDGE KOUTRAS: It shows me the futility of this particular standard, quite frankly. I mean on its face it says cable should be adequately protected and Mr. Carmona has produced a memorandum and guidelines that's supposed to have set the standards. This is what's recommended to the industry, to protect trailing cables of this kind.

THE WITNESS: Yes, sir.

And, at Tr. 69-70:

JUDGE KOUTRAS: Let me ask you a question. Let's assume this operator sees a piece of mobile equipment running over a cable. And they stop, they deenergize the cable, and they check it out and find there's been absolutely no damage done to it, okay?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Is that a violation?

THE WITNESS: If I seen the mobile equipment on the cable, yes, sir, I would have to cite it.

JUDGE KOUTRAS: What if the operator says to you, "By the way, Mr. Inspector, this morning before you got here a piece of mobile equipment ran over this cable, that's why you see the tire tracks. Before you do anything now, Mr. Inspector, we want you to know that we -- we de-energized that machinery, we pulled that cable out and we checked it. There was absolutely no damage to it." You'd say, "Aha, but I see the tire tracks and therefore I'm going to give you a citation?"

THE WITNESS: I don't believe I'd be right if I cited that -- the conditions which you described, no, sir. I would have to accept the operator's good faith word that we know that this happened and we run the test that you would require if you had observed it. I think I would accept that -- I would have to in all fairness to the operator and my oath.

Exhibits P-7 through P-10, are copies of four prior citations issued by two MSHA inspectors assigned to the same district office as Inspector Hinckle, for violations of section 77.604, because of mobile equipment running over cables. In each instance, the inspectors found that the violations were not "significant and substantial."

In two of the prior citations, (exhibits P-9 and P-10), the inspector abated the conditions after physical and electrical examinations indicated that the cables sustained no damage, and he did not require that the cables be suspended, buried, bridged, or otherwise protected.

In one of the prior citations (exhibit P-7), the inspector, in describing the condition or practice on the face of the citation, indicated that the cited cable should have been trenched and covered with soft material to prevent damage. However, he abated the citation after examining the cable and finding no damage, and he did not require any trenching. This same inspector required trenching for the final citation (exhibit P-8), before abating it.

Inspector Hinckle and district engineer Collier both expressed some reservations and difficulty in applying MSHA's trailing cable policy guidelines in this case. Mr. Collier was not with the inspector during the inspection, and did not observe the cited cables. He alluded to a committee which will soon begin work on revising some of the standards found in Part 77, and he observed that "We're going to have to rewrite that standard" (Tr. 237).

Inspector Hinckle did not determine the precise type of equipment which ran over the cables in question, but he believed that it may have been a "payloader." He apparently did not speak to any equipment operators to determine all of the circumstances, or the frequency of any such incidents. Upon inspection of the cables, he found no signs of any internal or electrical damages, and there is no evidence that the cables were spliced, cut, worn, or otherwise less than in

proper working order. Further, there is no evidence that the cable shielding was damaged, and upon examination of similar sample cables produced by the respondent at the hearing (exhibits R-12 and R-14), they appear to be of substantial construction.

Mine electrical superintendent Higgerson testified that the dragline cable is stronger and safer than the minimum type cables required to be used at the mine, and safety director Rushing testified that the cable was covered with dirt, rock, and fire clay to protect it from damage by rocks falling out of the dragline boom bucket as it swings over the cable, rather than by equipment running over it.

Mr. Rushing's testimony has not been rebutted by the petitioner, and Mr. Collier's suggestion that the operators who drove over the cables in question were using a "roadway" simply because they decided to cross at that those locations is rejected as speculative and unsupported. Although an MSHA district policy memorandum dated January 7, 1977, (exhibit P-4), concludes that protecting cables crossing roadways by covering them with dirt or coal to allow equipment to pass over them is not a suitable means of cable protection, it is not too clear whether Inspector Hinckle relied on this policy in citing the dragline cable, or whether he relied on the inspector's manual policy directive prohibiting equipment from simply running over a cable. In any event, it does seem clear that Mr. Hinckle believed that a violation occurred in both instances simply because he had some evidentiary support for the conclusion that the cables had been run over.

The testimony of Mr. Hansen, an electrical engineer who was personally and extensively involved in the development and testing of the cables for the manufacturer, including extensive laboratory and field test, establishes that the cables in question are of substantial construction, are designed to withstand damages from being run over by equipment, and are provided with grounding and shielding devices to preclude shock and fault hazards. Mr. Hansen's testimony is corroborated by the testimony of Dr. Brown, a professor of electrical engineering who has over 20 years of university teaching experience. Dr. Brown testified that based on his knowledge of the facts concerning the cable citations, including a site visit where he viewed both cables, he did not believe that any hazards were presented. Conceding that a heavy piece of equipment such as a "D 9 Cat" running over a cable "a few times" would result in some cable failure, Dr. Brown was of the opinion that the inherent safety features of the cables would deenergize the equipment, and provide adequate safeguards against any resulting electrical hazards.

On the facts of this case, I cannot conclude that the petitioner has established by a preponderance of the evidence that the respondent failed to adequately protect the cited trailing cables from damage. Although the evidence establishes that the cables were run over at least once, that is all that the petitioner has established. With regard to any cable damage resulting from an unspecified piece of rubber-tired equipment running over the cables, the evidence establishes that no damages occurred. Further, respondent's evidence and testimony establishes that the construction and shielding of the cables provided more than adequate protection against any damage from the rubber tired equipment which ran over them.

I am convinced that Inspector Hinckle issued the citations because he believed that the mere act of a piece of equipment running over a trailing cable constituted an ipso facto violation of section 77.704, as stated in the last sentence of MSHA's inspector's manual policy directive. Having viewed Mr. Hinckle during the course of the hearing, I am also convinced that while he may have some personal difficulty with the policy, he was simply "doing his duty" by following the policy directive.

I reject MSHA's interpretation and application of section 77.604, in this case. I find nothing in the standard to support a conclusion that simply running over a trailing cable, where is no resulting damage established, constitutes a violation. It seems to me that if MSHA's intent is to prohibit a piece of equipment from running over a trailing cable at any location at a surface mining operation, it should promulgate a standard that says precisely that. In short, MSHA should consider adopting the language found in the last sentence of its policy manual directive (exhibit P-14), by promulgating it as a mandatory safety standard.

In view of the foregoing findings and conclusions, Citation Nos. 2324823 and 2324824 ARE VACATED, and the petitioner's civil penalty proposals as to these citations ARE REJECTED AND DISMISSED.

Fact of Violation - Citation No. 2201879

In this instance, the respondent is charged with failing to comply with mandatory standard section 77.505, which requires that all cables entering electrical compartments are properly fitted. The obvious intent of this standard is to insure that such cables are tight or snug as they enter the enclosure so as to preclude any strain on the electrical

connections within the enclosure, and to insure against the cable rubbing against the enclosure frame in such a manner as to cut or otherwise wear out the cable insulation. The inspector found that the cable was not equipped with a proper fitting or bushing, and that the cable conductors and jacket insulation were in contact with the frame of the enclosure.

The respondent does not dispute the fact that the cable which entered the enclosure in question was not properly fitted or bushed to prevent it from contacting the frame of the disconnect box, nor does it dispute the fact that the cable had been "pulled" or "backed out" of the box. Its dispute and disagreement is with the inspector's "S&S" finding.

I conclude and find that the petitioner has established a violation of section 77.505, by a preponderance of the evidence. It seems clear to me from the testimony and evidence presented by the inspector that the cable in question was not properly bushed or fitted as it entered the disconnect box. Accordingly, the violation IS SUSTAINED, and the citation IS AFFIRMED.

With regard to the inspector's "S&S" finding, I cannot conclude that the petitioner has established through any credible evidence that the violation posed a hazard or any reasonable likelihood of electrocution. I find the inspector's testimony in support of his "S&S" finding to be speculative and general, and it has been rebutted by the credible testimony of Dr. Brown.

Petitioner's rebuttal witness Collier was not with the inspector at the time of the inspection, and he did not observe the cited condition. Although he stated that he was familiar with the conditions, it seems obvious that any knowledge on his part came from reading the citation form and possibly speaking with Inspector Hinckle in preparation for the hearing. When asked whether he knew what was in the contactor box in terms of any electrical circuits, he responded "No, I don't know other than the fact that we have a circuit that comes from transformers" (Tr. 244).

In response to certain questions concerning his opinion as to whether or not the cited condition constitutes a significant and substantial violation, Mr. Collier responded that in the event the energized wire conductor insulation wears off, a chain of four subsequent events would have to occur before there would be any electrocution hazard. He described these events as (1) a ground or high resistance

fault to the system; (2) the bare uninsulated wire coming in contact with the frame of the contactor box; (3) a resulting short circuit; and (4) someone touching the box would become part of the circuit and could be electrocuted (Tr. 242).

Mr. Collier conceded that it was possible that none of the four conditions he described were presented at the time the citation was issued. However, assuming that they were not, he indicated that he would still have found an "S&S" violation because he had to assume that events can take place and that electrical circuitry can break down through aging.

In view of the foregoing findings and conclusions, the inspector's "S&S" finding is REJECTED and VACATED. The citation is affirmed as a section 104(a), non-"S&S" violation.

Negligence

I conclude and find that the violation which has been sustained resulted from the respondent's failure to exercise reasonable care, and that this amounts to ordinary negligence.

Gravity

Although I have concluded that the violation is not "S&S," I find that it was serious. Failure to insure that the cable entered the electrical box in question through a proper or snug fitting or bushing could in time lead to abrasions and wear on the cable.

Good Faith Compliance

The record supports a finding that the violation was timely abated by the respondent, and that it exercised good faith compliance.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business.

Based on the stipulated coal production for the mine and the respondent as a whole, I conclude and find that the respondent is a large mine operator. I also conclude that the penalty assessed by me for the violation in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations.

Exhibit P-6 is a computer print-out of the mine compliance record for the period September 28, 1981 through September 27, 1983. The parties agree that during this time period, the

respondent paid a total of \$6,210 for 49 assessed violations. I take note of the fact that 25 of these prior violations were \$20 "single penalty" violations. Under the circumstances, I cannot conclude that for an operation of its size, that the respondent has a poor compliance record warranting any additional increase in the civil penalty assessed by me for the violation which has been affirmed.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that a civil penalty in the amount of \$150 is appropriate and reasonable for the section 104(a) Citation No. 2201879, September 28, 1983, 30 C.F.R. § 77.505.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of \$150 for the violation in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this case is dismissed.


George A. Koutras
Administrative Law Judge

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slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JAN 14 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 83-31-M
Petitioner	:	A.C. No. 39-00055-05508
	:	
v.	:	Homestake Mine
	:	
HOMESTAKE MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Eliehue C. Brunson, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Petitioner; Robert A. Amundson, Esq., Amundson & Fuller, Lead, South Dakota, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating two safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq.

After notice to the parties, a hearing on the merits commenced on October 30, 1984 in Rapid City, South Dakota.

Prior to the conclusion of the hearing the parties reached an amicable settlement.

The citations, the standards allegedly violated, the initial assessments, and the proposed dispositions are as follows:

<u>Citation No.</u>	<u>30 C.F.R. Section Violated</u>	<u>Assessed Penalty</u>	<u>Disposition</u>
2097208	57.12-30	\$20.00	\$20.00
2097774	57.4-9	20.00	20.00

The proposed disposition as to Citation 2097208 is in order and it should be approved.

Concerning Citation 2097774, the parties advised the judge that the evidence established a violation of 30 C.F.R. § 57.4-9,

instead of 30 C.F.R. § 57.4-1. The citation was amended. Fed. R. Civ. P. 15(a). Respondent thereupon moved to withdraw its notice of contest and to pay the proposed penalty. Pursuant to Commission Rule 11, 29 C.F.R. § 2700.11, the motion was granted.

Accordingly, I enter the following:

ORDER

1. The settlement agreement is approved.
2. The following citations and proposed penalties are AFFIRMED:

<u>Citation No.</u>	<u>Penalty</u>
2097208	\$20.00
2097774	20.00


John J. Morris
Administrative Law Judge

Distribution:

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/ot

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 1985

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 84-25-D
ON BEHALF OF : MSHA Case No. NORT CD-84-3
SAMUEL E. GRIFFITH, :
Complainant : No. 2 Mine
v. :
BOWMAN COAL COMPANY, INC., :
Respondent :

DECISION

Appearances: Mary K. Spencer, Esq., Office of the
Solicitor, U.S. Department of Labor,
Arlington, Virginia, for Complainant;
Keary R. Williams, Esq., Williams & Gibson,
Grundy, Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant Griffith contends that he was discharged from his job as belt man and scoop operator on February 21, 1984, because of his refusal to operate mining equipment, which he considered to be unsafe. An Order of Temporary Reinstatement was issued on April 26, 1985, but Complainant declined to return to Respondent's employ. He is seeking back wages from February 22, 1984 to April 26, 1984, with interest. The Secretary also seeks a civil penalty for the alleged violation of section 105(c) of the Act.

Respondent contends that Griffith was not discharged, but voluntarily quit and that the equipment he was operating was not unsafe.

Pursuant to notice, the case was heard in Abingdon, Virginia, on November 29, 1984. Samuel E. Griffith, Michael Reed Moran and Rufus Earl Barton testified on behalf of Complainant. Roby Bowman, Casby Bowman and Tony Viers testified on behalf of Respondent. Both parties have filed posthearing briefs.

Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. On February 21, 1984, and prior thereto, Respondent was the owner and operator of an underground coal mine in Buchanan County, Virginia, known as the No. 2 Mine. The mine produced goods which entered interstate commerce and its operations affected interstate commerce.

2. On February 21, 1984, Complainant Samuel E. Griffith was employed by Respondent at the No. 2 Mine and was a miner.

3. Complainant was hired as a belt man and machine operator by Respondent on February 20, 1984.

4. Complainant had previously worked in about 1974 for Island Creek Coal Company as general inside labor. He quit because it was too dangerous. He worked about 6 to 8 months for Bishop Coal Company in about 1976. He quit because of too many strikes and two few hours of work. He worked for 1 year and 2 months at Trammel & Cline Coal Company, beginning in April 1981. He operated a scoop. He quit for no special reason. Thereafter, he worked for Carey Coal Company for about 4 months as a roof bolter. He also operated a scoop. He quit because a fellow miner was killed operating a scoop.

5. Respondent is a corporation. At the time of the hearing, it was operating a coal mine in Kentucky. The subject mine was operated for about 9 months until July 25, 1984. It was shut down because "[we] just couldn't make it; rejects." (Tr. 75). It was the practice at the subject mine if equipment was not operating for even a short time to lay off the affected miners.

6. Although Complainant was hired and began working as a belt man, Respondent's President, Roby Bowman, intended that he take over operating a scoop. Complainant told Bowman that he could operate a scoop and had approximately 7 years experience as a scoop operator.

7. The Kersey scoop operator before Complainant, Rufus Barton, was experiencing difficulty in shearing axle studs and in knocking out the lights on the scoop. For these reasons, Bowman wanted "to make a change and see if I could get better service out of my scoop." (Tr. 78).

8. Complainant worked the entire shift on February 20, 1984, as a belt man. The following day after working 2 or 3 hours on the belt, he was asked to come to the face area to run a scoop. Belt men were paid \$40 per shift. Scoop operators were paid \$50 per shift.

9. Complainant drove the scoop on a short test run in Bowman's presence. Then Bowman left and Complainant commenced operating the scoop.

10. Complainant had problems getting the scoop to run: "It was cutting off and on. And I had to kick the gas feed to get the thing to go and back up. And the other scoop man was making four or five trips to my one." (Tr.13).

11. Complainant also had difficulty with the brakes and steering.

12. Because of these difficulties, Complainant parked the scoop and told the section boss Michael Moran that "I parked the scoop because I couldn't run it, and the thing was just too raggedy to run; that I wasn't going to run it" (Tr. 15). Moran stated that Complainant told him "that he couldn't run it; that he wasn't going to run it; it was unsafe." (Tr. 57).

13. Moran called Bowman who told him to send Complainant outside. Complainant waited outside until the end of the shift. He asked Casby Bowman (part owner of Respondent and brother of Roby Bowman) whether he was fired and Casby said he would have to talk to Roby.

14. When Moran came out at the end of the shift, Complainant asked whether he was fired and Moran said he did not know. Complainant told Moran to ask Roby Bowman and if he was fired, to return his miner's papers. Moran asked Roby if Complainant was fired and Roby handed him Complainant's papers without replying to the question. Complainant said "I guess this means I'm fired." Moran replied "I guess so." (Tr. 19).

15. Complainant left the job site and went to the local MSHA office where he filed his complaint.

16. The following day, February 22, 1984, an MSHA inspector inspected the mine. He issued a citation for

insufficient illumination in the No. 2 entry, an inoperative methane monitor on the S & S Scoop (Complainant operated the other scoop - a Kersey scoop), permissibility violations on the S & S Scoop, an inoperative de-energizing device on the S & S scoop, and several defective splices in the cutting machine trailing cable. No citations were issued on the Kersey Scoop. There is no evidence, however, to indicate whether the Kersey scoop was inspected. The evidence indicates that it was operated on February 22. The MSHA inspector was not called as a witness in this proceeding.

17. The Kersey scoop in question had the following safety defects at the time Complainant was operating it: The brakes were inadequate and leaked fluid; the steering was dangerously loose; some or all of the lights were out.

18. Complainant declined to continue operating the scoop on February 21, 1984, in part because of his frustration resulting from his inability to keep up with the other scoop operator. This was largely caused by the problems with the ignition and accelerator. His refusal to continue working was also related in part to what he perceived was the unsafe condition of the scoop.

19. Complainant has sought work at other coal companies and mobile home companies after leaving Respondent's employ. He was hired by a mobile home company in Richlands, Virginia, on April 26, 1984.

20. On application of the Secretary, the Commission ordered Respondent to reinstate Complainant. The order was issued April 26, 1984. Complainant declined to accept reinstatement because he had accepted the new job with the mobile home company. Respondent by a clerical error paid Complainant for 8 hours worked on February 22, 1984, although he did not work on that day.

ISSUES

1. Was Complainant Griffith discharged (actually or constructively), or did he quit his employment with Respondent?

2. If Complainant was discharged, was it for activity protected under the Mine Safety Act?

3. If he was discharged for protected activity, to what relief is he entitled?

4. If he was discharged in violation of section 105(c) of the Act, what is the appropriate penalty?

CONCLUSIONS OF LAW

1. Complainant Griffith was a miner as that term is used in section 105(c) of the Act. Complainant and Respondent are subject to the Act, and I have jurisdiction over the parties and subject matter of this proceeding.

2. Respondent discharged Complainant on February 21, 1984, from the position he held as beltman - machine operator with Respondent. At the time of his discharge he was working as a scoop operator and was paid \$50 per day.

DISCUSSION

Respondent contends that Complainant was not discharged but voluntarily quit. The records shows a strange reluctance on the part of Complainant and the Bowmans to communicate with each other as to Complainant's status after leaving the scoop. I conclude, however, that (1) Complainant refused to continue operating the scoop (Finding of Fact No. 12) and (2) Respondent discharged him because of this refusal (Finding of Fact No. 14).

3. Complainant's refusal to continue operating the scoop was activity protected under the Act. Refusal to work is protected activity if it results from a reasonable, good faith belief that continuing to work would be hazardous. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds, Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981). Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981), and that belief is communicated to the mine operator. Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982). I conclude that Complainant believed in good faith that continued operation of the scoop would have been hazardous. In view of the safety defects present on the scoop, this belief was a reasonable one. Complainant communicated this belief to his supervisor, Mick Moran; whether it was communicated to the Bowmans is not so clear, but is unnecessary to my conclusion.

4. Therefore, I conclude that the discharge of Complainant on February 21, 1984, was the result of activities protected under the Act. It was therefore in violation of section 105(c) of the Act.

RELIEF

Complainant is entitled to back wages from February 23, 1984 (he was paid for February 22) through April 25, 1984, together with interest thereon in accordance with the Commission approved formula set out in Secretary/Bailey v. Arkansas-Carbona Company and Michael Walker, 5 FMSHRC 2042 (1983). Complainant shall submit a statement on or before February 15, 1984, of the amount due hereunder, to the date of this decision. Respondent shall have 10 days from the date the statement is submitted to reply.

CIVIL PENALTY

Respondent is a small operator and the subject mine has been closed. It does not have a serious history of prior violations. The violation found herein is serious, however. Based on the criteria in section 110(i) of the Act, I conclude that a civil penalty of \$100 is appropriate.

ORDER

1. Respondent IS ORDERED to pay Complainant back wages at the rate of \$50 per day from February 23, 1984 through April 25, 1984, with interest thereon, as set out above. This order is not final until the exact amount is determined and ordered paid hereafter.

2. Respondent is ORDERED to pay the sum of \$100 as a civil penalty for the violation of section 105(c) of the Act found herein to have been committed.

