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Commission Decisions

February 1 - 29, 1980

FEBRUARY

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

Secretary of Labor , MSHA v. Paramount Mining Company, VA 79-51; (Judge Broderick, December 31, 1979.)

Republic Steel Corporation v. Secretary of Labor, MSHA, PENN 80-56-R, PENN 80-61-R (Judge Kennedy, January 3, 1980.)

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

Secretary of Labor, MSHA v. Ottawa Silica Company, WILK 79-69-PM;
(Judge Michels, December 28, 1979)

Secretary of Labor, MSHA on behalf of Anthony Heriges, etc., v. Island Creek Coal Company, KENT 80-22-D, etc. (Judge Bernstein, January 24, 1980)

Secretary of Labor, MSHA v. Arch Mineral Corporation, WEST 79-58;
Petition for Interlocutory Review.

Thomas Dickenson & John Turner v. Clinchfield Coal Company, VA 79-93-D;
Petition for Interlocutory Review.

Alan Lund v. Clinchfield Coal Company, VA 79-94-D; Petition for Interlocutory Review.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

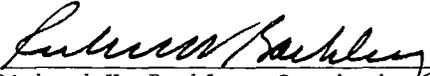
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

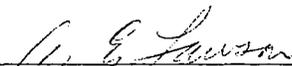
February 7, 1980

SECRETARY OF LABOR :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
v. : Docket No. WEST 79-58
ARCH MINERAL CORPORATION :

ORDER

Arch Mineral Corporation's petition for interlocutory review of an order of the administrative law judge that granted the Secretary of Labor's Motion to Accept Late Filing of Proposal for Penalty is denied. We do not pass on the question of what circumstances, if any, may excuse the late filing of a Proposal for Penalty. Because the events in this case occurred during the period of transition between the Commission's interim and final procedural rules, issues concerning the interpretation of final Commission Rule 27(a) are not presented squarely by this petition for interlocutory review. Our denial of the petition is not to be construed in any way as approval of the failure by the Secretary to timely file a proposal for a penalty in this or any other case.


Richard V. Backley, Commissioner


A. E. Lawson, Commissioner


Marian Pearlman Nease, Commissioner

80-2-3

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 25, 1980

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. KENT 79-129
 :
ISLAND CREEK COAL COMPANY :

DECISION

On October 6, 1978, an inspector of the Mine Safety and Health Administration inspected Island Creek Coal Company's Big Creek No. 2 mine. He observed an alleged violation of 30 CFR §75.400 (accumulation of combustible materials), which he believed was caused by an unwarrantable failure of the operator to comply with that standard. As a result of his finding, the inspector issued a withdrawal order under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §814(d)(1), because he believed that a citation containing the findings that must precede a section 104(d)(1) withdrawal order had been issued on September 27, 1978. 1/

1/ Section 104(d)(1) provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

On August 21, 1979, the Secretary filed with the Commission a proposal for a penalty, seeking the assessment of a penalty under section 110 of the Act for the alleged violation of 30 CFR §75.400 cited in the October 6 withdrawal order. A penalty of \$2,000 was sought.

Thereafter, the Secretary discovered that the September 27, 1978 citation had been modified by the inspector on September 28, 1978 to provide that "[t]he 104 D-1 citation and termination is hereby modified to a 104-A citation and termination." ^{2/} Thus, a citation containing the prerequisite findings did not in fact precede the October 6 withdrawal order under section 104(d)(1). On November 21, 1979, the Secretary filed a motion to dismiss the instant penalty proceeding, on the ground that "[a]s a result of the modification of [the September 27 citation, the October 6 order] is without foundation and does not properly allege a violation of section 104(d)(1) of the Act." On November 29, 1979, without explanation, the administrative law judge granted the Secretary's motion to dismiss. On December 28, 1979, we directed review on our own motion to determine whether the judge erred in granting the Secretary's motion to dismiss. We reverse.

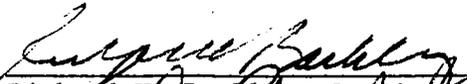
The Secretary's motion, and the judge's dismissal, proceeded on an erroneous understanding of the Act's penalty provisions. Section 110(a) of the Act provides in part:

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$10,000 for each such violation.

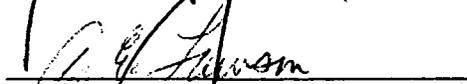
The Act mandates assessment of a penalty for any violation of a mandatory safety standard, such as 30 CFR §75.400, whether that violation is alleged in a citation issued under section 104(a), or in a withdrawal order issued under section 104(d) or other section of the Act. Whether a withdrawal order was properly issued or not (rather than a citation alone) does not affect the fact that a violation of a mandatory safety standard was alleged in that order. That allegation, unless itself properly vacated, survives a vacation of the order it is contained in, and, if proven, the assessment of a penalty under section 110 is required. Thus, whether the October 6, 1978 withdrawal order was properly issued under section 104(d)(1) is not relevant to the assessment of a penalty under section 110 for an alleged violation of a safety standard cited in that order. Therefore, the judge erred in granting the motion to dismiss.

^{2/} Presumably, the inspector meant that he was modifying the September 27 citation to delete either or both of the "significant and substantial" or "unwarrantable failure" findings in that citation.

Accordingly, the judge's order of dismissal is reversed and the case is remanded for further proceedings.


Richard V. Backley, Commissioner


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 25, 1980

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket No. SE 79-127
VAN MULVEHILL COAL CO., INC. :

DECISION

On January 22, 1979, an inspector of the Mine Safety and Health Administration inspected Van Mulvehill Coal Company's Black Creek No. 1 mine. He observed several alleged violations of mandatory safety standards, and he believed that an imminent danger existed. He issued a combined citation and withdrawal order under sections 104(a) and 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§814(a) and 817(a). The document stated:

An imminent danger existed in that the mine fan was not operating and employees were in the mine (75.300). A ventilation and dust control plan had not been submitted (75.316). A fan stoppage plan had not been submitted (75.321). An up-to-date map of the mine had not been submitted to MSHA (75.316-1a). The operator had not submitted arrangements for emergency medical assistance (75.1713-1(a)(b)). [Citation and Order No. 239804.]

The conditions cited by the inspector were abated by the operator and the withdrawal order was terminated on January 30, 1979.

On October 12, 1979, the Secretary filed with the Commission a proposal for a penalty, seeking the assessment of penalties under section 110 of the Act for the five alleged violations cited on January 22, 1979. Penalties totaling \$164 were sought.

80-2-10

On November 28, 1979, the inspector issued a document that stated:

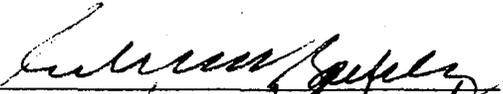
Citation number 239804 issued January 22, 1979 is vacated on grounds that coal was not being produced at the time. The financial condition as stated by accountants are such that the payment of the penalties could have an effect on the company continuing in operation. There has been full cooperation since the issuance of the citation to comply with the Act and regulations by company officials and employees.

On December 10, the Secretary moved to withdraw his proposal for a penalty "for the reason that the Order of Withdrawal No. 239804, heretofore issued, has been vacated." On December 12, the administrative law judge granted the motion. On January 11, 1980, we directed review on our own motion to determine whether the judge erred in granting the Secretary's motion to dismiss. We reverse.

We do not have before us in this civil penalty proceeding the propriety of the imminent danger withdrawal order issued under section 107(a). Thus, to the extent that the inspector's action on November 28, 1979, vacated that order (presumably on the basis that no imminent danger existed), as implied by the Secretary's December 10 motion to dismiss, we do not decide whether or not the vacation was correct. Even if it was, however, dismissal of the civil penalty proceeding was error. The Act mandates assessment of a penalty for any violation of a mandatory safety standard or any provision of the Act, whether that violation is alleged in a citation issued under section 104(a), or in a withdrawal order.... Whether a withdrawal order was properly issued or not (rather than a citation alone) does not affect the fact that a violation was alleged in that order. That allegation, unless itself properly vacated, survives a vacation of the order it is contained in, and, if proven, the assessment of a penalty under section 110 is required. Cf. Island Creek Coal Company, Docket No. KENT 79-129 (February, 1980). Thus, whether the January 22, 1979, withdrawal order was properly issued under section 107(a) is not relevant to the assessment of a penalty under section 110 for alleged violations cited in that order.

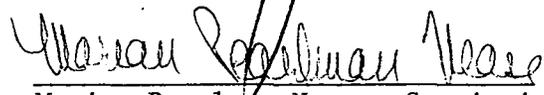
To the extent, however, that the inspector's November 28 action purported to vacate the section 104(a) citations, as appears was his intent, the dismissal was still error. As the Secretary now correctly states in his brief on review, the factors stated by the inspector do not support vacation of the citations. Rather, if the alleged violations occurred, those factors may be taken into account in considering the criteria of gravity, effect on ability to continue in business, and good faith of abatement efforts in assessing appropriate penalties under section 110(i) of the Act.

Accordingly, the judge's order of dismissal is reversed and the case is remanded for further proceedings.


Richard V. Backley, Commissioner


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A. E. Lawson, Commissioner


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Administrative Law Judge Decisions

February 1 - 29, 1980

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 4 1980

WHITE PINE COPPER,
DIVISION OF COPPER MINE,
Applicant

v.

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

: Applications for Review
:
: Docket No. LAKE 79-223-RM
: Citation No. 295881; 7/31/79
:
: Docket No. LAKE 79-224-RM
: Citation No. 294054; 7/31/79
:
: Docket No. LAKE 79-225-RM
: Citation No. 295055; 7/31/79
:
: Docket No. LAKE 79-226-RM
: Citation No. 294056; 8/1/79
:
: White Pine Mine

DECISION AND ORDER

The Secretary moves to dismiss the captioned matters on the ground that vacation of the challenged citations moots the issue of their validity. The operator opposes the motion on the ground that issuance of the citations was in excess of MSHA's statutory authority. The operator seeks therefore an order declaring MSHA's action null, void and unenforceable. See, Eastern Associated Coal Corp., HOPE 73-663, decided February 12, 1974, affirmed in part and reversed in part, 4 IBMA 298 (1975); Eastern Assoc. Coal Corp. v. IBMA, 491 F.2d 277 (4th Cir. 1974); Super Tire Engineering v. McCorkle, 416 U.S. 115, 122-126 (1975).

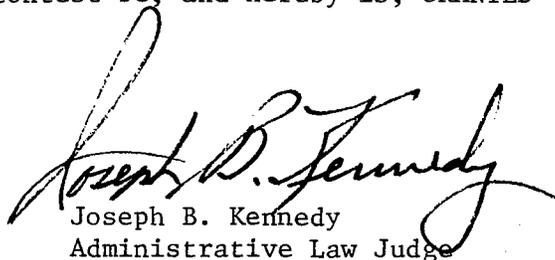
In essence, the operator claims that MSHA's method of enforcement is a deprivation of its property without due process of law. MSHA and the Union, on the other hand, claim that the operator's asserted right to change its ground support system without proof that the alternate method is safe may result in deprivation of a miner's right to life, liberty and property, also without due process of law.

The record shows that acting on a complaint under section 103(g)(1) of the Act, MSHA charged that the operator's failure to furnish data substantiating its claim that use of 4-foot resin bolts in lieu of alternating 4 and 6-foot mechanical bolts was a violation of the ground support standard for metal mines. 30 CFR 57.3-20. Thereafter, an evaluation of the alternate method by MSHA and the operator established

that in any area of the mine where "geologic and stress conditions are similar" 4-foot resin bolts will provide minimal adequate support. Evaluation Report at 6. In areas where the "geologic and horizontal stress conditions are different", however, MSHA reserves the right to require the operator to prove the efficacy of the 4-foot resin bolts prior to their general use.

After a careful consideration of the vital interests involved, I conclude the interest in life outweighs the interest in property. Congress made this choice inevitable when, in staking out goals for the Mine Safety Act, it solemnly declared that "the first priority and concern of all in the mining industry must be the health and safety of its most precious resource--the miner". That priority is reflected in the Act's review provisions, which do not tolerate temporary relief from 104(a) citations but which, under the Commission's decision in Energy Fuels Corp., DENV 78-410, 1 BNA MSHC 2013, 1 FMSHRC Decisions 299, (May 1, 1979), do provide for immediate, expedited review of the merits of abated citations. For these reasons, I find the operator's claim of irreparable injury or deprivation of property without due process of law without merit. As the courts have noted, "irreparable harm, presupposes the absence of an available remedy for relief, whether administrative or judicial." Sink v. Morton, 529 F.2d 601, 604 (4th Cir. 1975). In this case the Act clearly provides such a remedy since the operator can obtain an expedited hearing on the merits of the validity of a citation or closure order, including the right to apply for a temporary stay of a closure order. Such a procedure accords the operator all the process he is due. Lucas v. Morton, 358 F.Supp. 900, 905 (W.D. Pa. 1972); Sink v. Morton, supra.

The premises considered, it is ORDERED that the Secretary's motion to dismiss the captioned notice of contest be, and hereby is, GRANTED and the matter DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 4 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. NORT 78-337-P
Petitioner : A/O No. 44-02277-02004V
v. :
: Moss No. 3 Preparation Plant
CLINCHFIELD COAL COMPANY, :
Respondent :

DECISION

Appearances: Eddie Jenkins, Esq., Office of the Solicitor, U.S.
Department of Labor, for Petitioner;
Gary W. Callahan, Esq., The Pittston Company Coal
Group, Lebanon, Virginia, for Respondent.

Before: Judge Charles C. Moore, Jr.

Inspector Daniel S. Graybeal, a surface mine inspector for MSHA, conducted a regular health and safety inspection at Clinchfield Coal Company's Moss No. 3 Preparation Plant on November 29, 1977 (Tr. 8), and during the course of inspecting the plant's thermal drying system (Tr. 10), Inspector Graybeal found that the bypass relief gate for the No. 3 furnace was not working (Tr. 11). This particular plant had four furnaces, each with two dryers (Tr. 11).

Inspector Graybeal asked foreman Ernest Serber to have the furnace operator simulate an emergency shutdown. This is accomplished by stopping the dried coal transfer screw which stops all drying components except the exhaust fan. 1/ This was done, but the bypass gate did not open (Tr. 12). An emergency shutdown was simulated three more times and each time the bypass gate failed to open (Tr. 12). Inspector Graybeal then asked a local union representative to disconnect the air hose leading to the air motor that closes the bypass gate under pressure. The bypass gate still failed to open (Tr. 12). The protection door which normally allows heat from the furnace to rise into the dryers closed during the emergency shutdown, as it should (Tr. 23).

1/ There is a dispute as to this statement which will be discussed later.

Although Inspector Graybeal did not have a clear line of vision to the furnace from his location on the feed and discharge screw platform next to the bypass gate, he could see smoke rising up from the area of the furnace during the shutdown. None of the other dryers were shut down at this point (Tr. 28).

The inspector issued an unwarrantable failure order. This order was terminated 1 hour and 10 minutes after it was issued (Tr. 45). Inspector Graybeal was called back to reinspect the bypass relief gate (Tr. 46). In checking the gate, he observed it would only open part way and he refused to terminate the order until the bypass gate would open completely (Tr. 46). Employees of Respondent tied a 15-pound metal weight to the arm of the bypass gate to give it more leverage so that it would open (Tr. 46-47). The bypass gate then operated properly and the order was terminated.

The furnace operator on the day shift informed Inspector Graybeal that the bypass gate was last checked on November 21, 1977 (Tr. 43). Four other employees of Respondent did not know when the bypass gate had been most recently inspected (Tr. 75).

The last unwarrantable failure order issued to the Moss No. 3 Preparation Plant was written on October 12, 1976. During that 11-month interval, no complete health and safety inspections were conducted by MSHA at the plant to verify abatement of the unwarrantable failure citation, or for any other reason (Tr. 97).

A plant electrician was called to the No. 3 furnace to check the bypass gate after the order was issued and before it was abated. He testified that he unhooked the air hose to the bypass gate and found that the gate operated properly (Tr. 145). The electrician called one of the foremen and told him that he could not find anything wrong with the bypass gate (Tr. 45). He had watched the bypass gate open when he unhooked the air hose (Tr. 147).

Frank Hall, the plant superintendent, testified that no time had been lost due to a malfunctioning bypass gate during the week the citation was issued (Tr. 165).

There is no doubt that thermal dryers can be hazardous and that the chance of explosion or fire is greater during startup and shutdown than during normal operation of the dryer. Hot gases from the furnace enter the main part of the dryer where coal and coal dust is present and ignition of the coal dust sometimes occurs. It was explained that there is sometimes incomplete combustion in the furnace and thus some flammable gases reach areas where coal dust accumulates and that if an ignition occurs these gases would add to the severity of a coal dust ignition. It is not at all clear however, how the failure of the bypass gate could lead to an explosion in the dryer. The last page of Exhibit M-2 contains a schematic diagram of the thermal dryer involved in this case. The furnace portion of the dryer is constructed of an inner wall which is firebrick hung on a framework with no mortar and an outer wall which, although mortared, nevertheless has substantial openings therein. When the system is operating the exhaust fans

cause air to be drawn in through the furnace openings and out of the furnace up past the protection door into the main part of the dryer. When the protection door is closed no gases from the furnace can be sucked up into the dryer, and the purpose of the bypass gate is to disburse the combustion products via a bypass stack leading to the outside rather than having these products exit the furnace through holes in the furnace itself. Even with the protection door closed (the bypass gate has no function unless the protection door is closed), I am unconvinced that an explosion hazard existed. I cannot accept the inspector's speculation that sufficient pressure might build up in the furnace to force open the protection door. According to the inspector, there were two 16-inch square openings at the top corners of the furnace (this is the outside wall of the furnace) and at the bottom some bricks were left out to provide an airflow (Tr. 70). With the protection door and the bypass gate closed, smoke could be forced through the furnace openings until the fire smothered itself. The smoke coming out of these openings may constitute a hazard, but not an explosion hazard.

Although there is some question about it, I am going to assume that the thermal dryer operator used the proper emergency shutdown procedures. According to the note at the bottom of page 4 of the emergency shutdown procedures (Exhibit M-2), stopping the dried coal screw will stop the complete system in sequence except for the exhaust fan. Respondent's superintendent however, testified that the note was erroneous and that the other steps listed on the same page would have to be taken in order to shut down the system in sequence. Inasmuch as the inspector asked the dryer operator to simulate an emergency shutdown and observed that the bypass gate did not close and that smoke was coming from the bottom of the furnace (indicating the protection door had closed), he established a prima face case that the bypass gate was not working properly. If the dryer operator acted improperly, it was the burden of Respondent to rebut the prima face case by showing that some step in the shutdown procedure was omitted. It has failed to make such a showing. I therefore find that there was a violation of the safety standard.

The inspector issued the unwarrantable failure order because four tries were made to simulate the emergency shutdown and in each case the bypass gate would not open. It is clear that I do not have any authority to review the unwarrantability finding or the order during a civil penalty proceeding. In Zeigler Coal, 2 IBMA 216 (1973), the Board of Mine Operations Appeals decided that the validity of a withdrawal order is not an issue in a civil penalty proceeding. Subsequent cases under the 1969 Act decided by both the Board and the Commission unerringly follow Zeigler (Wolf Creek, PIKE 78-70-P, March 26, 1979; Pontiki, 1 FMSHRC 1476 (October 1979); Jewell Ridge, 3 IBMA 376 (1974); Plateau Mining, 2 IBMA 303 (1973); Buffalo Mining, 2 IBMA 327 (1973); North American Coal, 3 IBMA 93 (1974), cf. Freeman Coal, 2 IBMA 197 (1973)). This is the rule whether the improperly considered order was an unwarrantable failure order (Wolf Creek, supra; Jewell Ridge, supra; Pontiki, supra; North American Coal, supra), or an imminent danger withdrawal order (Zeigler Coal, supra; Plateau Mining, supra; Buffalo Mining, supra; cf. Freeman Coal, supra).

I think a distinction should have been made between orders that depend on a violation of a health and safety standard, such as unwarrantable failure orders, and imminent danger orders which need not be supported by any violation of a health and safety standard. An imminent danger can exist when there is no violation, but the idea of there being an unwarrantable violation but no violation is self-contradictory. If I had found that there was no violation proved in this case, the effect of that finding would be to show the invalidity of the order but I could not vacate that order. Assuming my decision was affirmed, there would be a final legal determination that no violation had occurred and at the same time, an equally final and valid order stating that an unwarrantable failure violation had occurred.

In the instant case, I have found that a violation occurred and while I cannot review the unwarrantability of the violation I can find and do find that Petitioner has not proved negligence in this case. 2/ The bypass stack has to open in both emergency and normal shutdowns and there was no evidence that prior to the date of the inspection this bypass stack had failed to operate properly. The fact that in four separate tries the inspector and dryer operator could not get the bypass stack to open, shows that there was something wrong with it but it does not prove that Respondent knew or should have known that something was wrong with it. Respondent is a large company and has a substantial history of violations and it abated the violation promptly and in good faith. I find the evidence establishes a low order of gravity and that a penalty of \$300 is appropriate.

ORDER

IT IS THEREFORE ORDERED that Respondent pay to MSHA, within 30 days of the issuance of this decision, a civil penalty in the amount of \$300.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

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2/ This makes it unnecessary for me to consider Respondent's contention that it was prevented from escaping the unwarrantable chain by MESA's failure to conduct a complete inspection for 11 months.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
520~~3~~ LEESBURG PIKE
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FEB 5 1980

SECRETARY OF LABOR, : Complaint of Discharge,
MINE SAFETY AND HEALTH : Discrimination, or
ADMINISTRATION (MSHA), : Interference
Petitioner :
: Docket No. LAKE 79-282-D
CHARLES W. MILLER, : CD 79-158
Applicant :
v. : No. 24 Mine
: :
OLD BEN COAL COMPANY, :
Respondent :

DECISION

This is a proceeding under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. Applicant alleges that he was removed from his position as face boss at Old Ben's No. 24 Mine because of his "insistence that the men working under me do so under safe conditions and in compliance with [F]ederal law." A hearing was held in St. Louis, Missouri, on November 28 and 29, 1979. The parties were represented by counsel, and have filed post-hearing briefs.

At the hearing, Applicant, J. B. Gibbs, John Barwick, George Jenkins, and Dennis Benns testified for Applicant. Lester Grogan, Roger Roper, Robert Travelstead, and James Green testified for Respondent. Ernest Duckworth testified for Applicant as an adverse witness, and for Respondent.

FINDINGS OF FACT

The parties stipulated and I find:

1. Old Ben Coal Company (Old Ben) is engaged in the coal mining business in the State of Illinois, with its home office at 125 South Wacker Drive, Chicago, Illinois 60606, and a regional office at 500 North DuQuoin Street, Benton, Illinois 62812.
2. Charles W. Miller was employed by Old Ben as an underground miner from June 3, 1974, to July 25, 1977.
3. On or about July 25, 1977, Mr. Miller was promoted by Old Ben to a management position as a section boss (sometimes referred to as a "face boss").

4. Mr. Miller performed his management duties at Old Ben's No. 24 Mine.

On February 27, 1979, Old Ben fired Applicant. Applicant contends that he was discharged because he had made complaints regarding various safety matters. Old Ben contends that Applicant was fired because he disobeyed orders and in other respects was not a satisfactory employee.

In support of his case, Applicant alleges that his conduct in connection with four separate safety-related incidents resulted in his discharge. These incidents are:

1. The "four-violation incident," which occurred on or about July 18, 1978;
2. The "telephone incident," which occurred on or about July 21, 1978;
3. The "roof-bolting incident," which occurred in mid-December 1978; and
4. The "longwall incident" of February 26, 1979.

The Four-Violation Incident

On July 18, 1978, Applicant worked the 4 p.m.-to-midnight shift as the face boss of a continuous miner crew. When he entered the company's conference room at approximately 3:30 p.m., he learned that a Federal inspector had discovered certain safety violations in his section of the mine. Four of these violations had to be corrected by 8 a.m. the following morning, and Applicant was told that this would have to be done by his crew. ^{1/} The key issue with respect to this incident concerns Applicant's testimony that he was directed by mine superintendent Lester Grogan to correct the violations and load coal at the same time. Applicant stated that when Mr. Grogan found out that no coal had been loaded on Applicant's shift, he became angry. Applicant testified that Robert Travelstead, Old Ben's safety director, shut down the continuous miner until a broken bolt under the seat was fixed. Applicant contends that it would have been unsafe to operate the continuous miner without first correcting the violations, and therefore that his refusal to follow Mr. Grogan's instructions was justified. Additionally, Applicant stated that there was no rock dust in his section of the mine, and thus he was unable to correct the rock dust violation.

^{1/} Applicant testified that correcting the violations involved replacing a headlight on a continuous miner, replacing a broken bolt in an electrical panel under the seat of the continuous miner, cleaning up the area, and doing rock dusting. The testimony of Respondent's witnesses, including Old Ben's safety director, Robert Travelstead, indicates that the four violations found by the MSHA inspector did not include the broken bolt under the seat, but did include a permissibility electrical violation. Mr. Travelstead and Old Ben's mine superintendent, Lester Grogan, testified, and I find, that the broken bolt was found after the inspection. I do not believe, however, that this fact is material to the legal issues presented in this case.

Respondent's witnesses testified that Applicant was not told to operate the machinery while the violations remained uncorrected. Mr. Grogan testified that he told Applicant to fix the electrical violation and the headlight on the continuous miner before operating it. He added that when he later learned of the broken bolt under the seat, and Mr. Travelstead's order to shut down the machine, "the matter was dropped * * *." Mr. Grogan's version of these events was corroborated by the testimony of Mr. Travelstead. None of the testimony of Applicant's fellow employees confirmed Applicant's testimony that he was ordered to mine coal and repair the violations simultaneously.

The Telephone Incident

Applicant's testimony concerning the telephone incident is essentially consistent with that of Respondent's witnesses, as well as several of Applicant's co-workers. The telephones broke down in Applicant's section around July 21, 1978, and were inoperable for two or three days. Management claims that it did not know that the phones were broken, and that the situation was remedied as soon as the problem was made known to it. Applicant and his fellow employees contend that management was informed of the situation, and that after one or two days the workers refused to mine coal until the telephones were repaired. The workers felt that this was an unsafe situation. Management agreed that the miners should not mine coal in the section until the telephones were repaired, and the miners were given jobs shoveling coal elsewhere. There is no evidence, however, that Applicant was responsible for, or involved in, this refusal. One of the miners testified that Applicant "had nothing to do with it." Nor does it appear that management blamed him for this incident.

The Roof-Bolting Incident

Toward the end of November 1978, Applicant became a section boss of a crew that operated a longwall miner. ^{2/} When he was transferred to this position, he received eight hours of instruction on the operation of this equipment. For about the first two weeks, he worked under an experienced face boss on the longwall miner, and then assumed those duties himself. He was not, as other mine personnel were, sent to Rend Lake College for longwall instruction.

The roof-bolting incident occurred in mid-December 1978 in the longwall area during the midnight-to-8 a.m. shift. Some of the roof had fallen, and there was a crack in the roof which made it appear unsafe. Applicant's crew had planned to cut down the roof area around the fall, since Applicant felt it would be unsafe to bolt the roof. However, Ernest Duckworth, the longwall coordinator, instructed the crew to bolt it anyway. At this point, Duckworth left the area. The men started to bolt the roof when Roger Roper,

^{2/} A longwall miner is a complicated and sophisticated machine which moves along a section of face approximately 460 feet long, shearing off coal as it moves. Twelve people are required to operate such a device, which costs approximately seven million dollars. The section boss thus holds a very responsible position.

the mine manager, arrived. When Roper learned of the situation, he told the men to move the roof-bolting machine back out of the way because the roof looked unsafe. Shortly after the machine was moved, the roof fell in. Applicant testified that men could have been killed if they had been under the roof, and the machine could have been damaged. Apparently, an argument ensued in which Roper blamed Applicant for doing bolting which was dangerous, and Applicant blamed Duckworth for giving him the order to do something which Applicant felt was wrong. Applicant also resented the fact that Duckworth usurped Applicant's authority. There is no indication, however, that Applicant made a safety complaint in connection with this incident.