James A. Broderick
James A. Broderick
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 15 1985

THOMAS F. MURPHY, : COMPLAINT OF DISCRIMINATION
Complainant :
v. : Docket No. PENN 83-150-D
: :
CONSOLIDATION COAL COMPANY, : PITT CD 83-5
Respondent :

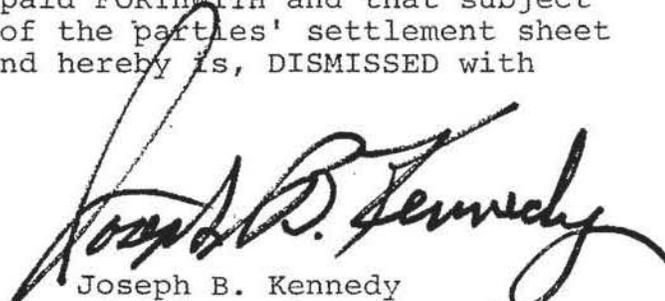
ORDER APPROVING SETTLEMENT

Before: Judge Kennedy

This matter is before me on the parties' stipulation and motion to approve settlement. Counsel advises that companion proceedings pending before the Departments of Labor and Interior have or will be dismissed on the basis of the same stipulation.

Based on an independent evaluation and de novo review of the circumstances, I find the settlement proposed is in the interest of complainant and in accord with the purposes and policy of the Mine Health and Safety Act.

Accordingly, it is ORDERED the settlement proposed be, and hereby is, APPROVED. It is FURTHER ORDERED that the monies due complainant be paid FORTHWITH and that subject to payment and the filing of the parties' settlement sheet the captioned matter be, and hereby is, DISMISSED with prejudice.



Joseph B. Kennedy
Administrative Law Judge

Mr. Thomas F. Murphy, 2311 Firethorn Rd., Bridgeville, PA 15017 (Certified Mail)

Robert P. Ging, Jr., Esq., Counsel for Complainant, 430 Boulevard of the Allies, Pittsburgh, PA 15219 (Certified Mail)

Daniel L. Strickler, Esq., Consolidation Coal Company, Consol Plaza, Pittsburgh, PA 15241 (Certified Mail)

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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 15 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No: VA 84-4
Petitioner : A/O No: 44-04920-03518
: :
v. : No. 3 Mine
: :
H J AND H COAL COMPANY, :
Respondent :

DECISION

Appearances: Sheila Cronan, Esq., Office of the
Solicitor, U.S. Department of Labor,
Arlington, Virginia, for Petitioner,
John L. Bagwell, Esq., Grundy, Virginia,
for Respondent

Before: Judge Moore

At the outset of the hearing in Bristol, Virginia, respondent's attorney, Mr. Bagwell, announced that his client no longer wished to contest the citations and moved to withdraw its contest and have judgement entered for the amount of penalties that the assessment office had arrived at. Mr. Bagwell was not accompanied by either respondent or any witnesses. The government objected on the grounds that its witness was present and it was ready to proceed and that I might wish to set higher penalties than those assessed by the assessment office. I ruled in favor of the government and allowed the trial to proceed.

The mine in question produces 120,000 tons of coal per year and employs 12 miners. A computer printout purportedly showing the history of violation was introduced and received as government exhibit G-8. That printout shows a total of 89 violations between October 3, 1981 and October 2, 1983, but does not show any that have been paid. Under the column headed "last action" various codes are listed and I have determined the meaning of the codes as follows: D L T R means that a demand letter was sent; F A L J means that the matter has been filed with an administrative law judge; F D S T means that the matter has been filed in the District Court; D L T 2 means a second demand letter has been sent and D L T 3 means that a third demand letter has been sent.

I think it is safe to assume that demand letters would not be sent and cases would not be filed in the District

Court unless the penalties had, by operation of law, become the final orders of the Commission. I will therefore count as past history of violations, all listed citations and penalties except those which have been forwarded to an administrative law judge. There were eight such citations and therefore the total number in the two-year period was 81 alleged violations. The total number of inspection days was 102.

Citation No. 2163514 alleging a violation of 30 CFR 75.1722.

The citation alleges that a scoop used in the mine "was not provided with a guard behind the foot controls to protect a person's foot from contacting the drive shaft." Inspector Coleman testified that the drive shaft was smooth and contained no bumps or sprockets. The standard provides for the guarding of "gears; sprockets; chains; drive, head, tail, and takeup pulley; flywheels; couplings, shafts; saw blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons and which may cause injury to persons . . .". I do not know what kind of shaft the promulgators of this regulation had in mind, but the standard does not require that all moving parts be guarded. A smooth drive shaft such as the one involved in this case, (smooth where it could be contacted) is entirely different from the other items referred to in the standard. All of those other items either involve a pinchpoint or a rough surface such as blades and cogs. Nevertheless there was uncontroverted testimony that the driver's foot could come in contact with the drive shaft and that it could cause injury. I therefore find that there was a violation. The drive shaft had originally been guarded and the guard had been removed and not replaced. I find the failure to replace the guard was negligence. I assess a penalty of \$30.

Citation No. 2163515 alleges a violation of Section 75.400

The citation alleges an extensive accumulation of loose coal four to nine inches in depth along the ribs of eight entries and adjoining crosscuts. The length of each accumulation was 140 feet. This was not sloughing, but coal that had been mined and not cleaned up. Such an accumulation could propagate a mine fire and one has only to read the newspaper to know how disastrous mine fires can be. I find a high degree of hazard and negligence. A penalty of \$1,000 is assessed.

Citation No. 2163516 alleges a violation of 30 CFR 75.1720.

One of the owners of the mine was 3,000 feet underground and was not wearing protective footwear. The extent of his participation in the mining process on the day in question is not clear but he fits the definition of a miner and did

not protest when the inspector announced that he was going to cite him for not wearing protective footwear. It was negligence to not wear the protective footwear but the degree of hazard would depend on the type of work being done. A miner working along the side of a piece of mobile equipment would have more chance of having his toe run over than would the driver of the equipment, for example. I will find a moderate degree of hazard and will assess a penalty of \$50.

All violations were abated promptly.

ORDER

Respondent is accordingly ORDERED to pay to MSHA, within 30 days, a civil penalty in the total amount of \$1,080.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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/db

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JAN 15 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No: WEVA 83-127
Petitioner : A/O No: 46-01369-03509
: :
v. : MacGregor Cleaning Plant
:
AMHERST COAL COMPANY, :
Respondent :
:
AMHERST COAL COMPANY, : CONTEST PROCEEDINGS
Contestant :
: Docket No. WEVA 82-329-R
v. : Citation No: 908667; 6/16/82
:
SECRETARY OF LABOR, et al : MacGregor Cleaning Plant
Respondent :

DECISION

Appearances: James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner, Robert G. McLusky, Esq., Jackson, Kelly, Holt and O'Farrell, Charleston, West Virginia, for the Respondent

Before: Judge Moore

On June 9, 1982, at approximately 9.30 P.M. one coal miner died and another was seriously injured as the result of a collision between the six railroad cars the victims were riding on and nine runaway railroad cars that were traveling about 60 miles per hour at the time of impact. The six cars that the victims were dropping were traveling at a walking speed.

While the only issue directly involved in the case before me concerns the derail switch located between the preparation plant where the cars are loaded and the storage area some 3,000 feet downhill where the fatal collision occurred, in order to describe what happened it is necessary to discuss events and alleged violations which have already been settled in other proceedings. In this mine, it is downhill from the east end of the preparation plant to the west end and at a somewhat steeper grade (2-1/2%) from the west

end of the preparation plant to the storage area. Car dropping is therefore done by gravity. The car dropper gets on the platform of the railroad car, releases the brakes and controls the speed of the car until it gets to the track and area of that track where it is needed. In this case car dropper Tom Gilco got on three coupled railroad cars at the east end of the preparation plant and loosened the brake. After rolling a short way, and in accordance with standard procedure, he tightened the brake to see if it would stop the three cars--it would not. He then got off of the first car and ran back to the second car and boarded it. The brake on that car was also ineffective.

Mr. Gilco, realizing that a runaway was beginning, jumped from the cars and yelled a warning. The warning was heard and broadcast over a loud speaker so that everyone in the preparation plant knew that a collision was imminent. The three runaway cars crashed into six cars in the loading area and the collision broke the restraining cable and started another six cars rolling toward the storage area. There were now nine runaway cars and they all ran through the derail switch without being derailed. The derail switch is alleged to have been in the open position, a position that should have derailed the runaway cars. Instead, they proceeded on towards the storage area and as stated before attained a speed of approximately 60 miles per hour before crashing into the cars that the victims were dropping. The estimated speed is derived from the fact that a Mr. Goodman looked at the derail switch position indicator and saw that it was in the open position which should have derailed the cars. He then observed the runaway cars going through the derail switch and he and a Mr. Waugh jumped in a pickup truck to try to beat the cars to the storage area. The pickup truck caught up with the runaways but could not pass them. The pickup truck's lights were flashing and its horn was blowing in an attempted warning to the two victims, Mr. Butcher and Shawver, but the warning was not heard. The surviving victim, Mr. Butcher, testified at the hearing and said that he had heard no warning whatsoever.

As stated earlier the only part of this sequence that is involved in the instant case concerns the alleged violation of 30 CFR § 77.1605(p) as far as the derail device is concerned. The section in question provides:

"positive-acting stop-locks, derail devices track skates or other adequate means shall be installed wherever necessary to protect persons from runaway or moving railroad equipment."

According to A DICTIONARY OF MINING, MINERAL AND RELATED TERMS published by the Bureau of Mines, a derail or derailer is "[a] safety device for derailing mine cars. . .". The definition says nothing about a device that will derail or not derail depending on the way it is set. I interpret this to mean that the device for derailing must not only be present "wherever necessary" but must be maintained in a derail position. By all accounts the device involved here was in the derail position when the runaway cars passed through.

On June 4, a group of cars had passed through this same derail switch and the workers that observed it stated that the switch was in the derail position. There was considerable evidence that the derail switch was inadequate and there was considerable evidence that it was adequate and effective. Inspector Davis' theory was that since the track curves to the left when going in a downhill direction right at the spot where the derail switch opens at the left rail, that the centrifugal force would be rocking the cars toward the right rail and the flange of the left wheel might miss the moveable section of the derailer and thus not derail the car. He said the cars would be swaying and presented evidence that the right rail was thinner than the left rail. For this to happen however, 36 wheels would have to be in exactly the right place in order that each one of them escape the derailer. I do not see how that could happen. The rails were tested with a jack and it was found that the right rail would not move. There was also testimony that the moveable part of the derailer was actuated by an arm which was somewhat flexible or was loose. Mr. Butcher said that the piece was loose and Mr. Davis speculated that because of the flexibility of the arm that actuated the switch the moving part could be deflected inward either two and one half inches or six inches depending on the flexibility of the actuating arm.

A Department of Transportation team inspected the switch after the accident (applicant's exhibit No. 1). In its report it is stated on page 9 "notwithstanding sworn statements to the contrary, it is 99% improbable that nine coal hoppers passed safely through this derail while it was in the open or derail position. . . Results of post-accident inspection of the derail indicate no probable cause to suspect that the derail malfunctioned". ^{1/} On June 8, the day before the accident, the foreman noted in the on-shift report "derailer needs slack took out". (Gov. Exh. 6). The next day, at 1.15 A.M. another foreman, in his pre-shift examiner's report (Gov. Exh. 7) stated "derail switch below plant was approved by C&O on 6/4/82, & condition of switch has not changed." There was other confirming testimony about the examination by C&O personnel. After the accident a Federal inspector inspected the switch and said there was nothing wrong with it.

^{1/} Government Exhibit 5 is the same report but for some reason it does not contain the quoted language.

I have no crystal ball nor the type of training that would allow me to study the photographs and measurements between the rails and determine what the experts failed to determine i.e. whether the nine cars actually **escaped the** derailing device or whether someone inadvertently closed the switch. All I know is that the cars were not derailed and as a result one man was killed and another seriously injured. Certainly a derail device was "necessary" between the preparation plant and the storage area and inasmuch as the runaway cars were not derailed there did not exist a type of derail device required by the standard. If the switch was closed it was not a derail device and if it was open it was not effective. I therefore find a violation and affirm the citation.

C&O Railroad Company was responsible for the maintenance of the track itself and this included the track parts of the derail switch. Respondent was responsible for the switch motor but there had been no indication of any trouble with the switch motor. If the switch was actually set in the correct position and failed to derail the cars, C&O Railroad would share in the responsibility for this accident. Respondent would share because it was on notice that other cars had gone through the derail. The fact that Amherst knew about the previous failure of the derail, the fact that Amherst employees operated the derail together with the fact that Amherst employees were the victims of the accident are sufficient to establish respondent's partial liability.

The Secretary can cite the "independent contractor, the owner of both." Cyprus Industrial Minerals v. FMSHRC, 664 F.2d 1116, 1119 (9th Cir. 1981). Also Harman Mining Corp. v. FMSHRC, 671 F.2d. 794 (4th Cir. 1981). While the Secretary's choice is not without limit, the facts of this case are not similar to those in Secretary of Labor v. Phillips Uranium Corporation, 4 FMSHRC 549 (April 1982). 2/ If the switch was

2/ At page 553.

The shortcomings of the Secretary's decision to proceed against Phillips here are made all the more evident by viewing the facts in light of the basic statutory scheme. Large, skilled contractors were retained for their expertise in an important and familiar facet of mine construction, i.e., the sinking of shafts and related underground construction activities. The hiring of contractors to perform the specialized task of shaft construction is common in the mining industry. The contractors, conceded to be "operators" subject to the Act, failed to comply with various safety standards. Yet Phillips, rather than the contractors, was cited; penalties were sought against Phillips, rather than the contractors;

inadvertently closed, however, by respondents, C&O would bear no responsibility. The railroad has paid a penalty of \$2,000. I do not know its history of violations, but the other criteria would be the same for the railroad and the company if they were equally negligent.

I find that while the Secretary has established a violation he has failed to carry the burden of proving that Amherst was more negligent and thus should be penalized more than the railroad. I find equal negligence. I will assess the same penalty as that assessed against the railroad.

Amherst Coal Company is consequently ORDERED to pay to MSHA, within 30 days, a civil penalty in the amount of \$2,000.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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fn. 2 (continued)

the violations would be entered into Phillips' history of violations, rather than the contractors' histories, resulting in increased penalties for Phillips rather than the contractors in later cases; Phillips, rather than the contractors could be subjected to the stringent section 104(d) sequence of citations and orders; and Phillips rather than the contractors could be subjected to the stringent section 104(e) pattern of violation provisions. Compared to Phillips' burden in bearing the full brunt of the effects of the violations committed by the contractors, the contractors would proceed to the next job-site with a clean slate, resulting in a complete short-circuiting of the Act's provisions for cumulative sanctions should the contractors again proceed to engage in unsafe practices.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 16 1985

KITT ENERGY CORPORATION : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEVA 83-125-R
: Order No. 2115977; 3/24/83
: :
SECRETARY OF LABOR, : Kitt No. 1 Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent :

DECISION ON REMAND

Appearances: Bronius K. Taoras, Esq., Kitt Energy Corp.,
Meadow Lands, Pennsylvania, for Contestant;
Howard K. Agran, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Respondent.

Before: Judge Fauver

On December 3, 1984, the Commission remanded this case to me "for further consideration and ruling in view of the arguments raised by the Secretary before the Commission."

The Secretary, in his Petition for Discretionary Review to the Commission, sought a ruling modifying my decision so as to convert the original section 104(d)(2) withdrawal order to a section 104(d)(1) citation instead of a section 104(a) citation.

For the reasons submitted in the Secretary's Petition, I believe the Secretary's position is well taken. I find that my decision should be amended: (1) to convert the original withdrawal order to a section 104(d)(1) citation and (2) to find that the violations cited in the modified section 104(d)(1) citation were "substantial and significant" and unwarrantable within the meaning of section 104(d) of the Act.

ORDER

WHEREFORE IT IS ORDERED that my decision of October 4, 1984, is AMENDED as follows:

1. Conclusion of Law No. 2 is AMENDED, in the last sentence, to change "section 104(a) citation" to read "section 104(d)(1) citation."

2. The order in the decision is AMENDED to read as follows:

"MSHA Order No. 2115977 is MODIFIED to change it from a section 104(d)(2) order into a section 104(d)(1) citation, including a finding that the violations charged were significant and substantial and unwarrantable. As so modified, this citation is AFFIRMED in all respects."

William Fauver
William Fauver
Administrative Law Judge

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JAN 16 1985

WESTMORELAND COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	
v.	:	Docket No. WEVA 83-141-R
	:	Order No. 2141231
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Hampton No. 3 Mine
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
v.	:	Docket Nos. WEVA 83-122
	:	WEVA 83-123
	:	WEVA 83-232
	:	A.C. No. 46-01283-03505
	:	A.C. No. 46-01283-03507
WESTMORELAND COAL COMPANY, Respondent	:	A.C. No. 46-01283-03519
	:	
	:	Hampton No. 3 Mine

DECISION

Appearances: Kevin McCormick, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent;
F. Thomas Rubenstein, Esq., Westmoreland Coal Company, Big Stone Gap, Virginia, for Contestant.

Before: Judge Fauver

Pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., Westmoreland Coal Company filed a Notice of Contest seeking review of the Secretary's Order No. 2141231, which charges a violation of 30 CFR § 75.1722(a) at its Hampton No. 3 Mine on March 1, 1983. Thereafter, a Petition for Assessment of a Civil Penalty was filed by the Secretary seeking a civil penalty for the alleged violation. Those proceedings were consolidated with two other civil penalty proceedings (Docket Nos. WEVA 83-122, 83-123) and were heard at Charleston, West Virginia.

Having considered the testimony, exhibits, and the record as a whole, I find that a preponderance of the substantial, probative, and reliable evidence establishes the following:

FINDINGS OF FACT

Docket Nos. WEVA 83-232, 83-141-R

1. On March 1, 1983, MSHA Inspector Vaughan Gartin inspected the 6 Left 4 West section of Westmoreland's Hampton No. 3 Mine. Gartin observed that the belt tail roller was not guarded so as to prevent a person from contacting the exposed moving parts of the roller. There was a 17-inch, unguarded area between the belt tail roller and the end of the belt line. Gartin testified that, although someone walking past the belt tail roller could come in contact with the roller or its moving parts, he was more concerned with the safety of the miners who were required to regularly grease and clean the equipment. Because of the lack of a guard on the tail roller, it was necessary for the maintenance man to reach right up to the roller with his grease gun and attach it to one of the grease fittings on each side of the roller. If any contact were made with the moving parts of the roller or belt, a miner could lose an arm, leg, or even die as a result. If a guard had been in place, a grease hose could be used, removing the necessity of coming in such close contact with the belt tail roller. There was no grease hose on the belt tail roller when Gartin observed it. A miner cleaning up coal in the unguarded area could accidentally contact the moving parts of the roller or belt with his shovel. If a guard were in place, it would prevent the worker from having the shovel come in contact with the belt or the roller.

2. When Gartin inspected the belt tail roller, the belt was energized and running.

3. Because there was no guard around the belt tail roller, Inspector Gartin issued a section 104(d)(1) order, alleging a violation of 30 CFR § 75.1722(a). He alleged that the violation was "unwarrantable" because he had recently issued a citation for a similar condition in another part of the mine. Upon learning of the earlier citation, David Nelson, the Mine Superintendent, told Gartin that he knew of one other unguarded tailpiece, but that condition would be corrected before Gartin returned to the mine. However, when

Gartin returned and inspected the 6 Left 4 West section, the belt tail roller was unguarded.

4. Gartin also alleged that the condition he observed on March 1, 1983, was "significant and substantial." He testified that there was a reasonable likelihood that an injury of a serious nature could result because of the alleged violation.

5. On June 6, 1984, during the hearing, at the request of the Judge, Inspector Gartin and management personnel returned to Hampton Mine No. 3 to take measurements and photographs of a belt tail roller and coal feeder set-up. The measurements and photographs are in evidence, and show how the structures looked on June 6, 1984. Inspector Gartin testified that the situation he observed on March 1, 1983, was significantly different in two important respects. First, concerning photograph No. 1, the feeder was 37 inches from the mine floor on the day Gartin issued the order, but in the photograph, the feeder was only 23 inches from the floor. Second, regarding photographs Nos. 2 and 4, the feeder appears much closer to the tailpiece than it was on the day the order was written. On that day, Gartin measured approximately 28 inches between the coal feeder and the tailpiece. The photographs show only an 8-inch space between those structures. Gartin stated that the feeder is not normally that close to the tailpiece because the shuttle car often bumps the feeder when coal is unloaded. None of the measurements, observations or photographs taken on June 6, 1984, caused Gartin to change his opinion as to a violation and the gravity of the condition he found on March 1, 1983.

6. Another MSHA Inspector, Don Ellis, testified at the hearing. He stated that he was present when Gartin and Nelson were discussing the citation for leaving a belt tail roller unguarded on 7 Left section, and remembered that Nelson, the Mine Superintendent, said that he had an additional tail roller to be guarded. Ellis was also with Gartin when the subject order was issued. He observed the unguarded belt tail roller, and stated that a person could easily reach in and become caught in the pinch points of the belt tail roller. He also stated that the mine floor in the area was damp to wet. Ellis agreed with Inspector Gartin's opinions as to the serious nature of injuries that could result from the unguarded belt tail roller and stated that he was aware of two cases in which a miner had lost an arm in an accident involving a tail roller.

7. Two of Westmoreland's employees also testified at the hearing concerning the belt tail roller charge. Dave Nelson, the Mine Superintendent, stated that before the issuance of the citation on February 22, 1983, it was Westmoreland's practice not to provide any guard on the belt tail roller when the coal feeder was located in a straight line position. According to Nelson, the feeder provided a sufficient guard for the belt tail roller. He did not observe the belt tail roller on the day Inspector Gartin issued the subject order and he could not state what the conditions were when Gartin observed the belt tail roller on March 1, 1983. Nelson acknowledged that in the past miners have cleaned and greased the belt tail roller while the belt was moving.

8. The other Westmoreland witness, Dennis Dent, an assistant mine foreman, testified that although he was with Inspector Gartin when the order was issued, he did not know whether or not the belt tail roller was equipped with a grease hose. Nor did Dent remember exactly how far the coal feeder was from the belt tail roller. He did not take any measurements of this distance, but it was his opinion that the coal feeder provided a sufficient guard for the belt tail roller. He recognized that the structure was unguarded if a miner was greasing the roller. Without a grease hose in place, Dent explained that to grease the roller, a miner had to kneel and bend underneath the edge of the feeder; this would place the miner about 6 to 10 inches from the belt itself. Dent had seen miners under the feeder structure around the belt tail roller greasing and shoveling while the belt line was energized.

9. On November 17, 1982, MSHA Inspector Harold Baisden conducted a triple A inspection of Westmoreland's Hampton Mine No. 3. During his inspection of the 7 Left section face area, Inspector Baisden observed that there was no lock screw on the electrical panel cover inspection plate on the No. 19 shuttle car. Upon closer examination Baisden found that the plate was so loose that it could be rotated by hand. The inspection plate screws into the panel cover on the shuttle car and is supposed to be held tightly in place by a lock screw. The lock screw prevents the inspection plate from rotating loose from the shuttle car. Behind the inspection plate and panel cover are the electrical components and contact points of the shuttle car. When the controls of the shuttle are activated, the contact points behind the inspection plate move, emitting an arc or a spark. It is likely that the inspection plate on car No. 19 became loose either because of improper maintenance or excessive vibration causing the screw to fall out.

10. Hampton Mine No. 3 liberates large quantities of methane, is considered a "hot" or gassy mine, and is subject to section 103(i) spot inspections for methane. Baisden explained that when methane is liberated in the magnitude found at Hampton No. 3 (between 436,000 to 500,000 cubic feet in 24 hours), there is a high risk of an explosion in having impermissible openings of arcing electrical equipment.

11. Based on his observations of the loose panel cover inspection plate without the required lock screw, Baisden issued a section 104(a) citation alleging a violation of 30 CFR § 75.503. Baisden stated that if the inspection plate fell off the shuttle car and methane or float coal dust was present in the area, the exposed electrical contactors in the panel would spark and could cause an explosion or fire.

12. Baisden found that the condition was "significant and substantial." He stated that because of the mine's history of excessive methane liberation and his own personal observations of shuttle car inspection plates falling off, it was very likely that an injury would result from this type of violation. In the event of a mine explosion or fire, up to nine miners working in the area could be killed or seriously injured.

13. An impermissible level of methane was not detected during this inspection, but conditions could change quickly, either because of a sudden change in the mine's ventilation or because of a sudden liberation of methane. Baisden noted that a shuttle car, because of its ability to travel up to 550 feet, was the most likely piece of mine equipment to tear down a ventilation curtain. At the time of the inspection the section was producing coal and the shuttle car was energized and in active use.

14. About 2 weeks later, Inspector Baisden returned to Hampton No. 3 Mine. Upon arriving at the 8 Right section, Baisden observed that the lock screw was missing on the electrical panel cover inspection plate of the No. 21 shuttle car. Baisden's notes indicate that this inspection plate, as with the one on the No. 19 shuttle car, could be turned by hand. Baisden stated that this condition would create the same type of hazard and possible injuries as the condition he observed as to No. 19 shuttle car.

15. Baisden also inspected the No. 24 shuttle car in the same 8 Right section of the mine. He found that the headlight on the shuttle car was not tight to frame. One of the two bolts which attach the headlight to the car was missing and the remaining bolt was so loose "you could turn it with your fingers." As a result, the headlight could be moved up and down a quarter to one-half an inch. Also, a ground wire was not connected to the frame. A loose headlight, not properly grounded to a shuttle car, could cause an electrical shock or external sparking. As a result of this condition, Baisden issued a section 104(a) citation alleging a violation of 30 CFR § 75.503(G-6).

16. According to Inspector Baisden, if the one remaining bolt, which was already loose, came off, the headlight assembly would fall and break against the side of the shuttle car, leaving exposed, hot wires trailing against the car. Any time the wires would hit the shuttle car, there would be a spark, which could ignite any methane or dust in the area. Because of the amount of methane liberated in this mine, exposed, sparking electrical wires would present a high risk of death or serious injury as a result of an explosion, fire or smoke inhalation.

17. Inspector Baisden also found another unsafe condition on the No. 24 shuttle car. The electrical panel cover on the shuttle car had an opening in excess of .0005 inch which he measured by using a feeler gauge. The panel is designed to be explosion-proof. Because there was an opening greater than .0005 inch in the panel, methane could seep into the area where the electrical contactors arc or spark, with a high risk of a mine explosion. Baisden also found that this condition, as with the other electrical permissibility violations alleged in this docket, was "significant and substantial."

18. One witness, Robert Damron, testified on behalf of Westmoreland. Damron did not travel with Baisden during his inspections; nor did he see any of the shuttle cars involved in these proceedings either before or after the citations were issued. Damron was not in a position to refute any of the findings or observations made by Inspector Baisden. Instead, Damron testified generally as to the conditions of the mine when the citations were issued, how certain mining equipment operates and how it would be unlikely that the conditions observed by Baisden could lead to any serious accidents. Because shuttle cars do not have methane monitors, an operator could drive into a pocket of methane without

prior warning. Damron acknowledged that if a headlight was not properly grounded to the frame of a shuttle car, and the headlight became loose and fell off, arcing and sparking would be likely.

Docket No. WEVA 83-123

19. On December 6, 1982, Inspector Dennis Cook observed the No. 1 South belt idler roller and take-up. He found that the mechanical guard which was provided for the belt idler roller and take-up was partially torn down or completely removed. Although there was evidence that roof bolts had been welded across the front of the roller, several of the bolts, which acted as a guard, had been knocked off by a hammer or some other instrument. The screening, intended to guard the tight side of the belt roller, had also been taken off and placed up against the rib. Inspector Cook believed that the guards, which were lying three to four feet from the take-up roller, were removed for maintenance or clean-up work and never replaced.

20. The belt is threaded over and around the idler roller, which is between 12 and 16 inches in diameter. Normally, fencing material or wire mesh is placed around the belt idler roller and take-up to prevent persons from accidentally falling into or reaching into the moving belt or roller "pinch points." A person coming in contact with the pinch points of the roller could be severely injured or killed.

21. Based on his observations that the mechanical guards on the energized 1 South belt idler roller and take-up had been removed on the back and the side, Inspector Cook recommended (see Finding 29, below) a section 104(a) citation alleging a violation of 30 CFR § 75.1722(b). Cook stated that normally one employee works around the belt idler roller, and that this condition could reasonably lead to a serious injury. If someone did get a limb caught in the machinery, that person would be unable to deenergize the belt. Even if another person, probably in an adjacent entry, saw or heard the accident, it would take 15 or 20 minutes to extricate the injured person from the belt idler roller and transport him to the surface. Based on his opinion of a reasonable likelihood of an accident and the seriousness of any resulting injury, Cook alleged that this violation was "significant and substantial."

22. Cook also alleged that the operator's negligence in allowing this condition to exist was high. He stated that the area around the belt idler roller is required to be inspected each production shift by a certified mine examiner, and that the absence of a mechanical guard was so obvious that it should have been detected during such inspection. Also, on the day the citation was issued, three or four miners were working in the area performing clean-up work, along with a management representative. Cook believed that these individuals should have seen the removed guards. The condition was abated by replacing the guards that were lying against the rib.

23. In his inspection on December 6, 1982, Inspector Cook also observed float coal dust on top of rock dusted surfaces around the No. 1 South belt head and at the slope belt tailpiece. The area around the South belt head area was 20 feet wide and 80 to 100 feet long. The area, which is the main discharge point for all the coal that is produced at the mine, was black with dust. When the coal comes off the belt conveyor it is dumped into a hopper, generating float coal dust. Based on his visual observations of the dust accumulation, Cook estimated that the float coal dust had been there at least one shift, possibly several shifts.

24. The area around the slope belt tailpiece was also described by Inspector Cook. The width of the entry ranged from 18 to 40 feet, and the height extended from 8 to 18 feet. The dust was black; there was no question in Cook's mind that it was coal. According to Cook, the accumulations around the slope belt tailpiece had been there at least one shift, possibly longer. Because both areas cited by Cook are required to be inspected on a shift basis and a miner is stationed in close proximity, Cook believed that Westmoreland knew or should have known about the accumulation of float coal dust in these areas. Based on his observations of these conditions Cook recommended a section 104(a) citation alleging a violation of 30 CFR § 75.400.

25. The float coal dust was accumulated in an area where several energized power cables, starter boxes and other electrical components were located. This combination created a dangerous conditon.

26. On the next day, December 7, 1982, Inspector Cook returned to Hampton Mine No. 3. While inspecting the No. 1 South belt starter box, Cook opened the doors on the box and measured 1/16 of an inch of float coal dust in the starter box compartment itself and saw some float coal dust on the contactors in the box. He estimated that it took at least one week for the coal dust to accumulate in the starter box.

27. The starter box is 4 feet long, 24 inches wide and 24 to 36 inches high. Several energized electrical power cables, carrying up to 480 volts, enter the starter box and energize the belt head. The box contains switches and relays, which regularly arc and spark when the electrical cycle is interrupted. Float coal dust was observed on these components.

28. Sparks emitted by the contactors would be sufficient to ignite float coal dust, causing a violent explosion or fire. If a fire developed from the ignition, the heat of the flames could further weaken the already poor roof in this area, and possibly cause a roof fall. The presence of methane would intensify any mine explosion or fire. As stated above, this mine liberates substantial quantities of methane. When Cook observed the condition, the belt starter box was energized, the belt line was working and there were at least two employees in the immediate area. An accident producing serious injuries would be reasonably likely. Based on all of these factors, Cook recommended a section 104(a) citation alleging a violation of 30 CFR § 75.500.

29. Because of a prior break in Cook's service as a MSHA inspector, and the resulting administrative delays in processing his personnel papers, Cook did not have his "authorized representative" card with him at the time of the actual inspections in these proceedings. As a result, he did not sign the citations; instead, another inspector, Harold Baisden, signed and confirmed the citations recommended by Cook.

30. Two of Westmoreland's employees testified at the hearing regarding these citations. Jackie Roberts, a bin operator, testified generally as to the conditions of the mine where the citations were issued, and what type of maintenance is generally required on some of the equipment in the area. However, Roberts did not travel with Inspector Cook during his inspection and could not remember what the conditions were like in the mine when the citations were issued. Roberts was not in a position to refute any of the findings or observations made by Inspector Cook. Roberts stated that if the area where the citations were issued was not rock dusted for two or three days, it would get "awful black" with coal dust from the dumping point. Roberts also

stated that as a result of poor roof conditions in this area, there have been roof fatalities as recent as a year or two ago. Roberts stated that one of Westmoreland's employees, Ralph Karas, lost an arm while he was working on a belt line.

31. The other Westmoreland witness on this charge was Robert Damron. Like with Jackie Roberts, Damron did not have personal knowledge of the conditions cited by inspector Cook. Instead, he testified as to general conditions and practices at the mine which may or may not have occurred or been followed on December 6, 1982; nor did he have an opportunity to observe the float coal dust accumulations in the entire belt slope area described by Inspector Cook.

32. Westmoreland is a large operator. Hampton No. 3 Mine is a large coal mine. In the 24-month period before the order and citations at issue, Westmoreland paid \$35,751 in civil penalties for 216 violations at Hampton No. 3 Mine.

DISCUSSION WITH FURTHER FINDINGS

Docket Nos. WEVA 83-232 and 83-141-R

I find that Westmoreland violated 30 CFR § 75.1722(a) by failing to provide a guard on the tail roller. The condition presented a substantial and significant hazard to miners working around the tail roller. The violation was also unwarrantable as alleged in Order No. 2141231, in that the operator knew or should have known of the violative condition before the Federal inspection.

Under the Act (section 110(i)) six criteria must be considered in assessing a civil penalty. In this case, the parties have stipulated to four of the six criteria, that is, the size of the operator (large) and the mine (large), whether the proposed civil penalties will adversely affect the operator's ability to continue in business (no), whether the conditions cited were timely abated in good faith (yes), and the operator's compliance history (216 paid violations amounting to \$35,751 at Hampton Mine No. 3).

The other factors are the gravity and negligence, if any, involved in the violations.

I find that this violation was serious because of the risk of serious injury to miners who might have come in contact with the tail roller because of the absence of a guard. I also find that the violation was due to negligence of the operator, because the violation could have been detected and prevented by the exercise of reasonable care.

In considering the statutory criteria for assessing penalties, I find that an appropriate civil penalty for this violation is \$750.

The Secretary's order should be affirmed.

Docket No. 83-122

I find that Westmoreland violated 30 CFR § 75.503 as charged in Citations Nos. 2035981, 2035985, and 2035987 by failing to maintain shuttle cars 19 and 21 in permissible condition, because the inspection plates were loose and not secured by lock screws, and by failing to maintain shuttle car 24 in permissible condition, because the headlight was very loose and not properly grounded and there was an impermissible opening in the electrical panel of that car.

These violations presented a serious risk of injury, even death, because of hazards of a methane or float coal dust explosion or fire. The violations were due to negligence of the operator, because they could have been detected and corrected by the exercise of reasonable care.

In considering the statutory criteria for civil penalties, I find that appropriate civil penalties for these violations are: Citation No. 2035981 -- \$276, Citation No. 2035985 -- \$329, and Citation No. 2035987 -- \$329.

Docket No. WEVA 83-123

I find that Westmoreland violated 30 CFR § 75.400 as charged in Citations Nos. 2035998 and 2035999.

Inspector Cook testified that he observed float coal dust accumulations around the No. 1 South belt head, the slope tailpiece and in the energized belt starter box, the dust he observed was black, and there was no doubt in his mine that it was float coal dust.

The operator did not offer any persuasive evidence to refute Cook's observations.

The violations presented a serious risk of injury to miners because of the danger of float coal dust and possible sources of ignition in the affected areas.

The violations were due to negligence of the operator, because they could have been prevented by the exercise of reasonable care.

Considering the criteria for civil penalties, I find that an appropriate civil penalty for each violation is \$294.

I find a violation of 30 CFR § 75.1722(b) as charged in Citation 2035997. Inspector Cook testified without contradiction that the guard for the belt idler roller had been removed and left on the mine floor. He estimated that the guard had been taken off at least two, possibly more, production shifts earlier.

This violation presented a serious risk of injury and was due to negligence attributable to the operator.

Considering the criteria for civil penalties, I find that an appropriate penalty for this violation is \$241.

At the hearing I approved settlement of Citation 2140562 by assessing a civil penalty of \$100 and settlement of Citation 2140566 by assessing a civil penalty of \$371.

CONCLUSIONS OF LAW

1. Westmoreland violated safety standards as charged in Order No. 2141231 and in Citations Nos. 2035981, 2035985, 2035987, 2035997, 2035998, and 2035999.
2. Settlements of Citations Nos. 2140562 and 2140566, as stated in the Transcript, page 252, are APPROVED.
3. Westmoreland is ASSESSED the civil penalties specified in the Discussion part of this Decision.

ORDER

WHEREFORE IT IS ORDERED that:

1. Westmoreland shall pay the above civil penalties in the total amount of \$2,984 within 30 days of this Decision.
2. Order No. 2141231 is AFFIRMED.


William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 18 1985

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-161-D
ON BEHALF OF	:	MSHA Case No. PIKE CD-82-15
LARRY DUTY,	:	
Complainant	:	Docket No. KENT 83-232-D
v.	:	MSHA Case No. PIKE CD-83-06
	:	
WEST VIRGINIA REBEL COAL	:	No. 1 Surface Mine
COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq., and Ralph D. York, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant; George V. Gardner, Esq., and J. Edgar Bailey, Esq., Gardner, Moss, Brown and Rocovich, Roanoke, Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

On March 1, 1983, the Secretary filed a complaint with the Commission on behalf of Larry Duty alleging that he was discharged on February 8, 1982, from his job with Respondent West Virginia Rebel Coal Company, Inc. (Rebel), for activity protected under the Mine Safety Act (Act). Duty was returned to work after this discharge, and was again discharged on March 3, 1983. The Secretary instituted a separate proceeding on May 24, 1983, by filing an Application for Temporary Reinstatement. A complaint was filed August 22, 1983, alleging that the discharge of Duty on March 3, 1983, was also for activity protected under the Act. The cases were assigned to Judge Joseph B. Kennedy who presided over certain pretrial activity including an on-the-record pretrial hearing on May 3, 1984. Judge Kennedy recused himself on May 29, 1984, and the cases were assigned to me on May 30, 1984.

Pursuant to notice, the cases were heard on the merits in Paintsville, Kentucky, on July 9 through July 13, 1984, and on September 11 through September 13, 1984. Larry Duty, Robert B. Goodman, John Franklin Meade, Hobert Meade, Tommy R. Ryan, Johnny Pennington, Delmer Green, John Patrick McCoart, Kenneth Borders, Roger Dean Fannin, Donald Litton, James Robert Collins, Philip Wells, Jerry Lee Meade, Barry Wilson Lawson, R. C. Hatter, William Creech, Gary Ousley, John H. Gamble and John South testified on behalf of Complainant; Lambertus Boerboom, Ezra Martin, Milton Preston, Clarence Inscore, Pete Webb, O'Dell Rogers, Malcolm Van Dyke, Jake Taylor Watts, Nina Sneed Tackett, Paul Greiner, Wendell Knight and Dale Mosely testified on behalf of Respondent.

Both parties have filed extensive posthearing briefs. Based on the entire record and carefully considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT COMMON TO BOTH PROCEEDINGS

1. At all times pertinent to these proceedings, Respondent West Virginia Rebel Coal Company, Inc., was the owner and operator of a surface coal mine in Martin County, Kentucky, known as the No. 1 Surface Mine, the products of which entered interstate commerce.
2. At all times pertinent to these proceedings, Complainant Larry Duty was employed by Respondent Rebel as a miner. He began his employment with Rebel in April 1977.
3. Duty was a member of the United Mine Workers of America (UMWA) and, in December 1979, was appointed member and Chairman of the Mine Health and Safety Committee at the subject mine. He also acted as head of the Mine Committee which dealt with contract grievance matters under the collective contract between the UMWA and the Bituminous Coal Operators Association (BCOA). This contract governed the employment relations between Rebel and its miner-employees.
4. In May, 1980, Duty was elected President of Local 1827 UMWA. He continued as President until April 1983, when he became ineligible for the position because he was no longer actively employed as a miner at Rebel.
5. The evidence concerning the size of Rebel's business at the times it is alleged in these proceedings to have violated 105(c) of the Act, shows that in 1983,

Respondent had 131 employees at the subject mine (Secretary's Exhibit C-12). In 1981, approximately 1,292,568 tons of coal was produced by Respondent (Secretary's Exhibit C-65); apparently 980,172 tons were produced at the subject mine (Secretary's Exhibit C-63); in 1982, 1,353,829 tons were produced by Respondent, 1,050,408 tons at the subject mine (id); in 1983, 919,118 tons were produced at the subject mine (C-63) and from January to March 1984, 185,288 tons were produced (id). On the basis of this evidence, I conclude that Respondent is of moderate size.

6. Between March 3, 1981 and March 2, 1983, 354 violations were assessed against the "controller" of Respondent (the owner of Respondent, O'Dell Rogers, also owned other companies), 35 of which were paid. (Secretary's Exhibit C-27). Between the same dates, 51 violations were assessed against Respondent, 32 of which were paid. (Secretary's Exhibit C-1). I do not consider this history to be such that penalties otherwise appropriate should be increased because of it.