The Longwall Incident

On February 26, 1979, there was a severe blizzard along the eastern seaboard of the United States. Of between 100 and 125 men who were supposed to work the midnight-to-8 a.m. shift at Old Ben's No. 24 Mine, only six, including Applicant, reported to the mine. These six men were assigned to a make-shift crew on the longwall machine. Another man who reported to work was posted at the face of the mine to relay telephone messages for safety purposes. The crew on the longwall machine included Applicant, another foreman named Palmowski, and four other men who were either trainees or just off of trainee status. None of the other men knew how to operate a longwall miner. At the beginning of the shift, Superintendent Grogan told Palmowski that he wanted Applicant, who was in charge of the crew, to have the men replace some "flights" ^{3/} on the longwall machine. Approximately 75 flights on the chain had to be bolted into place, a task which required that the machine be started and the chain moved into position. The equipment did not have to be actually operated, however, and it was not near the face. Applicant contends that he did not know how to operate the machine; that his crew was incapable of operating it; that he was totally unfamiliar with the machine's control panel; and that in order to start the machine, it would have been necessary to short out its methane detector. ^{4/} Applicant felt that this would be a violation of safety laws. Respondent pointed out that Applicant was not being asked to mine any coal with the machine, but merely to start it and move the belt so that the flights could be replaced.

Applicant's crew did not replace any flights on that day. He assigned the men to do other work. It was not until three or four hours after the shift began that Mr. Roper telephoned the crew and learned of this. Applicant was fired the following day.

^{3/} A flight is a metal bar about four inches in diameter and twelve inches long which is attached to a chain that drags coal towards the conveyor after it is cut from the face. The flights had to be installed because the longwall miner had recently been moved to a new panel. During the move, the flights had been removed.

^{4/} The methane detector on a longwall miner is a device which stops the machine from operating if methane is sensed. On the day in question, the detector was broken, rendering the machine inoperable unless the detector was circumvented.

Concluding Findings and Conclusions of Law

For Applicant to prevail in this action, he must show that his safety-related actions constituted "protected activity." This concept has received considerable attention from the courts under both the 1969 and 1977 Mine Acts. The leading case is Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). There, the Court held that the plaintiff's notification to his foreman of possible dangers was an "essential preliminary stage" of those actions which bring the protection of the Act into play. ^{5/} Id. at 779. This view, in the Court's opinion, represented a compromise between two extremes which the parties had urged upon it:

"We do not think that merely because a discharge originates in a disagreement between a foreman and a miner that the Mine Safety Act is automatically brought into play. Nor do we adopt the other extreme, take the bare words of the statute with their most limited interpretation, and hold that before a miner's safety complaint is accorded the protection of the Safety Act the coal miner must have instituted a formal proceeding with the Secretary of Interior or his representative. Rather, we look to: the overall remedial purpose of the statute * * *; the practicalities of the situation in which government, management, and miner operate; and particularly to the procedure implementing the statute actually in effect at the * * * mine."

The issues to be determined are whether Applicant's action in any of the incidents crossed the line from a "disagreement" to "notification * * * of possible dangers * * *."

With respect to the four-violation incident, Applicant made no safety complaint. Applicant's testimony that he was directed to repair the violations in question and load coal simultaneously was not corroborated by the testimony of any of his fellow miners, and was expressly contradicted by Mr. Grogan and Mr. Travelstead. Similarly, the telephone incident did not involve such a complaint. Applicant merely informed management of the need for a telephone in his section of the mine. There is no evidence that he was responsible for the refusal of his men to work until the phones were repaired, nor is there any indication that management blamed him for the workers' refusal.

The roof-bolting incident was, in my opinion, a mere "disagreement" between Applicant and management. Admittedly, Applicant was caught between the orders of two of his superiors and, as is often the case in such a situation, some hard feelings resulted. Applicant believed that Mr. Duckworth gave him an instruction to do something which was dangerous. When his men started to carry out those orders, Applicant found himself arguing with

^{5/} While Phillips was decided under the 1969 Act, it remains the leading case defining the concept of "protected activity" under the 1977 Act.

Mr. Roper. Roper agreed with Applicant that the roof should not be bolted, and ordered the crew to move the equipment away from the roof. Clearly, there was no safety complaint made by Applicant to Mr. Roper, as the two men agreed that the situation was unsafe. Furthermore, Applicant's discussion with Mr. Duckworth did not cross the line from a "disagreement" to a "complaint."

Thus, if Applicant is to prevail in this case, he must show that there was something about the longwall incident which resulted in his being discriminated against for making a safety complaint.

It is pertinent to note that none of the prior incidents occurred within three months of the date of Applicant's discharge. Although Mr. Grogan and other management witnesses indicated that they never placed any information in Applicant's personnel file, nor issued anything else in writing, which indicated that they were in anyway dissatisfied with Applicant's performance, there was considerable credible testimony concerning various sources of friction between Applicant and other management officials. For example, Applicant testified that he was always very safety-conscious, and that he often became concerned when the crew before him did not clean up the worksite properly, attach the sucker hose, 6/ or bolt and maintain the roof in a safe condition. Grogan testified that it was common for each crew to blame the previous one for such circumstances. He added that Applicant often did not clean up his own area as much as he should have, and that as a result, Applicant's section was the source of an abnormally high number of safety violations. Grogan testified that Applicant often disobeyed instructions, and blamed other shifts and upper management for his own problems. There was also testimony that Applicant resented being assigned to the longwall crew since this entailed working on Saturdays and Sundays.

I agree with Mr. Grogan's assessment of Applicant as a very intelligent worker with a good deal of potential. Obviously, there was some friction between the parties, but I do not find that this was due to Applicant's having made safety complaints. The pivotal question here is whether Applicant's refusal to obey his orders to replace the flights on the longwall miner constitutes a safety complaint for which he can claim protection under the Act. The evidence indicates that Applicant was not as well trained in the operation of the longwall miner as he should have been. Although he may have been able to figure out how to start the machine on the day in question, he was justified in declining to do so without further instructions. However, I am more impressed with the fact that he was told to replace the machine's flights at the beginning of his shift, and although a telephone was available, he did not inform management of his feelings until the shift was almost half over and then only after Mr. Roper telephoned him. I think it was incumbent upon Applicant to register his complaint immediately, and tell his supervisor that he could not perform his

6/ A sucker hose is an exhaust hose which keeps the mine face free of methane and other harmful gases.

assigned duties without further instructions on the operation of the machine. Instead of doing this, Applicant simply disobeyed his supervisor's directions. That type of conduct is not protected under Section 105(c) of the Act.

ORDER

The complaint is DISMISSED.



Edwin S. Bernstein
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 6 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 79-105
Petitioner :
v. : Chisholm Mine
: PIKEVILLE COAL COMPANY :
Respondent :

DECISION

Appearances: Darryl A. Stewart, Office of the Solicitor, U.S. Department of Labor, for Petitioner;
John M. Stevens, Esq., Stephens, Combs and Page, Pikeville, Kentucky, for Respondent.

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Lexington, Kentucky, on December 20, 1979, at which both parties were well represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, I entered a detailed opinion on the record. It was found that the violation charged in the withdrawal order did occur. My oral decision, containing findings, conclusions and rationale appears below as it appears in the record, other than for minor corrections in grammar and punctuation:

Turning to Docket No. KENT 79-105, that docket contains one charge of violation of section 30 CFR 75.400, the 75.403 violation having been dismissed for failure of evidence previously in this proceeding.

The question involved is whether or not the accumulations as charged in the withdrawal order did exist, and if so, what the amount of penalty should be based upon the statutory penalty assessment criteria and any other relevant factor which might stand either in mitigation or aggravation of the amount of penalty.

As I have previously noted in my decision in the review proceeding which is related to this penalty proceeding, I find no question on the record but that the accumulations as described by inspector Vernon P. Hardin in the order of withdrawal did exist. There was no really serious challenge to the existence of such accumulations. I found specifically in the review proceeding that Inspector Hardin's testimony describing the appearance of these accumulations, the fact that the rock dusting was inadequate, and the depth and extent of the same, to be credible. And I so find here.

Having found that the accumulations existed, and that does constitute the violation itself, I conclude that a violation of 30 CFR 75.400 occurred.

I also find that this is a large company from the standpoint of a three-size spectrum--small, medium and large--since it had approximately 270 employees at the time of the violation, 285 employees at the present time, and since its coal production annually runs approximately 680,000 tons per year. To be more specific, I also find that if one were to take only the large category of coal companies, that this is not one of the giants, certainly, of the coal industry, nor would it be one of the middle range coal companies. This would be one of the smaller of the large coal companies.

I find that the history of previous violations for this company is average for a company of this size based upon the stipulation of the parties, and also based thereon, that any penalty that I assess in this case and which I am going to be assessing in this proceeding will not affect the company's ability to continue in business.

Turning now to the third statutory penalty assessment factor, whether or not the respondent company proceeded in good faith to abate the cited violation, I can only conclude that the company did proceed in ordinary good faith to abate this violation, there being no evidence to the contrary. I do note in this connection, in viewing abatement, that even though the inspector first sighted the violation at 9 o'clock, the abatement period would run from the time of the issuance of the order of withdrawal (approximately 2-1/2 hours later). It would not run from 9 o'clock to 11:30. It did appear to me that perhaps the operator here was a little slow in correcting the problem. On the other hand, it does appear that the scoop broke down with a defective hose at the wrong time, and perhaps other unanticipated misadventures occurred.

With respect to the seriousness of the violation, I find that 10 employees were exposed to a hazard which itself could

be either fire or an explosion. As I have previously noted in the related review proceeding, I do not find this hazard to be an "urgent" or an "imminent" one. I do find this to be a serious violation. Accumulations are one of the serious violations, and as the Commission has recently noted in its decision in Old Ben Coal Company, which issued within the last month, this type of violation is one of the kinds which contributed to the passage of the 1969 Federal Coal Mine Health and Safety Act since it is the cataclysmic or disaster-type of violation. This type of violation will normally be found to be serious.

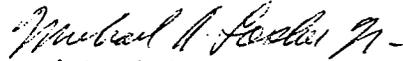
In connection with negligence, I find the delay between 9 o'clock and 11:15 which the operator engaged in to be adverse to any argument that the penalty should be nominal or small. One of the things which was not shown is whether or not, when a dangerous situation occurs and a piece of machinery designed to correct that situation malfunctions, there is a backup procedure or backup equipment or the like to cure it. If a fire is in progress and you have a hose which does not work, it would seem to me that there should be a backup procedure which would take care of a such a serious condition, or else some procedure or means of diverting another piece of machinery from another operation into an area where a danger occurs. While I do not find gross negligence, and it is very close to gross negligence in my estimation, I find a high degree of negligence in this case for allowing this type of condition to exist for that period of time.

I know of no other factors to consider with respect to this violation.

In summary, I do find that that violation occurred and that the penalty factors of seriousness, negligence and size of the company mandate a substantial penalty. The MSHA proposed assessment of \$1,000 is a substantial penalty. I see no reason to increase it. On the other hand, I see no reason to reduce that penalty on the basis of this record. So a penalty of \$1,000 for the 75.400 violation contained in Withdrawal Order 065134, dated December 20, 1978, is assessed and the Respondent is directed to pay the same to the Secretary of Labor within 30 days from receipt of my written decision which will issue after this hearing."

ORDER

Respondent, Pikeville Coal Company, is ORDERED to pay a penalty of \$1,000 to the Secretary of Labor within 30 days from the issuance date of this decision.


Michael A. Lasher, Jr.,
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
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FEB 6 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 79-165
Petitioner :
v. : Chisholm Mine
: :
PIKEVILLE COAL COMPANY, :
Respondent :

ORDER APPROVING SETTLEMENT

At the hearing in Lexington, Kentucky, on December 20, 1978, a settlement of the two violations involved in the above docket was accomplished in the total sum of \$975 (Citation No. 65011--\$445 and Citation No. 65130--\$530). MSHA's total initial assessment was \$1,640.

This settlement is approved for the following reasons:

1. MSHA concedes that its initial evaluation of proper penalties may have been excessive based upon its initial overevaluation of the statutory factor relating to Respondent's good faith in abating the two violations in question.
2. The violative conditions described in Citation Nos. 65011 and 65130 are not inherently conditions of sufficient severity to warrant higher penalties absent aggravated surrounding circumstances.
3. The settlement amounts are substantial.

ORDER

Respondent, if it has not previously done so, is ORDERED to pay the stipulated penalties totaling \$975 in the above docket to the Secretary of Labor, within 30 days from the issuance date of this order.

Michael A. Lasher, Jr.
Michael A. Lasher, Jr., Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 6 1980

PIKEVILLE COAL COMPANY, : Contest of Order
Contestant :
v. : Docket No. PIKE 79-66
: :
SECRETARY OF LABOR, : Order No. 65134
MINE SAFETY AND HEALTH : December 20, 1978
ADMINISTRATION (MSHA), :
Respondent : Chisholm Mine

DECISION

Appearances: John M. Stephens, Esq., Stephens, Combs & Page, Pikeville, Kentucky, for Contestant;
Darryl A. Stewart, Assistant Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, for Respondent.

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Lexington, Kentucky, on December 20, 1979, at which both parties were well represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, I entered a detailed opinion on the record. 1/ It was found that the violation charged in the withdrawal order did occur. My oral decision, containing findings, conclusions and rationale appears below as it appears in the record aside from minor corrections in grammar and punctuation:

This proceeding involves an imminent danger withdrawal order, No. 065134, issued on December 20, 1978, which is the subject of both a penalty proceeding and an application for review.

Turning first to Docket No. PIKE 79-66, which is the proceeding for review of the order, the issue presented is

1/ Tr. 146-151.

whether or not the physical conditions described in the order did exist, and if so, if such conditions constitute an imminent danger, as that term is defined in section 107(a) of the 1977 Federal Mine Safety and Health Act.

I preliminarily note that whether or not an imminent danger exists is not dependent upon the existence of an actual violation of any of the mandatory safety and health standards.

I also preliminarily note that two violations of such standards were specifically stated in the withdrawal order, one of which, the violation of 30 CFR 75.403, has been previously dismissed upon motion by the Government, and properly I think, when it appeared that the sampling technique was inadequate.

The withdrawal order describes the condition as follows: "Loose coal and inadequate rock dust in depths of three and a half inches to ten inches deep in the Numbers 2 through 8 Entries and connecting rooms, including the last open cross-cut outby the face." The withdrawal order contains other language which I deem it unnecessary to quote.

The evidence presented indicates that the depth of the accumulations was from 3-1/2 to 10 inches, based upon the testimony of the inspector, which I do find credible.

The inspector also indicated, and I find, that the accumulations ran from 50 to 100 feet in six of the entries and for approximately 200 feet in the No. 4 entry.

I find that the condition existed on an active working production shift and that had an imminent danger existed some 10 employees would have been exposed.

Since I conclude that there is really no serious question, nor has there really been a strong challenge to the evidence indicating the existence of the accumulations as described in the order, I do find that the accumulations did exist. The question then becomes whether or not these physical conditions constitute an imminent danger.

The record reveals that the inspector arrived on the section in the area where the accumulations existed at approximately 9 o'clock on the morning of December 20, 1978. At that time, he observed the accumulations but made no measurements. Nor did he take any samples of the accumulations to determine combustibility.

The inspector did visually observe the accumulations and believed that they had been inadequately rock dusted, that there was "a thin layer" of rock dust over the material which appeared to him to be very black. On the other hand, at 9 o'clock in the morning, the inspector, visually observing this condition, took no action. He returned approximately 2 to 2-1/2 hours later and the condition was found to have remained present in the area. At this time, the inspector who is an "electrical inspector," and who was not equipped with a sampling kit containing sampling equipment to measure combustibility, did take samples, but these were processed in such a way that the same appeared to be inadequate for proper sampling analysis. This led in turn to the dismissal of one of the two violations specifically cited in the withdrawal order, that in 30 CFR 75.403.

The inspector testified that there was present in the area where the accumulations were present a roof bolting machine which had splices in its cable, but he also indicated that the splices were adequate and that there was nothing wrong with the splices. He also testified that occasionally shuttle cars were known to come in and out of the area but that there were none at the time he observed the condition.

I thus find that there was only one potential, I underline potential, ignition source in the area.

In concluding that an imminent danger has not been established in this case, I emphasize that one of the bases for finding no imminent danger is that this was not the type of situation one normally would encounter with respect to ignition sources where the imminent danger flows out of accumulations. In this case, there was no evidence indicating that there were sparks actually flying from any piece of machinery or equipment. There was no evidence, for example, that there was a belt roller grinding in accumulations or that there was arcing from some defective piece of equipment. Nor was there evidence in this case that there were numerous potential ignition sources which would perhaps increase the likelihood that a spark or a fire would result from it, which in turn would be aggravated by the existence of accumulations or which would combine with accumulations to create an explosion.

Here we have, really, one piece of equipment which is in operable condition. I find that while there was a hazard, that it is not shown to be imminent. It is not shown to be urgent.

In that same connection, I note that the inspector observed substantially the same situation at 9 o'clock and yet, did not do anything about it. So this detracts somewhat, in my thinking--had this been a blatant or a clear cut situation where one senses urgency or imminence to a hazard, and a serious hazard, that one would act to clear the area upon the initial observance of the same.

The Government's evidence with respect to imminent danger, and its position in this case, is also deteriorated by the fact that the evidence of combustibility of the material has substantially fallen by the wayside by the problem with the sampling technique, which led to the dismissal of the 75.403 charge and which in turn, I do note, was described by the inspector in the withdrawal order itself.

So for those various reasons, I am unable to conclude that an imminent danger did exist and, accordingly, Order No. 065134, dated December 20, 1978, is ordered vacated, the application for review in this case, having been found to be meritorious.

ORDER

The application having merit, Order of Withdrawal No. 065134 is VACATED.


Michael A. Lasher, Jr., Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 8 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	
	:	Docket No. BARB 79-307-P
	:	A.O. No. 15-11348-03002
v.	:	
	:	Docket No. BARB 79-285-P
THE PITTSBURG & MIDWAY COAL MINING COMPANY, Respondent	:	A.O. No. 15-11348-03001
	:	
	:	Docket No. PIKE 79-129-P
	:	A.O. No. 11348-03004 F
	:	
	:	Docket No. KENT 79-74
	:	A.O. No. 15-11348-03006
	:	
	:	Docket No. KENT 79-180
	:	A.O. No. 15-13348-03007
	:	
	:	Docket No. KENT 79-367
	:	A.O. No. 15-13348-03009
	:	
	:	Docket No. KENT 79-269
	:	A.O. No. 15-11348-03008
	:	
	:	Docket No. KENT 79-99
	:	A.O. No. 15-11348-03003
	:	
	:	Pleasant Hill Surface Mine
	:	
	:	Docket No. KENT 79-229
	:	A.O. No. 15-02021-03005
	:	
	:	Colonial Strip Mine

DECISIONS

Appearances: Marvin Tincher, Attorney, Office of the Regional Solicitor,
U.S. Department of Labor, Nashville, Tennessee, for the
petitioner;
George M. Paulson, Esq., Denver, Colorado, for respondent;
Harold A. Hintze, Esq., Salt Lake City, Utah, for proposed
intervenor Ford, Bacon and Davis Utah, Inc.

Before: Judge Koutras

Statement of the Proceedings

These consolidated civil penalty proceedings concern proposals for assessment of civil penalties 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). Hearings were conducted in Docket Nos. BARB 129-P, BARB 285-P, and BARB 79-307-P, in Evansville, Indiana, on August 22, 1979, and the parties appeared and were represented by counsel. Subsequently, the petitioner filed proposals for assessment of civil penalties in Docket Nos. KENT 79-74, KENT 79-180, KENT 79-269, and KENT 79-367, and on motion by the respondent, these four dockets were consolidated with the three heard in Evansville. The motion was granted because of respondent's assertions that all of these cases involve the same legal issues as those covered by the Evansville hearings, namely the question of whether the proposals for assessment of civil penalties should have been served on certain independent contractors and subcontractors performing construction work for the respondent at its Pleasant Hill Surface Mine. Further, respondent's motions of February 4, 1980, concurred in by the petitioner, to consolidate Docket Nos. KENT 79-99 and KENT 79-229, with the previously-filed seven dockets was granted.

During the August 22, 1979, hearings the parties indicated that they would jointly prepare and file with me a proposed stipulation and order for disposition of the cases which were heard, and that such stipulation would address the question of contractor and subcontractor responsibility and liability for the citations which were the subject of those proceedings. Thereafter, by letter received October 11, 1979, petitioner advised me that the parties were unable to agree upon the terms of a stipulation and proposed order as contemplated by the Evansville proceedings and that they had likewise failed to agree as to appropriate language in a motion by petitioner for continuance of the cases to which respondent would have no objection. At the same time, petitioner filed a motion for an indefinite continuance of all of the dockets pending final action by the Commission on the question concerning the Secretary's discretion to cite a mine/owner-operator for violations attributable to independent contractors on the mine property. In support of its motion, petitioner asserted that the parties were unable to stipulate all facts which would make a resumed hearing in these dockets unnecessary, but that a decision by the Commission in MSHA v. Monterey Coal Company, HOPE 78-469 through HOPE 78-476, which addresses the question of the Secretary's discretion to cite the mine owner, may be dispositive of the liability question and that the legal questions regarding the right of certain contractors to intervene herein as respondents and the appropriate entities to be held accountable for the violations as such violations might affect respondent's non-compliance history in future penalty assessments can then be resolved on the basis of the present record or on a stipulation of additional facts which do not appear to be in dispute.

On October 22, 1979, respondent filed a motion in opposition to the petitioner's motion for an indefinite continuance pending the Commission's decision in the Monterey case, and requested that I proceed with decisions

in these cases. In support of its opposition to any further delay, respondent argued that by awaiting the Commission's decision in Monterey the decisions in the instant cases will be unduly delayed and that even if petitioner prevails in Monterey it will likely continue to cite mine owner-operators for administrative convenience rather than to carry out what respondent believes is the intent of Congress, namely, to cite the independent contractor responsible for the violations. Respondent also requested that its contractor, Ford, Bacon & Davis Utah and certain subcontractors be allowed to intervene and be substituted as parties in these proceedings, that I accept the offer of the contractor and certain named subcontractors to pay the civil penalties to which they admit responsibility and liability, that respondent be dismissed as a party respondent from all of these proceedings, and that none of the penalties for violations assessed in these proceedings be charged against respondent's history of violations at its Pleasant Hill Mine.

Relying on the Commission's decisions in MSHA v. Monterey Coal Co., HOPE 78-469 and HOPE 78-476, November 13, 1979, and MSHA v. Old Ben Coal Company, VINC 79-119, October 29, 1979 which, I concluded were dispositive of respondent's "independent contractor" defenses in these dockets, I issued an order on December 10, 1979, and made the following rulings with respect to the motions filed by the parties:

1. Respondent's motion to permit its contractors and subcontractors to intervene and be substituted as parties was DENIED.

2. Respondent's request to permit such contractors and subcontractors to pay the civil penalties for which they claim responsibility was DENIED.

3. Respondent's motion that it be dismissed as the respondent in these proceedings was DENIED.

4. Petitioner's motion for an indefinite continuance was DENIED.

My order of December 10, 1979, directed the parties to advise me of any stipulations or agreements as to all issues not in dispute, and any remaining issues which may be required to be tried by additional hearings. In compliance with my order, respondent advised me by letter dated January 9, 1980, that the parties were in the process of preparing a stipulation which, together with the record and exhibits made at the hearings of August 22, 1979, would enable me to decide the case without the need for further evidentiary hearings. Regarding the independent contractor/mine-owner issue, respondent asserted that the factual question as to why MSHA elected the respondent as the party to bring these enforcement proceedings against is still unresolved, but in light of the history of the problem which indicates that the sole reason it is the respondent is MSHA's continued policy of enforcing violations committed by independent contractors against the owner

of the mine at which the contractor is employed, respondent suggested that the record contains sufficient evidence for me to decide this issue and it specifically makes reference to hearing Exhibits R-1 through R-3, which are identified as follows:

(R-1) - November 17, 1978, Memorandum from MSHA Assistant Joseph O. Cook to MSHA District Managers advising them that "[P]ending issuance of regulations to identify independent contractors, the instructions contain in memorandums dated June 3 and June 17, 1975, subjects, "Contractors Associated with the Coal Mining Industry" and "Violation Citations Issued to Contractors," respectively, remain in effect.

(R-2) - June 3, 1975, Memorandum from former MSHA Assistant Administrator John W. Crawford to MSHA District Managers, citing the District Court decision in ABC v. Morton, and instructing all MSHA enforcement personnel to cite mine operators for all violations observed when inspecting contractors performing work on coal mine property.

(R-3) - June 17, 1975, Memorandum from MSHA Assistant Administrator Crawford to MSHA District Managers, following-up on his June 3 memorandum, instructing MSHA enforcement personnel to issue violation citations committed by contractors to the mine owner if the citations have not already been processed under section 109 of the 1969 Act.

In addition to the independent contractor issue, respondent also requested that I make certain additional findings in regard to the following points of law in my final order concerning these cases:

1. Whether these citations will become part of the citation history of the Pittsburgh & Midway Coal Mining Co. for the purposes of 30 C.F.R. §100.3(c).
2. Whether the negligence involved in these citations must legally be attributed solely to the independent contractor actually committing the safety violation or whether it can also be attributed to the owner on a theory of vicarious liability.
3. Whether the fact that the citations involved in these cases were issued at later dates than the citations involved in the cases of MSHA v. Old Ben Coal Company, Docket No. 79-119 and MSHA v. Monterey Coal Co., Dockets HOPE 78-469 - HOPE 78-476, affects the applicability of the Old Ben Coal Company decision to these cases in light of the different facts involved in and the basis of decision used by the Mine Safety and Health Review Commission in the Old Ben Coal Company case.

4. Whether the fact that the independent contractors involved in these cases have petitioned for intervention and identified themselves to MSHA as the parties legally responsible for the violations involved in these cases affects the applicability of the Old Ben Coal Company decision in light of the different facts involved in and the basis of decision used by the Mine Safety and Health Review Commission in the Old Ben Coal Company case.

In further response to my order of December 10, 1979, petitioner advised me by letter dated January 9, 1980, that the parties had reached agreement on a stipulation which they believe will enable me to dispose of the cases without further hearing and that as soon as it is finalized it would be filed with me for further consideration. In addition, petitioner advised that the agreement reached did not represent a proposed settlement of the cases since the parties are seeking to preserve their appeal rights in light of developments in the Old Ben and Monterey cases.

On January 25, 1980, the petitioner and the respondent submitted their joint stipulation and agreed that these proceedings may now be disposed of on the basis of the present record and documents filed, including all pleadings, motions, exhibits, transcript of hearing, orders and stipulations and that the parties' rights of appeal are expressly reserved. However, in his transmittal letter, respondent's counsel states that there remain three questions to which the parties are unable to stipulate, namely:

1. The reasons for MSHA selecting the respondent rather than the contractors for enforcement of the citations.

2. Whether the independent contractors in these proceedings are "independent contractors" within the meaning of MSHA's proposed Rules, 30 CFR 45, published in the Federal Register on August 14, 1979.

3. Whether the independent contractors involved in these cases have admitted responsibility for the citations. (In this regard, respondent invites my attention to pgs. 28-29 of the August 22 Evansville hearing where contractor's counsel Hintze stipulated to liability on behalf of at least three of the contractors).

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.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 CFR 2700.1 et seq.

Issues

The principal issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

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

Additional issues raised by the parties are identified and disposed of in the course of my findings, conclusions, and rulings made in these cases.