7. Respondent is presently in bankruptcy before the Bankruptcy Court for the Eastern District of Kentucky in Lexington, Kentucky (transferred from the Western District of Virginia). The Statement of Financial Affairs filed by Rebel shows an inventory of the property on April 30, 1983, of \$421,976 (at cost). An attached schedule shows pending suits against the company seeking more the 2 million dollars in damages. Included in these suits are cases brought by MSHA to collect civil penalties. The same documents show that Respondent has sold and had repossessed substantial quantities of mining equipment. It shows further in a list of notes and accounts payable that it owes creditors in excess of 3 million dollars. Based on this information, it is apparent, and I find that the imposition of substantial penalties in these cases would affect Respondent's ability to continue in business.

8. On a number of occasions prior to the incidents involved herein, Complainant was disciplined for matters he considered related to miners' safety. (1) In about February 1980, he asked management to have the miners withdrawn because of what he thought was an imminent danger (loaders working within 100 feet of charged holes). He asked MSHA for an inspection under section 103(g) of the Act. The foreman J. D. Ellison threatened to fire him thereafter. (2) At an unrelated grievance meeting in March 1980, Superintendent Clarence Inscore asked Complainant if he had called MSHA concerning Respondent's failure

to have a supervisor in a remote area. Inscore made what Complainant considered an oblique threat when Complainant told him he had called MSHA. (3) On about September 12, 1980, Complainant complained that the coal trucks were not properly trimmed. He was criticized for this by Inscore and later discharged. He filed a grievance which went to arbitration before being settled by the imposition of a 3-day suspension. (4) On October 17, 1980, Complainant received a written warning because he stopped his time to inform miners of the status their grievance proceedings. Complainant filed a grievance and the warning was removed from his records. (5) On October 21, 1980, Complainant filed a health and safety grievance because the coal trucks were not properly trimmed. In step 2, the company agreed to make a reasonable effort to keep the trucks reasonably trimmed and the grievance was dropped. (6) On December 11, 1980, Complainant was relieved of his duties subject to discharge for conducting union business during working hours and interfering with management. (7) On December 19, 1980, he was suspended with intent to discharge when he filed a 103(g) inspection request on behalf of employees at the L & M Coal Company (members of the same union local) while on suspension. He filed a 105(c) case which came to the Commission and was settled. The settlement provided that Complainant receive pay for the 10-day suspension and that all references to the suspensions be removed from his personnel file. (8) In February 1981, Respondent discharged Complainant for using the bath house after Respondent had declared it "off limits" to truck drivers during production hours. He filed a grievance which went to arbitration. The arbitrator modified the discipline to a 14 day suspension without pay.

FINDINGS OF FACT IN DOCKET NO. KENT 83-161-D

On February 8, 1982, Duty was working as a laborer with the blasting crew on the day shift. At the beginning of the shift, he met with an MSHA inspector who was preparing an accident survey at the mine. After the meeting, Duty went to a blasting area called the shovel pit. The blasting foreman, Lambertus Boerboom, ("Dutch") then sent him to the magazine to obtain explosives and take them to another blasting area called the binder pit. There two end loaders were removing overburden and loading it into rock trucks at each end of the binder. The trucks then carried it to a nearby spoil area and dumped it. Holes had been drilled in the binder to be loaded with explosives. Duty and the pit foreman, Ezra Martin, had a discussion concerning whether the loaders would be too close to the holes

after they were charged. Duty said they would be, and Martin said the equipment would be pulled out when they started loading the holes. One of the loaders broke down and was moved to a point about 50 to 75 feet from the binder shot holes where repairs were performed on it. The other loader was being operated about 75 to 100 feet from the holes. The two rock trucks passed to within 15 to 25 feet of the holes when dumping the overburden.

Duty then returned to the shovel pit and resumed his work loading the holes. He could see the binder pit area from the shovel pit and noticed that the trucks were still being operated there although the prell (ammonium nitrate, a explosive) and primers had been placed in the holes. On two occasions, he told Dutch who said he would call Martin. The work continued, however, and Duty requested that his time be stopped so that he could go on union time to inspect the area, because he believed the situation created an imminent danger. I find as a fact that his belief was in good faith. Dutch told him to go ahead and inspect the area. Duty asked whether a management official would accompany him, and whether transportation would be supplied. Dutch then took him in a company vehicle to the office where he received a notice of discharge for insubordination and interference with management. Duty filed a grievance which went to arbitration. On March 29, 1982, the arbitrator issued an opinion and award sustaining the grievance and ordering Duty reinstated with back pay. The company did reinstate him, and paid him for his lost time from work except for one day. Duty claims that he is entitled to pay for that one day with interest.

There are conflicts in the testimony concerning the binder pit incident. I have largely accepted Complainant's version which is corroborated by other witnesses, particularly by Robert Goodman, a State licensed blaster, who drove the prell truck and loaded the holes on the day in question. My findings are consistent with those made by the arbitrator in the grievance proceeding.

FINDINGS OF FACT IN DOCKET NO. KENT 83-232-D

As President of the Local Union and Chairman of the Mine Safety and Health Committee, Duty received \$280 per month from the Union. As part of this case, he claims reimbursement for 5 months during which he failed to receive this amount which he alleges resulted from the discrimination complained of herein.

Duty returned to work following the arbitrator's decision referred to above, and continued as a laborer on the shooting crew until March 27, 1982, when he was assigned to cleaning equipment. At some time thereafter, he became a coal truck driver and worked as a driver for about 1 year. On about March 3, 1983, he was assigned to operate a loader at the coal stockpile, loading coal trucks. The coal was taken by Rebel's trucks to the tipple operated by Island Creek Coal Company. After he loaded "a few trucks," the coal inspector from the Island Creek tipple, Kenneth Borders, came to where Duty was loading and told him to lower his load a little and to load the trucks "graveyard style, and just have the hump in the center" (Tr. III, 106). Borders repeated the instruction to the foreman, William Runyon (also known as "Preacher"). Borders testified that he gave the instruction because coal was spilling on the tipple road from overloaded trucks.

On at least four occasions prior to March 3, 1983, Duty had filed grievances or complaints alleging that Respondent was not properly "trimming" its coal trucks. The issue was raised at one union meeting in February 1983.

A short time after Borders left the stockpile area on March 3, 1983, Mr. O'Dell Rogers, President of Respondent Rebel, arrived with J. T. Watts, Superintendent. Rogers told Duty to load additional coal on a truck which was "fixing to pull out and it was half loaded too." (Tr. VII, 91). Duty loaded additional coal on the truck and it pulled out "with lumps hanging over the side." (Tr. III, 149). The truck driver, Philip Wells, testified that the truck "was real heavy," and coal fell off as he was driving to the tipple (Tr. VI, 17-18). Rogers followed the truck to the tipple and testified that "there might have been a peck or something" of coal that fell from the truck going around a curve (Tr. VII, 94).

Rogers returned to the stockpile and he and Duty had a heated discussion concerning the loading of trucks. Duty then requested that his time be stopped so that he could go to MSHA. Runyon drove him to the portal where Duty's private vehicle was located. Duty drove to the Paintsville MSHA office and made a written request for an inspection under section 103(g) of the Act. When he returned to the mine site, he was told to go home and was discharged for "interfering with management. Refusing to work as directed by management. Leaving job site without permission or stated good cause." (Secretary's Exh. C-11).

Duty filed a grievance which went to arbitration. The arbitrator denied the grievance and the discharge was upheld. The 103(g) inspection resulted in a citation for improperly trimmed coal trucks (Secretary's Exh. C-5). Duty filed a 105(c) complaint with MSHA and Judge Kennedy issued an Order of Temporary Reinstatement on May 25, 1983, on application of the Secretary. Duty did not return to work, however, but was placed on "economic reinstatement" effective May 31, 1983. In May 1983, Duty was reelected President of his local union for a 3-year term. The election was challenged and a new election was ordered by the International Union because Duty was not then actively employed as a miner. He returned to work on July 27, 1983. A new election was held in August and Duty was defeated. He went back on economic reinstatement on September 1, 1983. Duty did not receive the \$280 per month as union President and Committeeman in April, May, June or July 1983. He continued on economic reinstatement until he was laid off pursuant to the contract on March 16, 1984. Subsequent to that date, Rebel has recalled miners with less seniority than Duty but has refused to recall Duty. On September 11, 1984, I issued a bench order on the record that Respondent reinstate Duty with back pay to the date he was entitled to be rehired under the terms of the contract. This order was issued in written form on September 18, 1984, and corrected on October 3, 1984.

ISSUES

1. Did the discharge of Duty on February 8, 1982, result from activities protected under the Act?
2. Did the discharge of Duty on March 3, 1983, result from activities protected under the Act?
3. If either or both of the above issues are answered affirmatively, to what relief is Duty entitled?
 - (a) May he be reimbursed for loss of income received as local union President and Committeeman?
4. If either or both of the first two issues are answered affirmatively, what are the appropriate civil penalties for the violations?

EVIDENTIARY RULINGS

Respondent objected to the admission into evidence of Secretary's Exhibits 2 through 6 and renewed its objections in its posthearing brief. The objection was to the relevance of the documents. Exhibits 2, 3 and 4 were notes prepared by Duty as Safety Committeeman with reference to certain alleged safety problems at the mine site. Exhibit No. 4 also contains a grievance filed by Duty resulting from his discharge and an agreed arbitration award wherein the discharge was modified to a 3-day suspension. Exhibit Nos. 5 and 6 are grievances filed by Duty both in October 1980, one because he was given a written warning for allegedly conducting union business on company time, the other a safety grievance filed by Duty because of alleged improper trimming of coal trucks.

Exhibit No. 2 contains notes of a protest Duty made on February 19, 1980, because of loaders working within 30 feet of charged holes. Duty asked that the men be removed which ultimately was done. MSHA was called, and a closure order was issued. Exhibit No. 3 contains notes of a "3rd step safety meeting" with management March 27, 1980, apparently over the absence of a foreman in certain areas. Exhibit No. 4 relates to alleged improper trimming of trucks on September 12, 1980, and the grievance proceedings in connection therewith.

Although none of these documents or the incidents they refer to is directly concerned with either of the alleged discriminatory discharges involved herein, they tend to show a pattern of hostility between Duty and Rebel over conduct similar to that involved herein. The documents are relevant to these proceedings.

Milton Preston, Rebel's Safety Director, testified that he had a conversation with Duty in which Preston asked Duty what he thought about reports of charges by Judge Kennedy "that inspectors had been on the take." (Tr. III, 10). The conversation took place about in June 1984. Preston testified that the discussion had nothing to do with the instant case. I sustained an objection to the testimony and counsel for Respondent made an offer of proof "that Mr. Duty had a conversation with Judge Kennedy while his very own case was pending before this court . . . the relevance is it would be prejudicial to this case, and the mere fact that a judge of this court has talked with this defendant (sic) without notifying counsel is prejudicial in and of itself." Judge Kennedy recused himself by an order

issued May 29, 1984. The case was reassigned to me on May 30, 1984, and has been entirely my responsibility since that date. The testimony, assuming as true the facts in the offer of proof (that Judge Kennedy had a conversation with Duty) has no relevance to these proceedings and would be of no assistance in the just resolution of the issues. The objection was properly sustained.

CONCLUSIONS OF LAW DOCKET NO. KENT 83-161-D

Duty was discharged on February 8, 1982, ostensibly for "insubordination and interference with management." In fact, he was discharged, as my findings show, for requesting that his time be stopped so that he could inspect an area which he believed to be dangerous. Duty was acting as Chairman of the Mine Safety Committee. His action is protected by the Act if it was reasonable and in good faith. See Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds, Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). "Good faith," the Commission held in Robinette, "simply means honest belief that a hazard exists." Id., at 810. With respect to the requirement that affirmative self help be reasonable, the Commission said that "a miner need only demonstrate that his affirmative action was a reasonable approach under the circumstances to eliminating or protecting against the perceived hazard." Id. at 812. I have found that Duty had a good faith belief that the situation at the binder pit was dangerous. Unlike Robinette, Duty was a representative of the miners as local union president and safety committee chairman. He had a special responsibility for the safety of the miners. Compare Local 1110, UMWA and Carney v. Consolidation Coal Co., 1 FMSHRC 338 (1979). The reasonableness of his action is supported by the testimony of miners working in the binder pit that the equipment was being operated within 100 feet of the charged holes. There may be a legitimate dispute as to whether this is dangerous, but I conclude that one who believes it to be dangerous is acting reasonably. Therefore, I conclude that the discharge of Duty on February 8, 1982, was the result of activities protected under the Act. It therefore was in violation of section 105(c) of the Act.

CONCLUSIONS OF LAW DOCKET NO. KENT 83-232-D

Duty was discharged on March 3, 1983, ostensibly for interfering with management, refusing to work as directed, and leaving the work site without permission. In fact, he

was discharged because of a dispute over the proper loading and trimming of coal trucks. The testimony is conflicting as to whether Rogers' direction that Duty increase the load on the truck driven by Philip Wells on March 3, 1983, resulted in a dangerously overloaded truck. Wells testified that the truck "weaved" because of the load and coal fell off as he drove to the dump (Tr. VI, 17, 18). Rogers testified that he had observed "half loaded trucks" (Tr. VII, 90) going to the dump and that he saw the truck loaded by Duty "fixing to pull out and it was half loaded too." (Tr. VII, 91). He directed that more coal be added and that the load be trimmed. When the truck pulled out, he followed it to the tipple, did not notice it weaving and only "a peck or something" of coal fell off going around a curve. His testimony was generally supported by that of Malcolm Van Dyke, foreman and J. T. Watts, Superintendent of Rebel. Watts testified that Wells stated when questioned at the tipple that the load was safe and that he had "no problems" (Tr. VII, 146).

I conclude (1) the question of overloading trucks and improperly trimming trucks is a matter involving safety to miners; (2) Duty in good faith believed that he was directed by Rogers on March 3, 1983, to overload coal trucks and that this caused a safety hazard to miners, (3) this belief was reasonable under the circumstances, since injury to miners could result from the practice; (4) Duty's action in requesting that his time be stopped so that he could request an MSHA inspection was reasonable, particularly because he was a representative of the miners in safety matters. See Local 1110 UMWA and Carney v. Consolidation Coal Co., supra.

Therefore, I conclude that the discharge of Duty on March 3, 1983, was the result of activities protected under the Act. It therefore was in violation of section 105(c) of the Act.

RELIEF

1. The statement of back wages filed by the Solicitor indicates that Duty "should have been recalled from layoff" (pursuant to my order of October 3, 1984) during "the period from July 17, 1984 to October 26, 1984." From that statement, I assume that his continued absence from work beyond October 26, 1984 results from a layoff proper under the contract. Therefore, I do not order his reinstatement. However, because Commission orders have been flouted by Respondent in the past, I ORDER Respondent to reinstate

Complainant Duty when by reason of his seniority (which shall not be affected by the discharges involved herein), he is entitled to be recalled under the contract.

2. IT IS FURTHER ORDERED that within 30 days of the date of this decision, Respondent pay back wages which Complainant Duty lost as a result of his wrongful discharge on February 8, 1982, with interest thereon in accordance with the Commission approved formula in Secretary/Milton Bailey v. Arkansas-Carbona Company and Michael Walker, 5 FMSHRC 2042 (1983).

a. The parties have stipulated that the gross amount due as back wages is \$66.90. Interest on this amount to December 10, 1984, is \$26.05.

b. Respondent is ORDERED to pay Complainant the sum of \$92.95 as back wages and interest for the wrongful discharge of Complainant on February 8, 1982. Docket No. KENT 83-161-D.

3. IT IS FURTHER ORDERED that within 30 days of the date of this decision, Respondent pay back wages which Complainant Duty lost as a result of his wrongful discharge on March 3, 1983, with interest thereon in accordance with the Commission approved formula in Arkansas-Carbona, supra.

a. The parties have stipulated that the gross amount due as back wages is \$20,602.29. Interest on this amount to December 10, 1984, is \$1,898.44.

b. Respondent IS ORDERED to pay Complainant the sum of \$22,500.73 as back wages and interest for the wrongful discharge of Complainant on March 3, 1983 Docket No. KENT 83-232-D.

4. IT IS FURTHER ORDERED that Respondent shall expunge references to these discharges from Duty's employment records and shall post a copy of this decision at a conspicuous place at the mine office.

5. The uncontradicted testimony shows that Duty lost income he had previously received as local union president and safety committee chairman as a result of his discharge. The claim submitted indicates that this income was lost for

a 5-month period. However, the evidence shows that he lost this income in April, May, June and July 1983, and was defeated in an election held at some unknown date in August 1983. Therefore, I find that he is entitled to reimbursement of \$280 for 4 months (\$1,120) with interest thereon in accordance with the above formula.

a. Within 30 days of the date of this decision, Respondent IS ORDERED to pay Complainant the sum of \$1,290.70 as reimbursement for loss of 4 months income (with interest) from the union resulting from his wrongful discharge by Respondent.

CIVIL PENALTIES

The two violations found to have occurred herein were serious. They were attempts to undermine a basic purpose of the Mine Act "to consciously involv[e] the employees in the enforcement of safety regulations and protect that involvement." Broderick and Minahan, Employment Discrimination Under the Federal Mine Safety and Health Act, 84 West Va. L. Rev. 1023, 1066 (1982). See S. Rep. No. 181, 95th Cong., 1st Sess. at 35 (1977), reprinted in 1977 U.S. Code Cong. & Ad. News at 3435. The violations were deliberate. Respondent is a moderate sized operator and does not have a serious history of prior violations. Respondent is in bankruptcy attempting a reorganization. High penalties might affect its ability to continue in business. Based on the criteria in section 110(i) of the Act, I find the following civil penalties to be appropriate.

Docket No. KENT 83-161-D	\$100
Docket No. KENT 83-232-D	\$400

Respondent is therefore ORDERED to pay within 30 days of the date of this decision the sum of \$500 as civil penalties for the violations found herein to have occurred.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S.
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Nashville, TN 37203 (Certified Mail)

George V. Gardner, Esq., and J. Edgar Bailey, Esq.,
Gardner, Moss, Brown and Rocovich, Suite 900, Dominion Bank
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(Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 18 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. WEVA 84-373
	:	A.C. No. 46-03307-03567
VALLEY CAMP COAL COMPANY, Respondent	:	No. 15-A Mine
DONALDSON MINE CORPORATION, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 84-147-R
	:	Order No. 2127006; 2/28/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 15-A Mine

DECISION

Appearances: Mary K. Spencer, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor;
Laura E. Beverage, Esq., Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia, for Valley Camp Coal Company and Donaldson Mine Corporation.

Before: Judge Melick

These consolidated cases are before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., "the Act", to contest a citation and withdrawal order issued to Valley Camp Coal Company (Valley Camp) and its wholly owned subsidiary, Donaldson Mine Corporation, and for review of civil penalties proposed by the Mine Safety and Health Administration (MSHA), for the violations charged therein.

Withdrawal Order No. 2127006 issued under section 104(d)(2) of the Act 1/ reads as follows:

Overhanging rock was present at the junction of the roof and rib along the left side of No. 5 room right off 6 left section (NNU002-0). The overhang was present 30 feet inby survey station No. 3739 and extended inby towards the face for a distance of 12 feet. The overhanging rock extended from the vertical rib line a distance of 48 inches out over the active work place.

The cited standard, 30 C.F.R. § 75.202, requires in relevant part that "loose roof and overhanging or loose faces and ribs shall be taken down or supported."

MSHA Investigator Homer Grose, arrived at the scene of a fatal rock fall in the No. 5 room right off 6 left section of the No. 15 Mine at around 6:30 p.m., on February 27, 1984. At the accident scene, he observed that a portion of overhanging brow some 12 feet long still remained along the left rib of the No. 5 room. Grose described the brow as ranging from 24 inches to 48 inches in width and extending into the work area. According to Grose, the brow was readily observable because of its size and within the brow, fractures could be seen. It is not disputed that photographs taken at the time of the investigation (Exhibit G-6, Photographs 1 through 6) accurately depict the cited brow.

Valley Camp does not deny the existence of the cited brow but alleges that it was not as large as described by Inspector Grose and was not a hazard. While the responsible section foreman, Paul Williams, was not sure he saw any

1/ Section 104(d)(2) provides as follows:

"If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), 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 paragraph (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."

brow, Keith Grounds, the continuous miner operator who had been working in the No. 5 room just before the fatal accident, thought there was indeed a brow about 2 feet thick. Another Valley Camp witness, Jack Campbell, the Manager of Safety and Training, estimated that the brow was not more than 10 inches thick.

The thickness of the brow as demonstrated in Photographs 4, 5 and 6 of Exhibits G-6 is not disputed. Moreover, since Inspector Grose used a tape measure to determine the dimensions of the brow, (see for example Exh. G-6 photographs 4, 5 and 6) I give dominant weight to his testimony in this regard. Since even a 10 inch overhanging rib constitutes a violation of the cited standard, the size of the overhanging area is, in any event, significant only insofar as it relates to a greater hazard and increased negligence. It is of course also relevant to the "significant and substantial" and "unwarrantable failure" findings associated with the order at bar.

In determining whether there was an unwarrantable failure to comply with the cited standard, additional evidence must also be considered. An unwarrantable failure to comply may be proved by showing that the violative condition or practice was not corrected or remedied prior to the issuance of the order because of indifference, willful intent, or a serious lack of reasonable care. United States Steel Corporation v. Secretary, 6 FMSHRC 1423 at 1437 (1984).

In this case, the evidence shows that normal mining progressed on the morning of February 27, 1984, until the second cut by the continuous-mining machine in the No. 5 room. At that time, a section of roof (ranging from 10 to 16 inches thick, 16 feet wide and 16 feet long) fell onto the continuous-mining machine, but caused no injury or damage.

Section foreman Paul Williams heard the roof fall at what he thought was around 11:30 that morning and 10 or 15 minutes later he was at the scene of the fall. He remembers talking to the deceased, Don Jones, and to Keith Grounds the continuous miner operator, but does not recall "what all was said." Williams testified that he did not see the brow, but later said he "could have" seen it. In any event, Williams gave no specific instructions to the crew, relying on their experience and the "general practice" at the mine to take down or support "loose brows." Williams opined that rock falls of this magnitude were not unusual at

the No. 15-A Mine and occurred about once a shift. He also acknowledged, however, that loose rock and overhanging brows are potential hazards remaining after roof falls.

Keith Grounds, the continuous miner operator, testified on behalf of Valley Camp that he cleaned up after the roof fall and then inspected the area with the deceased. They agreed that the room "looked alright." Grounds concedes, however, that he had been unable to remove the cited brow in the No. 5 room because of an obstructing ledge that remained after the roof fall. Grounds testified that in any event it was then the accepted practice at the mine not to cut down brows less than 2 feet thick. He estimated that the remaining brow was in fact about 2 feet thick.

It is not disputed that the roof-bolting machine operated by the deceased was then trammed to the No. 5 room. After installation of the third row of roof supports, John Wright, acting as roof bolter helper, retracted the ATRS (Automated Temporary Roof Support System) and trammed the machine into position for the last row of roof supports. Jones stood aside near the left rib when a section of overhanging rock fell from the junction of the roof and rib pinning Jones to the floor.

According to the undisputed testimony of MSHA Investigator Grose, it is the standard industry practice for the section foreman to examine and inspect the affected roof area following a roof fall such as the one in this case. The section foreman then has the responsibility to determine what action should be taken to remove hazards and to verify that no hazards remain before allowing production to resume.

Section foreman Williams in this case admittedly left such decisions to the individual judgment of his work crew. That practice was clearly deficient under prevailing industry standards and directly contributed to the death of a miner in his charge. Williams had knowledge of the first roof fall and was present in the room in which the fall occurred, but did not even take time to thoroughly evaluate the residual roof conditions for himself. Moreover, he allowed production to resume without first examining the work place to determine whether any hazards remained. The violation was accordingly the result of gross negligence.

I also observe that it had been management policy at the subject mine to allow overhanging brows to remain in work areas so long as such brows were no more than 2 feet

thick. Thus the miners herein allowed a substantial brow to remain along the left rib of the No. 5 room, which was deemed to be no greater than 2 feet thick. This policy also directly contributed to the death of Mr. Jones and also warrants an independent finding of gross negligence. The same evidence establishing gross negligence also supports a finding that the violation was caused by the "unwarrantable failure" of the mine operator to comply with the standard. United States Steel Corporation, supra, at 1437.

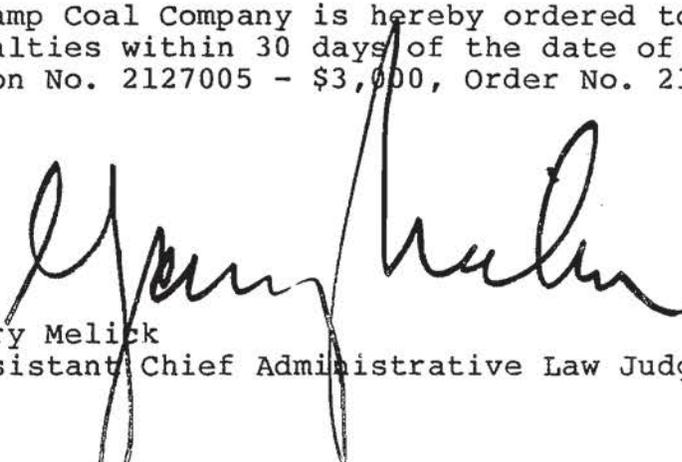
Since it is undisputed that an overhanging rib or brow at least 2 feet thick existed in an active working place where a roof fall had recently occurred and in an area where roof falls were common, there was clearly a "significant and substantial" violation of the cited standard. It was indeed reasonably likely that death or serious injuries would result in that active work place. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984). Since it is undisputed that there had been no intervening clean inspections of the subject mine between the date of the precedential section 104(d)(1) order (Order No. 1064308) and the date of the issuance of the section 104(d)(2) order at bar, (Order No. 2127006), the latter order is affirmed.

In determining the appropriate penalty to be assessed in this proceeding, I have also considered that the mine operator is large in size and has a fairly substantial history of violations. Under the circumstances, I find that a penalty of \$5,000 is appropriate.

A motion for approval of a settlement agreement was submitted at hearing with respect to Citation No. 2127005. The citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.200, because work was being performed by the deceased under unsupported roof. Valley Camp has agreed to pay the proposed penalty of \$3,000 and considering the facts in this case in light of the criteria under section 110(i) of the Act, I find the proposed settlement to be appropriate.

ORDER

The Valley Camp Coal Company is hereby ordered to pay the following penalties within 30 days of the date of this decision: Citation No. 2127005 - \$3,000, Order No. 2127006 - \$5,000.



Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

Mary K. Spencer, Esq., Office of the Solicitor, U.S.
Department of Labor, 4015 Wilson Boulevard, Room 1237A,
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Laura E. Beverage, Esq., Jackson, Kelly, Holt and
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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 18 1985

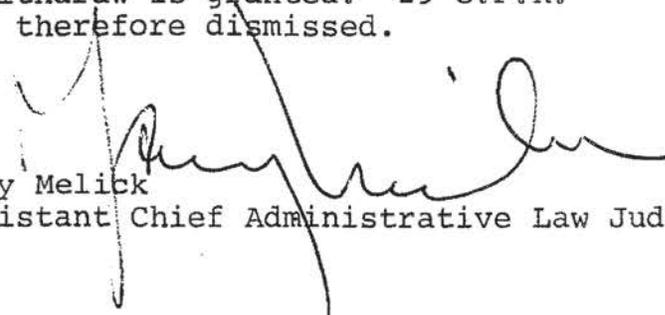
METTIKI COAL COMPANY : CONTEST PROCEEDING
Contestant :
v. : Docket No. YORK 84-11-R
: Order No. 2413197; 5/22/84
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : C-Mine
ADMINISTRATION (MSHA), :
Respondent :

ORDER OF DISMISSAL

Appearances: Adrienne J. Davis, Esq., Crowell & Moring,
Washington, D.C., for Contestant;
Covette Rooney, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Respondent.

Before: Judge Melick

Following hearings held on October 31, 1984 and January 3, 1985, the Respondent moved to modify the section 104(d)(2) order at bar to a section 104(a) citation. The motion was granted for reasons stated on the record and thereafter the Mettiki Coal Company requested approval to withdraw its Contest in the captioned case. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. The case is therefore dismissed.


Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

Adrienne J. Davis, Esq., Crowell & Moring, 1100 Connecticut Avenue, N.W., Washington, D.C. 20036 (Certified Mail)

Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

rbg

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 22 1985

STEVE L. TURNER, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 84-233-D
TERRY GLENN COAL COMPANY, : MSHA Case No. BARB CD 84-36
Respondent :

DECISION

Before: Judge Melick

On August 13, 1984, the Complainant, Steve Turner, filed a complaint of discrimination under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., "the Act," with the Secretary of Labor, Mine Safety and Health Administration (MSHA) against the Terry Glenn Coal Company. That complaint was denied by MSHA and Mr. Turner thereafter filed a complaint of discrimination with this Commission on his own behalf under section 105(c)(3) of the Act. Mr. Turner, alleges that he was discharged in violation of section 105(c) of the Act because he was falsely accused of smoking in the mine. More specifically he alleges as follows:

A cigarette butt was found at the North Main Headdrive, no one saw anyone smoking and everyone entering and exiting the working place uses this route. It could have been anyone in the mines but I was accused of smoking. They had the opportunity to search me, but they declined my offer. Because of this accusation I lost my job and a whole lot more.

The Terry Glenn Coal Company (Terry Glenn) thereafter responded, inter alia, that the "complaint fails to state a claim upon which relief can be granted under section 105(c)." That contention may be taken as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the purposes of such a motion, the well pleaded material allegations of the complaint are taken as admitted. 2A Moore's Federal Practice, ¶ 12.08. A complaint should not be dismissed for insufficiency unless it appears to a certainty that the complainant is entitled to no relief under any state of facts which could be proved in support of a claim. Pleadings are, moreover, to be liberally construed and mere vagueness or lack of detail is not grounds for a motion to dismiss. Id.

Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings 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, representative or miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

In order to establish a prima facie violation of section 105(c)(1) the Complainant must prove that he engaged in an activity protected by that section and that his discharge was motivated in any part by that protected activity. Secretary ex. rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds, sub nom, Consolidation Coal Company v. Secretary, 663 F.2d 1211 (3rd Cir., 1981). In this case Mr. Turner asserts that he was discharged solely because of false accusations that he had been smoking a cigarette in the mine. Even assuming that the allegation is true however, it is clearly not sufficient to create a claim under section 105(c)(1) of the Act. That section does not provide redress for a discharge that may

have been unfair if that discharge was not caused in any part by an activity protected by the Act. Accordingly the complaint herein must be denied and the case dismissed.


Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

Mr. Steve L. Turner, Star Route, Box 704, Coxton, KY 40831
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Randall Scott May, Esq., Barret, Haynes & May, P.O. Box
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rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JAN 22 1985

JOHN A. VOYTEN, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. PENN 84-184-D
: :
CANTERBURY COAL COMPANY, : MSHA Case No. PITT CD 84-06
Respondent :
: DiAnne Mine
:

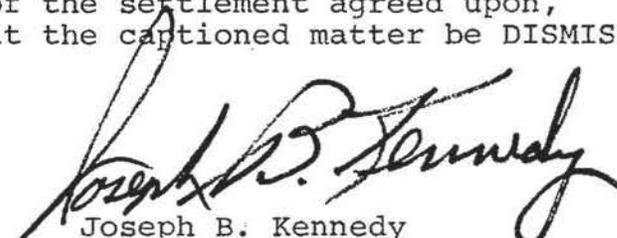
DECISION APPROVING SETTLEMENT

Before : Judge Kennedy

This matter is before me on the complainant's motion to approve settlement.

Based on an independent evaluation of the circumstances, I find the settlement proposed is in the interest of complainant and in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motion be, and hereby is GRANTED. It is FURTHER ORDERED that the operator pay FORTHWITH the amount of the settlement agreed upon, and that subject to payment the captioned matter be DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

Distribution:

Charles F. Fox III, Esq., Uncapher and Uncapher, Attorney for John A. Voyten, Grant and Columbia Avenues, Vandergrift, PA 15690 (Certified Mail)

R. Henry Moore, Esq., Attorney for Canterbury Coal Company, 900 Oliver Bldg., Pittsburgh, PA 15222 (Certified Mail)

/ejp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JAN 23 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 84-98-M
Petitioner : A.C. No. 39-00055-05522
v. : Homestake Mine
HOMESTAKE MINING COMPANY, :
Respondent :

DECISION

Appearances: Eliehue C. Brunson, Esq., Office of the Solicitor,
U.S. Department of Labor, Kansas City, Missouri,
for Petitioner;
Robert A. Amundson, Esq., Amundson & Fuller, Lead,
South Dakota,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating four safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq.

After notice to the parties, a hearing on the merits commenced on October 30, 1984 in Rapid City, South Dakota.

Prior to the conclusion of the hearing the parties reached an amicable settlement.

The citations, the standards allegedly violated, the initial assessments, and the proposed dispositions are as follows:

<u>Citation No.</u>	<u>30 C.F.R. Section Violated</u>	<u>Assessed Penalty</u>	<u>Disposition</u>
2097960	57.19-106	\$20.00	\$20.00
2096744	57.12-4	20.00	Vacated
2096745	57.6-8	20.00	Vacated
2097986	57.3-22	20.00	20.00

The proposed settlement is in order and it should be approved.

Accordingly, I enter the following:

ORDER

1. The proposed settlement is approved.

2. The following citations and proposed penalties are
AFFIRMED:

<u>Citation No.</u>	<u>Penalty</u>
2097960	\$20.00
2097986	20.00

3. The following citations and all proposed penalties
therefor are VACATED:

Citation No.

2096744
2096745


John J. Morris
Administrative Law Judge

Distribution:

Eliehue C. Brunson, Esq., Office of the Solicitor, U.S. Department
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(Certified Mail)

Robert A. Amundson, Esq., Amundson & Fuller, 215 West Main, Lead,
South Dakota 57754 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 23 1985

JAMES H. TUCKER, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEVA 85-47-D
SOUTHERN OHIO COAL COMPANY, : MSHA Case No. MORG CD 85-3
Respondent :
: Martinka Mine

DECISION

Before: Judge Melick

On October 12, 1984, the Complainant, James Tucker, filed a complaint of discrimination under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., "the Mine Safety Act," with the Secretary of Labor, Mine Safety and Health Administration (MSHA) against the Southern Ohio Coal Company. That complaint was denied by MSHA and Mr. Tucker thereafter filed a complaint of discrimination with this Commission on his own behalf under section 105(c)(3) of the Mine Safety Act. Mr. Tucker, alleges that he was denied employment in violation of section 105(c) of the Mine Safety Act because of "my color and my age." More specifically he alleges as follows:

"They turned me down, saying I had a diseased disc. I got a second opinion of the Lumbar spine, the area of the spine that they xrayed (sic) me for at the Herron Clinic. The findings, on the second opinion, show that there is nothing wrong with my back.

I think that is has to do with my color and my age, color more so than age. There is no more than 14 or 15 Blacks working there."

The Southern Ohio Coal Company thereafter responded, inter alia, that the "complaint fails to state a claim upon which relief can be granted inasmuch as [Complainant] has failed to allege therein any facts, conditions or events giving rise to such alleged discrimination which are within the scope of section 105(c). . ." That response may be taken as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the purposes of such a motion, the well pleaded material allegations of the complaint are taken as admitted. 2A Moore's Federal Practice, ¶ 12.08. A complaint should not be dismissed

for insufficiency unless it appears to a certainty that the complainant is entitled to no relief under any state of facts which could be proved in support of a claim. Pleadings are, moreover, to be liberally construed and mere vagueness or lack of detail is not grounds for a motion to dismiss. Id.

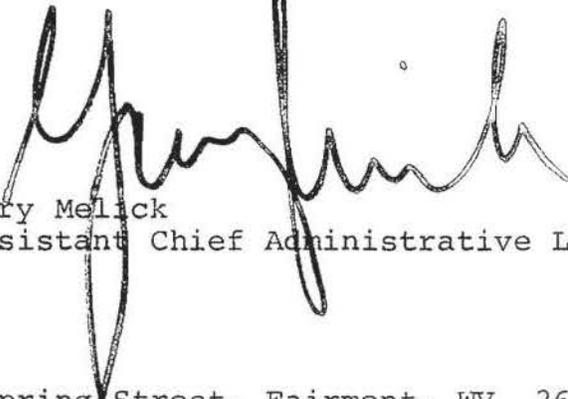
Section 105(c)(1) of the Mine Safety Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings 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, representative or miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

In order to establish a prima facie violation of section 105(c)(1) the Complainant, as an applicant for employment must prove that he exercised a right protected by the Mine Safety Act and that the refusal to hire him was motivated in any part by the exercise of that protected right. See Secretary ex. rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds, sub nom, Consolidation Coal Company v. Secretary, 663 F.2d 1211 (3rd Cir., 1981). In this case Mr. Tucker asserts that he was not hired solely because of his age and/or race. Even assuming, arguendo, that the allegations were true however, the grounds asserted are clearly not within the ambit of

protections afforded by the Mine Safety Act. Accordingly the allegations are not sufficient to create a claim under section 105(c).

While the Mine Safety Act does not provide redress for employment discrimination based on age or race, there are of course other Federal and state laws dealing with such discrimination. It is noted in this regard that the Complainant herein has apparently filed a complaint of age and racial discrimination with the West Virginia Human Rights Commission. The complaint herein must however be denied and the case dismissed.



Gary Mellick
Assistant Chief Administrative Law Judge

Distribution:

James H. Tucker, 410 Spring Street, Fairmont, WV 26554
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David A. Laing, Esq., Alexander, Ebinger, Fisher, McAlister
& Lawrence, 25th Floor, 1 Riverside Plaza, Columbus, OH
43215-2388 (Certified Mail)

rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JAN 25 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 84-86
Petitioner : A. C. No. 15-13547-03503
: :
v. : Voyager Mine
: :
VOYAGER MINING COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on January 7, 1985, in the above-entitled proceeding a motion for approval of settlement. Under the parties' settlement agreement, respondent has agreed to pay a civil penalty of \$20 instead of the penalty of \$42 proposed by MSHA for the single violation of 30 C.F.R. § 70.501 involved in this proceeding.

Section 110(i) of the Federal Mine Safety and Health Act of 1977 lists six criteria which are required to be considered in determining civil penalties. The official file and the motion for approval of settlement contain information pertaining to the six criteria. The proposed assessment sheet indicates that respondent is a large operator which produces about 14 million tons of coal on an annual basis. Therefore, to the extent that the penalty is determined under the criterion of the size of respondent's business, a penalty in an upper range of magnitude would be appropriate.

Neither the official file nor the motion for approval of settlement contains any information concerning respondent's financial condition. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd. 736 F.2d 1147 (7th Cir. 1984), that if an operator fails to furnish any evidence concerning its financial condition, that a judge may presume that the operator is able to pay penalties. Consequently, I find that payment of civil penalties will not adversely affect respondent's ability to continue in business. In such circumstances, it will not be necessary to reduce the penalty, determined pursuant to the other criteria, under the criterion of whether the payment of penalties will cause respondent to discontinue in business.

The proposed assessment sheet indicates that respondent has not previously violated any mandatory health or safety standards. Therefore, no portion of the penalty to be assessed should be based upon the criterion of respondent's history of previous violations.

Consideration of the remaining three criteria of good-faith abatement, negligence, and gravity require a discussion of the violation here involved. Citation No. 2059582 alleged that respondent had violated section 70.501 by failing to maintain the noise in an employee's working environment at or below a permissible level. The inspector who wrote the citation considered the violation to be associated with a low degree of negligence and believed that it was reasonably likely that an injury involving lost workdays or restricted duty was likely to be experienced by one employee. As a result of the inspector's evaluation of negligence and gravity, MSHA proposed a penalty of \$42 after giving respondent a 30 percent reduction in the penalty because respondent had demonstrated a good-faith effort to achieve compliance after the citation was written.

The parties' agreement to reduce the penalty to \$20 is well supported by an affidavit attached to the motion for approval of settlement. The affidavit was given by Stephen C. Davis, respondent's Manager of Environmental Services who has a Master of Public Health degree from the University of California. Mr. Davis began working on noise problems at respondent's mine in November 1982 before the citation here involved was issued. The problem arose primarily from the noise generated by a diesel-driven teletram manufactured by the Wagner Mining Machinery Co. Through Mr. Davis' efforts, respondent participated in a noise-control project conducted by the United States Bureau of Mines' Pittsburgh Research Center. Respondent also sought the assistance of MSHA's Pittsburgh Health Technology Center, Physical and Toxic Agents Division. Inasmuch as respondent had obtained the assistance of two different agencies of the Federal government to assist it in reducing noise levels at its mine prior to the writing of the citation, I believe that the motion for approval of settlement correctly expresses a belief that respondent's failure to reduce the noise to a permissible level was a nonnegligent violation.

Mr. Davis' affidavit also indicates that respondent conducted an educational program to make its employees aware of noise problems at its mine and to encourage its employees to engage in hearing conservation measures. Finally, in April 1983 a designated teletram was made the subject of a quieting modification which involved the installation of sound-absorption material around the engine and radiator fan exhaust compartments as well as the installation of newly fabricated sound-absorbing louvers. Shortly after the retrofitting had been performed, respondent's mine was closed because of depressed market conditions. The motion for approval of settlement states that the

parties agreed that the settlement reached in this proceeding is subject to the following condition (Motion, page 3):

In the event that the Voyager Mine of Voyager Mining Company is reopened and the subject equipment is put back into service, Voyager Mining Company agrees to cooperate with the U.S. Bureau of Mines, Pittsburgh Research Center, in an effort to find a solution to the noise problem.