Discussion

Docket No. BARB 79-307-P

104(a) Citation No. 399328, September 19, 1978, 30 CFR 77.1701: "The ho 012 TD-15 Dozer and 613 scraper used by Koester Const. Corporation are not provided with seat belts. Roll protection is provided. Responsibility of Roger Huser, project manager."

Docket No. BARB 79-285-P

104(a) Citation No. 399321, September 18, 1978, 30 CFR 77.1605(a): "Link belt mobile crane used by J & F Const. Co. The over head cab window is not in good condition in that the glass is broken with fragged edges. Responsibility of Roger Huser, project manager."

104(a) Citation No. 399322, September 18, 1978, 30 CFR 77.208(d): "Oxygen and acetylene tanks used by J & F Const. Co. were not secured in a safe manner. Responsibility of Roger Huser project manager."

104(a) Citation No. 339323, September 18, 1978, 30 CFR 77.1109(a): "The supply trailer used by J & F Const. Co. is not provided with a fire extinguisher. Responsibility of Roger Huser, project manager."

104(a) Citation No. 399324, September 18, 1978, 30 CFR 77.1710(e): "Ted Rodgers, working for Davco Corporation is not wearing suitable foot wear. Responsibility of Roger Huser, project manager."

104(a) Citation No. 399325, September 18, 1978, 30 CFR 77.410: "Red Ford back dump and John Deere back hoe used by Davco Corp. are not provided with back-up alarms. Responsibility of Roger Huser, project manager."

104(a) Citation No. 399326, September 18, 1978, 30 CFR 77.402: "Hand held saber saw and hand held portable grinder is not equipped with controls requiring constant hand or finger pressure to operate used by Davco Corp. Responsibility of Roger Huser, project manager."

104(a) Citation No. 399329, September 19, 1978, 30 CFR 77.1109(c)(1): "The 613 scraper and Ford 7000 service truck used by Koester Corporation are not provided with fire extinguishers. Responsibility of Roger Huser, project manager."

104(a) Citation No. 339330, September 19, 1978, 30 CFR 77.1102: "The Ford 700 service truck used by Koester Corp. is not provided with warning sign against smoking and open flame. Responsibility of Roger Huser, project manager."

104(a) Citation No. 399335, September 26, 1978, 30 CFR 77.1713(a): "Daily on-shift safety inspections are not being made and recorded by a certified person at the mine. Responsibility of Roger Huser, project manager."

Docket No. PIKE 79-129-P

This docket concerns two citations in which MSHA elected to waive the assessment formula contained in 30 CFR 100.3 in determining the civil penalties, and the citations were "specially assessed" under section 100.4.

104(a) Citation No. 399333, September 21, 1978, 30 CFR 77.400(a): "The hand held Black & Decker cut-off machine was not provided with a guard. The cut-off machine was being used by J & F construction Co. N 11. This citation was issued during a fatality accident investigation."

104(a) Citation No. 399334, September 21, 1978, 30 CFR 77.404(a):

The Black and Decker portable hand held cut off machine was not maintained in safe working condition in that an over size unguarded blade had been installed and used. The blade disintegrated resulted [sic] in a fatality accident. The machine was rated to use no larger than a 12 inch diameter blade. The blade in use was approximately 19 inches in diameter at the time of investigation (J & F Const. Co. ID N 11).

Docket No. KENT 79-180

104(a) Citation No. 0795019, April 16, 1979, 30 CFR 77.1605(b): "The White No. 50 Chevrolet truck used by Coal Rigging Contracting Corp. was not provided with a parking brake. Responsibility of Sonny Arnold, foreman."

104(a) Citation No. 0795020, April 16, 1979, 30 CFR 77.205(b). "The travelway in draw off tunnel used by Coal Rigging Contracting Corp. was not kept clear of stumbling and tripping hazard. Responsibility of Sonny Arnold, foreman."

104(a) Citation No. 0795229, April 16, 1979, 30 CFR 77.402: "The 3/8 and 1/2 electrical drills used by Cambron Electrical Co. was not equipped with controls requiring constant hand or finger pressure to operate."

Docket No. KENT 79-74

107(a) Citation No. 400843, December 31, 1978, 30 CFR 77.404: "The hand held grinder serial No. 627199 electric powered 115 volt and RPM rated 6500 was provided with a buffing disc rated maximum 6000 RPM. This grinding device was connected to the power source. Under the supervision of J & F Construction Co. Jim Bethel."

Docket No. KENT 79-269

107(a) Citation No. 0794248, April 11, 1979, 30 CFR 77.404(a): "The Lorain Crane No. 11 operated by Coal Rigging Construction Co. at the Pleasant Hill Mine construction site is hereby ordered to be removed from service in that the hoist brake will not hold a load and the swinger will not reverse in a reasonable distance."

107(a) Citation No. 0794249, April 11, 1979, 30 CFR 77.404 (a): "The Grove Crane No. CP operated by Coal Rigging Construction Co. at the Pleasant Hill Mine construction site is hereby ordered removed from service in that the swing lock brake is not working."

Docket No. KENT 79-367

104(a) Citation No. 0797717, August 1, 1979, 30 CFR 77.204: "At tipple construction site on third floor of tipple the opening for the elevator was not protected. On second floor the opening for wash box was not protected and sump in bottom of raw coal hopper was not protected. (Coal Rigging Contractors)."

104(a) Citation No. 0797718, August 1, 1979, 30 CFR 77.205(b): "At tipple construction site on third floor and second floor of tipple travelways where persons were required to travel and work were not kept clear of all extraneous material and stumbling hazards. (Coal Rigging Contractor)."

Docket No. KENT 79-99

104(a) Citation No. 399327, September 18, 1978, 30 CFR 71.400: "Bathing facilities change room and sanitary flush toilets are not provided for the employees at the mine. Responsibility of Roger Huser, project manager."

104(a) Citation No. 399332, September 21, 1978, 30 CFR 77.701: "The electric powered hand held cut off machine was not provided with frame"

grounding in that a two conductor exterior cable was used and the machine was not double insulated. This machine was in service at the shop office construction site. J & F Construction Co. I.D. N 11."

104(a) Citation No. 400844, December 21, 1978, 30 CFR 77.701:

The Fornly ram pressure machine electric motor was not frame grounded in that the grounding prong was broken off the plug and a two conductor extension cord was in use and the ventilation fan was not frame grounded in that the ground prong was missing from the plug located in the test building near the office trailers (Geological Associates) under Ford, Bacon Davis Utah Contractors.

Docket No. KENT 79-229

104(a) Citation No. 079425, May 15, 1979, 30 CFR 77.1102: "Warning signs are not posted at the liquid portable storage tank located at the Smith-Miller construction site. The responsibility of Guy Brownbuger."

104(a) Citation No. 0794254, May 15, 1979, 30 CFR 77.1109(e)(1): "Portable fire extinguishers are not provided at the liquid portable storage tank located at the Smith-Miller construction site. The responsibility of Greg Brownbuger."

Stipulations

During the hearing of August 22, 1979, the parties agreed to the following stipulations (Tr. 7-10):

1. Respondent Pittsburg and Midway has been inspected previously at two surface mines operated in Western Kentucky. A significant number of safety and health violations of the act involved had been disclosed by MESA and MSHA, admitted at this time, by those inspections for which ordinary negligence is conceded. Respondent exhibited good faith in correcting or abating those past violations.
2. There was no gross negligence involved in any of those violations; the number of such violations was not large and the penalties were not large.
3. The respondent is a wholly-owned subsidiary of Gulf Oil Company, and the size of its business in 1978 was approximately eight million tons of coal produced.
4. Respondent's operations, including those at the Pleasant Hill Mine, affect commerce within the meaning of the statute and any assessment of penalties approximating those proposed in the matters pending for hearing will not seriously affect P and M's ability to continue in business.

5. Copies of the citations contested in this proceeding were identified as Exhibits P-1 through P-11 and P-13. And those, as well as a copy of the report of the fatality investigation which was identified as P-12 may be received in evidence. There is no issue as to the correct sections of the safety regulations cited.

6. Respondent exhibited good faith in correcting or causing correction and abatement of the alleged conditions on which the citations involved in these proceedings are based.

7. Bill Brasher, an employee of P and M, was mine superintendent of respondent's Pleasant Hill mine during the period involved in these proceedings.

8. Roger Huser was an employee of the Gulf Mineral Resources Company, a division of the Gulf Oil Company, and was assigned to the P and M mine construction site, the Pleasant Hill surface mine.

9. No coal has been or was being mined by the respondent at the Pleasant Hill mine at the time involved in these proceedings. Preparation and construction of the facilities, including a building to house shop offices and abating [sic] facilities, plus a railroad spur track and a loading hopper were in progress under construction agreement -- a construction agreement between P and M and Ford, Bacon and Davis Utah, Inc. which will be designated hereafter as the contractor. Various parts of the construction were being carried out by subcontractors pursuant to agreements between them and the contractor. There was no privity contract between P and M and the subcontractors, including those identified in Exhibits P-1 through P-13.

Findings and Conclusions

The Independent Contractor Issue

MSHA's prevailing enforcement policy at the time the citations in these proceedings were issued was to cite the mine owner for all citations generated on its mine property, regardless of the fact that they resulted from work being done by contractors. Further, although MSHA has argued that it does not routinely issue mine identification numbers to contractors, two of the citations issued in PIKE 79-129-P, contain mine identification numbers apparently assigned to the J & F Construction Company. Further, with the exception of Citation No. 399327 (KENT 79-99) for lack of bathing and toilet facilities, and one citation issued in BARB 79-285-P (Citation No. 399335) for failure to conduct a daily onshift examination, all of the citations contain findings by the inspector that the equipment cited or the practices

constituting violations resulted from work being performed by contractors, and they are identified collectively as follows:

1. Koester Construction Corporation.
2. J & F Construction Company.
3. Davco Corporation.
4. Coal Rigging Contracting Corporation.
5. Cambron Electrical Company.
6. The parties have stipulated that citation 399335 is the responsibility of contractor Ford, Bacon & Davis Utah Inc. (See also, Tr. 19).
7. Smith-Miller Construction Company (KENT 79-229).
8. Geological Associates (Citation 400844-KENT 79-99).

MSHA's enforcement policy is reflected in the aforementioned hearing Exhibits R-1 through R-3. The November 17, 1978, Memorandum (R-1), sets forth MSHA's general inspections policies, and on page 9, states as follows: "Pending issuance of regulations to identify independent contractors, the instructions contained in memorandums dated June 3 and June 17, 1975, subjects, "Contractors Associated with the Coal Mining Industry" and "Violation Citations Issued to Contractors," respectively, remain in effect."

The June 3, 1975, MSHA Memorandum (R-2), quotes pertinent portions of District Court Judge Gessell's opinion in ABC v. Morton, and contains the following instructions:

Memoranda of April 19, 1973, "Issuing Notices and Orders to Contractors on Mine Property" and June 29, 1973, "Assignment of identification numbers to contractors," are hereby rescinded.

We will continue, as in the past, to inspect mine construction work, however, where violations or other hazardous conditions or practices are observed, appropriate Notices and/or Orders shall be issued to the mine operator (they shall not be issued to the contractor or construction company unless the contractor or construction company is also the mine owner, etc.). In accordance with the Court's ruling the mine operator is responsible for the contractor's compliance with the Regulations and the Act.

Effective upon receipt of this memorandum, Coal Mine Health and Safety enforcement personnel will cite coal mine

operators for all violations observed when inspecting contractors performing work on coal mine property.

MSHA's June 17, 1975 Memorandum (R-3), states as follows:

As a follow-up to our memorandum dated June 3, 1975, concerning contractors doing mine construction work, this relates to the handling of citations issued to such contractors prior to the receipt of our June 3 memorandum.

Notices and/or Orders, citing violations and issued to contractors will be reissued to the appropriate mine operator, except in instances where such citations have been processed pursuant to Section 109 of the Act, penalties paid and/or the cases closed. All such citations that have not been transmitted to the Assessment Office should be retained in the issuing office and reissued to the proper mine operator prior to transmitting.

Notices and/or Orders issued to mine construction contractors, citing violations and transmitted to the Assessment Office, for processing under Section 109, but penalties have not been paid nor the case closed, will be returned to the appropriate issuing office to be reissued to the proper mine operator.

In cases where Notices and/or Orders have been referred to the Associate Solicitor, Division of Mine Health and Safety, the Associate Solicitor will (1) notify the Assessment Office which will notify the District Office to reissue the Notice and/or Order to the proper mine operator and (2) file a motion to substitute parties.

All Notices and/or Orders affected shall be modified and reissued to the appropriate mine operator. The following guidelines shall be adhered to:

1. Notices (and Orders citing violations) issued to contractors that have not been disposed of under Section 109 of the Act shall be modified and reissued to the appropriate mine operator.

2. In modifying and reissuing the citations, the inspector will use the date of the modification, however he will refer to the original citation by No. and date and attach a copy of the original to the modification.

3. On Modification, Form 2, following the statement, "is hereby modified as follows, * * *" use an explanation of what is being done and why, such as, By virtue of the U.S.

District Court for the District of Columbia, decision in Civil Action No. 1058-74, this modification is made to show the mine owner, in lieu of the contractor, as the operator charged with noncompliance of the cited regulations (see attachments).

Respondent's Argument

Respondent takes the position that petitioner should have cited the independent contractors identified in these proceedings for the violations described in each of the citations issued and that each of these contractors are independent contractors within the meaning of MSHA's proposed rules, 30 CFR, Part 45, published in the Federal Register on August 14, 1979. Under the circumstances, respondent argues that it was improper and contrary to the Act for MSHA to cite the respondent for the violations solely for the reason that respondent is the owner-operator of the mine. Inasmuch as the contractors have admitted responsibility for the violations, respondent argues further that they should be permitted to intervene in these proceedings and that respondent's motion that it be dismissed as a party-respondent should have been granted.

Petitioner's Argument

MSHA's position is that respondent was the operator of the mine in question at the time the citations were issued and therefore it was proper and appropriate under the circumstances to cite respondent for those violations, and that its motion to be dismissed as a party-respondent was properly denied.

It seems clear to me from the facts presented in these proceedings that at the time the citations were issued and the petitions for assessment were filed, MSHA's enforcement policy was that owner-operators were liable for the violations of their independent contractors. Although respondent has made a most persuasive and cogent argument with respect to the basic unfairness in an enforcement scheme which penalizes a mine owner for violations over which it has no control, and which were caused by the independent contractors and did not endanger any of the mine owners' employees, I am constrained to follow the decisions of the Commission in MSHA v. Old Ben Coal Company, VINC 79-119, October 29, 1979, and MSHA v. Monterey Coal Company, HOPE 78-469 and HOPE 78-476, November 13, 1979, and I conclude that those decisions are controlling and dispositive of the independent contractor defenses raised by the respondent in these proceedings. Although the Commission seemingly recognized the folly of MSHA's continued policy decision to cite only mine owners for the violations attributable to independent contractors, it opted not to disturb that policy for the sake of "consistent enforcement." As I interpret these Commission decisions, the only conclusion I can draw is that the Commission has at this point in time given its blessing to MSHA's policy decision to enforce the Act only against owner-operators and not contractors, and in so doing, the Commission has specifically permitted the Secretary additional time within which to promulgate

and implement his proposed independent contractor regulatory guidelines as published in the Federal Register on August 14, 1978, 44 Fed. Reg. 47746-47753. Under these circumstances, respondent's independent contractor defenses raised in these proceedings are rejected and I find and conclude that MSHA properly cited the respondent for the violations in question and that the respondent is liable for them. I am not persuaded by respondent's arguments that the factual record adduced in these proceedings indicates that the identified independent contractors are independent contractors within the meaning of MSHA's proposed rules. Those rules are at this point in time only proposed rules and have not been promulgated or implemented as final MSHA guidelines.

In MSHA v. Republic Steel Corporation, IBMA 76-28 and IBMA 77-39, decided by the Commission on April 11, 1979, it was held that under the 1969 Act, a mine owner may be held responsible for violations of the Act created by independent contractors even though none of the mine owner's employees were exposed to the violative conditions and the mine owner could not have prevented the violations. In Old Ben, a case decided under the 1977 Act, the Secretary conceded that Old Ben was proceeded against under an agencywide policy to enforce the Act against only owner-operators for contractor violations. Although the Commission recognized the fact that the Secretary's enforcement policy "had its roots in the district court's decision in ABC v. Morton," which was subsequently reversed, indicated that any doubt concerning the Secretary's ability to proceed against contractors was dispelled by the passage of the 1977 Act, and observed that "if the Secretary's decision to proceed against Old Ben was made pursuant to an enforcement policy based solely on the discredited foundation of ABC v. Morton, there would be no doubt that his decision was improper," the Commission, nonetheless, affirmed Old Ben on the basis of the Secretary's assertion that its enforcement policy was an interim one pending adoption of its proposed independent contractor regulations.

In its posthearing briefs filed in these proceedings, respondent suggests that the facts in these proceedings may be different from those which prevailed at the time Old Ben and Monterey were decided. It further suggests that the basis for the Commission's decisions in those cases may be different from those presented here in that the citations involved in these cases were issued at later dates than those involved in Old Ben and Monterey. After careful analysis of the Commission's decisions in Old Ben and Monterey, I can find no factual distinctions in the cases, nor can I find any distinctions in the Commission's rationale for upholding the Secretary's prevailing policy. In the instant cases, it seems clear from the record that the Secretary's owners-only enforcement policy was bottomed on the ABC v. Morton decision, and notwithstanding the publication of proposed rules covering independent contractors, I can perceive no change in that policy until such time as the rules are adopted and promulgated. As I interpret the Commission's decisions in Old Ben and Monterey, the Commission has permitted the Secretary to buy additional time within which to implement his new rules for enforcement and no amount of semantical or rationalized arguments have persuaded me to the contrary, irrespective of the fact that I may disagree with the Commission's

rationale or am in accord with Commissioner Backley's well-reasoned dissents with respect to the independent contractor liability issue. Under the circumstances, respondent's suggestions that there are factual differences in the cases insofar as the respondent and the proposed contractor intervenors are concerned must be rejected.

In the course of the arguments at the hearing, and in arguments presented by the respondent in its motions objecting to any continuance of these dockets, filed October 22, 1979, respondent alluded to my prior ruling of April 24, 1979, in MSHA v. Morton Salt Company, DENV 79-161-PM, where I took the position that on the facts there presented, since the independent contractors were crying out to be recognized as party-respondents ready, willing, and able to assume their responsibilities and liabilities for violations and citations issued under the Act, MSHA's continued ignoring of this fact and its rigid enforcement policy defied logic, was basically unfair, and did little to promote and assure the safety of miners. I therefore dismissed MSHA's proposals to assess civil penalties against Morton Salt for three of the citations included in its proposals, and one remaining citation is still to be adjudicated as chargeable to Morton. Since my ruling dismissing the three citations was an interlocutory ruling rather than a final decision constituting my final disposition of the case, the Commission, on June 4, 1979, dismissed MSHA's petition for discretionary review of my order as premature, and in so doing noted that it expressed no view on whether the issues raised by MSHA were reviewable through the interlocutory review procedures provided for in Commission Rules 29 CFR 2700.52 and 61. Since my Morton Salt ruling was made prior to the Commission's decisions in Old Ben and Monterey, it would now appear that my ruling dismissing MSHA's proposal to assess Morton Salt for three violations may not stand Commission scrutiny in light of the developments in Old Ben and Monterey. Under the circumstances, my prior ruling of December 10, 1979, denying respondent's motion to be dismissed as a party-respondent in these proceedings is reaffirmed.

My prior rulings made in the December 10, 1979, order denying respondent's motion to permit its contractors and subcontractors to intervene and be substituted as parties are likewise reaffirmed. In Morton Salt, I rejected a similar motion by Morton to intervene its independent contractor on the ground that my interpretation of the then-prevailing Commission Interim Rules, 29 CFR 2700.10, limited participation by certain "parties" to hearings, and that the rules may not serve as a basis for transforming such "parties" into respondents not named by the Secretary as respondents subject to civil penalty assessments. The Commission's current Rules, 29 CFR 2700.4, confer party status on operators who are "named as parties or permitted to intervene," and while subsection (c) permits the filing of a motion to intervene at any time before a hearing on the merits, and requires the party to show its interest and establish that intervention will not unduly delay or prejudice the adjudication of the issues, I can find no authority in the rules to support a substitution of a party for purposes of civil penalty assessments and respondent has cited none. Further, for these same reasons, respondent's motion of February 4, 1980, to permit contractor Smith-Miller Construction Company to intervene in Docket No. KENT 79-229, is likewise DENIED.

My prior ruling made in the December 10, 1979, order denying respondent's request to permit the identified contractors and subcontractors in these proceedings to pay the civil penalty assessments for which they claim responsibility and liability is reaffirmed. Further, respondent's assertion that Smith-Miller Construction Company has agreed to pay the penalties assessed in Docket No. KENT 79-229, insofar as it seeks an order from me accepting this agreement, is likewise rejected and DENIED. I can find no authority for summarily entering an order assessing civil penalties on the basis of a stipulation or agreement entered into by a party-respondent and a non-party contractor, nor can I find any authority for forcing MSHA to accept a unilateral offer to pay civil penalty assessments, Zeigler Coal Company, 7 IBMA 312 (1977), and it makes no difference that MSHA is unwilling to stipulate in these proceedings that the named independent contractors have each admitted responsibility for the citations and are willing to pay the penalties. With regard to this question, I find that the record as a whole supports the conclusion that the independent contractors are willing to assume responsibility for the penalties assessed in these proceedings (Tr. 28-29, 33; p. 4 of January 25, 1980, stipulation).

Fact of Violation

Respondent concedes that all of the conditions and practices described on the face of the citations issued in these proceedings constitute violations of the cited safety standards, and that the citations were properly issued (Tr. 28; January 25, 1980, stipulation, p. 2). Accordingly, I find that the fact of violation as to each of the citations issued in all of these cases has been established and they are all affirmed. Further, on the basis of my findings and conclusions concerning respondent's liability for these citations, I conclude that they were properly issued to the respondent and that the respondent is liable for any civil penalties assessed for the citations.

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

At the Evansville hearing, the parties stipulated that respondent is a wholly-owned subsidiary of Gulf Oil Company, and that the size of its mining business in 1978 was approximately 8 million tons of coal produced. The parties also stipulated that respondent's operations, including those at the Pleasant Hill Mine, affect commerce within the meaning of the Act. Under the circumstances, I conclude that for purposes of any civil penalty assessments levied in these proceedings respondent may be considered a large mine operator.

The parties stipulated that all of the citations issued in these proceedings were properly issued and that the proposed penalty assessment amounts are fair and reasonable under the circumstances known to have existed at the time the citations issued. Further, the parties agree and stipulate to the fact that MSHA's proposed penalties as reflected in its pleadings are appropriate to the size of respondent's business, and that

payment thereof will not seriously affect respondent's ability to continue in business. The stipulation and agreement on this issue is adopted as my finding and conclusion.

Good Faith Compliance

The parties stipulated that respondent, as well as the independent contractors, demonstrated good faith in causing correction and timely abatement of the conditions or practices cited by the inspectors in these proceedings. I accept and adopt this stipulation as my finding in these proceedings.

Gravity

The gravity of the conditions or practices described on the face of each of the citations issued in these proceedings, with the probability of the occurrence of the event against which each safety standard is directed, and the employee exposure to possible injury, is reflected as follows in the January 25, 1980, stipulations:

Docket No. BARB 79-307-P

<u>Citation No.</u>	<u>Standard</u>	<u>Probability</u>	<u>Exposure</u>	<u>Gravity of Injury</u>
399328	77.1710(i)	moderate	2 employees	lost work days

Docket No. BARB 79-285-P

<u>Citation No.</u>	<u>Standard</u>	<u>Probability</u>	<u>Exposure</u>	<u>Gravity of Injury</u>
399321	77.1605(a)	moderate	1 employee	lost work days
399322	77.208(d)	moderate	4 or more	lost work days
399323	77.1109(a)	moderate	4 or more	lost work days
399324	77.1710(e)	moderate	1 employee	lost work days
399325	77.410	moderate	4 or more	permanent disability
399326	77.402	moderate	2 employees	lost work days
399329	77.1109(c)(1)	substantial	1 employee	lost work days
399330	77.1102	moderate	1 employee	lost work days
399335	77.1713(a)	moderate	30 employees	lost work days

Docket No. BARB 79-129-P

<u>Citation No.</u>	<u>Standard</u>	<u>Probability</u>	<u>Exposure</u>	<u>Gravity of Injury</u>
399333	77.400(a)	imminent	1 employee	permanent disability or death

399334	77.404(a)	imminent	1 employee	permanent disability or death
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Docket No. BARB 79-180-P

<u>Citation No.</u>	<u>Standard</u>	<u>Probability</u>	<u>Exposure</u>	<u>Gravity of Injury</u>
0795019	77.1605(b)	moderate	1 employee	lost work days
0795020	77.205(b)	moderate	1 employee	lost work days
0795229	77.402	moderate	1 employee	lost work days

Docket No. KENT 79-74-P

<u>Citation No.</u>	<u>Standard</u>	<u>Probability</u>	<u>Exposure</u>	<u>Gravity of Injury</u>
400843	77.404	substantial	1 employee	lost work days

Docket No. KENT 79-269-P

<u>Citation No.</u>	<u>Standard</u>	<u>Probability</u>	<u>Exposure</u>	<u>Gravity of Injury</u>
0794248	77.404(a)	imminent	1 employee	permanent disability
0794249	77.404(a)	imminent	1 employee	permanent disability

Docket No. KENT 79-367

<u>Citation No.</u>	<u>Standard</u>	<u>Probability</u>	<u>Exposure</u>	<u>Gravity of Injury</u>
797717	77.204	substantial	1 employee	lost work days
797718	77.205(b)	moderate	1 employee	lost work days

All of the citations issued in these dockets, with three exceptions, were issued pursuant to section 104(a) of the Act. The one citation issued in Docket No. KENT 79-74-P, and the two citations issued in Docket No. KENT 79-269-P, were imminent danger orders issued pursuant to section 107(a). The first one ordered the removal from service of a hand-held grinder which was connected to a power source and which was equipped with an overly-rated (RPM) buffing disc. The other two ordered the removal from service of a crane which had a hoisting brake which would not hold a load and a swinger which would not operate in reverse in a reasonable distance, and a second crane which had an inoperative swing lock brake. Aside from the fact that the equipment cited was removed from service, and in addition to the stipulated characterization of the probability of any injury resulting from these citations as "substantial" and "imminent," I have also weighed the fact that

the violations were cited in withdrawal orders, Zeigler Coal Company, 3 IBMA 366 (1974), and I find that these citations were serious.

In Docket No. PIKE 79-129-P, although both citations were issued pursuant to section 104(a) of the Act, for failure to provide a guard for a cut-off machine, and for using an over-sized blade on that machine, the conditions cited resulted in a fatality and the record reflects that MSHA "specially assessed" these citations in light of that fatality. Under the circumstances, I conclude and find that these two violations were very serious.

Docket No. BARB 79-307-P, concerns a citation for failure to provide seat belts for a dozer and a scraper. Although the citation reflects that the equipment was provided with roll protection, the standard requires the use of seat belts in a vehicle where there is a danger of overturning. Since the equipment was provided with roll protection, an inference may be made that the equipment cited could overturn and injure the operators. The use of seat belts would provide additional protection for the operators and I conclude that the failure to provide them as required resulted in a serious violation.

Docket No. KENT 79-99 concerns three citations for (1) failure to provide bathing, change, and toilet facilities at the mine, (2) failure to frame ground an electric hand-held cut-off machine, and (3) failure to frame ground an electric machine motor and ventilation fan. Failure to provide necessary toilet facilities could lead to hygiene and discomfort problems and I find that was a serious violation. Failure to properly ground electrical equipment could lead to shock and electrocution and I find these violations are serious.