The motion for approval of settlement states that respondent's efforts to bring about a reduction of noise levels at its mine supports findings to the effect that MSHA overevaluated the criterion of gravity in proposing a penalty of \$42 because it is unlikely that any of respondent's employees would have experienced a hearing injury which would have resulted in restricted duty or lost workdays. I believe that the parties have shown adequate reasons for reducing the penalty to \$20 on the ground that MSHA's proposed penalty of \$42 was derived without taking into consideration respondent's extensive efforts to reduce noise levels at its mine.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement is granted and the parties' settlement agreement is approved.

(B) Pursuant to the parties' settlement agreement, respondent, within 30 days from the date of this decision, shall pay a civil penalty of \$20.00 for the violation of section 70.501 alleged in Citation No. 2059582 dated January 19, 1983.

(C) The approval of the parties' settlement agreement is also subject to the condition that respondent will continue to cooperate with the Bureau of Mines "in an effort to find a solution to the noise problem," as hereinbefore indicated.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U. S. Department of Labor, Room 280, U. S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

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yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JAN 25 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 84-338
Petitioner : A. C. No. 46-06607-03506
v. : Dean No. 1 Mine
DEAN FUELS INC., :
Respondent :

DEFAULT DECISION

Before: Judge Steffey

A prehearing order was issued October 18, 1984, in the above-entitled proceeding requiring the parties to discuss settlement and to notify me by November 23, 1984, whether a settlement of the issues had been reached. The order also provided for the parties to furnish specified information by November 30, 1984, if they were unable to achieve settlement.

Counsel for the Secretary of Labor filed on November 13, 1984, a copy of a letter which she had mailed to respondent's representative. That letter stated that the Secretary's counsel had been unsuccessful in her efforts to talk to respondent's representative by telephone and asked that he either call her or write to her so that they could discuss the issues involved in this proceeding. On November 27, 1984, the Secretary's counsel filed a response to the prehearing order of October 18, 1984. That response explained that the Secretary's counsel could not provide the stipulations required by the prehearing order because she had been unable "to reach the respondent's representative, despite telephone calls and a letter to the representative."

Inasmuch as respondent's representative had failed to submit any reply whatsoever to the prehearing order, I issued on December 7, 1984, a show-cause order to respondent's representative pursuant to the Commission's rules, 29 C.F.R. § 2700.63, which provide that when a party fails to comply with an order of a judge, "an order to show cause shall be directed to the party before the entry of any order of default or dismissal." The show-cause order specifically provided as follows:

Respondent, by January 7, 1985, shall show cause, that is, explain in writing, why it should not be held in default for failure to comply with the provisions of the prehearing order of October 18, 1984. Failure of respondent to give a

satisfactory answer to this order will result in a finding that respondent has waived its right to a hearing and that respondent should be found to be in default. If respondent is found to be in default, respondent will be ordered to pay the full penalties proposed by MSHA.

A return receipt in the official file shows that respondent received the show-cause order on December 10, 1984. Respondent filed on December 17, 1984, a reply to the show-cause order. The reply, in its entirety, states as follows:

I will be unable to get away to Washington D.C.
-- I had been hoping to get some of the violations reduced.

Thank you for your time and attention.

Respondent has failed to give a satisfactory answer to the show-cause order. There was no mention in either the prehearing order or the show-cause order of any need for respondent's representative to travel to Washington, D. C. The petition for assessment of civil penalty filed by the Secretary in this proceeding seeks to have civil penalties assessed for four alleged violations of the mandatory health and safety standards. MSHA proposed a penalty of \$20 each for two of the alleged violations and a penalty of \$50 each for the two remaining violations. The prehearing order explained that it was unlikely that the proposed penalties of \$20 could be reduced unless respondent had evidence to prove that no violations had occurred. As to the proposed penalties of \$50, the prehearing order requested the parties to discuss settlement to determine whether respondent had any reasons to justify a reduction of those two penalties. The letter written to respondent's representative by the Secretary's counsel contained the following sentence:

If you would like the fines for the other penalties lowered, you should offer proof that the mine inspector incorrectly assessed the gravity or the negligence involved in the violation, or that payment of the fine will seriously affect your ability to remain in the coal mining business.

When respondent requested a hearing concerning the penalties proposed by the Secretary, it became a party to a proceeding before the Commission and, as such, respondent is obligated to comply with the Commission's procedural rules. Section 2700.54(b) of the Commission's rules lists procedures which a judge may follow for simplification of the issues, obtaining stipulations or admissions of fact, and settlement of some or all of the issues. Respondent's representative has

ignored the requirements of the prehearing order issued October 18, 1984, and has refused to discuss settlement or stipulation of any facts with the Secretary's counsel despite her repeated efforts made in writing and by telephone. Finally, respondent's representative has provided no reasons whatsoever for his failure to reply to the prehearing order.

Respondent's refusal to comply with my prehearing order supports a finding that respondent has waived its right to a hearing and I find respondent in default for its failure to give a satisfactory answer in reply to the show-cause order issued December 7, 1984. Section 2700.63(b) provides that when a judge finds the respondent in default in a civil penalty proceeding, he "shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid."

WHEREFORE, it is ordered:

Respondent, having been found to be in default, shall, within 30 days from the date of this decision, pay civil penalties totaling \$140.00 for the violations alleged in this proceeding. The penalties are allocated to the respective violations as follows:

Citation No. 2411512	5/2/84	§ 75.503	\$ 20.00
Citation No. 2411513	5/2/84	§ 75.1722(a)	50.00
Citation No. 2411514	5/7/84	§ 75.400	20.00
Citation No. 2411516	5/7/84	§ 77.505	<u>50.00</u>

Total Civil Penalties Proposed in This Proceeding	\$140.00
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Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Linda M. Henry, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (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 25 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 85-25
Petitioner : A. C. No. 46-04465-03534
: :
v. : No. 1 Surface Mine
: :
MONUMENT MINING CORPORATION, :
Respondent :

DEFAULT DECISION

Before: Judge Steffey

An order was issued on December 18, 1984, in the above-entitled proceeding permitting the law firm which had filed an answer to the Secretary of Labor's petition for assessment of civil penalty to withdraw as counsel for respondent on the ground that the law firm was no longer authorized to represent respondent in this proceeding.

The grant of counsel's request to withdraw left the case before me with no known representative and with no official address or telephone number at which respondent could be reached for the purpose of serving notices of hearing or orders. The Commission's rules, 29 C.F.R. § 2700.5(c), require that each document filed with the Commission provide the filing person's name, address, and telephone number and require that the Commission be promptly notified of any change in address or business telephone number. Therefore, the order allowing respondent's counsel to withdraw also contained a request that respondent provide the name, address, and telephone number of the person who had been designated by respondent to represent it in this proceeding in view of the fact that respondent's counsel had been allowed to withdraw as respondent's representative. Paragraph (C) of the order stated that:

(C) This order is being sent to the business address given for respondent in MSHA's petition for assessment of civil penalty. If no reply to this order is received, or if the letter is returned by the post office as undeliverable, respondent will be found to be in default and a final order will be issued requiring respondent to pay the penalty of \$500 proposed by MSHA despite the fact that the default decision may be undeliverable.

The envelope containing the above-described order was returned by the post office as undeliverable because respondent had declined to accept the envelope after the post office had given respondent two notices of the fact that the envelope containing the order had been received by the post office.

Respondent's refusal to provide the name of a person to represent respondent in this proceeding prevents me from being able to process the case because there is no known address at which respondent will accept notices of hearing or orders. Therefore, I find respondent to be in default for failure to comply with the Commission's rules or accept envelopes sent by certified mail. Section 2700.63(b) of the Commission's rules provides that when a judge finds the respondent in default in a civil penalty proceeding, he "shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid."

WHEREFORE, it is ordered:

Monument Mining Corporation, having been found to be in default, shall, within 30 days from the date of this decision, pay a civil penalty of \$500 for the violation of 30 C.F.R. § 77.404(a) alleged in Citation No. 2142832 dated May 16, 1984.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

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Calvin D. Cantrell, President, Monument Mining Corporation, P. O. Box 618, Holden, WV 25625 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 30 1985

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 84-54
Petitioner : A.C. No. 34-01317-03502 FN6
: :
v. : Heavener Mine No. 1
: :
JOHNSON'S TRUCKING, INC., :
Respondent :

DECISION

Appearances: Jack R. Ostrander, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for
Petitioner;
Gary Brasel, Esq., Sand Springs, Oklahoma, for
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a civil penalty proposal 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), seeking a civil penalty assessment in the amount of \$250 for an alleged violation of mandatory safety standard 30 C.F.R. § 77.410.

The respondent filed a timely answer and notice of contest denying the alleged violation, as well as MSHA's enforcement jurisdiction, and a hearing was convened in Tulsa, Oklahoma, on November 28, 1984. Although given an opportunity to file post-hearing proposed findings and conclusions, and briefs, the parties declined to do so. However, I have considered their oral arguments made on the record during the hearing in this case in the course of my decision in this matter.

Applicable Statutory and Regulatory Provisions

1. The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., now the Federal Mine Safety and Health Act of 1977.

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.
4. Independent Contractors Regulations, Part 45, Title 30, Code of Federal Regulations, section 45.1 et seq.

Issues

The respondent maintains that it is not a "mine operator" or "independent contractor," and therefore is not subject to the petitioner's enforcement jurisdiction.

Aside from the jurisdictional question, the remaining issues presented 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, 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.

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

Discussion

The citation in question in this case is a section 104(a) citation, with special "significant and substantial" (S&S) findings, No. 2077404, issued on January 23, 1984, by MSHA Inspector Lester Coleman. Mr. Coleman cited an alleged violation of mandatory safety standard 30 C.F.R. § 77.410, and the "condition or practice" cited as a violation is described as follows on the face of the citation form:

The White haulage truck #370 owned by (Johnson Trucking, Inola, OK. Contractor I.D. No. FN 6), operating in the 001 pit was not provided with an operable automatic warning device which shall give an audible alarm when such equipment is put in reverse.

The record reflects that the citation form, in block #6, identified the mine operator as Turner Brothers, Inc., but that it was subsequently modified to identify the operator as the respondent, Johnson's Trucking, Inc.

Stipulations

The parties stipulated that the Heavener Mine is owned by Turner Brothers, Inc., and that the mine is a coal mine subject to the Act and to the jurisdiction of this Commission (Tr. 6).

The parties stipulated that the cited truck was equipped with an operative warning device, but at the time of the inspection the device was inoperative when the truck was operated in reverse gear (Tr. 7-8).

Petitioner's counsel stipulated that the respondent has no history of prior violations (Tr. 21-22).

Petitioner's Testimony and Evidence Regarding the Alleged Fact of Violation.

MSHA Inspector Lester Coleman testified as to his background and experience, and he confirmed that on January 23 and 24, 1984, he made a general inspection of the mine. He observed the cited no. 370 haulage truck backing down into the pit area, and the automatic back-up horn or warning device was not working (Tr. 48). Two workmen were in the pit cleaning coal, and an end loader was loading a truck. In addition to himself, a foreman, and a mechanic were also present. All were on foot, and he estimated that he and the foreman were 20 to 30 feet from the truck, and that the coal cleaners were another 40 to 50 feet behind the truck (Tr. 49).

Mr. Coleman was of the opinion that the lack of an operative back-up alarm posed a hazard because of the men and equipment operating in the pit. He believed that the truck would be in close proximity to the men performing their various duties in the pit, and that with all of the equipment noise, the men would not hear the truck backing up without an operable alarm (Tr. 50).

Mr. Coleman stated that the truck in question is owned by the respondent. He confirmed that mine superintendent Payne advised him of this fact, and that he personally observed the respondent's logo on the truck cab door. He also confirmed that the respondent had additional trucks operating at the mine site while he was there, and upon inspecting them, he found that the back-up alarms were all operable (Tr. 51).

When asked about the probability of an accident occurring under the conditions which he cited, Inspector Coleman responded as follows (Tr. 54, 56, 58-59):

Q. Mr. Coleman, what in your opinion is the probability of an accident occurring, under the conditions that you have just described?

A. I think it is reasonably likely, some of the statistics that we have gotten in the last seven months, we have had ten fatalities occurring just like this.

Q. Ten fatalities, where?

A. Nation wide.

* * * *

Q. Mr. Coleman, you stated that it was your opinion, that the chance of an accident occurring was reasonably likely. Could you tell the Court what you mean by reasonably likely?

A. Yeah, because of the congestion, people on foot in the area, and the excessive noises from the other equipment, end loaders, back up horns not working, the excessive noise from the other equipment, you know, was -- keep you from hearing a truck, just starting to back up.

Q. Okay, but specifically, what do you mean when you say reasonably, likely, what do you mean by this term, reasonably, likely to occur?

A. Well, all the -- I can't think of the word that I want to use, everything is there, that can contribute to it.

* * * *

Q. Mr. Coleman, what do you base your opinions on, with regards to the probability of an accident occurring, under these conditions that you have just described for us?

A. Statistics, a lot of it.

Q. Anything else, besides statistics?

A. My experience.

Q. What type of experience do you have pertaining to conditions similar to the ones that we are discussing here today?

A. For the past ten years, I've been an inspector in these mines.

Q. Have you observed any similar accidents?

A. I've never observed one, no.

Q. What type of injuries could occur to an employee, in your opinion, if an accident did occur?

A. Well, in my opinion, you know, anything from broken bones to a death.

Inspector Coleman testified that a mine employee complained to him that the respondent's trucks were equipped with toggle switches so that the drivers could turn the back-up alarms on and off. He stated that he advised Mr. Payne that toggle switches were unacceptable, and that when the defective switch on the cited truck was repaired, it was not to be equipped with a switch (Tr. 51). When he returned to the mine on January 24, 1984, the day after he issued the citation, he found that "the operator made no apparent effort to correct the condition" (Tr. 59). He then issued a section 104(b) withdrawal order on the truck, and he did so because an operative alarm had not been installed. He explained that while an automatic alarm had been installed, it had been equipped with a toggle switch. Under the circumstances, he believed that the toggle switch rendered the alarm "nonautomatic," and that is why he issued the order (Tr. 60).

Inspector Coleman explained that the existence of a toggle switch allows the driver to turn the alarm on and off at his discretion. Since section 77.410 requires that back-up alarms be automatically activated when the vehicle is operated in reverse, the existence of the toggle switch renders the alarm other than automatic. Mr. Coleman confirmed that he has issued similar citations in the past. In his opinion, the use of a toggle switch is a violation of the cited safety standard (Tr. 59-62).

On cross-examination, Mr. Coleman confirmed that when he served the citation on mine superintendent Payne, Mr. Payne informed him that he would contact the respondent and have one of its mechanics repair the alarm (Tr. 63). When Mr. Coleman returned the next day, he asked Mr. Payne whether the alarm had been repaired. When Mr. Payne responded that it had not, Mr. Coleman hung a red tag on the truck removing it from service. He then asked Mr. Payne when the alarm would be repaired, and when Mr. Payne replied "probably 8:00 a.m., the next morning," Mr. Coleman fixed that as the abatement time for the order. When asked why he had not contacted

the respondent, rather than Mr. Payne, Mr. Coleman stated that Mr. Payne was the only "management member" present at the mine. He also stated that he was not obligated to contact the respondent, even though he cited him, because "we have independent contractors from all over the country" (Tr. 64-65).

Mr. Coleman stated that after "red tagging the truck," he next returned to the mine on January 26, 1984. The back-up alarm had been rendered operative, and he terminated the order (Tr. 66). He confirmed that he personally spoke with Mr. Johnson about the matter on the evening of January 24, but not after that (Tr. 67). He indicated that Mr. Johnson was "pretty angry" over his truck being "tied down, closed down" (Tr. 69).

Mr. Coleman stated that he did not speak with the truck driver at the time he initially observed the vehicle backing up into the pit (Tr. 71), nor did he speak with him after Mr. Payne advised him that the alarm had not been fixed (Tr. 77). He confirmed that before he issued the citation, he did not know whether or not the respondent had an MSHA assigned Mine I.D. number. He later confirmed that it did, and he modified the citation to delete Turner Brothers as the "responsible operator," and he substituted the respondent as the operator responsible for the citation (Tr. 73).

Mr. Coleman initially stated that at the time he issued the citation, he did not know whether a toggle switch was installed in the cab of the truck to control the alarm. He believed that Mr. Payne had a responsibility to insure that all trucks coming on mine property were in compliance with the law (Tr. 75). Mr. Coleman later testified that when he returned to the mine on January 24, the day after the citation issued, the cited truck was loaded with coal and the driver was leaving the pit. He stopped the truck and had the driver demonstrate how the alarm was repaired. When he found that a toggle switch had been installed, he decided that abatement had not been achieved (Tr. 79).

Respondent's Testimony and Evidence

James W. Payne, testified that at the time the citation issued he was employed by Turner Brothers as the mine superintendent. He confirmed that Inspector Coleman issued the citation after observing a truck backing up into the pit without the back-up alarm sounding. Mr. Payne also confirmed that Mr. Coleman told him that he was citing Turner Brothers for the Citation, but that he would include Johnson's Trucking Company on the citation (Tr. 97).

Mr. Payne testified that after the issuance of the citation on January 23, 1984, he contacted the respondent's shop, and a mechanic came to the mine that same day (Tr. 97). When Mr. Coleman returned the next day, the truck had been repaired, but since a toggle switch had been installed, Mr. Coleman informed him that it had to be removed. Mr. Payne then contacted the respondent again and informed them that the toggle switch had to be removed (Tr. 98). A part was then ordered by the respondent so that it could be installed on the truck transmission to insure that the back-up alarm operated automatically, and on January 25th, the mechanic came to the mine with the part to install it on the truck (Tr. 99). Present were Mr. Coleman, Mr. Johnson, the mechanic, and Mr. Payne. Mr. Johnson and the mechanic went to the truck to repair the back-up alarm, and Mr. Johnson told Mr. Coleman that it would take 15 minutes to complete the repairs, but Mr. Coleman did not wait, and left the mine. He returned the next day, and terminated the order on the truck (Tr. 100-103).

On cross-examination, Mr. Payne confirmed that he had in the past contacted the respondent's repair garage and the mechanic when any of its trucks needed attention (Tr. 104). He reiterated that the back-up alarm was broken on January 23, but that it was repaired that same day. The alarm was working the next day, January 24, but a toggle switch had been installed. When Inspector Coleman discovered that a toggle switch had been installed, he tagged out the truck. Subsequently, Mr. Johnson and Mr. Coleman were involved in an argument over the closure order and the abatement (Tr. 105-107).

Troy Johnson, confirmed that he was notified about the cited condition on the day that Inspector Coleman issued the citation. The mechanic informed him that a transmission switch had broken, and that he had to order a part to repair it. He and the mechanic picked the part up from the supplier the day after the citation was issued, and they went to the mine site to repair the truck. The truck was repaired within a matter of minutes, but since Mr. Coleman had left the site, the order which he placed on the truck remained in effect until the morning of January 26th (Tr. 111-117). Mr. Johnson explained the reasons for the installation of the toggle switches on his trucks, and he explained that he has no use for back-up alarms on any of his trucks once they leave the mine site (Tr. 119-120). He also explained that his trucks generally have little reason for backing up, and that the normal practice on mine sites is for the truck to "circle in and out of areas" where they are loading, and that it is unusual for the trucks to be operated in reverse (Tr. 123). He confirmed that he was not present when Inspector Coleman

observed the truck which he cited backing up into the pit (Tr. 124). He also confirmed that he was concerned and upset over the fact that the truck was taken out of service by Mr. Coleman (Tr. 125). He identified photographic exhibits R-2(a) through 2(F), as the truck in question (Tr. 128).

The Jurisdictional Question

During his opening statement at the hearing, the respondent's counsel stated that in a prior civil penalty proceeding concerning these same parties, Docket No. CENT 81-78, MSHA's Kansas City Regional Solicitor's Office filed a motion to withdraw its proposal for assessment of civil penalty, and that it did so on the ground that the respondent was not an "independent contractor" within the meaning of the Act (Tr. 11). A copy of the motion is a matter of record, (exhibit R-1), and it states in pertinent part as follows:

* * * As grounds for this motion, the Secretary states that after a review of the facts and circumstances regarding the issuance of citation 1023638 he has determined that at the time this citation was issued Johnson's Trucking, Inc., was not acting with respect to the mine operator as an 'independent contractor' within the meaning of that term as used in section 3(d) of the Act and Part 45 of Title 30 of the Code of Federal Regulations.

Petitioner's counsel stipulated that the motion in question was filed, and he confirmed that it was filed with Commission Judge Charles C. Moore, and that Judge Moore granted the motion and dismissed the prior case by an order entered on January 8, 1982 (Tr. 14). When asked about the supporting reasons for the Kansas City Solicitor's motion to withdraw for lack of jurisdiction, counsel stated that "I'm not really sure," but he went on to explain that he was advised that the solicitor's office advised that "he didn't have control over the work site, and so forth, and I just got the opinion, that maybe they were going under some of the old type of case law decision, with respect to independent contractors" (Tr. 14-15). Counsel confirmed that at the time the motion was filed, MSHA's Independent Contractor regulations had been adopted and published at 30 C.F.R. Part 45 (Tr. 15).

In further explanation as to why the prior case was withdrawn, petitioner's counsel stated as follows (Tr. 16):

MSHA does have some internal informal guidelines, for when to cite truckers, not having back-up alarms, and it's my understanding in

the past, that if the truck is not backing up in the pit, that it was just going around in a circle, in a circle and did not back up, that MSHA would not cite the independent contractor.

But if the truck was backing up, then MSHA would cite the independent contractor, and it may be in the prior case, that the truck was not backing up, and that may have been one of the reasons for not doing it. I don't know if that's still MSHA's informal policy or not, but I couldn't find it written anywhere.

Respondent's counsel asserted that the respondent is a general common carrier regulated by the Federal Interstate Commerce Commission and other appropriate state and local authorities, that it has approximately 30 employees, and does a gross annual business of approximately 10 million dollars (Tr. 8). Counsel argued that since the respondent is a certified interstate public carrier who is also regulated by the Department of Transportation, it is in fact a utility service providing services to the general public, and is not an independent contractor. Counsel also maintained that since the cited piece of equipment is a tractor trailer and not a truck, it is not the type of equipment intended to be covered by the cited mandatory safety standard section 77.410 (Tr. 11-12). At the close of the petitioner's case, respondent's counsel moved for a dismissal of the case on jurisdictional grounds, and he also asserted that the petitioner had failed to establish a violation (Tr. 91). The motion was denied (Tr. 94).

Respondent Troy Johnson testified that he operates trucking, construction, and ready-mix operations, and that each of these business ventures are incorporated as separate corporations. His trucking business is incorporated as Johnson's Trucking, Inc., and he serves as vice-president of that corporation. He confirmed that his trucking company hauls freight and bulk commodities such as fertilizers, road building materials, different types of iron and copper ore, and coal, and that this operation encompasses an eleven state area (Tr. 30-31). He estimated that the company uses 118 trucks for its haulage business, and these include company owned trucks as well as trucks owned and operated by independent haulage contractors who may perform services for his company (Tr. 36).

Mr. Johnson disputed the assertion that he uses coal haulage "trucks" to haul and deliver coal. While he agreed that there is only one basic kind of equipment used for this purpose, he insisted that they are not "trucks." His position is that they are separate tractor and trailer units which are not within the scope and intent of section 77.410. He identified several photographs as the type of equipment used for hauling coal (Tr. 34, 38; exhibits R-2(a), (c), and (f)). He believed that these units are "unique" tractor and trailer units which are used in conjunction with different types of trailers or "beds." His company has approximately 120 to 130 of these trailer beds, and they are used interchangeably for hauling coal, sand, asphalt, etc. (Tr. 39-41). His company performs its own maintenance on the trucks (Tr. 34).

Mr. Johnson denied that he has any formal contractual arrangements with Turner Brothers, but he did concede that on the day the citation issued, Turner Brothers paid him for hauling coal from its mine (Tr. 31). He explained that he is sometimes compensated by coal brokers for hauling coal which they have purchased, and at other times he is paid by the mine operator who produces it (Tr. 31-32). With regard to his relationship with Turner Brothers, Mr. Johnson indicated that he is simply called and told to come to the mine to pick up and deliver coal which needs to be hauled to one of Turner's customers (Tr. 33). He stated that during the period in question, his trucks were at the mine site "most every day" (Tr. 37), that on any given day he would have as many as five trucks at the site hauling coal, and that some of the trucks would be there for more than one trip (Tr. 37-38).

Mr. Johnson could not state the percentage of time his trucks would be hauling coal, as compared to the haulage of other products, but he did indicate that his trucks also loaded barges from tipping areas, and that he hauled "a lot of the coal that Turner produces, and some of the coal that McNabb produces" (Tr. 36). In response to a question as to whether his trucks regularly enter coal mines, he responded "* * * I will have trucks, at some mines, almost every day, somewhere" (Tr. 37).

Inspector Coleman stated that independent contractors are not required to have a legal identity number until a condition warranting a citation is found (Tr. 88). He confirmed that the person shown on MSHA's identification records as responsible for safety and health matters at the mine was mine superintendent Payne (Tr. 86).

Findings and Conclusions

The Jurisdictional Question

Section 3(d) of the Act defines "operator" as "any owner, lessee, or other person who operates, controls, or

supervisors a coal or other mine or any independent contractor performing services or construction at such mine." (Emphasis added).

Section 3(g) defines "miner" as "any individual working in a coal or other mine," and section 3(h)(1) defines "coal or other mine" as including, inter alis, "lands, excavations, structures, facilities, equipment, machines, tools, or other property * * used in, or to be used in * * * the work of extracting such minerals from their natural deposits * * *."

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 (hereinafter cited as Leg. Hist.).

As part of the 1977 amendments to the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1969) (amended 1977) ("Coal Act"), the phrase "any independent contractor performing services or construction at such mine" was added to the Coal Act's definition of operator. The amendment was intended "to settle an uncertainty that arose under the Coal Act, i.e., whether certain contractors are 'operators' within the meaning of the Act," and "to clearly reflect Congress' desire to subject contractors to direct enforcement of the Act." Old Ben Coal Co., 1 FMSHRC 1480, 1481, 1486 (October 1979). Accord, Phillips Uranium Corp., 4 FMSHRC 549, 552 (April 1982).

On the facts of this case, MSHA obviously considered the respondent an "independent contractor" subject to the Act. Although the citation was initially served on the mine operator Turner Brothers, Inc., the inspector specifically noted on the face of the citation that the cited truck belonged to the respondent, and he included the respondent's contractor identification number. He subsequently modified the citation to show the respondent as the responsible party.

MSHA's Independent Contractor regulations, which provide certain requirements and procedures for contractors to obtain MSHA identification numbers, Part 45, Title 30, Code of Federal Regulations, section 45.1 et seq., defines an "independent contractor" as follows at section 45.2(c):

'Independent Contractor' means any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine; * * *

I take note of the fact that section 45.3(a) states that an independent contractor may obtain a permanent MSHA identification number by submitting certain information to MSHA's district manager. Further, by letter and attachments filed on December 20, 1984, in response to my inquiries made during the course of the hearing regarding the procedure for assigning mine identification numbers to contractors, petitioner's counsel submitted a copy of MSHA's policy memorandums concerning certain guidelines for its independent contractor regulations found in Part 45, Title 30, Code of Federal Regulations, particularly with regard to the reporting requirements found in Part 50, Sections 50.20, 50.30, and 50.40 (accident and injury reports, and certain production and maintenance reports and records). Counsel's letter states in pertinent part as follows:

Please note that these guidelines, as enforced by MSHA, only require that certain independent contractors comply with 30 C.F.R. Part 45 and sections 50.20, 50.30, and 30 C.F.R. Part 50.

However, the fact MSHA does not require certain independent contractors to get ID numbers does not mean they cannot be cited for health and safety violations under the Act.

As explained in the policy memorandum, the 'primary purpose of 30 C.F.R. sections 45.3, 45.4 and 50.30 is to collect information that is necessary for MSHA to effectively and efficiently administer the Act.' Therefore, independent contractors who do not spend much time on mine property are not generally required to get an ID number (see paragraph 8 on page 3).

On pages 2 and 3 of the policy memorandum, MSHA lists eight groups of independent contractors who should be required to get ID numbers. However, when MSHA observes a violation committed by an independent contractor who does not fall within one of the eight groups, they assign that independent contractor an ID Number (see page 3, 1(a)).

In the instant case, it is my understanding that the MSHA inspector, who issued the prior citation which was dismissed, sent in the information and the Kansas City office issued Johnson's Trucking an ID number. Johnson's Trucking did not apply for it.

Included among the groups of "independent contractors" who are required to get MSHA ID numbers are those contractors performing the type of work described by item 8 on page 3 of the policy memorandum submitted by petitioner's counsel. That work is described as follows:

Material handling within mine property; including haulage of coal, ore, refuse, etc., unless for the sole purpose of direct removal from or delivery to mine property. (Emphasis added).

On the facts of this case, since the sole purpose of the respondent's trucking services at the mine was to transport coal from mine property, it would appear that for purposes of MSHA's Part 50 regulations, the respondent may not be considered to be an independent contractor. However, Guideline #1, which appears at page 3 of the memorandum, goes on to state that contractors who have not been assigned an identification number under section 45.3, may nonetheless be assigned such a number by the appropriate MSHA district or subdistrict office when they are cited for any violation.

After review of all of these regulatory requirements seemingly promulgated to identify who is and who is not an independent contractor, I find them rather confusing and contradictory. One regulation states that an independent contractor may obtain an identification number; another regulation states that no identification number need be assigned if the contractor's work simply involves hauling coal directly from the mine property; and yet another one states that the first time a contractor is observed violating the law, MSHA's district or subdistrict office will gratuitously assign such a number to the contractor. Nowhere in any of this maze of regulatory gobbledygook have I been able to find a direct and succinct regulation providing guidelines for a simple, direct, and intelligent system for the identification and tracking of independent contractors for purposes of MSHA's enforcement jurisdiction in cases involving violations of the mandatory safety and health standards found in Title 30, Code of Federal Regulations.

In addition to the prior dismissal by Judge Moore, the respondent's arguments against jurisdiction in this case is its assertion that it had no express written contract

with Turner Brothers to haul its coal, and that its Federal ICC or DOT authorizations to Act as a "public utility" prohibits it from entering into any contractual or "independent contractor" relationships with its customers. Since the respondent did not elaborate further, and has filed no supporting arguments or brief on this question, I am unable to consider this argument in any detail. However, assuming that the respondent's arguments are correct, simply because the ICC and DOT may have issued certain limitations concerning its operational authority, does not negate the fact that it is in a coal haulage business directly related to mining, and the critical question is whether or not its trucking services provided to mine operators may be construed or characterized as services provided by an "independent contractor" within the meaning of the Act.

In a recently decided "independent contractor" case concerning a public utility power company providing certain services to a coal mine operator, Old Dominion Power Company, 6 FMSHRC 1886 (August 29, 1984), the Commission's majority held that the power company was an independent contractor subject to the Mine Act. Several findings by the Commission with respect to the interpretation and application of the term "independent contractor" are relevant in the instant case, and they are quoted below in pertinent part:

Generally, the term 'independent contractor' describes a party who 'contracts with another to do something . . . but who is not controlled by the other nor subject to the other's right to control with respect to his . . . conduct in the performance of the undertaking.' Restatement (Second) of Agency, § 2 (1958). (6 FMSHRC 1890-91).

* * * the Mine Act is applicable to independent contractors 'performing services or construction' at a mine. * * * 'Service' has been defined to include: 'the performance of work commanded or paid by another;' 'an act done for the benefit or at the command of another;' and 'useful labor that does not produce a tangible commodity.' Webster's Third New International Dictionary (Unabridged) 2075 (1971). * * * At the time of the events at issue, Old Dominion was at the mine site at the behest of the mine operator to check the equipment to determine whether it was functioning properly and, if necessary, to replace any defective components. In our view, the work performed by Old Dominion constitutes the performance of a service and places it within the literal terms of section 3(d). (6 FMSHRC 1891).

We find it unnecessary to decide in this case whether 'there may be a point . . . at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services are being performed.' National Industrial Sand Assoc. v. Marshall, 601 F.2d 689, 701 (3d Cir. 1979). See also Legis. Hist., supra at 602, 1315. Rather, we conclude that, if there is a point at which the literal reach of section 3(d) must be tempered, that point is not reached under these facts. Here, Old Dominion's employees were at mine property at the request of the mine operator. The request for Old Dominion's services was made, and responded to, in accordance with a longstanding, and regularly maintained, business relationship defined by a written contract entered into in 1952 as well as custom and practice. * * * The extent of Old Dominion's contact with the mining process cannot be viewed as de minimis. Accordingly, we conclude that in these circumstances, Old Dominion is properly subject to MSHA standards regulating safe performance of electrical work on mine sites. (6 FMSHRC 1892).

We emphasize that by citing Old Dominion for the violation committed by its employees, the Secretary has acted in accordance with the Commission's longstanding view that the purpose of the Act is best effectuated by citing the party with immediate control over the working conditions and the workers involved when an unsafe condition arising from those work activities is observed. Old Ben, supra; Phillips Uranium, supra. By citing the operator with direct control over the working conditions at issue, effective abatement often can be achieved most expeditiously. Id. Citation of Old Dominion is also consistent with the Secretary's conclusion, after rulemaking, that 'the interest of miner safety and health will best be served by placing responsibility for compliance . . . upon each independent contractor.' 45 Fed. Reg. 44494, 44495 (July 1, 1980). (6 FMSHRC 1892).

One of the respondent's principal arguments against a finding of jurisdiction is Mr. Johnson's assertion that as a "public utility," he is prohibited by law from providing services as an "independent contractor." Aside from the fact that the respondent has failed to provide any evidentiary or legal support for this conclusion, I take note of the

fact that in the Old Dominion Power Company case the Commission held that the utility company was an independent contractor within the reach of the Mine Act. Except for the absence of any written contract between the respondent in this case and the mine operator, the crucial factors resulting in the Commission's decision in Old Dominion, as enumerated above, are also present in this case, and a discussion of these follows below.

The testimony presented in this case establishes that the respondent is engaged in a trucking business which spans several states, and that it is clearly an inter-state operation. At the time the citation was issued, the respondent's truck was at the mine performing a service for the mine operator. The mine operator mined the coal, and the respondent transported it from the mine. Mr. Johnson confirmed that his trucks were dispatched to the mine on a daily or weekly basis, and that more than one truck would often be at the mine hauling coal on any given day. As a matter of fact, on the day the truck in question was cited, Mr. Johnson had other trucks at the mine site, and after they were inspected by the inspector, the back-up alarms were found to be in proper working order. The trucks are dispatched to the mine at the request of, and in response to, the needs of the mine operator, and the respondent is compensated for these services. Similar services have also been provided for at least one other mine operator identified by Mr. Johnson (McNabb), and Mr. Johnson confirmed that his trucks are used to haul coal from tipplers to coal barges for loading.

The cited violation in this case occurred in the course of work and services being performed by the respondent's employee at a mine which is clearly covered by the Act. The employee was backing the truck up into a pit area where the mining, cleaning, and loading of coal was taking place. Thus, the loading and transportation of the coal from the mine was an integral part of the mining activity, and it seems clear that MSHA's mandatory safety standards apply to that working environment.

The testimony adduced in this case also establishes that the cited truck was owned by the respondent, that the driver was its employee, and there is no evidence that the mine operator exercised any supervision over the driver. The testimony also establishes that the respondent performed its own maintenance on the trucks which it owned and that its own mechanic would make such repairs as required. The respondent repaired the cited truck in question, and abated the violation. Given these circumstances, it seems clear that the respondent was in the best position to insure that all applicable mandatory safety standards were complied with.

On the facts of this case, respondent has not established that its trucking services provided to at least two mine operators was de minimis. On the contrary, the facts presented support a conclusion that the respondent had a continuous arrangement with Turner Brothers to haul its coal, and that several trucks are at the mine on any given day to provide these services. Mr. Johnson candidly admitted that he hauls "a lot of the coal that Turner produces," and when asked whether his trucks regularly enter coal mines, he responded "I will have trucks, at some mines, almost every day, somewhere" (Tr. 36-37). Respondent's counsel indicated that its trucking operation has 30 employees and does ten million dollar gross annual business (Tr. 8).

A secondary jurisdictional defense advanced by the respondent is the assertion that it does not have a written contract with any mine operators for the haulage of coal. This defense is rejected. It seems clear from the record in this case that the respondent provides coal haulage services for mine operators, and that these services are carried out for the mutual benefit of both parties as a regularly acceptable and normal business custom or practice. On the facts of this case, the respondent and its customers have an implied or oral contractual relationship, and it seems that each enjoy the benefits of such a relationship. Under the circumstances, I cannot conclude that the lack of any evidence of an express written contract is relevant or material to the jurisdictional status of the respondent in this case.

After careful consideration of all of the evidence and testimony adduced in this case with respect to the jurisdictional question, I conclude and find that for purposes of this proceeding, Johnson's Trucking Company is an independent contractor within the meaning of the Act, and that at all relevant times was subject to MSHA's enforcement and compliance jurisdiction.

MSHA's Dismissal of the Prior Proceeding

In the answer filed in this case, the respondent asserts that MSHA is not consistent in the manner in which it has enforced the Act, and that the failure of uniform enforcement is discriminatory. While I can readily understand the respondent's frustrations, it should take solace in the fact that when dealing with "independent contractors," consistency and uniformity in the interpretation and application of its promulgated guidelines is not one of MSHA's strong points. The decisional case law which has developed since the adoption of the "independent contractor" regulations attest to the problems created by lack of uniformity and consistency. However, the fact that such inconsistencies arise from time to time, as it has in this case, does not establish a discriminatory scheme of enforcement.

The prior civil penalty case initiated by the Kansas City Regional Solicitor's Office against this same respondent concerned a citation which was issued because one of its trucks had an inoperable back-up alarm. As indicated earlier, the case was dismissed by Judge Moore on motion by the solicitor's office on jurisdictional grounds. The solicitor withdrew the civil penalty proposal because he made a determination that at the time that particular citation was issued, Johnson's Trucking, Inc., was not acting with respect to the mine operator as an independent contractor within the meaning of section 3(d) of the Act, and MSHA's Part 45, Independent Contractors regulations.

The factual background which prompted the prior dismissal on jurisdictional grounds is not the same as that presented in the case before me for adjudication. I take note of the fact that in the prior case, the situs of the mining operation, as well as the mine operator, were both under the enforcement jurisdiction of MSHA's Kansas City Regional Office. In the case before me, the mining operation, as well as the operator (Turner Brothers), are not the same, and they are within the enforcement jurisdiction of MSHA's Dallas Regional Office. While I am in sympathy with the respondent's frustrations and concern over MSHA's apparent inconsistent jurisdictional positions, I am constrained to adjudicate the case before me on its particular facts. MSHA's prior discretionary decision to withdraw its civil penalty proceeding, mistaken or not, is not binding on me in the instant case, nor is it controlling.

I take particular note of the fact that in the prior case, the attorney who represented the respondent is the same attorney who now represents him in the case before me. Under the circumstances, I believe it is reasonable to assume that he is aware of the facts which prompted MSHA's motion for a dismissal of the prior case. If not, I further believe that he had a duty in this case to come forward with a full argument in support of any conclusion that the respondent is not subject to the Act, or to at least initiate discovery to ascertain any critical distinctions which he believes support a conclusion that the respondent is not within the reach of the Act.

Since this is a civil penalty proceeding, the initial burden of establishing jurisdiction, as well as the alleged fact of violation, lies with the petitioner. While it would have been better for MSHA's attorney to "lay all the cards on the table" at the beginning of the hearing, rather than have me drag it out of him, "card-by-card," he finally conceded

the possibility of a mistake on the part of his counterpart in the Kansas City Solicitor's Office with respect to the jurisdictional question. In response to my questions during the hearing, counsel reluctantly produced an internal memorandum prepared by an MSHA attorney in the Kansas City Regional Solicitor's Office, addressed to the Regional Solicitor, taking issue with another attorney's interpretation of MSHA's Part 45 regulations, as applied to the facts in the prior case. The memorandum was received in camera, and counsel has filed a letter strenuously objecting to the release of the document on grounds of an asserted "government deliberative process privilege," as well as an assertion that the information contained therein is irrelevant to any issue presented in this case.

With regard to the question of relevancy, counsel's objections to the release of the memorandum in question on this ground IS REJECTED. The respondent here has specifically placed the question of jurisdiction in issue. Given the fact that the respondent's answer clearly implied that the facts in both cases were the same, and that it was being charged with the very same violation, the basis for MSHA's prior conclusions and motion for dismissal are certainly relevant. This is precisely the point made earlier in this decision concerning MSHA's inconsistent positions concerning independent contractors. Rather than candidly admitting that a mistake was possibly made, with full disclosure as to the facts, counsel here obviously wishes to spare his colleagues, including the regional solicitor, some embarrassment over an apparent internal disagreement among government attorneys as to the reach of MSHA's Part 45 regulations.

During the course of the hearing in this case, petitioner's counsel offered some insight into a possible explanation as to why the prior case was not pursued. He alluded to the fact that in the prior case, the facts apparently indicated that the cited truck was not backing up at the time the inspector discovered that it had an inoperable back-up alarm, and that since it apparently took a circle route, and did not back up, the independent contractor truck operator driver would not be cited. Since there was not evidence that the truck was backing up, counsel surmized that this influenced the solicitor's decision not to pursue the matter further.