Docket No. KENT 79-229 concerns two citations for failure to post warning signs at a storage tank and failure to provide fire extinguishers at a storage tank location. I find that in the event of a fire there would be no means to control it in view of the absence of fire extinguishers and the failure to post warning signs could lead to employees not being aware of fire hazards. I find these violations are serious.

Docket No. BARB 79-285-P concerns nine citations for (1) broken glass and fragged edges on a windshield of a mobile crane; (2) failure to secure oxygen and acetylene tanks in a safe manner; (3) lack of a fire extinguisher in a supply trailer; (4) an employee's failure to wear suitable footwear; (5) lack of back-up alarms on a dump truck and a back hoe; (6) failure to equip a saber saw and grinder with constant pressure hand or finger controls; (7) failure to provide fire extinguishers for a scraper and a service truck; (8) failure to provide a "No Smoking" sign on a service truck; and (9) failure by a qualified person to conduct and record daily onshift inspections.

Considering the circumstances described on the face of each of the aforesaid citations, and the stipulations of the parties which reflect that

lost work days would result in the event of an injury caused by the conditions cited to one or more employees, I conclude that the conditions cited as violations were serious.

Docket No. KENT 79-367 concerns two citations for (1) failure to provide protection for an elevator opening in the tipple and in an opening at the wash box in the raw coal hopper, and (2) failure to maintain two tipple travelways where persons were required to travel and work clear of extraneous material and stumbling hazards. These standards are obviously intended to prevent injuries to employees from falling into unprotected openings and from stumbling or tripping in areas where they are required to work or travel, and coupled with the stipulations concerning employee exposure to such hazards, I conclude that the conditions cited as violations were serious.

Docket No. KENT 79-180 concerns three citations for (1) no parking brakes on a truck; (2) failure to keep a tunnel travelway clear of stumbling and tripping hazards; and (3) failure to equip two drills with constant pressure hand or finger controls. On the basis of the stipulations, and considering the conditions described on the face of the citations, I find these violations were serious.

Negligence

At the hearing, the parties stipulated that there was no gross negligence involved in any of the citations covered in these proceedings. Further, the subsequent stipulations filed January 25, 1980, on this issue reflect agreement by the parties that there was negligence involved in each of the citations presented in all of these dockets. Aside from the question as to the entity against whom negligence should be attributed and whether respondent should be held accountable for any negligence with respect to the conditions or practices cited as violations, I find and conclude that the record supports a finding that each of the citations resulted from a failure to exercise reasonable care to prevent the conditions or practices which were known or should have been known to exist at the time the citations issued, and that in such circumstances, the violations resulted from ordinary negligence.

With regard to the question of whether the negligence involved in the citations must be legally attributable solely to the independent contractors or whether it can also be attributable to the respondent mine owner on a theory of vicarious liability, I take note of the fact that at the time the citations were issued no coal was being produced at the mine in question (Tr. 30), and the parties stipulated and agreed that the contract (Exh. R-4) entered into between the respondent and its contractor, Ford, Bacon and Davis Utah, Inc., as well as its subcontractors with regard to the Pleasant Hill construction or mine site, reflects that each contractor had control over their respective employees as to health and safety, each had a continuing presence in the mine for a substantial period of time to perform the work that they were doing, each had complete control over their

portion of the work, and the only control that the Pittsburg and Midway Coal Mining Company had was as to the results to be obtained. Further, the parties stipulated that Ford, Bacon and Davis Utah, Inc., is an independent contractor, that it is not the agent of respondent Pittsburgh and Midway Mining Company in performing the work, that the contractor had control of the work, and that the respondent mine owner only had an interest in the results to be obtained from that work (Tr. 15-16). Further, the January 25, 1980, stipulation reflects an agreement by the parties that Ford, Bacon and Davis Utah's subcontractors, namely, J & F Construction Company, Koester Contracting Corporation, Davco Corporation, Coal Rigging Contracting Corporation, and Cambron Electrical Company, may be considered for purposes of these proceedings, during the periods involved, as independent contractors. As such independent contractors they were engaged in clearly-defined areas of mine construction work prior to and in preparation for respondent's putting its Pleasant Hill Surface Mine into actual production of coal. Each of said independent contractors was engaged in a major work and exercised a continuous presence at the mine during the periods designated.

It is clear that while the absence of any negligence on the part of an operator does not absolve him from liability for a civil penalty, that fact may however be weighed in mitigation in determining the amount of any civil penalty assessed for the violation, Webster County Coal Corporation, 7 IBMA 264 (1977), and the cases cited therein. It follows therefore, that if the record establishes that a mine owner is not negligent for violations attributed to an independent contractor who has exclusive control and supervision over the work site, and no employees of the mine owner are exposed to any hazard caused by those violations, the mine owner should not be penalized for such negligence. One of the statutory criteria which must be considered under section 110(i) of the Act in the assessment of civil penalties for violations which have been established is the negligence of the operator. Accordingly, while I have found the respondent liable for the citations which were issued, and while respondent is liable for any civil penalty assessments resulting from those citations, I conclude that since the facts presented in these proceedings establish that any negligence which occurred as a result of the conditions or practices cited as violations resulted from a lack of reasonable care on the part of the identified contractors and subcontractors cited, the respondent should not bear the burden of any increased assessments based on that negligence. In addition, since the parties stipulated that the contractors were not the agents of the respondent, I further conclude that any theory of vicarious liability may not serve as a basis for increasing any assessments levied against the respondent.

History of Prior Violations

During the Evansville hearing, MSHA's counsel characterized the Pleasant Hill Mine site as a "construction site", that it is a new mine, and that these proceedings in fact constitute the first time that any violations have occurred at that mining operation (Tr. 22). Counsel also indicated that in view of these circumstances no assessment points for prior history were levied against the respondent by MSHA's Assessment Office in its initial

evaluation of the citations, and the Assessment Office limited its consideration of prior history to that mine (Tr. 23). Although counsel indicated that the respondent has two other surface mines in operation within the Western Kentucky area which have generated what he characterized as a "significant number of violations," he also qualified this statement by indicating that the number is "not large" and that in each instance the violations involved only ordinary negligence (Tr. 24-25). MSHA has submitted no additional information concerning the overall prior history of the respondent separate and apart from the information relating to its Pleasant Hills mining operation. I accept counsel's assertion that it is not large, and based on the stipulated facts here presented I conclude and find that for purposes of these proceedings, respondent has no prior history of violations.

Respondent's suggestions that the violations in these proceedings should not be charged against its record and should not become a part of its citation record for purposes of future proceedings is rejected. In effect, respondent is seeking a declaratory judgment from me that in any future proceedings, another Commission judge may not consider the instant violations as part of its track record. I find no authority for such a decision by me and it seems clear that prior violations which have been paid, compromised, settled, or finally ordered paid, and even those paid under protest, may be considered as part of a mine operator's prior history, Church of Latter Day Saints, 2 IBMA 285 (1973); Peggs Run Coal Company, 5 IBMA 144 (1975). Further, it is clear that the identified contractors are not respondents in these cases, and the fact that they are willing to include the violations as part of their history is immaterial. Of course, I see nothing to preclude the respondent from arguing in any future proceedings that the judge may consider and weigh the effect of those violations on any civil penalty amounts fixed against a mine owner.

Penalty Assessments

It is clear that in litigated civil penalty proceedings, the determination of appropriate civil penalty assessments for proven violations is made on a de novo basis by the presiding judge and he is not bound by any assessment method of computation utilized by MSHA's Assessment Office, Boggs Construction Company, 6 IBMA 145 (1976); Associated Drilling Company, 6 IBMA 217 (1976); Gay Coal Company, 7 IBMA 245 (1977); MSHA v. Consolidated Coal Company, VINC 77-132-P, IBMA 78-3, decided by the Commission on January 22, 1980.

In the instant proceedings, the initial civil penalty assessments which appear as part of the petitioner's initial pleadings and civil penalty proposals in the form of "assessment worksheets" as exhibits to the proposals, reflect proposed penalty amounts derived from either the application of "points" assessed for each of the statutory criteria set out in section 110(i) of the Act, or from a "special assessment" made pursuant to Part 100, Title 30, Code of Federal Regulations. The record reflects that no penalty assessment points were attributable to the respondent's prior history of violations and MSHA has admitted that this is the case. However, with regard

to the question of negligence, a review of the proposed penalty assessments made by MSHA reflects that negligence "points" were assessed against the respondent for some but not all of the citations in question and this fact obviously resulted in an increase in the proposed penalty amounts. Since I have concluded that the respondent was not negligent for any of the citations, the question presented is whether I may consider this as mitigating a decrease in the proposed amounts where MSHA considered the factor of negligence in determining the proposed penalties.

The parties have stipulated that any civil penalties approximating those proposed in these proceedings will not adversely affect its ability to remain in business, that the proposed penalties are appropriate to the size of respondent's business, and that the proposed assessments are fair and reasonable amounts under the circumstances known to have existed at the time the citations were issued. MSHA has recommended no penalties as part of its posthearing arguments or stipulations, and apparently rests on the initial evaluations made by its Assessment Office, and respondent makes no further arguments that it is entitled to any penalty reductions for lack of negligence on its part. However, I believe that section 110(i) mandates consideration of the element of negligence on a case-by-case basis, and if the record supports a reduction in penalties, basic fairness dictates that respondent is entitled to it even though he has not specifically pleaded for a reduction. Further, as I view the stipulations with respect to the reasonableness of the proposed assessments, they were obviously made on the basis of negligence attributable to the respondent and as such, I conclude that I am not bound by them, particularly in light of my finding that the absence of any negligence attributable to the respondent may be considered in mitigation of the penalties which I may assess. Accordingly, as to each citation where no negligence points were assessed against the respondent, except for those "specially assessed", I find them to be reasonable and I adopt them as the penalties assessed by me in these proceedings. With regard to those citations which took into account any negligence by the respondent, including those "specially assessed", I find that reductions are warranted and they are reflected in the assessments levied me in these proceedings. I might add that had the named contractors been before me as parties, absent any mitigating circumstances, or the presence of any aggravating factors, the initial proposed assessments may or may not have been disturbed.

On the basis of the foregoing findings and conclusions made in these proceedings, civil penalties are assessed in each of these dockets as follows:

Docket No. KENT 79-180

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
0795019	4/16/79	77.1605(b)	\$50
0795020	4/16/79	77.205(b)	45
0795229	4/16/79	77.402	45

Docket No. KENT 79-367

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
0797717	8/1/79	77.204	\$80
0797718	8/1/79	77.205(b)	50

Docket No. KENT 79-74

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
400843	12/21/78	77.404	\$175

Docket No. KENT 79-269

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
0794248	4/11/79	77.404(a)	\$205
0794249	4/11/79	77.404(a)	200

Docket No. KENT 79-129-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
399333	9/21/78	77.400(a)	\$1,500
399334	9/21/78	77.404(a)	350

Docket No. KENT 79-307-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
399328	9/19/78	77.1710(i)	\$20

Docket No. BARB 79-285-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
399321	9/18/78	77.15605(a)	\$25
399322	9/18/78	77.208(d)	44
399323	9/18/78	77.1109(a)	25
399324	9/18/78	77.1710(e)	30
399325	9/18/78	77.410	60
399326	9/18/78	77.402	25
399329	9/18/78	77.1109(c)(1)	50
399330	9/18/78	77.1102	44
399335	9/26/78	77.1713(a)	25

Docket No. KENT 79-99

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
399327	9/18/78	71.400	\$15
399332	9/21/78	77.701	35
400844	12/21/78	77.701	45

Docket No. KENT 79-229

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
794253	5/15/79	77.1102	\$45
794254	5/15/79	77.1109(e)(1)	30

ORDER

The respondent IS ORDERED to pay the penalties assessed in these proceedings in the amounts shown above, totaling \$3,218 within thirty (30) days of the date of these decisions.


George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 8 1980

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-461-P
Petitioner : A/O No. 48-01096-03003
v. :
: Docket No. DENV 79-460-P
KERR-MCGEE COAL CORP., : A/O No. 48-01096-03002
Respondent :
: Docket No. DENV 79-462-P
: A/O No. 48-01096-03004
:
: East Gillette No. 16 Surface Mine

DECISION

These cases concern four citations and one order issued to Respondent for safety violations committed by independent construction contractors operating at Respondent's "East Gillette No. 16 Surface Mine."

Having stipulated that the facts contained in the citations are true, and that the proposed penalties are reasonable, both parties submit that the only issue remaining is whether Respondent was the proper party to be cited.

After MSHA v. Monterey Coal Co., 1 FMSHRC 1781 (November 1979), it is clear that Respondent was properly cited. The Commission based its decision in that case on MSHA v. Old Ben Coal Co., 1 FMSHRC 1480 (October 1979), wherein it held that until final rules were promulgated, the practice of citing owner-operators for independent contractor violations would be upheld for reasons of consistent enforcement.

Based upon the foregoing and the parties' stipulation, I find Respondent was properly cited for the violations contained herein.

ORDER

It is therefore ORDERED that Respondent pay to MSHA, within 30 days, a civil penalty in a total amount of \$796.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 8 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
	:	
	:	Docket No. SE 79-2-M
Petitioner	:	A/O No. 54-00036-05003
v.	:	
	:	Docket No., SE 79-53-M
DAVID CABRERA, INC.,	:	A/O No. 54-00036-05006
Respondent	:	
	:	Cantera Dorado

DECISION

ORDER TO PAY

Appearances: Edwin Tyler, Esq., Office of the Solicitor, U.S. Department of Labor, Santurce, Puerto Rico, for Petitioner;
Tadeo Negrón Medero, Esq., Rafael Castro, Esq., Santurce, Puerto Rico, for Respondent, David Cabrera, Inc.

Before: Judge Merlin

The above-captioned cases are petitions for the assessment of civil penalties filed by the Mine Safety and Health Administration against David Cabrera, Inc. A hearing was held on January 8, 1980.

At the hearing, the parties agreed to the following stipulations (Tr. 3-5):

1. The legal name of the respondent is David Cabrera, Inc.
2. The identification of the mine where the inspection was conducted is Cantera Dorado.
3. The location of said mine is Dorado, Puerto Rico.
4. David Cabrera, Inc., is the operator of said mine.
5. During the period from June 29, 1978, to January 8, 1979, a duly authorized representative of the Federal Mine Safety and Health Administration, namely Pedro Sarkis, conducted inspections at respondent's aforesaid Cantera Dorado Mine under the Federal Mine Safety and Health Act of 1977, hereinafter referred to as the Act.

6. As a result of an inspection conducted on January 5, 1979, Citation Number 94112 was issued to respondent for failure to comply with an order of withdrawal previously issued to respondent on September 26, 1978, in relation to its bulldozer Komatzu D-155.

7. The parties stipulate that all orders, citations, extensions and notifications attached to the Solicitor's petition in the Commission's files are true and accurate with respect to the facts set forth therein.

8. Respondent employs approximately 27 employees at Cantera Dorado.

9. Respondent employs 10 employees during one shift daily, six days per week, 52 weeks per year.

10. Each of the employees of respondent works approximately 44 hours per week.

11. The parties stipulate that respondent has a small history of previous violations.

12. The annual manhours worked at respondent's Cantera Dorado Mine in 1978 and 1979 were approximately 52,000 man-hours respectively.

13. Respondent was the owner and had control of bulldozer Komatzu D-155 and Caterpillar D-8.

14. The payment of the penalty as assessed will not affect respondent's ability to continue in business.

15. The parties stipulate that citation numbers 93314, 93315, and 94112 correctly cited violations of the Act.

16. The parties stipulate that MSHA Exhibit 1 is true and accurate respecting the facts stated therein.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 1-29). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench (Tr. 29-30). A decision was rendered setting forth findings, conclusions, and determinations with respect to the alleged violations (Tr. 32-37).

Bench Decision

The bench decision (which was simultaneously translated in Spanish for the benefit of respondent) is as follows:

These two consolidated cases involve noise violations on two bulldozers for which two citations were issued.

The operator has admitted the violations. The parties also have agreed that the facts as set forth in the inspector's citations, extensions and orders, all of which have been admitted into the record or are attached to the pleadings, are true and accurate with respect to the facts set forth therein. Both citations were originally issued on June 29th, 1978. Numerous extensions were given simultaneously on both bulldozers with respect to both citations until September 6, 1978.

Thereafter, citation 93315 on the D-8 bulldozer was eventually abated on October 10, 1978, within the time allowed. The Solicitor has recommended a penalty of \$40, the originally assessed amount for this violation. I conclude this is a reasonable penalty for this violation. Accordingly, a penalty of \$40 is assessed for this citation.

The story with respect to citation number 93314 issued with respect to the 155 bulldozer is unfortunately much different. The record reflects that on September 6, 1978, the inspector gave an extension until September 11, 1978. The inspector also testified that on September 12 and September 20 he spoke with the operator's brother who is the plant manager and with the operator's son who is the plant supervisor, and that although the materials for abatement were present, the operator did not abate the violation. The inspector issued a withdrawal order on September 26, 1978.

The Solicitor recommends a penalty of \$370, the originally assessed amount for this citation for which a withdrawal order was issued. Under the circumstances, including repeated advice from the inspector to the operator, despite which there was a failure to abate, I cannot agree with operator's counsel that this amount is excessive. On the contrary, I conclude this amount to be reasonable on the facts presented.

If the operator cannot abate the citation within the time allowed, particularly where many extensions have been given and substantial time has elapsed, then the operator has a responsibility to inform the inspector why abatement has not been accomplished and, moreover, to justify to the inspector why a further extension should be given. It is not the inspector's function to chase after the operator.

This, however, is not the end of the matter. These consolidated cases also contain a petition for the assessment

of a civil penalty based upon Citation 94112, dated January 5, 1979, issued for failure to comply with the withdrawal order on the 155 bulldozer. It appears from the inspector's testimony and from MSHA Exhibit No. 1 that another citation not at issue in these proceedings was issued on November 28, 1978, also for failure to comply with the subject withdrawal order. Apparently, after the withdrawal order was issued, the operator continued to use the machine in defiance of the withdrawal order. However, the inspector also testified that after the November 28 citation was issued, the operator did some work on November 29 and November 30 with respect to abating the noise violation but that this abatement had not been completed.

The operator must understand that it cannot ignore withdrawal orders issued by inspectors of the Mine Safety and Health Administration, especially where, as here, the inspector's uncontradicted testimony demonstrates he told the operator what the effect of the withdrawal order was, i.e., that the equipment in question must not be used until the withdrawal order is terminated by an inspector no matter what work has been done on the equipment for abatement. If the operator believes the inspector is wrong, he can go to the inspector's superiors or he can request and obtain a hearing before a Judge within four days or even less if the parties agree. The operator has avenues of relief against erroneous actions by inspectors. What the operator does not have is the right to disregard these orders as if they did not exist. If an inspector removes a piece of equipment from service, then it cannot be used until the operator obtains the proper permission to do so.

The operator must understand that by acting as it has done in this case, it is subjecting itself to very severe penalties indeed. Section 110(b) of the law provides that an operator who fails to correct a violation within the period permitted may be assessed a penalty of up to \$1,000 for each day during which the violation continues. In addition, Section 110(d) provides that any operator who willfully violates the law shall, upon conviction, be punished by a fine of not more than \$25,000 or by imprisonment for not more than one year or by both.

After listening to the testimony and conferring with the Solicitor and counsel for the operator, I have reached the conclusion that the operator's unfamiliarity with the Act played a part in its misconduct in this case. Upon questioning from the bench, the inspector's testimony indicated that the circumstances occurred during early inspections of this facility under the Act.

I also bear in mind the operator's small size and small prior history. However, the operator's actions cannot be excused and an appropriate civil penalty must be assessed. What the operator must realize is that recurrence of such conduct in the future will result in much harsher and severer punishment.

After much deliberation, I determine that \$1,800 is an appropriate civil penalty for this violation. Accordingly, penalties of \$40, \$370 and \$1,800 are assessed in this case.

ORDER

The foregoing bench decision is hereby, **AFFIRMED**.

The operator is **ORDERED** to pay \$750 within 30 days from the date of this decision; \$750 within 60 days from the date of this decision; and \$710 within 90 days from the date of this decision.



Paul Merlin

Assistant Chief Administrative Law Judge

Distribution:

Edwin Tyler, Esq., Office of the Solicitor, U.S. Department of Labor,
P.O. Box 9092, Santurce, P.R. 00908 (Certified Mail)

Tadeo Negrón Medero, Esq., Box 40621, Minillas Station, Santurce,
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Administrator, Metal and Non-metal Mine Safety and Health,
U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 8 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
	:	
	:	Docket No. SE 79-2-M
Petitioner	:	A/O No. 54-00036-05003
v.	:	
	:	Docket No. SE 79-53-M
DAVID CABRERA, INC.,	:	A/O No. 54-00036-05006
Respondent	:	
	:	Cantera Dorado

DECISION

ORDER TO PAY

Appearances: Edwin Tyler, Esq., Office of the Solicitor, U.S. Department of Labor, Santurce, Puerto Rico, for Petitioner;
Tadeo Negrón Medero, Esq., Rafael Castro, Esq., Santurce, Puerto Rico, for Respondent, David Cabrera, Inc.

Before: Judge Merlin

The above-captioned cases are petitions for the assessment of civil penalties filed by the Mine Safety and Health Administration against David Cabrera, Inc. A hearing was held on January 8, 1980.

At the hearing, the parties agreed to the following stipulations (Tr. 3-5):

1. The legal name of the respondent is David Cabrera, Inc.
2. The identification of the mine where the inspection was conducted is Cantera Dorado.
3. The location of said mine is Dorado, Puerto Rico.
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The operator must understand that by acting as it has done in this case, it is subjecting itself to very severe penalties indeed. Section 110(b) of the law provides that an operator who fails to correct a violation within the period permitted may be assessed a penalty of up to \$1,000 for each day during which the violation continues. In addition, Section 110(d) provides that any operator who willfully violates the law shall, upon conviction, be punished by a fine of not more than \$25,000 or by imprisonment for not more than one year or by both.

After listening to the testimony and conferring with the Solicitor and counsel for the operator, I have reached the conclusion that the operator's unfamiliarity with the Act played a part in its misconduct in this case. Upon questioning from the bench, the inspector's testimony indicated that the circumstances occurred during early inspections of this facility under the Act.

I also bear in mind the operator's small size and small prior history. However, the operator's actions cannot be excused and an appropriate civil penalty must be assessed. What the operator must realize is that recurrence of such conduct in the future will result in much harsher and severer punishment.

After much deliberation, I determine that \$1,800 is an appropriate civil penalty for this violation. Accordingly, penalties of \$40, \$370 and \$1,800 are assessed in this case.

ORDER

The foregoing bench decision is hereby, AFFIRMED.

The operator is ORDERED to pay \$750 within 30 days from the date of this decision; \$750 within 60 days from the date of this decision; and \$710 within 90 days from the date of this decision.



Paul Merlin

Assistant Chief Administrative Law Judge

Distribution:

Edwin Tyler, Esq., Office of the Solicitor, U.S. Department of Labor,
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Administrator, Metal and Non-metal Mine Safety and Health,
U.S. Department of Labor

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
520 1/2 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 8 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 79-3-M
Petitioner : A/O No. 54-00036-05004
v. :
 : Cantera Dorado
DAVID CABRERA, INC., :
Respondent :

DECISION

ORDER TO PAY

Appearances: Edwin Tyler, Esq., Office of the Solicitor, U.S. Department of Labor, Santurce, Puerto Rico, for Petitioner; Tadeo Negrón Medero, Esq., Rafael Castro, Esq., Santurce, Puerto Rico, for Respondent, David Cabrera, Inc.

Before: Judge Merlin

The above-captioned proceeding is a petition for the assessment of civil penalties for 19 alleged violations of the Act.

At the hearing on January 8, 1980, the Solicitor advised that the parties now recommended settlement of the violations in this docket number. The Solicitor explained each of the settlements in detail and stated that the gravity factor had been overassessed. Further, the operator has virtually no history of prior violations under the Act, and the Act itself is relatively new as regards this operator. The recommended settlements total \$1,504, which is a substantial amount for this operator who is not large in size. ^{1/} In view of the circumstances which are fully set forth in the administrative transcript of the hearing, the recommended settlements are approved. It is however, a matter of concern when at the hearing the Solicitor expresses evaluations so different from that of the Assessment Office.

^{1/} The Solicitor incorrectly stated the total amount to be \$1,554. The correct amount is \$1,504.

ORDER

The operator is ORDERED to pay \$1,504 in six equal payments, the first payment to be made within 30 days from the date of this decision, with subsequent payments every 30 days thereafter.



Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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P.O. Box 9092, Santurce, P.R. 00908 (Certified Mail)

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Administrator, Metal and Non-metal Mine Safety and Health,
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(703) 756-6210/11/12

FEB 8 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VINC 79-227-P
Petitioner : A.O. No. 33-02308-03021F
v. :
: Raccoon No. 3 Mine
SOUTHERN OHIO COAL COMPANY, :
Respondent :

DECISION AND ORDER

Appearances: Linda Leasure, Esq., U.S. Department of Labor,
Office of the Solicitor, Cleveland, Ohio, for
Petitioner;
David Cohen, Esq., Lancaster, Ohio, for
Respondent.

Before: Judge Kennedy

The captioned penalty proceeding came on for an evidentiary hearing in Columbus, Ohio on November 1 and 2, 1979. The Secretary charged that as the result of two separate occurrences on May 5, 1978, the operator violated section 302(a) of the Act, 30 CFR 75.200. The first charge was that as a result of an investigation of a fatal roof fall accident that occurred on May 5, 1978, it was determined that the victim and another miner had travelled inby permanent roof support for the purpose of removing temporary supports in violation of the prohibition against miners travelling under unsupported roof. The second

charge was that the investigation revealed that at the time of the accident the victim and another miner were removing temporary supports under unsupported roof by hand instead of by some remote means and without installing other temporary support in violation of Safety Precaution No. 3 of the approved roof control plan.

At the hearing, counsel for the operator conceded the two miners in question "were engaged in the practices that were stated in the citations" (Tr. Vol. I, 16) but now claims there was only one violation. The statute, however, clearly provides that each occurrence of a violation constitutes a separate offense and there is no dispute about that the fact that two miners participated in the conduct charged and that the conduct of each was in violation of the standard. The operator is fortunate that the Secretary did not charge, as he might have, that each of the miners violated the standard twice for a total of four violations.

The operator's theory of two for the price of one is, therefore, rejected.

At the conclusion of the hearing, and in accordance with the pretrial order, the parties presented oral argument in support of their proposed findings and conclusions and the presiding judge made a tentative decision on the record. At the request of the operator, the effective date of the bench decision was stayed pending receipt of the transcript

and the parties proposed findings, conclusions, and supporting briefs.

After a careful consideration of the parties' written submissions, I find my bench decision, as supplemented below, should be adopted and confirmed as my final decision in this matter. My decision, therefore, is as follows:

After observing the demeanor of the witnesses and based on a preponderance of the reliable, probative and substantial evidence, I find:

1. The two violations charged did, in fact, occur.
2. Because these violations were the proximate cause of the death of a miner they were extremely serious.
3. The violations were the result of a disregard for compliance with safe mining practices by Socco's top management, its Section Foreman, Lonnie Darst, the miner-victim, James Six, and the miner-survivor, John Endicott.
4. Mr. Six's knowing disregard of the prohibition against working under unsupported roof and the safety precautions of the approved roof control plan was an act of gross negligence.
5. The violations were also the result of a reckless disregard for compliance with safe mining practices by the miner-survivor, John Endicott. Mr. Endicott knowingly disregarded the same prohibitions of the mandatory safety standard and the safety precautions of the approved roof control plan as did Mr. Six.
6. The acts of the miners Six and Endicott were foreseeable and preventable by the Section Foreman Lonnie Darst and top management. As several witnesses testified it was not unusual for miners in the Raccoon #3 Mine to work under unsupported roof (Tr. Vol. I 94, 108, 110, 131, 136, 159-160; Vol. 2 144; GX-9). Mr. Darst and top management knew or should have known this.

7. More specifically, Lonnie Darst knew or should have known that Mr. Six could not knock the six jacks in the 15 entry with the loader without damaging the jacks seriously.
8. Lonnie Darst did not tell James Six how to knock and remove the six jacks without damaging them.
9. Lonnie Darst did not tell James Six how to load the coal in the 15 entry without removing the jacks.
10. James Six and John Endicott knew they were expected to knock and remove the jacks without damaging them.
11. It never occurred to Six and Endicott to knock out the jacks with the loader because this would have damaged the jacks and seriously impeded production.
12. It is not reasonable to believe that Lonnie Darst would have directed Six to employ a means of removing the jacks that would render them inoperable.
13. Lonnie Darst and top management condoned the violations committed by Six and Endicott because they did only what was expected of them.
14. Lonnie Darst's actions as well as those of Six and Endicott are, therefore, imputable to Socco.
15. Lonnie Darst was negligent in his supervision of the 15 entry of the 001 Section on May 5, 1978.
16. Socco's management is vicariously responsible for the negligence of its agents and employees and independently responsible for its failure to design, implement and enforce a mine safety program that ensures compliance with the Mine Safety Laws at all times--not just some times--by its section foremen and miners.

17. The operator's claim that the section foreman, Lonnie Darst and top management were not involved in the violations committed is without merit. The record shows the section foreman's failure to supervise and monitor the remote recovery of the temporary supports was in violation of the safety precautions set forth in 30 CFR 75.200-14. These precautions were issued in implementation of the underlying interim mandatory standard pursuant to the Secretary's authority under section 301(d) of the Act to "prescribe" the manner in which roof support recovery is to be accomplished under roof control plans adopted and approved under section 302(a), 30 CFR 75.200 of the Mine Safety Law. Inasmuch as this criteria "prescribes" the manner in which an operator is to "carry out on a continuing basis" his program of roof control as mandated by section 302(a), 30 CFR 75.200, it is an enforceable part of the underlying interim mandatory safety standard. Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 405 and n. 32 (D.C. Cir. 1976); United States v. Finley Coal Co., 493 F.2d 285, 290 (6th Cir. 1974), aff'g. 345 F.Supp. 62, 67 (E.D. Ky. 1972). Under decisions of the Board of Mine Operations Appeals, it is well settled that once an operator adopts and the Secretary approves a roof control plan the operator is "obliged to carry out" the plan in accordance with the criteria set forth in 30 CFR 75.200-7 through 75.200-14. Affinity Mining Company, 6 IBMA 100, 109 (1976); Bishop Coal Company, 5 IBMA 231, 241-244 (1975) (75.200-1 through 75-200-14 "fill in some of the interstices" of the operator's obligation to "adequately" support or otherwise control the roof or ribs).
18. 30 CFR 75.200-14 prescribes a detailed method for roof support recovery. Mr. Darst's conduct and instructions violated this criteria in six particulars all of which are imputable to top management. Furthermore, top management is independently responsible for its own negligent failure to supervise properly Mr. Darst's performance of his duties and responsibilities.

19. Mr. Darst's six violations of 75.200-14 were as follows:

- (a) 75.200-14(a) provides that "Recovery should be done only under the direct supervision of a mine foreman, assistant mine foreman, or section foreman." It is undisputed that at the time of the fatal roof fall the section foreman, Lonnie Darst, was not supervising the recovery operation but was in the No. 13 crosscut assisting another miner in hanging power cable (Tr. Vol. II, 101, 107, 156).
- (b) 75.200-14(c) required that "The person supervising recovery should make a careful examination and evaluation of the roof, and designate each support to be recovered." Mr. Darst admitted that he failed to designate the jacks to be recovered (Tr. Vol. II, 108-109). In addition, the record shows that neither Mr. Darst nor the miners involved made any effort to sound or otherwise evaluate the condition of a badly fractured roof that, in the area where the fatality occurred, was unsupported for a minimum distance of 23 feet, 9 inches. The record further shows that despite the requirement for preshift and on-shift reports of hazardous conditions the operator tolerated the existence of this massive unsupported roof area for approximately 17 hours. This constituted a reckless disregard for management's obligation to exercise a high degree of care for the safety of the miners. Legislative History of the Federal Coal Mine Health and Safety Act of 1969, U.S. Senate, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., (August 1975), at 1515.
- (c) 75.200-14(d)(1) directs that "Supports should not be recovered . . . Where roof fractures are present or there are other indications of the roof being structurally weak." The record shows the operator had encountered extremely bad roof conditions while driving the 15 entry. The roof leaked

substantial quantities of water which indicated the overlying strata had lost its cohesive qualities and that the overburden was fractured. During the period it was unsupported, the roof had sagged and cracked. (Tr. Vol. I, 71, 74, 87-88, 93, 96, 108, 173, 193; Vol. II, 107, 159). Mr. Darst was fully aware of the condition of the roof in the number 15 entry. This knowledge is imputable to top management. In addition, top management knew or should have known of the hazardous roof condition in the 15 entry at the time it made its determination to recover coal from the area. Its determination to do so in the face of this criterion constituted a conscious and deliberate indifference to the safety of its employees.

- (d) 75.200-14(e) requires that "Two rows of temporary supports on not more than 4 foot centers, lengthwise and crosswise, should be set across the place, beginning not more than 4 feet in by the support being recovered. In addition, at least one temporary support should be provided as close as practicable to the support being recovered." It is undisputed that the only temporary supports in the No. 15 entry were those taken down by the miners Six and Endicott. (OX-8, Tr. Vol. I, 91, 120-121). The record shows Mr. Darst's instruction for tripping the jacks with the loader directly contravened this criterion, the approved roof control plan, and the requirement that the operator control the roof adequately to protect Mr. Six from a roof fall during removal of the temporary supports. Section 302(a) of the Act, 30 CFR 75.200. Mr. Darst's instruction which was tantamount to a directive to violate the safety precautions set forth in the law was negligence per se and clearly imputable to top management which was responsible for ensuring that Mr. Darst performed his duties in accordance with the law.

- (e) 75.200-14(f) provides that "Temporary supports used should not be recovered unless recovery is done remotely from under roof where the permanent supports have not been disturbed and two rows of temporary support, set across the place on 4 foot centers, are maintained at all times between the workmen and the unsupported area." Mr. Darst's instructions to knock the jacks out with the loader compelled action by Mr. Six that directly contravened this safety precaution as it was impossible to trip the jacks if two rows of temporary supports had been installed as required. Inspector Petit testified that to comply with this safety precaution and still recover the jacks it would be necessary, after setting the additional temporary support, to tie a rope around the jacks and then pull them out with the loader while remaining under supported roof (Tr. Vol. II, 59, 62-63). This, of course, would leave two rows of temporary support that could not be removed, nor could the coal. It is clear therefore that there was no way to effect remote removal of the temporary supports in compliance with the law and still recover the coal. Mr. Darst opted to flout the law and recover the coal. In doing so he set the stage for another roof fall fatality. It is a fair inference that Mr. Darst did not alone make the decision to go for the coal at the risk of a miner's life. I conclude therefore that top management of the Raccoon #3 Mine was primarily responsible for this regrettable case of institutional manslaughter.
- (f) 75.200-14(h) requires that "Entrances to the areas from which supports are being recovered should be marked with danger signs placed at conspicuous locations." Mr. Darst admitted he did not danger off the unsupported roof area in entry 15 (Tr. Vol. II, 107). The failure to ensure compliance with this safety precaution was another instance of the operator's failure to carry out its obligation to protect its miners from travelling or

working under hazardous roof as required by section 302(a), 30 CFR 75.200.

It also constituted another instance of the operator's failure to exercise the high degree of care imposed by the Act.

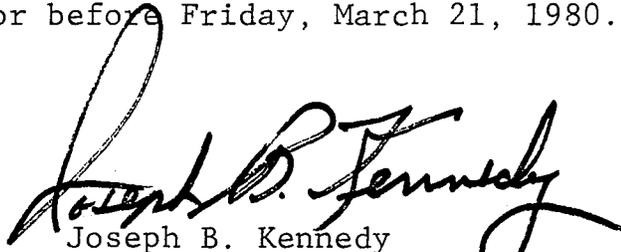
20. Finally, I find that the operator's independent failure to enforce sound mining practices, as evidenced by its failure to ensure compliance with the safety precautions applicable to the remote removal of temporary supports by its section foreman and the miners Six and Endicott as well as its foreman's failure to monitor and supervise properly the remote removal of the temporary supports by the miners Six and Endicott warrant the imposition of maximum penalties for the violations charged.

I conclude therefore that for the imputed negligence of its agents and employees as well as for its own acts of independent and contributory negligence, Socco is fully responsible for the violations charged. See Valley Camp Coal Co., 3 IBMA 463 (December 13, 1974) (section foreman's knowledge of dangerous condition imputable to operator for purpose of determining negligence); Pocahontas Fuel Co., 8 IBMA 136 (September 28, 1977) aff'd 590 F.2d 95 (4th Cir. 1979) (failure of preshift examiner to detect violation imputable to operator); Webster County Coal Co., BARB 78-185-P (June 7, 1978); Grundy Mining Co., BARB 78-168-P (June 19, 1978), appeal pending No. 78-3424 (6th Circuit) (foreseeable and preventable miner's negligence imputable to operator); Buffalo Mining Co., HOPE 78-333-P (October 30, 1979) (independent contractor's negligence imputable to operator); Cf. U.S. v. Illinois Central R. Co., 303 U.S. 239 (1938) (employee's

negligent breach of statutory duty imputable to employer);
Atlantic and Gulf Stevedores, Inc. v. OSHRC, 534 F.2d 541
(3rd Cir. 1976) (employer liable for predictable and
foreseeable employee misconduct).

I further conclude that in order to deter future violations,
heighten top management's awareness of the need for meaningful
supervision and sanctions to backup the mine safety laws, and
to ensure, if possible, voluntary compliance with those laws,
the amount of the penalty warranted for each violation found
is \$10,000.00.

Accordingly, it is ORDERED that Southern Ohio Coal Company
pay a penalty of \$20,000.00 on or before Friday, March 21, 1980.


Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 11 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-396-PM
Petitioner : A.C. No. 05-00354-05010
v. :
: Climax Mine
CLIMAX MOLYBDENUM COMPANY, :
Respondent :

DECISION

Appearances: Thomas E. Korson, Esq., Assistant Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, for Petitioner;
Richard W. Manning and Katherine Vigil, Climax Molybdenum Company, Golden, Colorado, for Respondent.

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Denver, Colorado, on January 3, 1980, at which both parties were represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, I entered a detailed opinion on the record. ^{1/} It was found that the violation charged in the withdrawal order did occur. My oral decision containing findings, conclusions and rationale appear below as it appears in the record aside from minor corrections in grammar and punctuation:

This penalty proceeding arose upon the filing of a petition for assessment of civil penalty by the Department of Labor on March 5, 1979, in which the Government seeks a penalty against the Respondent, Climax Molybdenum Company, for causing or permitting a condition or practice described in Citation No. 331766 which was issued by inspector James L. Atwood on August 2, 1978, and which is more particularly described as follows: "The ore pass in 3180-9 stopes, sub-drift F-finger, was not provided with a bumper block or berm.

^{1/} Tr. 127-139.

Mobile preparation crews use this ore pass for a dumping location."

The standard involved is that provided in 30 CFR 57.9-54 which provides as part of some 73 specific loading, hauling, and dumping safety requirements which are applicable generally to surface and underground mines that: "Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations."

At the outset, it is found, based upon stipulation provided by counsel, that this is a large mine having a payroll of some 1,500 underground employees and a daily production of molybdenum of 25,000 to 28,000 tons. It is also found that Respondent had a prior history of 122 previous violations. Since I do not know during what period of time that is involved, I make no specific finding with respect to that element.

The parties stipulated that payment of the proposed penalty of \$106 would not affect Respondent's ability to continue in business. I so find and, in addition, find that in view of the Respondent's size and that Respondent is itself a division of AMAX, Inc., that it would be able to pay a much higher penalty including the maximum penalty in this case without affecting its ability to continue in business.

Finally, based upon the expressed stipulation of the parties, I find that the Respondent, after being served with the citation involved here, proceeded in good faith to achieve rapid compliance with the safety standard cited in the citation by providing a berm at the site allegedly in violation.

In terms of issues, the general issues are, of course, whether or not a violation did occur and, if so, what degree of negligence, if such exists, and what degree of seriousness should be attributed to the Respondent and the condition respectively.

The primary issue in this case is a legal one which arises out of the proper interpretation which should be placed on the safety standard cited, 30 CFR 57.9-54. More particularly, the question is whether the coverage of this regulation applies when dumping is not actually going on. The issue of the construction to be given the regulation comes up based upon the defenses asserted by Respondent in this proceeding, the chief and secondary supporting arguments of such a defense being that berms

are not required around finger openings except when dumping is going on and that the Respondent had a practice of using berms when dumping actually was in progress. Respondent contends that there was no dumping in progress when the alleged violation was observed by the inspector on August 2, 1978, and that its employees were instructed to use berms when carrying on dumping, and other similar contentions which relate back to the primary construction of the regulation which it urges.

Turning now to the evidence, the inspector testified and I find that on August 2, 1978, the opening reflected on Exhibit R-2, which sometimes has been referred to as the "ore pass," but generally called the "F-finger," was not filled up; that it was irregular in shape; that it was approximately 8 feet across (the Respondent contends the same was approximately 7-1/2 feet across) and that it was some 31 feet deep.

I find, based upon the inspector's testimony and that of Respondent's witness, Dick Robush, that the depth of the finger was approximately 23 feet, the first half of which was straight down and the second half of which sloped off at an angle of approximately 45 degrees. As reflected on Exhibit R-1, the finger extended from subdrift F down to an area sometimes referred to as the slusher drift area.

I would footnote that I would refer to the ore pass as the actual opening or top of the hole through which the ore was dumped into the finger.

I find that on August 2, 1978, the ore pass and the finger was not filled up. For all intents and purposes it was empty. I also find that the subdrift reflected on Exhibit R-1 and in which the ore pass was located was used as a trailway, that the ore pass abutted on one side a wall of the subdrift, that there was a 3/4-inch hemp rope suspended from the sides which hung approximately 3 feet off the ground and which had a sway in it which at the bottom was approximately three-fourths of a foot off the bottom. Part of the rope was out over the open hole.

At the time the inspector observed the condition there were equipment tracks imprinted in the bottom of the material which constituted the floor of the area, most of which followed the direction of the trailway and some of which were in the direction of the ore pass, the closest of which were some 3 to 4 feet away from the edge of the ore pass. I am unable to find when these tracks were made or by which specific type of mobile equipment the tracks were left.

I find that there was a sign in proximity to the allegedly violative condition which said "Danger--No Manway," and that the area in which the ore pass was located could at times become, as the inspector described it, smoky as a result of blasting which could take place in the mine at distances ranging from 100 yards to 1 mile from the subject area.

In this connection, I also find that while such smoky or dusty condition could in the abstract affect visibility to what extent the same would be affected cannot be found on this record and, further, that there was no such condition on the day the alleged violation was observed.

I find that when the citation was issued at 8:50 a.m., the first or morning shift was in progress, that no dumping was carried on on the morning shift, and that the last dumping which occurred into the finger in question through the subject ore pass occurred on August 1 during the swing shift (between 3:30 and 11:30 p.m.).

I find that the ore pass and finger in question, both parts of the same thing, had prior to August 2, 1978, been used as a dumping location and would have been used as a dumping location subsequent to such date. The meaning of this finding is that actual dumping had occurred at such site and would have occurred at such site subsequent to the issuance of the citation.

I specifically find that on August 2, 1978, there was no berm, bumper guard, or other suitable means or material present at the site in question which would have prevented the overtravel of vehicles or overturning of vehicles--overtravel being a vehicle's going too far and going into the opening of the ore pass.

At the time the citation was issued, the only mobile equipment in the general area depicted on Exhibit R-2 were two loaders, a 1-yard loader and a 5-yard loader. The 1-yard loader was some 16 feet long, 5-1/2 feet high and 4-1/2 feet wide, and the 5-yard loader being some 26 feet long, 6 to 7 feet high, and 8-1/2 feet wide.

In this connection, I also find that, based upon the inspector's testimony, so-called "Wagner muckers"--a vehicle used for hauling which approximates the size of a standard-size automobile running on four wheels and powered by a diesel engine--constituted the majority of Respondent's mobile equipment operating in the area. As I have noted, the tracks found in the area cannot be attributed to any

specific piece of equipment including the Wagner mucker or the loaders previously described.

There were approximately four employees working in the general area depicted on Exhibit R-2 on August 2, 1978. It would have been impossible for the two loaders to proceed as depicted on Exhibit R-3 from the 400 production drift past the subdrift 22 into 3160 crosscut, and get closer than 7 feet to the ore pass opening. On the other hand, equipment could have directly turned into subdrift 22 and have been exposed to the hazard presented by the unfilled ore pass opening, which was not protected by a berm, bumper guard, or other suitable means or material to prevent overtravel or overturning.

Based upon the foregoing specific findings of fact, I make these following ultimate findings of fact: On August 2, 1978, when the citation was issued, no dumping was being conducted at the ore pass in question; the ore pass described in the citation was not protected in accordance with the specific requirements of the regulation cited, 29 CFR 57.9-54, in that no berms, bumper blocks, safety hooks, or similar means were provided to prevent overtravel and overturning; the ore pass and finger shown on Exhibit R-3 was used for dumping, even though at the specific time the inspector observed the same, dumping was not actually in progress; the ore pass in question constituted a very serious hazard to employees working or traveling in proximity to it due to its depth, its location--adjacent to a travelway, the condition of the protective rope--insofar as the same was not fastened properly, the possibility of impaired visibility, and all despite the precaution taken by management personnel in putting up a sign entitled "Danger--No Manway."

Since Respondent had other signs, some of which were more specific than the sign in question such as the ones which said "Danger--Open Finger" and one which said "Danger--Open Ore Pass," I find it possible that a sign which says "Danger--No Manway" might lead an employee into the belief that there was no danger from an open finger or an open ore pass. That is, by having specific signs which describe specific dangers, a (less) specific sign might be counterproductive. However, those are in my judgment minor considerations in comparison to the major considerations upon which (rests) my finding that the condition was a very serious hazard.

In this sense and in this respect, I fully credit the testimony of the inspector that in the event of an overturn of equipment, a fatality would probably occur. There was

really no challenge to this evidence with respect to seriousness. The general description of the condition itself would lead me to find the same absent the inspector's testimony.

I turn now to the primary question which is the construction of the regulation. I first note that it's a long-established principle of mine safety law that ambiguous provisions of the law are to be construed liberally so as to enhance the safety aspects of the language. I construe that to mean that if there is an ambiguity, a regulation should be construed liberally to promote health and safety. However, I find no ambiguity whatsoever in this regulation.

I'm going to be very explicit in saying I find the argument of Respondent that the regulation should be limited to only those times when dumping is going on to be wishful thinking at best and very cynical at worst. This regulation says that berms, bumper blocks, or similar means shall be present at dumping locations. Is an open hole in the ground 7-1/2 feet long a "dumping location" only when dumping is in progress when it's (been) used for dumping within some 15 to 20 hours before it's seen to present a very serious violation? Is a piano that's not in use not a piano because there's no musician sitting there playing it?

This site was used shortly before this violation was discovered as a dumping place and was intended to be used as a dumping place subsequently. The regulation does not say that berms, etc., shall be provided while dumping is going on. It says it shall be used at "dumping locations." In my judgment, if there was ever a dumping location, this was it, since it was one that was used very shortly before the violation was found. It would be impossible to enforce such a regulation absent having an inspector present at every single such location 24 hours a day, because you would then get down to where someone would say, "Well, it wasn't a dumping location, we were using it for ventilation or some other purpose at the time the violation was discovered."

This regulation is not just for the benefit of the employees actually engaged in dumping at some particular time. The hazard is to anybody that happens to be going along there at any time whether dumping is going on or not. The hazard is for a piece of equipment to overturn or to fall into that hole whether or not it's in the process of dumping. Are we to discriminate and limit the protection afforded by such a regulation, the hazard

which it is designed to protect being so obvious, in such a way?

I find no ambiguity whatsoever and I am surprised at the position that the Respondent has taken which, as it has pointed out, has resulted in a practice wherein the berms are taken away after the dumping is over. I find, in that connection, Inspector Atwood's testimony that it was not possible for the berms to have been removed without leaving traces of their presence, to be credible. Although I credit this testimony, I do not find it necessary to make an express finding of fact in resolving the ultimate issue in this case. More specifically, I do not find it necessary to determine whether there was a berm there or not at the time the dumping occurred the previous day or other times when dumping occurred. The fact this hole was present at 8:50 a.m. on August 2, 1978, presenting a hazard as it did without the berms or other similar means of protection constitutes a violation, and I so find.

The remaining question is whether or not, in permitting the violation, the Respondent was negligent. The facts of this case indicate that this was a willful act. I'm not saying it was a willful violation. It was a willful act on the part of the Respondent based upon its understanding that it was in compliance with the regulations.-

The negligence aspect of the case is not susceptible to being analyzed in terms of the normal precepts of negligence law. I do accept the Respondent's statement that in this case it had a sincere good faith belief that it was not violating the standard in question. I thus find that it is not a willful violation. If I found a willful violation, I'd have to refer this for criminal action.

Analyzing it in terms of willfulness, I would therefore find that the willfulness is excused by the good faith belief--and what I believe to be mistaken belief--that they were not in violation. This would, therefore, in my judgment equate with a low degree of negligence were we to analogize it to negligence.

Summing up then, I find that this is a large mine operator. I find that, based upon the history of previous violations, there is no reason to increase any penalty. I find that the penalty that I'm to assess will not interfere with Respondent's ability to continue in business. I have found this to be a very serious violation which was attributable to the Respondent's good faith belief that it was in compliance with the standard. And I footnote that I make such

finding even though I don't find much ambiguity or any ambiguity in that standard myself. Standing in some mitigation is the fact that Respondent proceeded rapidly to abate the violation found. Weighing all those factors and again noting that I had found either willfulness or gross negligence I would have given a penalty close to the maximum which is \$10,000 in this case, a penalty of \$1,500 is assessed. Respondent is directed to pay the same within 30 days of issuance of my subsequent written decision which will incorporate the oral decision which I have placed on the record.

ORDER

Respondent, Climax Molybdenum Company, is ORDERED to pay a penalty of \$1,500 to the Secretary of Labor within 30 days from the issuance date of this decision.


Michael A. Lasher, Jr., Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 11 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PIKE 78-420-P
Petitioner : A. C. No. 15-08413-02012V
: Pontiki No. 1 Mine
v. :
: PONTIKI COAL CORPORATION, :
Respondent :

DECISION

This matter is before me for reassessment of penalties for violations involved in three withdrawal orders after reassignment of judges pursuant to remand by the Commission's decision of October 25, 1979. The Administrative Law Judge who originally heard and decided this matter has since retired. He found the violations occurred as alleged. However, for failure of the Secretary's proof, he vacated the three section 104(c)(2) orders in question and mitigated penalties for the reason that the orders had been vacated.

In its reversal and remand, the Commission specifies only that the reassessment be made without consideration of the vacated orders as a mitigating factor. 1/ I therefore adopt the original judge's findings with respect to the six statutory criteria and incorporate such findings by reference. 2/ Although the original judge indicated that the penalties were being "mitigated due to the fact that the orders involved (were) vacated" the extent to which such reduction was carried was not described or shown. In these circumstances, my assessments will be de novo, that is, an independent evaluation of proper penalties--based, however, on the penalty assessment factors found by the original judge.

It should be further noted that (a) while this Respondent was a very large coal operator in 1977, it was not one of the giants of the industry

1/ The Judge's finding that the violations occurred as charged by MSHA, and his findings with respect to the statutory criteria were not disturbed.

2/ These findings are summarized in his written decision of February 9, 1979, at page 20, Finding Nos. 3 through 8, and are incorporated herein by reference.

(Tr. 7-9), or affiliated with one of the giant coal-producing groups, 3/ and (b) no injuries or fatalities were involved in any of the violations. 4/

Respondent is assessed the following penalties:

<u>Order No.</u>	<u>Date</u>	<u>Section</u>	<u>Penalty</u>
1 TE	12/05/77	30 CFR 75.316	\$ 250
1 MM	12/05/77	30 CFR 75.316	1,250
2 FDG	12/06/77	30 CFR 75.200	4,500
			<u>\$6,000</u>

ORDER

IT IS ORDERED that Respondent pay to the Secretary of Labor the sum of \$6,000 within 30 days from the date of this decision.

Michael A. Lasher, Jr.

Michael A. Lasher, Jr., Judge

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3/ See (Keystone Coal Industry Manual, (McGraw-Hill, 1977), pages 546, 756, and 757, indicating that in 1977 Pontiki was in Class 4 of a 10-class spectrum with annual coal production under 1 million tons, that the largest group with which it was then affiliated was in Class 1 (the largest class) with annual production of 3 million tons or more, and that such group was not one of the top 15 coal-producing groups in 1976.

4/ Respondent's appeal to the United States Court of Appeals, D.C. Circuit, was voluntarily withdrawn and dismissed on January 30, 1980.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 11 1980

PONTIKI COAL CORPORATION, : Contest of Order
Contestant :
v. : Docket No. KENT 79-115-R
: :
SECRETARY OF LABOR, : Order No. 706444
MINE SAFETY AND HEALTH : May 3, 1979
ADMINISTRATION (MSHA), :
Respondent : No. 1 Mine
: :
SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 80-53
Petitioner : Assessment Control
v. : No. 15-08413-03042V
: :
PONTIKI COAL CORPORATION, : No. 1 Mine
Respondent :

DECISION

Appearances: William H. Howe, Esq., and Timothy J. Parsons, Esq.,
Loomis, Owen, Fellman & Howe, Washington, D.C., for
Pontiki Coal Corporation;
John H. O'Donnell, Esq., Office of the Solicitor, U.S.
Department of Labor, for Secretary of Labor.

Before: Administrative Law Judge Steffey

Pursuant to written order dated June 22, 1979, a hearing in the above-entitled 1/ consolidated proceeding was held on August 9, 1979, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

1/ The order providing for hearing consolidated any civil penalty issues which might arise with respect to Order No. 706444 with the issues raised by Pontiki Coal Corporation's request for review of Order No. 706444. MSHA's Proposal for Assessment of Civil Penalty was filed on January 15, 1980, in Docket No. KENT 80-53 seeking assessment of a civil penalty for the violation of 30 CFR 75.403 alleged in Order No. 706444. Therefore, it is now possible to decide in this proceeding the civil penalty issues on which evidence was presented by the parties at the hearing held on August 9, 1979. My order did not consolidate the civil penalty issues raised in Docket No. KENT 80-53 with respect to underlying Citation No. 706762. Therefore, the order accompanying this decision defers all civil penalty issues pertaining to Citation No. 706762 for future disposition.

Counsel for Pontiki Coal Corporation filed on December 11, 1979, a posthearing brief and counsel for the Mine Safety and Health Administration filed on January 7, 1980, a reply to Pontiki's brief.

Issues

Pontiki's brief argues that Order No. 706444 is invalid as well as underlying Citation No. 706762 on which Order No. 706444 is based. Pontiki also contends that the violation of 30 CFR 75.403 alleged in Order No. 706444 did not occur or, in the alternative, that if a violation of section 75.403 did occur, the violation was not the result of any unwarrantable failure on the part of Pontiki.

MSHA's brief argues that a violation of section 75.403 occurred as alleged in Order No. 706444, that the violation was the result of an unwarrantable failure on the part of Pontiki, and that underlying Citation No. 706762 was validly issued and properly cited a violation of 30 CFR 75.313. Additionally, MSHA's brief claims that I am obligated to determine in my decision whether the violation of section 75.313 alleged in underlying Citation No. 706762 occurred even though Pontiki did not raise that issue in its contest of Order No. 706444. Finally, MSHA contends that a judge is obligated to consider a conglomerate's total civil penalty record of previous violations when he is evaluating an operator's history of previous violations as one of the six criteria which must be considered in assessing penalties in civil penalty proceedings if violations of the mandatory health and safety standards are found to have occurred.