I have reviewed the "internal memorandum" that counsel here so zealously wishes to protect from disclosure, and I will not order that it be released or made a part of the public record in this case. It will remain sealed with the record as an in camera document. I find nothing persuasive

in that document that would lead me to conclude that the respondent, on the facts of the case before me, is not an independent contractor. As a matter of fact, although the author of the in camera document disagreed with one of his fellow attorneys who is not fully identified by name, with respect to the interpretation and application of the term "independent contractor" pursuant to 30 C.F.R. Part 45, he nonetheless concurred and agreed with the ultimate conclusion that the case against the respondent should not be litigated, and that the case should be dismissed.

Fact of Violation

The respondent in this case is charged with a violation of mandatory safety standard section 77.410, which requires certain designated equipment to be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse. The petitioner has established by a preponderance of the evidence and testimony adduced in this case that the cited truck did not have such a required device at the time the inspector observed it operating in reverse, and the respondent has not rebutted this fact. Although the question of the use of a toggle switch has been raised in this case, I need not address that question. Respondent is not cited with using such a device, and I have decided the case on the limited issue as to whether or not the truck in question complied with the requirements of section 77.410. Since I have concluded that it did not, I conclude and find that the petitioner has established a violation, and the citation IS AFFIRMED.

While I have affirmed the citation issued in this case, I feel compelled to comment on the procedures followed by the inspector in issuing the citation. While it is clear that at the time Inspector Coleman cited the truck in question for an inoperable back-up alarm, he had no knowledge regarding the installation of any toggle switch. He simply assumed that the alarm was inoperative because he did not hear it sounding at the time he observed the truck operating in reverse while it was backing up into the pit. In my view, while this is sufficient to sustain a violation, it seems to me that when an inspector finds a condition that he believes constitutes a violation, he should at least determine the cause of the violation so that he may make an informed judgment as to what is required to achieve abatement. Here, the inspector did not initially speak to the driver of the truck, nor did he look into the cab to ascertain whether a toggle switch was installed. He simply "walked away" from the situation, and left it to the mine superintendent to insure that corrective action was taken.

Although Inspector Coleman indicated on the face of his citation that the cited truck belonged to the respondent,

he made no effort at the time he issued it to contact the respondent to specifically put him on notice that he was to take the corrective action. The inspector's explanation that he has to deal with a great number of independent contractors does not justify his failure to immediately notify the respondent of the citation. On the facts of this case, the independent contractor was readily identifiable, and it is inexcusable for an inspector to simply take the "easy route" of citing the mine operator. Inspection practices of this kind do little to enhance safety, but do much to escalate and exacerbate otherwise routine citations, and MSHA should give more attention to such practices.

Since the inspector modified his citation to show that the independent contractor was the responsible party, and since the record here establishes that the respondent was on notice as to the violation, and subsequently abated the condition, I cannot conclude that it has been prejudiced by the inspector's initial failure to name it as the responsible party or to immediately notify it of the violative condition.

I reject Mr. Johnson's assertion that the cited piece of equipment in this case was not a "truck" within the meaning of section 77.410, and that it is somehow a "unique" piece of equipment that is beyond the reach of the standard. Having viewed the photographs of the cited truck, and after consideration of all of the testimony in this case, I find that the cited truck, which consists of a unit composed of a "tractor trailer" and an attached coal carrying bed, constitutes a "truck" within the meaning and intent of section 77.410.

The respondent has not rebutted Inspector Coleman's testimony that at the time he observed the cited truck backing into the pit with an inoperable back-up alarm, two workmen were on foot in the pit cleaning coal, an end loader was loading coal, and the inspector, a mechanic, and a foreman were also on foot. Although the cleanup men were some 40 to 50 feet behind the truck, the other individuals were 20 to 30 feet behind the truck, and the inspector believed that in the normal course of backing up, the truck would be within close proximity of all of these individuals. With the normal equipment noises emanating from the truck and end loader, the inspector believed that the men working in the pit would not hear the truck backing up without an operable audible alarm to warn them, and he believed that, in these circumstances, it was reasonably likely that an accident could occur, and that in such an event, the men would sustain serious or fatal injuries.

Given the foregoing facts, I agree with the inspector's assessment of the likelihood of an accident and injuries. Accordingly, I conclude and find that the violation was significant and substantial, and the inspector's finding in this regard IS AFFIRMED.

Negligence

In view of MSHA's prior self-initiated withdrawal and dismissal of the prior civil penalty proceeding against the respondent for an identical alleged violation of the back-up alarm requirements of section 77.410, including the respondent's reliance on that decision, I conclude and find that the violation in this case resulted from a slight degree of negligence on the respondent's part. The stipulation by the respondent that the cited truck was equipped with an operative device of some sort, although inoperative when the truck was operated in reverse, is at least indicative of the fact that the respondent was not totally oblivious to the fact that the truck was required to be equipped with such a device.

Gravity

I conclude and find that the lack of an operable audible back-up alarm constitutes a serious violation in that the possible failure of the men on foot behind the truck to hear it when it backed up exposed them to a real hazard of being struck.

Good Faith Compliance

Respondent's counsel conceded that the January 24, 1984, section 104(b) withdrawal order was not contested, but he explained that "I think he (the respondent) did, contest it, by just protesting it" (Tr. 81). Counsel conceded that since no formal contest was filed within the statutory time period provided by the Act, that the legality of the order and any issue concerning the reasonableness of the abatement time, is not directly in issue in this civil penalty case, but that I may consider the circumstances in any finding concerning good faith abatement (Tr. 81).

The un rebutted facts in this case establish that immediately upon notification of the violative condition, the respondent dispatched a mechanic to the mine to repair the inoperable back-up alarm. While the record is not absolutely clear as to what transpired after this, it seems apparent to me that the mechanic either installed a toggle switch, or repaired one which had already been installed, but that this met with opposition from the inspector who believed

that such a device was illegal. However, petitioner's counsel conceded that there is no evidence that the respondent was ever told that a toggle switch could not be used (Tr. 84), and testimony of Mr. Johnson and Mr. Payne concerning the respondent's abatement efforts, particularly with respect to the purchase and installation of the part required to render the inoperable alarm "automatic" stands unrebutted by the petitioner. Under the circumstances, I conclude and find that the respondent took reasonable and prompt steps to achieve abatement in this case, and that its efforts in this regard support a conclusion that it exercised good faith in ultimately achieving compliance.

History of Prior Violations

Petitioner's counsel stipulated that the respondent has no history of prior violations (Tr. 21-22), and I adopt this as my finding on this issue.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

For the purposes of this proceeding, and on the basis of the available information concerning the respondent's trucking operation (30 employees; over 100 trucks; and approximately ten million dollars in annual revenues), I conclude and find that the respondent is a fairly large independent contractor, and that the civil penalty which I have assessed for the violation in question will not adversely impact on its ability to continue in business.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, and all of the foregoing facts and circumstances presented in this case, I conclude and find that a civil penalty assessment in the amount of \$50 for the citation in question is reasonable.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of \$50 for the citation in question, and payment is to be made to the petitioner within thirty (30) days of the date of this decision. Upon receipt of payment, this matter is dismissed.


George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 30 1985

U.S. STEEL MINING CO., INC., : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEVA 84-335-R
: Order No. 2266009; 6/29/84
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Morton Mine
ADMINISTRATION (MSHA), :
Respondent, :
and :
UNITED MINE WORKERS OF :
AMERICA (UMWA), :
Intervenor :

DECISION

Appearances: Louise Q. Symons, Esq., U.S. Steel Mining Company, Inc., Pittsburgh, Pennsylvania, for Contestant;
Heidi Weintraub, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for Respondent;
Charles Johnson, United Mine Workers of America, Washington, D.C., for Intervenor.

Before: Judge Melick

This case is before me upon the application for review filed by the U.S. Steel Mining Company, Inc. (U.S. Steel) under section 107 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act", to challenge the issuance by the Secretary of Labor of an imminent danger withdrawal order on June 29, 1984. The general issue before me is whether the conditions existing at the time the withdrawal order was issued constitute an "imminent danger" within the meaning of section 3(j) of the Act. "Imminent danger" is there defined as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

The order at bar (Order No. 2266009) issued pursuant to section 107(a) of the Act,¹ reads as follows:

The investigation of a fatal powered haulage accident that occurred in B entry near the third crosscut outby the face on main south section (MMU 040-0) revealed that the following conditions constitute an imminent [sic] danger. The Joy shuttle car, (Serial No. ET10618, Approval No. 2G-2216-8) was not blocked against motion while repairs to a stuck conveyor chain was [sic] in progress. Motion of the shuttle car was not necessary to make the repairs (75.1725(c)). The underlying cause was the hazard created when the operator modified the tram control located near the center of the shuttle car operators compartment. The modification caused the tram lever to extend into the operator compartment to such an extent that accidental activation could occur. The lever was accidentally moved while other activities were being preformed [sic] which resulted in fatal injuries to a miner.

On June 27, 1984, at 11:25 p.m. an accident occurred in the Morton Mine resulting in the death of Jerry W. Jarrell, an electrician. The deceased had been performing mechanical repairs on a shuttle car and had positioned himself close to the mine floor near the left front tram motor and bumper in an attempt to observe the conveyor chain beneath the shuttle car. While attempting to operate the conveyor and boom control simultaneously, it appears that the shuttle car operator accidentally contacted a modified tram control lever

¹Section 107(a) of the Act provides that "[i]f, upon any inspection or investigation of a coal or other mine which is subject to the 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."

causing the unblocked shuttle car to move about 2 feet. The movement caused the victim's head to be crushed between the shuttle car bumper and the mine floor.

Upon completion of his investigation on June 29, 1984, MSHA Inspector Homer S. Grose issued the withdrawal order at bar. According to Grose three primary factors led him to conclude that an imminent danger existed. First, the tram control lever in the cited shuttle car had been modified so that the hand control extended into the operator's compartment some 2-1/2 inches past the deenergizing switch (panic bar) and 1-3/4 inches above the floor of the compartment. Grose opined that the control protruded so far into the operator's compartment that it could be accidentally triggered, and that this did in fact occur 2 days prior to the issuance of his order, leading to the fatality.

The second factor Grose relied upon in finding an imminent danger was the continuing practice at the Morton Mine of performing repairs on mobile equipment without blocking it against tramping motion when such motion was not required for repairs. Inspector Grose found, and it may reasonably be inferred, that had the cited shuttle car been properly blocked Mr. Jarrell would not have been killed. U.S. Steel's Chief Inspector, Carl Peters, conceded that it was not the practice at the mine to block equipment under such circumstances because they did not believe that it was required by the regulations. Peters acknowledged moreover, that U.S. Steel changed this practice only "to get out from under the order". It may therefore reasonably be inferred that without the withdrawal order issued by inspector Grose, U.S. Steel would have continued the same practices of not blocking equipment under the same circumstances that led to the fatality. Whether or not U.S. Steel was in violation of the standard for equipment blocking (30 C.F.R. § 1725(c)) is, of course, a question not before me in this proceeding. Freeman Coal Mining Corp., 2 IBMA 197.

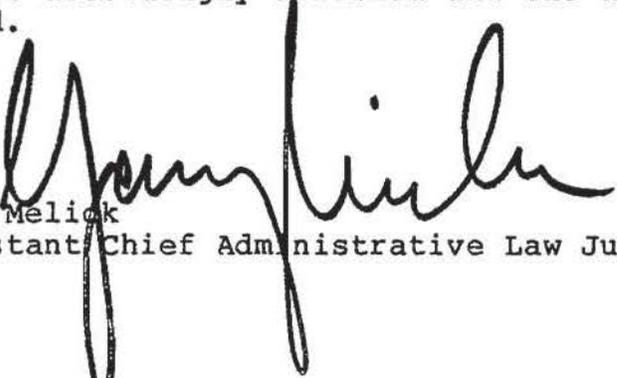
Finally, the determination by Inspector Grose that an imminent danger existed was based upon the expectation that equipment would continue to be operated and repaired in the vicinity of other miners. Grose observed that several fatalities had already occurred "this year" where miners had been pinned against ribs by a shuttle car. Within the above framework of evidence I find that indeed at the time the withdrawal order at bar was issued there existed an "imminent danger" within the meaning of the Act and that the Secretary has met his burden of proof in support of that order. See 5 U.S.C. § 556(d).

In reaching this conclusion I have not failed to consider the applicant's argument that the absence of serious physical injuries or other fatalities over the 8 years during which the tram lever had been modified, demonstrates that there was no imminent danger. In this case however the cited conditions and practices had in fact already caused the death of a miner and the evidence clearly indicates that those same or similar conditions and practices would have continued. Accordingly considering this past history the conditions and practices could reasonably be expected to cause serious or fatal injuries in the future.

U.S. Steel also appears to imply in its posthearing brief that the cited tram control lever had already been shortened as a result of a section 103(k) order before the citation at bar had been issued. There is no evidence in the record however to support this contention and inspector Grose indeed testified that at the time he issued the order at bar the tram control lever had not been modified. U.S. Steel also suggests that since the shuttle car which had crushed the deceased in this case was in fact blocked during the rescue efforts and remained blocked at the time the withdrawal order herein was issued, it was erroneous for Inspector Grose to assume that the shuttle car would not remain blocked. The blockage necessary to elevate the shuttle care to remove the body of the deceased was not however the same type of blockage cited by Inspector Grose as an element of the imminent danger. On the contrary, U.S. Steel's Inspector Peters clearly stated that, but for the withdrawal order in this case, U.S. Steel would have continued its practice of not blocking equipment during similar repairs. The contention is therefore irrelevant.

Finally, U.S. Steel contends that the subject withdrawal order was issued upon facts existing at the time of the fatality on June 27, 1984 and not upon events 2 days later when the order was issued. While the wording of the order appears to support this contention, Inspector Grose made it clear at the hearing in this case that although he relied upon the fatal accident as evidence of the type of accident that could occur as result of the circumstances he found 2 days later he was nevertheless relying upon facts existent on June 29, 1984, for his conclusion that an "imminent danger" existed at that time. The conclusions of inspector Grose are supported by the credible evidence of record. Old Ben Coal Corporation v. Interior Board of Mine Operation Appeals, 523 F.2d 25 (7th Cir., 1975).

Order No. 2266009 is accordingly affirmed and the application for review denied.



Gary Melick
Assistant Chief Administrative Law Judge

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rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

OCT 17 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No: CENT 84-24-M W 24
Petitioner	:	A/O No: 41-00010-05503
	:	
v.	:	Capitol Cement Plant
	:	
BIGELOW LIPTAK CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Jack F. Ostrander, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner
Laurel D. Breitkopt, for the Respondent

Before: Judge Moore

Bigelow Liptak Corporation is a construction company and at the time of the events involved in this case, it was engaged in the construction of a large vessel for the Capitol Cement Company. Bigelow Liptak stipulated that it was covered by and subject to the Federal Mine Safety and Health Act of 1977.

The company's specific task was to lay the brick and add gunnite to the inside of the steel vessel. Respondent's exhibit 2 was a drawing of the vessel but it was neither to scale nor is it accurate in the measurements shown. ^{*/} The tubular vessel with a cone-shaped lower part is used in the manufacture of cement. At the time of the inspection involved herein, respondent had already laid the brick, and had completed the spraying of the gunnite, a stucco-like cement mixture, and was engaged in cleaning up the gunnite that had bounced off the walls and fallen into the lower part of the conical vessel. Inspector Lilley said he entered the vessel through the port depicted on the right hand side of respondent's exhibit 2 and that he saw workers on two levels below him. On his level there was at least one worker and the scaffolding consisted of loose boards laid

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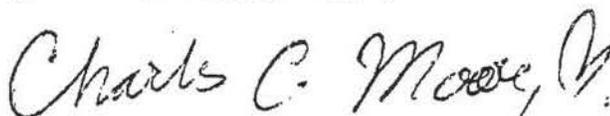
The court reporter states that the exhibits were mailed with the transcript. This office has no record that they were received. I am attaching a drawing that is consistent with my recollection. If this decision is appealed, the parties will have to resubmit the exhibits for the Commission.

across the pipes. The boards were overlapping in some places and did not go all the way to the outside edge of the vessel in other places. There was a hole through which the spilled gunnite was being hoisted from the lower level. Inspector Lilley, after being informed that respondent could complete its job in about an hour, nevertheless thought the situation so hazardous that a serious injury might occur before that time elapsed. He thus issued an imminent danger order and alleged therein a violation of 30 C.F.R. § 56.11-27.

The dimensions of the vessel are in dispute. It was between 11 and 15 feet in diameter and I find that if a person fell from the level from where Inspector Lilley was, he would fall 16 feet before striking the bottom level where a female was loading the gunnite into buckets. I find this is a hazard to the workers at the bottom level, as well as to one who might fall from the top level as well as a hazard to the one working in the middle level. Respondent admitted that the port shown on respondent's exhibit 2 was higher than the drawing indicated.

The fact that respondent rents scaffolding, in this case from a Safeway Scaffolding Company, and that the company that rents the scaffolding guarantees its safety does not excuse respondent from this violation. The scaffolding was assembled by respondent and I find that it was assembled in a negligent manner. The respondent is a fairly large company and it did abate the violation in good faith but the negligence and gravity were high. I find the special assessment of \$600 to be reasonable and therefore assess that amount as the appropriate penalty.

Respondent is accordingly directed to pay to MSHA within 30 days, a civil penalty in the amount of \$600.



Charles C. Moore, Jr.
Administrative Law Judge

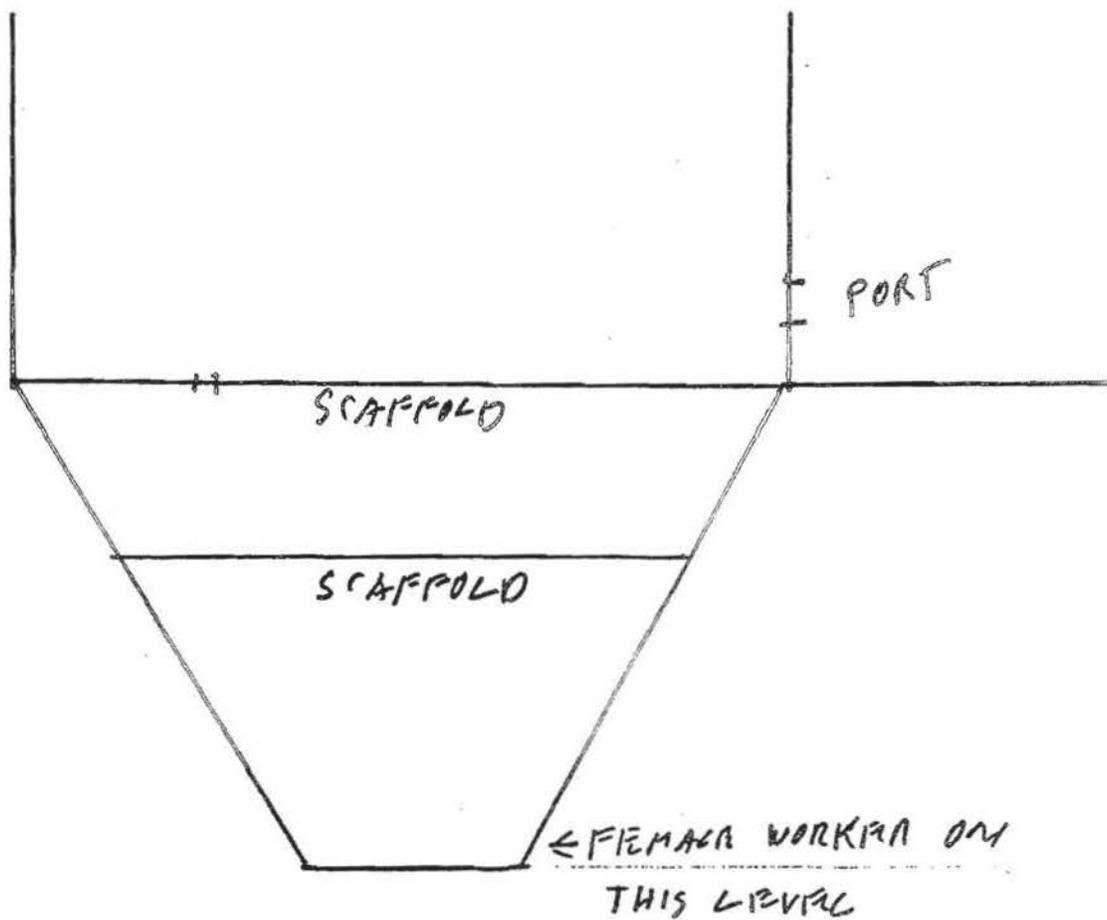
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Attachment 1

/db



RESPONDENT'S EXHIBIT 2 FROM
MEMORY