Findings of Fact

My decision on all issues in this consolidated proceeding will be based on the findings of fact set forth below:

1. Pontiki Coal Corporation is a subsidiary of Mapco, Inc. (Exh. 1). In addition to Pontiki Coal Corporation, Mapco controls four other coal companies, namely, Webster County Coal Corporation, Martiki Coal Corporation, Topiki Coal Corporation, and Mettiki Coal Corporation. Mapco's five subsidiaries operate a total of nine underground and surface coal mines. Pontiki operates two underground coal mines and one preparation plant (Exh. 2). Only Pontiki's No. 1 Mine is involved in this proceeding. That mine employs 169 miners on two production shifts and one maintenance shift to produce about 3,500 tons of raw coal per day from the Pond Creek coal seam (Tr. 12). After cleaning, the No. 1 Mine's production amounts to about 3,000 tons per day (Tr. 96). The mining height ranges from 36 to 109 inches (Tr. 12; 84). The No. 1 Mine is entered by one 400-foot shaft and one slope (Tr. 12). Coal is produced from four working sections, three of which use continuous mining machines and one of which utilizes conventional mining methods (Tr. 45). The No. 1 Mine liberates approximately 450,000 cubic feet of methane over a 24-hour period (Tr. 13).

2. An MSHA inspector entered the No. 1 Mine on May 3, 1979, at about 4:30 p.m. He was accompanied by an inspector trainee and Pontiki's safety

director, Mr. Danny P. Curry (Tr. 65; 81). All three men traveled to the No. 5 Section which uses conventional mining equipment (Tr. 136). For a month prior to May 3, the inspector had been engaged in making a complete inspection of the No. 1 Mine (Tr. 14; 41). He knew from previous experience that the personnel in the No. 5 Section were having some difficulty in controlling the roof and he wanted to check the roof conditions in the No. 5 Section before finishing his inspection (Tr. 42; 45; 194).

3. The inspector, the trainee, and Mr. Curry traveled up the No. 5 or track entry to the second crosscut outby the face (Tr. 83; 137). At that point they observed a miner installing roof bolts. Mr. Curry remained at the site of the roof bolter while the inspector and the trainee walked over to return entries Nos. 6 and 7. When they returned from those entries, they were rejoined by Mr. Curry at the No. 5 entry and all three men thereafter continued their examination of the entries by walking through the last open crosscut to the No. 1 entry. They walked down the No. 1 entry to the second open crosscut. As they entered the crosscut between the Nos. 1 and 2 entries, the inspector orally advised Mr. Curry that he was issuing a "(d)" order (Tr. 139; 146).

4. Mr. Curry himself had been a former MSHA inspector (Tr. 134) and he understood that the inspector was issuing an unwarrantable failure order (Tr. 154). Mr. Curry then left the inspector for about 10 minutes so that he could call the mine superintendent, Mr. Sloan, for the purpose of letting the superintendent know that the No. 5 Section had been closed by an order (Tr. 140; 162).

5. The inspector had found that the mine personnel were doing a "good job" of supporting the roof (Tr. 91), but he found that there was insufficient rock dust on the floor of the mine (Tr. 31-38). The inspector's Order No. 706444 was written at 6:05 p.m. on May 3, 1979, and cites Pontiki for a violation of 30 CFR 75.403 because there had been an "[i]nadequate application of rock dust on mine floor in entries No. 1 through No. 7 and connecting crosscuts on No. 005-0 Section, starting at spad No. 1450 and extending inby approx[imately] 360 feet" (Exh. 5).

6. The inspector based his citation of inadequate rock dusting in seven entries and their connecting crosscuts on an examination of the crosscuts and entries which he could see by walking through the No. 5 entry to the two rows of crosscuts outby the face (Tr. 46-47; 82-83). The inspector walked through the first and second rows of crosscuts outby the face and looked down each of the seven entries. The inspector walked down the No. 1 entry for three crosscuts from the face, down the No. 2 entry for 2-1/2 crosscuts from the face, and down the No. 4 entry to the belt feeder which was located just inby the third crosscut from the face. With the exception of the No. 5 entry, the inspector did not travel any entry for a distance of more than three crosscuts from the face (Tr. 84). Although the inspector had no illumination other than his cap light, he stated that he could see a distance of from 300 to 360 feet down each entry and could determine that the floor had been inadequately rock dusted (Tr. 82; 87; 196). There were permanent stoppings between the Nos. 2 and 3 entries and

between the Nos. 5 and 6 entries for the purpose of separating the intake and return airways (Tr. 47; 86; 159-160). The inspector could not have seen what the condition of the rock dust was in the crosscuts between Nos. 2 and 3 entries and between Nos. 5 and 6 entries because his observation from entry No. 5 would have been blocked by permanent stoppings as he walked up the No. 5 entry to the working faces (Tr. 149). Those portions of the crosscuts would not have constituted a major part of the No. 5 Section and would not have existed closer than three crosscuts from the working face (Tr. 86).

7. The inspector took two floor samples and the trainee took one floor sample to support the inspector's claim that rock dust on the mine floor in No. 5 Section was inadequate. One of the inspector's floor samples was taken at a point 20 feet inby spad No. 1491 in the No. 2 entry. The inspector's other floor sample was taken in the crosscut between the Nos. 1 and 2 entries at a point which was about 50 or 60 feet from the place where he obtained the first sample. The inspector trainee's floor sample was taken in the No. 3 entry about 10 feet outby spad No. 1490, or approximately 80 feet from the place where the inspector took his first sample (Exh. C; Tr. 190-195). Thus, all three samples used to substantiate the inspector's order were taken either in or close to the second crosscut from the face and all three samples were taken within a distance from each other of about 120 feet even though the inspector's order covered the entire No. 5 Section for a distance of seven crosscuts, or about 420 feet outby the face (Exhs. 5, 6 and C; Tr. 78-79; 86). The inspector considered the three samples, two of which revealed an incombustibility of 35 percent and one of which showed an incombustibility of 31 percent, to be representative of the condition of the floor throughout the No. 5 Section (Tr. 37-38).

8. The inspector conceded that there had been spillage in the crosscut where the samples were taken, but he insisted that he did not take samples where spillage existed (Tr. 71-72). In the inspector's opinion, the amount of spillage in the crosscuts and entries near the face was not excessive and would not have justified citing Pontiki for a violation of 30 CFR 75.400 for permitting combustible materials to accumulate (Tr. 90-91).

9. Respondent's safety director introduced as Exhibit C a drawing of the No. 5 Section which he made about 2 days after the inspector's order was issued. Exhibit C shows that both of the inspector's samples were taken in places where spillage existed. The sample obtained by the trainee was taken at a place where no spillage is shown on Exhibit C, and the incombustibility of that sample was 35 percent (Exhs. 6 and C; Tr. 144).

10. The chief mine foreman, second-shift mine foreman, and third-shift mine foreman all testified that they were having trouble in controlling the roof in the No. 5 Section (Tr. 105; 112; 121; 124; 170). Timbers were being set on each side of the entry and 72-inch roof bolts on 4-foot centers were being used to support the roof (Tr. 91-92). It was also frequently necessary to install cribs as further supplemental support (Tr. 112; 124; Exh. B).

Pontiki's safety director and all three foremen stated that when additional roof supports and rock dusting needed to be done at the same time, they gave priority to installation of roof supports (Tr. 112; 124; 151; 180).

11. All three foremen testified that the cleaning and rock dusting program in the No. 5 Section consisted of cleaning and rock dusting during both production shifts as well as cleaning and rock dusting on the maintenance shift (Tr. 99-100; 119; 124; 168-169). On each production shift, the operator of the scoop had the duty of bringing in supplies such as roof bolts, timbers, and rock dust during the first part of his shift. After he had completed bringing in supplies, it was the scoop operator's duty to shove excess coal accumulations into the face and to apply rock dust to the floor after the loading machine had completed removal of coal from each working place (Tr. 99-100; 167-169). The chief mine foreman each day leaves a list of duties for the third-shift mine foreman to complete on his shift between midnight and 8:00 a.m. Those duties always include cleaning up excessive coal accumulations and applying rock dust (Tr. 100-101; 119; Exhs. A and B).

12. Three of Pontiki's witnesses agreed that on May 3, 1979, when Order No. 706444 was written, there was an inadequate amount of rock dust on the mine floor (Tr. 110; 164; 174-175). Pontiki's safety director, who had formerly been an MSHA inspector for about 3 years, stated that he agreed that a violation of section 75.403 existed at the time Order No. 706444 was written, but the safety director stated that he disagreed with the inspector's claim that the violation was the result of unwarrantable failure (Tr. 164-165).

13. Pontiki's mine foreman stated that rock dusting on the midnight or maintenance shift is done by a machine and the maintenance shift concentrates on the area which has been mined during the preceding two production shifts (Tr. 99-100). The mine foreman specifically stated: "Honestly, when he dusts the last line of breaks he doesn't concentrate on the floor. Really machine dusting you just can't dust the floor * * *" (Tr. 104). The mine foreman explained that rock dust is applied by hand during the production shift by the scoop operator. Sometimes they get behind with dusting the floor and at such times "* * * we'll work extra hours at dusting the floor" (Tr. 105).

14. Pontiki's third-shift foreman stated that the miners on his maintenance shift did not apply rock dust to the mine floor as well as they should. He stated specifically, "I leave instructions for them to spray the ribs and the top and the bottom. Of course, you know, a lot of times, they don't get maybe to the bottom as good as they should. It should be thicker than what it is, really" (Tr. 123).

15. The inspector issued an unwarrantable failure order because the section foreman knew that inadequate rock dusting had been done, but the foreman was taking no action to apply rock dust although the roof-bolting machine was being operated and the miners were getting ready to produce

coal at the time Order No. 706444 was issued (Tr. 39; 45). The inspector believed that the violation of section 75.403 contributed significantly and substantially to the cause and effect of a safety hazard because the No. 1 Mine releases methane and an explosion could have occurred as a result of the inadequate rock dusting. The inspector believed that management was becoming complacent about the need to apply an adequate amount of rock dust. The inspector did not find that there was sufficient methane in the area at the time the order was written to warrant a finding of imminent danger (Tr. 39-40; 64; 73-80).

16. Order No. 706444 was based on Citation No. 706762 issued April 3, 1979, citing Pontiki for a violation of section 75.313 because "[t]he S and S battery powered scoop (no serial No.) which is used to load and haul coal from the faces on No. 001-0 Section is not equipped with a methane monitor" (Exh. 3). Pontiki had been using the scoop for about 2 weeks without ever having installed a methane monitor on the scoop. If the inspector had found that the scoop had been equipped with a methane monitor which had become inoperable, he would have issued an ordinary citation under section 104(a) of the Act, but he found that Pontiki's use of a scoop for 2 weeks without installing a methane monitor was a sufficient showing of negligence to justify his issuance of the citation under section 104(d)(1) of the Act. The inspector found that the alleged violation of section 75.313 contributed significantly and substantially to the cause or effect of a safety hazard because the No. 1 Mine releases methane and a methane monitor will deenergize equipment if it encounters a concentration of methane of up to 2 percent or more. A concentration of methane of up to 5 percent may cause an ignition. The inspector did not find that an imminent danger existed because the scoop was not being operated in an explosive concentration of methane (Tr. 14-29).

17. In the inspector's opinion, Pontiki's management failed to demonstrate a good faith effort to achieve rapid compliance after he issued Order No. 706444 citing Pontiki for a violation of section 75.403. The inspector based his opinion of lack of good faith abatement on the fact that his order was issued on May 3, 1979, and was not abated until May 7, 1979 (Tr. 40). After the inspector was shown a calendar, he stated that his order was issued on a Thursday at 6:05 p.m. and that an intervening weekend passed before he terminated the order on Monday, May 7, 1979 (Tr. 41). The inspector's opinion as to lack of good faith abatement failed to take into consideration the fact that Pontiki's management tried to get an inspector to return to the mine on Friday, May 4, 1979, to terminate the order, but no MSHA inspector was available for checking the conditions in the No. 5 Section because all of the inspectors were attending a personnel meeting at MSHA's Prestonsburg Office (Tr. 42-43; 115; 187). The inspector did not bring his notes with him when he testified at the hearing and therefore was unable to agree or disagree as to his availability to check the No. 5 Section on May 4, 1979, to determine whether his order should be terminated (Tr. 43). In the opinion of Pontiki's mine foreman, the conditions cited in the inspector's order had been abated by the next day after the order was issued (Tr. 115).

- Section 104(d)(1) - Unwarrantable failure - could significantly and substantially contribute to health or safety hazard
- Section 104(f) - Citation - exceeding respirable dust standard

Beneath the word "Citation" on the front of the form, the phrase "Type of Action" appears. The inspector entered after "Type of Action" the numbers and letter "104-D." There is nothing on the front of the form to explain what the entry "104-D" means. If one turns the form over, he will find nothing on the back of the form which explains what "104-D" means, but he will find under the caption "Citation/Order," as quoted above, an explanation opposite "Section 104(d)(1)" to the effect that section 104(d)(1) is associated with "unwarrantable failure."

Beneath the words "Part and Section" on the front of the form, the inspector placed an "X" in a box after which there appears "S and S (See Reverse)." Again, if one turns to the back of the form, he will find opposite "Section 104(d)(1)" a statement indicating that a 104(d)(1) type of action involves a violation which "could significantly and substantially contribute to health or safety hazard."

Pontiki contends that the entries on Exhibit No. 3 or Form 7000-3, as described above, fall short of compliance with section 104(d)(1) of the Act which requires that an inspector shall include a finding of unwarrantable failure "* * *" in any citation given to the operator under this chapter."

MSHA's brief (p. 11) notes that the Commission stated in Secretary of Labor v. Jim Walter Resources, Inc., 1 F.M.S.H.R. Comm. Decisions 1827, 1829, that "[t]he primary reasons compelling the statutory mandate of specificity is for the purpose of enabling the operator to be properly advised so that corrections can be made to insure safety and to allow adequate preparations for any potential hearing on the matter." The issue in the Jim Walter case was whether the inspector's description of the "condition or practice" cited in his notice of violation was sufficiently specific to comply with section 104(e) of the Federal Coal Mine Health and Safety Act of 1969, but the principle is the same, namely, whether Exhibit No. 3 sets forth a specific finding as to unwarrantable failure which satisfies the provisions of section 104(d)(1) of the 1977 Act.

I find that Exhibit No. 3 complies with the "finding" requirements of section 104(d)(1). The front of Exhibit No. 3 informed Pontiki that Citation No. 706762 was being issued under section 104(d). Although the inspector did not add subsection (1) after his entry of section "104-D," his omission was not prejudicial to Pontiki because there is no entry on the back of Citation No. 706762 with which the inspector's reference to "104-D" could have been confused. Therefore, the back of Citation No. 706762 specifically stated that the inspector had found the existence of a condition

or practice which was described on the front of Citation No. 706762. The front of the citation also advised Pontiki that the citation was being issued under section 104-D and the back of the form clearly shows that any reference to "D" must pertain to section 104(d)(1) which is only associated with unwarrantable failure. The inspector's checking of "S and S" on the front of the citation was associated with a request that the operator examine the "reverse" or back side of the form. There, again, opposite "Section 104(d)(1)," the form explained that "S and S" meant a significant and substantial violation which could contribute to a health or safety standard.

I do not think that Pontiki's brief raises a question about whether the evidence in this proceeding would support a finding that the violation alleged in Citation No. 706762 was the result of unwarrantable failure on the part of Pontiki, but if such an issue is inherent in Pontiki's arguments, I believe that Finding No. 16, supra, supports the inspector's finding of unwarrantable failure in Citation No. 706762, assuming that unwarrantable failure has the meaning assigned to that term in Zeigler Coal Co., 7 IBMA 280, 295-96 (1977).

MSHA's Request that I Find a Violation of Section 75.313

At the hearing, I sustained an objection by Pontiki's counsel when MSHA's counsel asked the inspector whether Pontiki had demonstrated a good faith effort to achieve compliance after Citation No. 706762 was issued. I sustained the objection because my order had consolidated for hearing in this proceeding only the civil penalty issues pertaining to Order No. 706444. Since Pontiki's counsel had claimed that the underlying Citation No. 706762 was invalid only for failure to make the findings required by section 104(d)(1) of the Act, it did not occur to me that I should consolidate the the civil penalty issues with respect to underlying Citation No. 706762 with the civil penalty issues pertaining to Order No. 706444.

In the preceding portion of this decision I have rejected Pontiki's argument that Citation No. 706762 failed to make the findings required by section 104(d)(1). Since Pontiki was not given notice that the civil penalty issues with respect to Citation No. 706762 would be considered at the hearing, I think that I must reaffirm my sustaining of Pontiki's objection to my considering in this proceeding the civil penalty issues with respect to Citation No. 706762.

It is true that MSHA's brief (p. 7) argues that I may find a violation of section 75.313 on the basis of the evidence introduced by MSHA in this proceeding regardless of whether Pontiki was given notice that the civil penalty issues with respect to Citation No. 706762 would be considered at the hearing. MSHA's theory is that I may determine whether the violation of section 75.313 alleged in Citation No. 706762 occurred as a part of my consideration of Pontiki's arguments that Citation No. 706762 is invalid for failure to make the findings required by section 104(d)(1) because MSHA claims that one of the findings required by section 104(d)(1) is that the inspector find that a violation has occurred. While that may be true, it

is a fact that Pontiki did not raise the specific issue of whether a violation of section 75.313 occurred. Pontiki's objection to the underlying citation has always been directed to the question of whether the citation properly made the finding as to unwarrantable failure which is required by section 104(d)(1).

In any event, it is a fact that my order did not consolidate for hearing in this proceeding the civil penalty issues associated with Citation No. 706762. The sole reason that MSHA requests me to find that a violation of section 75.313 occurred is to make my finding "res judicata" for the prospective civil penalty proceeding (MSHA's brief, p. 7). I do not believe I can ignore the clear provisions of my order providing for hearing and consider issues which my order failed to state would be considered.

As I stated at the hearing, it was an oversight on my part not to have consolidated for hearing the civil penalty issues pertaining to Citation No. 706762. It has been my consistent practice to consolidate for hearing all civil penalty issues with the issues relating to the primary order or citation involved in proceedings initiated by applications for review or notices of contest, but this is the first proceeding I have had in which MSHA wished to have me consider the civil penalty issues associated with an underlying citation. It would be unfortunate if my lack of foresight in consolidating the civil penalty issues pertaining to Citation No. 706762 for hearing in this proceeding should result in the necessity of my having to hold a further hearing on the civil penalty issues raised by MSHA's Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-53 with respect to underlying Citation No. 706762. As explained below, I do not think that an additional hearing should be required to resolve the civil penalty issues remaining to be determined with respect to Citation No. 706762.

Although the order accompanying this decision disposes only of the civil penalty issues raised by Order No. 706444, it is my opinion that this record contains the essential facts required for determining all civil penalty issues with respect to Citation No. 706762, provided counsel for the parties are agreeable to a resolution of the civil penalty issues on the basis of the record in this proceeding. The fact that evidence has been received with respect to Citation No. 706762 should not, of course, preclude the parties from settling the civil penalty issues raised with respect to Citation No. 706762, if they should be inclined to do so.

I shall take no action in scheduling a hearing or deciding the civil penalty issues with respect to Citation No. 706762 until time for filing a request for discretionary review of my decision has expired. Within a reasonable time after review has either been granted or denied, counsel for the parties should advise me as to their wishes concerning the manner for disposition of the civil penalty issues. If I do not eventually receive an expression of opinion from counsel for the parties as to the method they would prefer for disposing of the civil penalty issues raised by Citation No. 706762, I shall schedule those issues for hearing.

The Validity of Order No. 706444

The first argument in Pontiki's brief (p. 28) with respect to the invalidity of Order No. 706444 is that the order must fall because it was based on Citation No. 706762 which has been shown by Pontiki to be invalid. Since I have already held in a preceding portion of this decision that Citation No. 706762 was validly issued, I must necessarily reject Pontiki's first argument.

The second argument raised by Pontiki's brief (pp. 28-29) "* * * is substantially identical to that made with respect to the underlying citation," namely, that Order No. 706444 is invalid because it failed to make the special findings which are required by the remainder of section 104(d)(1) which provides:

* * * If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order [of withdrawal] * * *.

Since Pontiki's argument with respect to the invalidity of Order No. 706444 is substantially identical to that made with respect to underlying Citation No. 706762, my determination as to the validity of Order No. 706444 will also be nearly identical to that made with respect to Citation No. 706762. Order No. 706444 was received in evidence as Exhibit No. 5. Form 7000-3 used by the inspector in this instance for issuance of Order No. 706444 is, of course, identical to the form used for issuance of Citation No. 706762 except that the inspector correctly cited the type of action as "104(d)(1)" and checked the block at the top of the form indicating that he was issuing an order of withdrawal. When Exhibit No. 5 is examined on its reverse side in response to the suggestion on the front of the form to "See reverse," the following statement will be found on the left side of the back of the form:

ORDER

You are hereby ordered to cause immediately all persons, except those permitted under Section 103(j), 103(k) and/or 104(c) of the Federal Mine Safety and Health Act of 1977, to be withdrawn from, and to be prohibited from, entering the area of the mine described hereon until an Authorized Representative of the Secretary determines that the danger(s) and its causes no longer exist, the violation(s) of the mandatory health or safety standards have been abated or the emergency has been eliminated.

- Section 104(b) - Failure to abate a violation 104(a) or (d)(1) in the time period given
- Section 104(d)(1) - Unwarrantable failure - subsequent to 104(d)(1) citation during the same inspection or within 90 days after issuance of 104(d)(1) citation
- Section 104(d)(2) - Unwarrantable failure violation - subsequent to issuance to 104(d)(1) order - subsequent inspection - no intervening inspection of the mine in its entirety which has disclosed no further unwarrantable violation

* * *

* * *

* * *

An examination of Exhibit No. 5 shows that the inspector checked that an order of withdrawal was being issued under section 104(d)(1) of the Act and the reverse side of Exhibit No. 5 explained to Pontiki that the order involved a finding that the violation was the result of unwarrantable failure found during the same inspection or within 90 days after the issuance of Citation No. 706762. Exhibit No. 5 clearly made all the preliminary findings which are required to comply with the provisions of section 104(d)(1) of the Act insofar as they pertain to the issuance of an order. Although the former Board of Mine Operations Appeals has held that the violation cited in an order issued under section 104(c)(1) of the 1969 Act does not have to be a violation which would significantly and substantially contribute to the cause or effect of a health or safety standard (Zeigler Coal Co., 6 IBMA 182 (1976); Old Ben Coal Co., 6 IBMA 229 (1976); Old Ben Coal Co., 6 IBMA 234 (1976); Old Ben Coal Co., 7 IBMA 224 (1976); and Alabama By-Products Corp., 7 IBMA 85 (1976)), the inspector checked the "S and S" block on Order No. 706444 because he believed the violation of section 75.403 cited in the order was a significant and substantial violation which could significantly and substantially contribute to the cause and effect of a health or safety standard (Finding No. 15, supra).

Based on the examination of Order No. 706444 set forth above, I find that the order contained the special findings required by section 104(d)(1) of the Act and was therefore a valid order.

The third argument made in Pontiki's brief (pp. 29-31) is that the violation of section 75.403 cited in Order No. 706444 was not proven. As indicated in Finding No. 5, supra, Order No. 706444 cited Pontiki for having inadequate rock dust in all seven entries and connecting crosscuts in the No. 5 Section of the mine. Pontiki points to the fact that the inspector's order of termination stated that loose coal and coal dust were removed from the No. 5 Section and that entries Nos. 1 through 7 and connecting crosscuts were adequately rock dusted. Pontiki then refers to its own witnesses' testimony to the effect that there were loose coal accumulations in the No. 5

Section and concludes from such evidence that since there was a violation of section 75.400 in the No. 5 Section, the inspector incorrectly cited Pontiki for a violation of section 75.403.

One of the difficulties I have with Pontiki's argument that the existence of a violation of section 75.400 precludes an inspector from citing Pontiki for a violation of section 75.403, is the fact that three of Pontiki's own witnesses, including one who had previously been an MSHA inspector for 3 years, stated unequivocally that there was inadequate rock dust on the floor in the No. 5 Section (Finding No. 12, supra). Obviously, the inspector could have cited Pontiki for a violation of section 75.400 in the same order in which he cited Pontiki for a violation of section 75.403. Thus, it is quite immaterial that the floor in the No. 5 Section contained loose coal accumulations so long as the evidence also showed that Pontiki had failed to apply an adequate amount of rock dust to the floors as required by section 75.403.

Section 75.403 provides as follows:

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall not be less than 65 per centum [in intake entries] * * *. [Emphasis supplied.]

All the entries in which the inspector obtained a total of three samples were in intake air and two samples, when analyzed, showed an incombustible content of 35 percent and one sample had an incombustible content of 31 percent. The inspector's order cited a lack of rock dust in only those areas where rock dusting is required, that is, the areas were more than 40 feet from the working face, they were not too wet or too high in incombustible content to propagate an explosion, they were not inaccessible or unsafe to enter, and they had not been exempted from rock dusting by the Secretary (Tr. 93-94). Inasmuch as section 75.403 requires that an adequate amount of rock dust be "maintained" in the entries and crosscuts cited in Order No. 706444, Pontiki was not exempt from having the entries and crosscuts rock dusted just because its witnesses testified that an excessive amount of loose coal and coal dust had been permitted to accumulate. Pontiki was required by section 75.400 to keep the loose coal cleaned up and was also required by section 75.403 to apply sufficient rock dust to maintain the incombustible content at 65 percent in intake entries. The inspector believed the loose coal accumulations of about 1 inch were sufficiently thin that the area could be rendered 65 percent incombustible by application of rock dust alone without any cleaning (Finding Nos. 8 and 18, supra). If he had also believed that the loose coal needed to be cleaned up before rock dust could be applied, he could have cited Pontiki for a violation of section 75.400 and also for a violation of section 75.403. The fact that the inspector elected to cite Pontiki for only one violation instead of two does not make his order invalid for failing to cite both violations.

Perhaps the most unsatisfactory aspect of the evidence presented by MSHA to prove that a violation of section 75.403 existed is the question of whether the inspector's three samples were really representative of the conditions which existed throughout the seven entries and connecting crosscuts cited in the inspector's order (Pontiki's Brief, p. 31). The evidence unequivocally shows that all three samples were taken within the second crosscut from the face, or within a few feet of that crosscut in the Nos. 2 and 3 entries. Thus, the samples proved that the floor in the second crosscut from the face had an incombustibility of from 31 to 35 percent (Finding No. 7, supra). The inspector believed that those three samples were representative of conditions throughout all seven entries and connecting crosscuts, but his credibility would have been considerably enhanced if he had taken his samples farther apart than he did.

The inspector's testimony was, however, corroborated by the testimony of Pontiki's safety director who had been an MSHA inspector for about 3 years before he began working for Pontiki. The safety director was traveling with the inspector when the inspector stated that he was going to issue a "(d)" order citing Pontiki for a violation of section 75.403. Pontiki's safety director candidly stated that he agreed that Pontiki had violated section 75.403 (Finding No. 12, supra). Pontiki's safety director was of the opinion that the inspector should have taken additional samples and that the violation was not the result of unwarrantable failure, but he readily agreed that a violation of section 75.403 had occurred. Additionally, two of Pontiki's foremen stated that an inadequate amount of rock dust had been applied to the mine floor and they specifically stated that the machine duster used on the maintenance shift did not apply as much rock dust to the floor of the mine as was desirable (Finding Nos. 13 and 14, supra). Therefore, I find that the preponderance of the evidence shows that a violation of section 75.403 occurred as cited in Order No. 706444 (Finding Nos. 3 through 9 and 12 through 14, supra).

The fourth argument made in Pontiki's brief (pp. 32-39) is that, assuming, arguendo, that a violation of section 75.403 occurred, the violation was not the result of an unwarrantable failure by Pontiki's management. Many of the factual arguments advanced by Pontiki in support of its argument that MSHA failed to prove that the violation was the result of unwarrantable failure have been answered in my discussion above of the issue as to whether a violation of section 75.403 was proven. I agree that Pontiki's brief correctly cites the language from the former Board's Zeigler opinion for the correct definition of the words "unwarrantable failure," namely (7 IBMA at 295-96):

* * * an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care. [Emphasis supplied.]

Pontiki's brief also correctly quotes one of the inspector's answers in response to questioning done to elicit from the inspector his understanding of the words "unwarrantable failure" (Br., p. 32 and Tr. 27):

Unwarrantable failure on the part of an operator is a violation of a law where a condition exists at the mines which could add substantially and significantly to the health and safety of the miners. The operator knows the condition exists and yet is doing nothing to correct it. Or it can be a condition that exists where the operator knows or through diligent effort should have known the condition existed yet he was doing nothing to correct it. This is what I consider unwarrantable; it's a condition the operator knows exists.

Inasmuch as the inspector practically quoted one of the definitions of unwarrantable failure given in the Board's Zeigler opinion, supra, it is difficult to determine any defects in the inspector's rationale for finding that the violation cited in his order was the result of an unwarrantable failure to comply. Pontiki, therefore, resorts to language in the Zeigler opinion in which the Board indicated that the inspector's judgment that unwarrantable failure existed must be based on a thorough investigation and must be reasonable in light of the peculiar relevant facts and circumstances which existed at the time the inspector writes an unwarrantable failure order. Pontiki argues that the inspector's finding of unwarrantable failure was not based on a thorough investigation or reasonable conclusions because he did not walk the complete length of all the entries and connecting crosscuts cited in his order and because he did not inquire about the efforts which Pontiki's management was making to maintain an adequate coating of rock dust in the No. 5 Section (Br., pp. 34-36).

Although the inspector did not walk the entire length of each of the entries cited in his order (Finding No. 6, supra), he did inspect the face area, including walking through the last open crosscut and the second open crosscut from the face. He did walk back to the feeder and he did look down each of the entries. While he may not have been able to see a total distance of 360 feet with great precision while having only his cap light for illumination, it is quite probable that he could distinguish between the blackness of the floor and the whiteness of the roof and ribs for a distance of 360 feet. His order was primarily based on what he saw in the last two crosscuts and the fact that the floor appeared black everywhere he looked. Therefore, his testimony that he could see for a distance of 360 feet for the purpose of determining the condition of the floor is a credible statement.

It should be recalled that the inspector entered the mine about 4:15 p.m. or shortly after the second shift went to work at 4:00 p.m. (Tr. 136). The inspector issued his unwarrantable failure order at 6:05 p.m. after an examination of the No. 5 Section which had lasted about 1-1/2 hours. Pontiki's safety director testified that 190 shuttle cars of coal had been

produced in the No. 5 Section during the day shift which had ended just a few minutes before the inspector began his examination of the No. 5 Section (Tr. 142). I have never had a case in which anyone estimated the amount of coal hauled by shuttle cars to be less than 5 tons, and most of the time, the tonnage is estimated at 8 tons. Since all witnesses agreed that the shuttle cars in the No. 5 Section had been loaded so high that coal spilled off of them on the way to the feeder, it is likely that the 190 shuttle cars produced on the No. 5 Section during a single shift were hauling 8 tons each. In any event, the cars would have hauled from 950 tons (190 x 5) to 1,520 tons (190 x 8). The four producing sections in the No. 5 Mine produce a total of about 3,500 tons of raw coal per day. Therefore, the production of about 1,000 tons of coal during a single shift on a single section was a remarkable achievement. Moreover, even if the 190 cars only hauled 1 ton of coal each, just the process of loading and unloading 190 cars within an 8-hour period was a phenomenal accomplishment.

Pontiki's brief emphasizes that management had a very fine program for cleaning and rock dusting in the No. 1 Mine (Finding No. 11, supra). All three of Pontiki's foremen testified, however, that they were having a great many roof-control problems in the No. 5 Section and that much of their time was being spent in installing supplemental roof support in addition to the normal roof-bolting configuration. They further stated that when both a need for supporting the roof and a need for rock dusting occurred simultaneously, they gave priority to supporting the roof (Finding No. 10, supra). Three of Pontiki's witnesses also testified that they were not applying as much rock dust to the floor as was desirable (Finding No. 13, supra). Pontiki's chief foreman, in describing their difficulties in keeping the floor cleaned and rock dusted in the No. 5 Section, stated (Tr. 105):

Well, what I seen was just the ribs rolling off. And, well, the seam of coal was I guess all across the face from seven to nine feet and when a piece would tumble off it would almost close the roadway, if you know what I mean. Sometimes it would fall twenty foot long and clear across the road, but we had all kinds of trouble with that. We done everything I could and I guess just failed, that's all.

It is easy to understand why Pontiki's management thought that the inspector's finding of unwarrantable failure was unfair. The record shows that management had procedures which should have assured that the roof in the No. 5 Section was controlled and that the section was properly cleaned and rock dusted (Findings Nos. 10 and 11, supra). Nevertheless, in my opinion, there was at least one defect in management's plan, namely, an unreasonable and excessive reliance was placed on the ability of the operators of the scoop to bring in supplies, clean up excess coal, and apply rock dust to the floor during the production shifts. It was the duty of the scoop operator to bring in roof bolts, rock dust, and other supplies at the beginning of each shift. After he had finished bringing in supplies, it was his duty to clean up loose coal accumulations and apply rock

dust to the floor by hand. The maintenance shift, which worked from midnight to 8 a.m., was responsible for machine dusting the roof, ribs, and floor. While they were supposed to apply rock dust to the floor, they did not apply as much as was desirable (Finding Nos. 12 and 13, supra).

Since management was having difficulty in supporting the roof and since extra time was needed to maintain the roof, the evidence clearly supports a finding that management was not giving as much attention to cleaning and rock dusting as was required in the circumstances. In every instance, it was the scoop operator's duty to clean and rock dust after he had completed bringing in supplies. In other words, Pontiki's management was placing primary emphasis on producing coal rather than in maintaining a completely safe operation. At the beginning of the shift on which the inspector's order was issued, one of Pontiki's shift foremen had made an inspection of the section before the inspector arrived and he had concluded that the section needed cleaning and rock dusting (Tr. 175). Despite the fact that management knew an inadequate amount of rock dust was being applied to the floor and that excessive coal needed to be cleaned up, management was continuing to produce 190 shuttle cars of coal per shift, instead of stopping production long enough to clean up the section and apply an adequate amount of rock dust. It makes very little difference if miners are protected from having the roof fall on them if, while standing under a perfectly safe roof, they are killed or injured by a coal dust explosion.

A preponderance of the evidence supports the inspector's finding that management knew an inadequate amount of rock dust had been applied and yet management was not making sure that the section was cleaned and rock dusted as required by section 75.403. Therefore, I find that the inspector properly found that the violation of section 75.403 cited in Order No. 706444 was the result of unwarrantable failure. Since Order No. 706444 has successfully withstood all of Pontiki's arguments, the order accompanying this decision will hereinafter affirm Order No. 706444.

Docket No. KENT 80-53

MSHA's Proposal for Assessment of Civil Penalty was filed on January 15, 1980, seeking assessment of civil penalties for the violations of sections 75.313 and 75.403 alleged in Citation No. 706762 and Order No. 706444, respectively. As I have already explained on page 10 of this decision, supra, my order setting this case for hearing did not consolidate the civil penalty issues raised with respect to underlying Citation No. 706762. Therefore, my decision in this proceeding will deal only with the civil penalty issues concerning Order No. 706444.

I have hereinbefore found that the violation of section 75.403 alleged in Order No. 706444 occurred. I shall hereinafter consider the six criteria set forth in section 110(i) of the Act so that an appropriate civil penalty may be assessed for the violation of section 75.403 cited in Order No. 706444.

Size of Respondent's Business

On the basis of Finding No. 1, supra, I find that Pontiki is a large operator and that the civil penalty to be assessed in this proceeding should be in an upper range of magnitude insofar as it is determined under the criterion of the size of respondent's business.

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

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

Good Faith Effort To Achieve Rapid Compliance

On the basis of Finding Nos. 17 and 18, supra, I find that Pontiki demonstrated a good faith effort to achieve compliance and Pontiki will be given full credit for that mitigating factor in the assessment of a civil penalty.

History of Previous Violations

At the hearing, MSHA's counsel introduced as Exhibit No. 2 a 53-page computer printout which lists previous violations at all the mines controlled by Mapco, Inc. (Finding No. 1, supra). I stated at the hearing that it has been my practice to consider only the history of previous violations of the individual mine in which a given violation is found to have occurred (Tr. 7). MSHA's brief (pp. 3 and 24-25) argues that I am obligated to consider Mapco, Inc.'s, total history of previous violations rather than the previous violations which have occurred only at Pontiki's No. 1 Mine where the violation of section 75.403 here involved occurred. MSHA's argument is primarily based on a claim that section 110(i) of the Act provides for consideration to be given to "* * * the operator's history of previous violations," rather than for consideration to be given to the history of previous violations which have occurred at a single mine. MSHA contends that a greater deterrent against continued violations will be achieved if top management is held responsible for all of its subsidiaries' history than will be achieved if only a single mine is considered at a given time.

I do not have a closed mind on the subject. There may be cases in which it would be beneficial to consider the controlling company's history of previous violations rather than to consider only the previous violations which have occurred at the mine under consideration for a specific violation. In each proceeding, a judge must use the evidence which the parties

have presented. If the evidence concerning the controlling company's previous violations is limited, there is no way for the judge to show how he has considered a given respondent's history of previous violations.

In this proceeding, for example, Exhibit No. 2 indicates that Mapco, Inc., which controls Pontiki and four other coal companies, has a history of previous violations totaling 2,089 violations. The fact that Mapco's subsidiaries have violated various regulations on 2,089 occasions, by itself, means nothing. That figure does not reveal whether Mapco's violations are greater or less than the violations committed by other controlling companies of comparable size. Exhibit No. 2 does not indicate how many tons of coal are produced in the nine mines which are controlled by Mapco. Exhibit No. 2 does not reveal how many sections of each mine are engaged in production. Exhibit No. 2 does not show how many production shifts exist at each mine nor how many employees work at each mine.

The absence of statistical information prevents me from giving any meaningful consideration to Mapco's previous violations as a whole. For example, Exhibit No. 2 shows that Pontiki's No. 1 Mine has had 15 previous violations of section 75.403 over a period of 3 years, whereas the Retiki Mine of Webster Coal Company has had 14 previous violations of section 75.403 over a period of 5 years, and the Dotiki Mine of Webster Coal Company has had 11 previous violations of section 75.403 over a period of 6 years. The foregoing comparison would make it appear that Pontiki's previous violations are more adverse than those of its affiliated company, but I cannot make such a finding because I do not know how many sections produce coal in either the Retiki Mine or the Dotiki Mine. If those mines employ fewer miners and produce less coal than Pontiki's No. 1 Mine, their record of 14 and 11 previous violations of section 75.403 would be more significant and unfavorable than Pontiki's 15 previous violations of section 75.403.

In short, until MSHA is able to introduce data of a more meaningful nature than those provided in Exhibit No. 2, there is no way for me to show how I have actually considered the criterion of history of previous violations with respect to a given controlling company's total history of previous violations. Moreover, I believe that top management will be as much deterred from allowing future violations to occur by a penalty assessed specifically for a given mine's adverse history of previous violations as it would be deterred by a penalty assessed for its overall adverse history of previous violations. Management would recognize from having to pay a civil penalty so determined that action taken by it to reduce or eliminate future repetitious violations at all mines would be likely to reduce any civil penalties that might result from any subsequent violations.

As to the history of previous violations at Pontiki's No. 1 Mine, Exhibit No. 2 shows that there were two violations of section 75.403 in 1977, 12 in 1978, and one in 1979 by January 4, 1979. I find that 12 violations of section 75.403 during a single year shows a very unfavorable history of previous violations. Therefore, the penalty hereinafter assessed will be

increased by \$500 under the criterion of history of previous violations. That large a number of violations of section 75.403 tends to support the inspector's belief that Pontiki's management was becoming complacent about the need to maintain an adequate amount of rock dust to within 40 feet of the working faces (Tr. 39).

Negligence

The preponderance of the evidence shows that there was a high degree of negligence in respondent's violation of section 75.403. Management was producing coal at the rate of 190 shuttle cars per shift despite the fact that a greater amount of time and effort than normal was being exerted in controlling the roof. The effort to maintain a high productivity from the No. 5 Section, despite the roof-control problem, caused Pontiki's management to slight the need to exert as great an effort at cleaning and rock dusting as was being utilized to control the roof. Management's failure to keep the section clean and maintain an adequate amount of rock dust was the result of a considerable amount of indifference to adherence with section 75.403. The criterion of negligence requires that a penalty of \$2,000 be assessed (Finding Nos. 5, 7, 10, and 12 through 15, supra).

Gravity

Inasmuch as Pontiki's No. 1 Mine liberates about 454,000 cubic feet of methane in a 24-hour period (Finding No. 1, supra), the failure to maintain an adequate amount of rock dust exposed the miners to a serious threat of an explosion. At the time the inspector cited the violation of section 75.403, he found that no dangerous amount of methane was present. Nevertheless, there was a potential for an explosion because the roof-bolting machine was being operated and respondent's shift foreman had just inspected the No. 5 Section and had recognized that the section was badly in need of cleaning and had directed that cleaning be done as soon as possible. The section foreman, however, had made no attempt to clean up or rock dust and no cleaning had been commenced up to the time that the inspector issued Order No. 706444. In such circumstances, the miners had been exposed to a potential ignition for a considerable period of time and the lack of rock dust was necessarily a serious violation. Therefore, I find that a penalty of \$1,000 is required under the criterion of gravity (Finding No. 15, supra).

A total penalty of \$3,500 will hereinafter be assessed based on my findings above that \$500 be attributed to Pontiki's history of previous violations, that \$2,000 be attributed to Pontiki's negligence and that \$1,000 be attributed to the gravity of the violation. The penalty would have been larger than \$3,500 if Pontiki had failed to demonstrate a good faith effort to achieve rapid compliance. The penalty would have been less than \$3,500 if Pontiki were not a large operator and if the evidence in this proceeding had shown that Pontiki's ability to continue in business would be adversely affected by having to pay civil penalties.

Ultimate Findings and Conclusions

(1) Pontiki's application for review or notice of contest of Order No. 706444 dated May 3, 1979, should be denied and Order No. 706444 should be affirmed as having correctly cited a violation of section 75.403 and having properly found that the violation was the result of unwarrantable failure under section 104(d)(1) of the Act.

(2) Underlying Citation No. 706762 issued April 3, 1979, and Order No. 706444 properly made the findings required by section 104(d)(1) of the Act and were validly issued.

(3) MSHA's Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-53 should be granted to the extent that it seeks assessment of a civil penalty for the violation of section 75.403 alleged in Order No. 706444 and a civil penalty of \$3,500.00 should be assessed for that violation.

(4) The portion of MSHA's Proposal for Assessment of Civil Penalty which seeks assessment of a civil penalty for a violation of section 75.403 with respect to Order No. 706444 should be severed from the remainder of that Proposal and should be disposed of as provided for in paragraph 3 above. The remaining portion of MSHA's Proposal for Assessment of Civil Penalty in Docket No. KENT 80-53 which seeks assessment of a civil penalty for the violation of section 75.313 alleged in Citation No. 706762 should be scheduled for a hearing or should be decided on the basis of the record already made in this proceeding, depending upon the requests which are hereafter received from the parties to the proceeding in Docket No. KENT 80-53.

(5) Pontiki Coal Corporation is subject to the provisions of the Act and to the regulations promulgated thereunder (Tr. 96).

WHEREFORE, it is ordered:

(A) Pontiki Coal Corporation's application for review or notice of contest filed in Docket No. KENT 79-115-R is denied and Order No. 706444 issued May 3, 1979, is affirmed.

(B) MSHA's Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-53 is severed from the remainder of the Proposal and is granted to the extent specified in paragraph (3) above. Pontiki Coal Corporation is ordered, within 30 days from the date of this decision, to pay a civil penalty of \$3,500.00 for the violation of section 75.403 cited in Order No. 706444.

(C) MSHA's Proposal for Assessment of Civil Penalty, insofar as it seeks assessment of a civil penalty for the violation of section 75.313 alleged in Citation No. 706762 will be disposed of as provided for in paragraph (4) above.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 12 1988

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. HOPE 78-744-P
Petitioner : A.C. No. 46-03467-02070
v. :
SEWELL COAL COMPANY, : Meadow River No. 1 Mine
Respondent :

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, Department of Labor, for Petitioner;
C. Lynch Christian III, Esq., Jackson, Kelly, Holt and O'Farrell, Charleston, West Virginia, and Gary W. Callahan, Esq., Lebanon, Virginia, for Respondent.

Before: Judge Lasher

This proceeding arises under section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970), hereinafter the Act. 1/ Under section 301(c)(3) of the Federal Mine Safety and Health Act of 1977, 2/ proceedings such as this which were pending at the time the 1977 Act took effect are to be continued before the Federal Mine Safety and Health Review Commission.

STIPULATIONS

The parties entered the following stipulations:

1/ Section 109(a)(1) states, in part, as follows:

"The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of Title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than \$10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense * * *."

2/ 83 Stat. 742, 30 U.S.C. § 801 et seq.

1. Notices of Violation 2 HSG (8-0004) issued February 12, 1978, and 1 HSG (8-0005) issued February 14, 1978, are the subjects of this proceeding (Tr. 5). 3/

2. The presiding judge has jurisdiction in this matter.

3. Sewell Coal Company, a subsidiary of the Pittston Company, is the operator of the Meadow River No. 1 Mine located at Lookout, Fayette County, West Virginia (Tr. 5). The Meadow River No. 1 Mine was, at the time of the issuance of the two notices, subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969, and the regulations promulgated thereunder (Tr. 5-6). The Meadow River No. 1 Mine is subject to the provisions of the Act and the regulations promulgated thereunder (Tr. 6).

4. Respondent is a large operator (Tr. 6). 4/

5. At the time the notices of violation were issued, Respondent's union employees, members of the United Mine Workers of America, were on strike. This strike began on December 6, 1977, and continued until March 17, 1978 (Tr. 6).

6. The UMWA employees had been on strike for over 2 months prior to the issuance of the notices of violation (Tr. 6).

7. Homer S. Grose was a duly authorized representative of the Secretary at all times relevant to the issuance of Notices of Violation Nos. 2 HSG and 1 HSG. True and correct copies of the notices of violation were served on Respondent (Tr. 6).

8. At approximately 9:50 a.m. on February 13, 1978, Inspector Grose issued Notice of Violation No. 2 HSG to Sewell for an alleged violation of 30 CFR § 75.1704. The condition or practice alleged was Respondent's failure to maintain a designated intake escapeway to insure passage at all times of any person, including disabled persons. The alleged impediment to

3/ Notice No. 2 HSG (8-0004) alleges that Respondent violated 30 CFR 75.1704 by failing to maintain a designated intake escapeway to insure the passage of any person at all times, because of water ranging from 0 to 16 inches in depth. Notice No. 1 HSG (8-0005), alleges that Sewell violated 30 CFR 75.200 because of the occurrence of fractured and loose roof in the No. 1 section above the No. 1 entry roadway just inby the last open crosscut and extending inby approximately 30 feet.

4/ At the time pertinent herein, Sewell's payroll was 203 underground employees (which figure includes supervisory personnel). During the strike only 33 supervisory personnel worked (Tr. 85-86). Approximately 15 worked on the day shift, 10 on the second shift, and 8 on the third shift. Other personnel could not be hired because of the economic strike (Tr. 111-113, 124) which was in progress at the time.

travel was a water accumulation from 0 to 16 inches in depth for about 40 feet in the designated escapeway (Tr. 6-7).

9. At approximately 9:30 a.m., on February 14, 1978, Inspector Grose issued Notice of Violation No. 1 HSG to Respondent for an alleged violation of 30 CFR § 75.200. The condition alleged was fractured and loose roof in the No. 1 section above the No. 1 entry roadway just inby the last open crosscut and extending in toward the face approximately 30 feet. The roof was a shale material with loose rocks between the resin roof bolts, some of which had allegedly fallen in this area (Tr. 7).

10. The conditions cited in Notices of Violation Nos. 1 HSG and 2 HSG did exist (Tr. 7).

11. Respondent demonstrated good faith in abating Notices of Violation Nos. 1 HSG and 2 HSG and both notices were subsequently terminated (Tr. 7).

12. For the purposes of this proceeding, the Meadow River No. 1 Mine has a moderate history of previous violations (Tr. 7).

Although not by stipulation, Respondent concedes that payment of penalties for the two alleged violations would not interfere with its ability to continue in business (Tr. 48).

FINDINGS OF FACT

Sewell's Meadow River No. 1 Mine is a six-section coal mine entered by two shafts and one slope (Tr. 26). Mining is performed in the Sewell seam of coal and the Sewell Meadow River No. 1 Mine has approximately 25 miles of entries in such seam (Tr. 83). The entries are approximately 20 feet wide and 4-1/2 feet high (Tr. 24, 83), and are connected to adjacent entries by crosscuts (Tr. 82-83; R-1) which provide ventilation for the entries (Tr. 82). The roof above the coal seam is of a glassy shale type which is subject to fracture (Tr. 53, 84). The floor of the mine is undulating (dips up and down) and the mine itself is very "wet" in that it accumulates 500,000 gallons per day (Tr. 24, 84, 85).

Inspector Grose and his fellow inspectors were instructed to conduct inspections of all the coal mines within the jurisdiction of their field office for the purpose of finding violations and hazardous conditions so that the operators would give "priority in eliminating these from the mines as soon as the miners return to work" after the strike (Tr. 21, 22). 5/

5/ Inspector Grose testified:

"During the strike period, the abatement process is more liberal. We do not try to force management personnel to do manual labor and labor related activities in the mines. We give them an extended period of time. In some instances, if the original time as set expires before the work force returns, there are extensions given extending the time 'til the workforce does

An accumulation of water on the floor of an escapeway "forty feet long" and "zero to 16 inches" deep led Inspector Grose to issue Notice No. 2 HSG (8-0004) Tr. 24, 31). Inspector Grose admitted that this was not a "particularly serious" condition (Tr. 30) and that "* * * the mine deteriorates a little more rapidly during work stoppages" (Tr. 34).

Slips and cracks in the mine roof, fallen rock, and rock which was ready to fall led the inspector to issue Notice No. 1 HSG (8-0005) (Tr. 37). This was a serious condition which could have caused a fatality or serious injury (Tr. 37).

During the strike period (see Stipulation #5, supra), MSHA (MESA) inspectors were instructed to be more liberal with respect to granting abatement time and to help the mine operator find hazardous conditions during the strike since the operator has "fewer personnel and only management personnel" employed (Tr. 21-23, 52-54, 56, 57). The inspectors were also instructed not "to insist on management complying with" abating violations since this would be an interference with labor and management and would force management to perform manual labor (Tr. 21, 22, 57). Inspector Grose thought the strike would be over by the time he set for abatement (Tr. 58).

During a strike, a mine deteriorates rapidly because it does not get attention to minor problems since there are insufficient personnel to perform the repairs (Tr. 90, 92). The conditions cited in the two notices of violation were the result of natural deterioration in the mine (Tr. 91-93, 119) and there were an insufficient number of personnel at the mine to accomplish the elimination of such conditions during the strike (Tr. 91, 111-113, 120).

The mine was not sealed by Respondent during the strike because flooding and massive roof falls would probably occur, equipment would deteriorate, and a permit for reopening the mine might have taken a year because of changing legal requirements (Tr. 525, 526).

During the strike no coal production was undertaken (Tr. 90). The supervisory personnel who worked were occupied in "fixing up hazard conditions," such as rock dusting and pumping, and also timbering and ventilation work (Tr. 90-91). There were not sufficient supervisory personnel available during the strike to eliminate all the conditions which occurred in the mine

fn. 5 (continued)

return." Respondent was given 14 days to abate the two notices involved. Abatement of both, however, was accomplished within 2 days. The two notices were issued during MESA's first inspection of the mine during the strike-after the strike had been in progress approximately 2 months (Tr. 36).

as a result of natural deterioration which might constitute violations (Tr. 85, 96, 90, 91, 93, 102). 6/

The supervisors conducted preshift examinations only of the areas where they were assigned to work on a given day during the strike (Tr. 87, 106). Mine management followed the practice of correcting the most serious conditions first (Tr. 110, 127).

DISCUSSION, ULTIMATE FINDINGS AND CONCLUSIONS

Petitioner, MSHA, maintains that its policy was not to force management into performing manual labor during the strike. 7/ Yet, it did issue notices of violation during the strike and in this proceeding seeks a penalty. 8/ Respondent concedes the existence of the violative conditions (see Stipulation No. 10, supra), but contends it was impossible to prevent such violations during the strike because of insufficient personnel.

Impossibility of compliance became established in mine safety law as an affirmative defense to charges of mine safety violations by the Interior Department's Board of Mine Operations Appeals in its decision in Itmann Coal Company, 4 IBMA 61 (1975). In that matter, the mine operator, as the Respondent here, in effect conceded the existence of the violative conditions (a lack of various items of safety equipment) but argued that no violation should have been found because the equipment required by the regulations was not available. In Itmann, the Board affirmed its prior holding in Buffalo Mining Company, 2 IBMA 226m, 80 I.D. 630 (1973), that "* * * Congress did not intend that a section 104(b) notice be issued or a civil penalty assessed where compliance with a mandatory health or safety standard is impossible due to unavailability of equipment, materials, or qualified technicians."

6/ I have found the following testimony of Respondent's Division Safety Director to be persuasive:

"Q. In your opinion, Mr. Given, based on your experience with Sewell for the thirteen years you've been employed there and your knowledge of the Meadow River No. 1 Mine, do you believe the number of employees at the Meadow River No. 1 Mine during the strike were capable of eliminating all the conditions which occurred in the mine as a result of natural deterioration which might constitute violations of the Act?

A. No, we did not have enough for that, I don't believe.

Q. Can you generally summarize for the Court why?

A. Well, the fact you have twenty-five miles of entry and crosscuts to look after. You know. We didn't have a work force there, and the people we were using weren't very experienced in doing these things. And it's just physically impossible for a fellow to cover all these areas and take care of every conceivable condition." (Tr. 91).

7/ To avoid interfering with labor-management relations, and presumably, to avoid pressuring one of the parties involved in an economic strike to the benefit of the other.

8/ The subject of safeguard notices--for which penalties are not sought--was raised at the hearing but not subsequently pursued by either party (Tr. 58).

The burden of establishing that compliance with the safety standards is impossible rests of course on the mine operator charged. Here, as the proponent of the rule, Respondent clearly carried its burden and established a prima facie case by its evidence that the mine was idled by an economic strike, that the mine deteriorates rapidly when idle due to natural forces, that the two violations charged occurred as a result of such natural deterioration, that the small complement of men (33 management personnel) available was insufficient to correct conditions in such a large mine (25 miles of entries and crosscuts), and that the realities of labor--management relations made it impossible to hire additional personnel to keep the mine violation--free during the prolonged period of its idleness.

Petitioner failed to rebut Respondent's evidence in those respects. In contrast to the persuasive evidentiary presentation by Respondent, Petitioner failed to establish, even in a general way, how it would have been possible for Respondent to either prevent or correct the various physical problems occurring during the work stoppage. Petitioner's stated policy of not forcing management personnel to perform manual labor during a strike seems to be in contradiction to its prosecution of this proceeding.

I conclude that Respondent's position is meritorious and that the two notices of violation involved should be vacated.

ORDER

1. All proposed findings of fact and conclusions of law proposed by the parties which are inconsistent with the foregoing are rejected.
2. Notices of Violation 2 HSD (8-0004) issued February 12, 1978, and 1 HSG (8-0005) issued February 14, 1978, are VACATED.


Michael A. Lasher, Jr., Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

FEB 12 1980

CONROCK COMPANY,	)	CONTEST OF CITATION
)	
Applicant,	)	DOCKET NOS. WEST 79-373-RM
	)	WEST 79-374-RM
v.	)	(CONSOLIDATED)
)	
SECRETARY OF LABOR, MINE SAFETY AND	)	CITATION NOS. 384009, 8/1/79
HEALTH ADMINISTRATION (MSHA),	)	384010, 8/1/79
)	
Respondent.	)	MINE: UPLAND PIT AND MILL
)	

DECISION

APPEARANCES:

Scott J. Walcott, Esq., 3200 San Fernando Road, Los Angeles, California 90065,
for the Applicant.

Marshall P. Salzman, Esq., Office of Daniel W. Teehan, Regional Solicitor,
United States Department of Labor, San Francisco, California 94102,
for the Respondent.

Before: Judge John J. Morris

Applicant, Conrock Company, seeks review of two citations alleging its workers
were exposed to excessive noise concentrations in violation of 30 CFR 56.5-50. 1/

1/ The cited standard provides in part as follows:

56.5-50 Mandatory. (a) No employee shall be permitted an exposure to
noise in excess of that specified in the table below. Noise level measure-
ments shall be made using a sound level meter meeting specifications for
type 2 meters contained in American National Standards Institute (ANSI)
Standard S1.4-1971, "General Purpose Sound Level Meters," approved April 27,
1971, which is hereby incorporated by reference and made a part hereof, or by
a dosimeter with similar accuracy. This publication may be obtained from
the American National Standards Institute, Inc., 1430 Broadway, New York,
New York 10018, or may be examined in any Metal and Nonmetal Mine Health
and Safety District or Subdistrict Office of the Mine Safety and Health
Administration.

Footnote 1/ Cont'd on Page 2

The citations were issued pursuant to Section 104(a) ^{2/} of the Federal Mine Safety and Health Amendments Act of 1977 (30 U.S.C. 801 et seq.).

ISSUES

The issues are whether the standard is impermissibly vague and whether Conrock violated it.

Conrock contends the excessive noise levels must be measured by the noise actually reaching the employee's ears. Further, Conrock asserts the standard in contest is unenforceably vague. Finally, Conrock argues that MSHA failed to meet its burden of proof in respect to Citation 384010.

The contentions of Conrock and MSHA's counter arguments require a review of the uncontroverted evidence.

Footnote 1/ Cont'd

PERMISSIBLE NOISE EXPOSURES

Duration Per Day, Hours of Exposure	Sound Level dBA, Slow Response
8	90
6	92
4	95
3	97
2	100
1 1/2	102
1	105
1/2	110
1/4 or less	115

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level.

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

2/ 30 U.S.C. 814

FINDINGS OF FACT
CITATION 384009

1. The noise exposure to Conrock's truck driver, who was wearing ear plugs, was 21.6 percent of permissible limit, or about 96 dBA (Tr 9-14, 26).
2. A dosimeter was worn by the driver for 430 minutes; it measured an average exposure of between 95 and 96 dBA (Tr 11-14).
3. Engineering controls to reduce the noise levels include a barrier at the firewall (Tr 21, 60).
4. Holes in the floor could be plugged (Tr 21, 57).
5. Most of the noise was coming from in front of the driver's feet (Tr 42-43).
6. The cost of the controls would not exceed \$200; companies selling insulating material also make engineering recommendations (Tr 62).
7. Controls on the truck, if implemented, would reduce the noise level to within permissible limits.
8. Conrock implemented engineering controls on its Euclide truck at its Capistrano plant; these controls reduced the noise levels to within permissible limits (Tr 73-74, R4, R5).

CITATION 384010

9. A noise sampling was taken by the plant operator who is stationed near one of the sizing screens and the crusher (Tr 22, 23).
10. Most of the time the plant operator, who was wearing earplugs, was outside of his metal 3 X 5 X 6 foot high metal shack; the uninsulated shack was 3 to 4 feet from the shaker screen (Tr 23, 26).
11. The greatest amount of noise came from the shaker screen (Tr 24).
12. Sampling for 485 minutes, an 8 hour shift, indicated a noise level at 165 percent of the permissible limit (Tr 24, 53).

13. Engineering controls for the plant operator include installing a barrier, insulating the shack, or moving it, (Tr 62-63).

14. MSHA recommendations, if implemented, would reduce the noise levels to within permissible limits at a cost of \$200 to \$300 (Tr 64).

DISCUSSION

For the reasons hereafter stated, I dismiss the contests filed herein.

Conrock's initial contention is that MSHA must measure the alleged violation by the noise actually reaching the worker's ears. The thrust of Conrock's argument seeks to place personal protective equipment, such as ear plugs, before feasible administrative or engineering controls.

The plain wording of Section 56.5-50(b) is directly contrary to Conrock's contention. The section initially requires administrative or engineering controls. If they do not reduce the noise levels, then personal protective equipment is required. The rationale for this approach appears to lie in the fact that workers prefer not to use ear plugs. In addition, the ear plugs are not always fitted properly. Further, ear plugs cannot eliminate all frequencies of noise (Tr 66-67).

Applicant's second contention attacks the vagueness of the standard in regards to its requirement of "feasible administrative or engineering controls."

The test of vagueness is whether the standard is so indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application, Allis-Chalmers Corporation v. Occupational Safety and Health Review Commission 542 F2d 27 (7th Cir., 1976).

Applicant's reliance on Hilo Coast Processing Company v. Secretary of Labor, MSHA DENV 79-50-M is misplaced. Commission Judge Charles C. Moore, Jr., did not rule the standard invalid but he indicated MSHA failed to prove that the

recommended engineering controls were technically and economically feasible. Further considering vagueness compare Brennan v. OSHRC AND Santa Fe Transport Company 505 F2d 869, (10th Cir., 1974).

Applicant cites three Occupational Safety and Health Review Commission (OSHRC) cases in support of its argument that "the vagueness issue has not been put to bed by OSHRC." I disagree, OSHRC has repeatedly ruled that the Occupational Safety and Health Standard ^{3/} relating to noise exposure was not vague, cf Secretary of Labor

3/ The Occupational Noise Exposure Standard, 29 CFR 1910.95 reads in part as follows:

(a) Protection against the effects of noise exposure shall be provided when the sound levels exceed those shown in Table G-16 when measured on the A scale of a standard sound level meter at slow response. When noise levels are determined by octave band analysis, the equivalent A-weighted sound level may be determined as follows:

TABLE G-16 PERMISSIBLE NOISE EXPOSURES¹

Duration Per Day, Hours of Exposure	Sound Level dBA, Slow Response
8	90
6	92
4	95
3	97
2	100
1 1/2	102
1	105
1/2	110
1/4 or less	115

(1) When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

Exposure to impulsive or impact noise should not exceed 140 dB peak sound pressure level.

(2) If the variations in noise level involve maxima at intervals of 1 second or less, it is to be considered continuous.

(3) In all cases where the sound levels exceed the values shown herein, a continuing, effective hearing conservation program shall be administered.

v. Boise Cascade Corporation, Composite, Docket No. 802 (April 1977); Secretary of Labor v. Wheeling Pittsburg Steel Corporation, Docket No. 13286 (November 1977).

In this case MSHA established that engineering controls would reduce the noise levels to within permissible limits. Concerning the Euclide truck see the facts in Paragraphs 3, 4, 5, 6, 7, 8, in this decision. Concerning the plant operator, see facts in Paragraphs 13 and 14.

MSHA's evidence shows that as an administrative control Conrock could rotate its workers after four hours at the site. I reject this proposal since the record presents no foundation to establish the feasibility of this proposal.

Conrock's post trial brief points to the testimony of witness Readon to establish a failure of MSHA's proof on feasibility. I reject this view since witnesses Drussel and Polk directly established economic and technical feasibility. In determining the issues here, the entire record must be considered.

Applicant's final argument is that MSHA failed to prove the economic and technical feasibility of its recommendations for the plant operator's shack. Contrary to Conrock's argument MSHA's engineering recommendations at a cost of \$200 - \$300 are unrebutted (Fact 13, 14).

CONCLUSIONS OF LAW

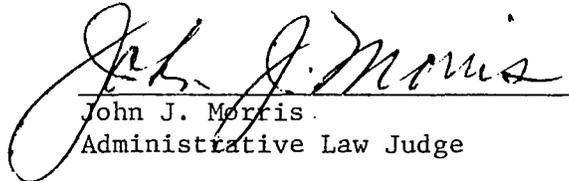
1. Applicant's Euclide truck operator was exposed to excessive noise and applicant violated 30 CFR 56.5-50; the contest of Citation 384009 should be dismissed (Facts 1 - 8).

2. Applicant's plant operator was exposed to excessive noise and applicant thereby violated 30 CFR 56.5-50; the contest of Citation 384010 should be dismissed (Facts 9 - 14).

Based on the foregoing findings of fact and conclusions of law, I enter the following:

• ORDER

The contests of Citations 384009 and 384010 are dismissed.



John J. Morris
Administrative Law Judge

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FEB 12 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 79-118
Petitioner	:	A/O No. 33-00939-03042
v.	:	Docket No. LAKE 79-214
	:	A/O No. 33-00939-03055
THE NORTH AMERICAN COAL CORP.,	:	Docket No. LAKE 79-263
Respondent	:	A/O No. 33-00939-03059
	:	Docket No. LAKE 80-64
	:	A/O No. 33-00939-03066
	:	Powhatan No. 3 Mine
	:	
	:	Docket No. LAKE 79-262
	:	A/O No. 33-00938-03050
	:	Docket No. LAKE 80-61
	:	A/O No. 33-00938-03052
	:	Powhatan No. 1 Mine
	:	
	:	Docket No. LAKE 79-266
	:	A/O No. 33-00937-03031
	:	Docket No. LAKE 80-65
	:	A/O No. 33-00937-03034
	:	Powhatan No. 5 Mine
	:	
QUARTO MINING COMPANY,	:	Docket No. VINC 79-124-P
Respondent	:	A/O No. 33-01157-03021
	:	Docket No. LAKE 79-228
	:	A/O No. 33-01157-03079
	:	Docket No. LAKE 79-265
	:	A/O No. 33-01157-03082
	:	Docket No. LAKE 80-31
	:	A/O No. 33-01157-03083
	:	Docket No. LAKE 80-32
	:	A/O No. 33-01157-03084
	:	Powhatan No. 4 Mine
	:	
	:	Docket No. LAKE 79-229
	:	A/O No. 33-02624-03055
	:	Docket No. LAKE 80-95
	:	A/O No. 33-02624-03066
	:	Docket No. LAKE 80-96
	:	A/O No. 33-02624-03065
	:	Powhatan No. 7 Mine

NACCO MINING COMPANY, : Docket No. LAKE 79-230
Respondent : A/O No. 33-01159-03059
: Powhatan No. 6 Mine

DECISION

The issue in the above-captioned cases and the arguments of the parties are identical to those involved in Secretary of Labor v. Alabama By-Products Corp., Docket No. SE 79-110, et al. which I have decided today. For the reasons set forth in the latter opinion, a copy of which is attached, the citations in the instant cases are vacated and the petitions are DISMISSED.


Charles C. Moore, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 12 1980

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 79-110
Petitioner : A/O No. 01-00347-03023
v. :
ALABAMA BY-PRODUCTS CORPORATION, : Docket No. SE 79-82
Respondent : A/O No. 01-00347-03021
: Docket No. SE 80-8
: A/O No. 01-00347-03030
: Segco No. 1 Mine
: Docket No. SE 79-33
: A/O No. 01-00515-03015
: Docket No. SE 79-74
: A/O No. 01-00515-03019
: Docket No. SE 79-108
: A/O No. 01-00515-03020
: Docket No. BARB 79-215-P
: A/O No. 01-00515-03008
: Mary Lee No. 1 Mine
: Docket No. SE 79-123
: A/O No. 01-00340-03024
: Gorgas No. 7 Mine

DECISION

Docket No. SE 79-110 was originally assigned to me. The other listed docket numbers were subsequently consolidated with SE 79-110 because of the similar parties and issues. While all of the files do not contain identical documents, Respondent's motion for summary decision and supporting papers, together with MSHA's opposition and supporting affidavit, are applicable to all of the consolidated cases. After the motion was filed and briefed, the

Attachment for LAKE 79-118 et al

parties entered a stipulation resolving all factual disputes and submitted the matter for decision on the stipulation and further briefing. By submitting the stipulation and further briefing based thereon, Respondent has abandoned its motion for summary decision. This decision is therefore based on the stipulation and arguments. Also, there is another sizable group of cases which have been consolidated under the caption Secretary of Labor v. North American Coal Corporation, et al., Docket Nos. LAKE 79-118, et al., which involve the identical issue although facts were not stipulated in those cases.

The question before me is whether there is a valid and enforceable respirable dust standard. On June 28, 1974, in Secretary of Labor v. Olga Coal Company, Docket No. HOPE 79-113-P, I issued a decision in which I held that "there is not now and never has been a valid enforceable respirable dust program * * *" (Dec., p. 2). I had previously made a similar ruling in MSHA v. B.B.W. Coal Company, Docket No. PIKE 76-149-P on January 9, 1979. Those rulings were made without the benefit of briefing and I think it is necessary that I reexamine the matter at this time.

Respirable dust, is an extremely important part of both the 1969 and 1977 Mine Acts. Respirable coal mine dust causes coal miners pneumoconiosis or black lung, and it has been estimated that 173,000 miners and 333,000 survivors are receiving black lung compensation from the Federal Government (see statement of John A. Breslin contained in Bureau of Mines' Information Circular 8753 published in 1973). It is because I consider it such an important program that I have been disturbed by the way the Bureau of Mines, MESA, and MSHA have dealt with that program.

I first considered respirable dust in a decision issued on July 9, 1973, in Valley Camp Coal Company, Docket No. MORG 72-88-P. I was unsatisfied with the quality of the proof offered in the respirable dust violations and rejected the evidence as being unconvincing. Subsequently, the Board of Mine Operations Appeals decided the Castle Valley Mining Company case, 3 IBMA 10 (January 25, 1974), in which it held that a computer print-out, standing alone, would establish a violation of the respirable dust standard. I next considered respirable dust in Eastern Associated Coal Corporation, Docket Nos. MORG 73-131-P et al. (December 16, 1974). In that case, I heard experts from MESA's respirable dust laboratory in Pittsburgh, as well as the testimony of Dr. Corn, who had done extensive research in connection with respirable dust. It was during the course of those hearings that I learned that MESA had been completely ignoring the statutory definition of respirable dust since the inception of the program. Instead of attempting to modify its equipment or work out some conversion factor, MESA chose to pretend that Congress had not defined respirable dust as only those dust particles of 5 microns or less in diameter. The evidence clearly established that MESA had been counting, as respirable coal mine dust, particles not only in excess of 5 microns in diameter, but also in excess of 10 microns in diameter. I am attaching as Appendix I excerpts from my opinion in that case which describe the dust-collecting instruments and the procedure at the Pittsburgh laboratory.

The Interior Department's Board of Mine Operations Appeals eventually ruled that the respirable dust procedures were invalid because MSHA had collected, and counted as respirable coal mine dust, particles which did not meet the statutory definition of respirable dust. Eastern Associated Coal Corporation, 7 IBMA 14 (1976), and 7 IBMA 133 (1976). Again, instead of attempting to modify its equipment, MESA sought, and obtained an order from the Secretary of the Interior staying the effect of the decision of the Board of Mine Operations Appeals. Such an appeal to the Secretary was not provided for in the published rules of the Department and, in my opinion, would not have survived a court test, but the stay was eventually dissolved and the Board's opinion became final.

The golden opportunity for the enforcement branch came on November 9, 1977, when Congress eliminated the statutory definition of respirable dust in the old Act and amended section 202(e) of the Act to read: "References to concentrations of respirable dust in this title mean the average concentration of respirable dust measured with a device approved by the Secretary and the Secretary of Health, Education and Welfare." While this is not a definition of respirable dust, it does appear to give the Secretary of Labor and the Secretary of Health, Education and Welfare the opportunity to establish a definition of respirable dust based on the size and type of dust which certain equipment collects. The Solicitor has taken the position that because section 202(e) of the Act became effective before the other sections of the Act, the definition of "Secretary" contained in the 1977 Act as the Secretary of Labor was not effective and that therefore, "Secretary" in section 202 means the Secretary of the Interior. The argument goes on that since the Secretary of the Interior and the Secretary of Health, Education and Welfare approved certain devices for the collection of respirable dust back in the 1970, Congress intended to ratify that 7-year old agreement and define as respirable dust anything collected by the MRE or the personal sampling device. This is obviously a contrived piece of backfilling because at no time has MSHA or MESA or anyone else contended that the oversized particles collected by both of these pieces of equipment was respirable dust. To do so would be to contravene the sworn testimony of the experts in the field and would be despite the "Report to the Senate Committee on Labor and Public Welfare", issued December 1975 and the Report of W. G. Courtney, research supervisor, dust control and life support group, dated November 29, 1974. The latter contains the following statements.

* * * * *

3. Sampler precision. MESA enforces the dust standard by stipulating that (1) the company use approved personal samplers and (2) the company-obtained 10-shift average for the dust level be less than 2.1mg/m³.

Using data obtained by MESA personnel using approved personal samplers, we have established that the approved samplers have a precision of only 30 pct (standard deviation) when routinely used in the field. Thus, if 100 MESA inspectors went

into the field to measure with approved dust samplers a dust cloud known to have a concentration of 2.0 mg/m^3 (MRE equivalent), 68 of their measurements would be between 1.4 and 2.6 mg/m^3 and 32 of the measurements would be outside this range.

Assuming that the precision of operator samples is as good as the precision of MESA inspector samples (a dubious assumption), the operator 10-shift average must be greater than 2.36 mg/m^3 to be 95 pct confident that the true average concentration is actually above 2.0 mg/m^3 . More important, a 10-shift average of less than 1.64 mg/m^3 is required to assure that the worker is not being exposed to hazardous dust levels as established by law. With the present limited precision of approved personal dust samplers in the field, 129 shifts must be sampled and averaged to reduce the width of the uncertainty to $\pm 0.1 \text{ mg/m}^3$.

* * * * *

5. Sampler flowrate. However, the MESA 0.1 mg/m^3 standard for respirable quartz dust does not match any known medical standard. MESA-coal requires that the approved personal sampler be operated at 2.0 l/min when used for enforcement purposes in coal mines, while the semi-official ACGIH recommendation of 0.1 mg/m^3 for the respirable quartz dust is based on a sampler flowrate of 1.7 l/min . Our field tests have indicated that similar masses of respirable dust are obtained when the approved personal sampler is operating at 1.7 or 2.0 l/min . Therefore, a quartz dust level of only 0.085 mg/m^3 when sampled at 2.0 l/min should be permitted in order to match the ACGIH standard of 0.1 mg/m^3 when sampled at 1.7 l/min . The percentage of coal miners being subjected to excessive amounts of respirable quartz dust thus is even higher than 20 pct.

* * * * *

We conducted a detailed comparison of company-obtained dust levels with MESA-obtained dust levels for the same sections. Results indicated that, on the average, MESA dust levels are about 30 pct higher than operator dust levels. This poor comparison casts grave doubts about the veracity of operator data and thus the entire MESA enforcement program.

* * * * *

In summary, the MESA enforcement program to ensure that coal mine personnel are working in a healthful dust-free environment involves seven major features. We have shown that, for

each of these features, the MESA procedure is unsatisfactory. As a result of this inadequate enforcement program, our coal mine personnel are being subjected to flagrantly hazardous environments, despite public reports to the contrary.

In view of these comments, I cannot believe Congress intended to perpetuate the discredited program. It intended that the Secretary of Labor and the Secretary of Health, Education and Welfare come up with a new definition. They have not done so.

But even if it could be said that it was the Secretary of the Interior and the Secretary of Health, Education and Welfare that could have established a new respirable dust definition, the fact is that such a new definition has not been established. To this day, 30 CFR 75.2(k) states "'Respirable dust' means only dust particulates 5 microns or less in size." It is axiomatic that an agency binds itself by its own regulation even though the Act of Congress would allow a different result. Vitarelli v. Seaton, 359 U.S. 535 (1959); Accardi v. Shaugnessy, 347 U.S. 260 (1945); Service v. Dulles, 354 U.S. 363 (1957); Pacific Molasses Company v. Federal Trade Commission, 356 F.2d 386, 389 (5th Cir. 1966). Under these authorities, the definition of respirable dust is still particles (particulates) of 5 microns or less in diameter. Under that standard, the program cannot be enforced using the type of collection equipment which MSHA currently uses. */

In my view, MSHA has two choices in order to institute an effective and enforceable respirable dust program. One, it can either develop equipment or modify equipment so as to collect and weigh only particles 5 microns or less in diameter or two, it can amend its regulations so as to rescind the definition contained in 30 CFR 75.2(k) and have the Secretary of Labor and the Secretary of Health, Education and Welfare agree on a new definition for and a device for the measurement of respirable dust.

In view of the importance of any early resolution of this matter, I urge the Commission to review this case on its own motion under 29 CFR 2700.71 and set an accelerated briefing schedule.

Judgment is for Respondent and the citations are vacated.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

*/ I realize this paragraph is contrary to some of my previous rulings regarding respirable dust, but I now believe that the 5-micron definition is still in effect.

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APPENDIX I

EXCERPTS FROM JUDGE MOORE'S DECISION IN
EASTERN ASSOCIATED COAL CORPORATION
DOCKET NOS. MORG 73-131-P et al (Dec. 16, 1974)

With reference to these 22 respirable dust violations, (footnote omitted) in Castle Valley Mining Company, 3 IBMA 10 (January 25, 1974) the Board of Mine Operations Appeals decided that the computer printout designated as a Notice of Noncompliance creates prima facie proof of the facts asserted therein regarding the respirable dust content of tested samples. In the absence of any rebutting evidence the printout's introduction into evidence may establish the violation. MESA relied almost exclusively on Castle Valley in its presentation of the instant case.

In the Castle Valley case, however, there were a number of other holdings by the Board that bear on the outcome of the instant decision. In that case there had been no evidence, except for that contained in various circulars of which the Board of Mine Operations Appeals took official notice, of the testing procedures employed by MESA's testing laboratory in Pittsburgh, Pennsylvania. The Board took official notice also that the techniques employed by MESA in respirable dust testing "are based upon scientific principles generally recognized in the scientific community." But, as pointed out by Respondent, the Board relied on facts "officially noticed" without giving the parties an opportunity to rebut such facts as required by the Administrative Procedure Act. Inasmuch as the Respondent in that case did not appear at the hearing before the Board, however, the Board may have reasoned

that Respondent was in default and thus not entitled to the opportunity to rebut officially noticed evidence. In any event, Respondent Eastern Associated Coal Corporation is challenging the scientific validity of MESA's testing procedures in the instant case, and its right to do so was specifically recognized by the Board on page 14 of its Castle Valley decision where it stated "of course, either the operator or MESA may question the reliability of the system at any stage."

Other statements about notices of noncompliance made by the Board in Castle Valley which bear on the decision in the instant case are:

[at page 19] All other circumstances of the making of such writing or record, including lack of personal knowledge by the enterant or maker, may be shown to affect its weight, but the circumstances shall not affect its admissibility.

[at page 21] This section does not make a government document received in evidence conclusive, irrefutable, or immutable. If such papers do not speak the truth, the defense can prove the untruth of the document.

[at page 22] Full discovery procedures were available to Castle Valley had they had any reason to question the reliability of the information recorded in the Notice of Noncompliance.

Respondent in this case has taken advantage of the discovery procedures provided by our rules and has attempted to prove the unreliability of the testing procedure. Although it has not actually demonstrated the untruth of any particular Notice of Noncompliance, Respondent has made such a showing that I cannot simply rely on Castle Valley and rule that the Notices of Noncompliance in evidence in this case establish the fact that Respondent has violated the respirable dust standard.

Regarding respirable dust, its definition, and measurement, we were indeed fortunate to have as witnesses such eminent experts as Dr. Morton Corn who has studied the subject for many years, Mr. Murray Jacobson who has also been involved in the respirable dust program for many years and who in fact set up the testing program in issue in this case, and Mr. Paul Parobeck who is currently in charge of the MESA respirable dust laboratory in Pittsburgh.

Respirable dust does not consist of coal dust exclusively. It is coal mine dust which would include fine particles of coal as well as any other fine particles of rock or other dust that may be found in a coal mine. When a miner breathes the dust contained in the atmosphere of a coal mine, a certain portion of that dust is filtered out in the nose, trachea and bronchial areas of the respiration system and another portion is deposited in the lungs or pulmonary compartment. Years of study have shown that it is the larger particles that are filtered out or deposited on surfaces of the respiratory system before reaching the lungs. It is only those small particles that pass through the filtering system and are deposited in the lungs which will lead to the disease known as coal miner's pneumoconiosis and which are accordingly called respirable dust.

Some of the testimony concerning respirable dust referred to a Bureau of Mines information circular dated February, 1971, entitled Sampling and Evaluating Respirable Coal Mine Dust bearing the number IC8503. On page three of that document, there appears a graph which plots the diameter and density of the particles of coal mine dust against the percentage of penetration or deposition of such dust in the lungs, in a personal sampler device and in an MRE instrument. ^{5/} While it is not exactly clear from the graph itself, the solid line indicates the manner in which various sizes of dust are deposited in the lungs, the dashed line designated "AEC", (a development of the Atomic Energy Commission,) indicates the same information with respect to deposition in the personal respirable dust sampler, developed by the Bureau of Mines and the line consisting of both dashes and dots and designated "MRE" indicates the amount of dust deposited in an MRE Isleworth Gravometric Dust Sampler, which is referred to as the MRE instrument. So far as the two instruments are concerned, deposition as depicted by the graph, indicates that part of the coal mine dust which is deposited in the section of the instrument which is designed to be equivalent to the lungs, i.e. the filter. Both instruments contain areas which are designed to eliminate dust that would ordinarily be deposited in the nose, trachea or bronchial areas of the human respiration system. The two instruments do this filtering out of the larger non-respirable particles by taking

^{5/} A copy of the referenced graph is designated Figure I.

advantage of the fact that if two spherical particles composed of the same substance are allowed to fall in an atmosphere, the larger particle will fall faster. This is because, as the size of spherical particles increase the cross-sectional diameter and therefore the air resistance is not increased to the same extent as the volume, (thus the mass of the particle) increases. In moving air, therefore, the larger particle will fall out sooner than the smaller particle. In the MRE instrument the air flow rate is such that the large particles fall out along the horizontal elutriator and only the smaller particles are deposited upon the filter which is later weighed. The air flow rate in this instrument is 2.5 liters per minute. It is obvious, that if the air flow in this instrument were increased, the larger particles would be deposited upon the filter whereas if it were decreased, particles normally reaching the filter might be deposited in the elutriator.

The personal sampler works on the same principle except that a cyclonic system is used to cause increased acceleration for the purpose of driving larger (i.e. heavier) particles to the outside of the circling atmosphere. The personal sampler must operate with an air flow of 2 liters per minute, and it is equally obvious that in this system an increase in the air flow will increase the G loads and thus cause the particles which might ordinarily reach the filter to drop out earlier, whereas too low an air flow would cause such larger, non-respirable particles to reach the filter. Any variation in the air flow in the two instruments therefore has the opposite effect. In one, increased air flow would cause an error of too small a particle being deposited on the filter whereas the same increased air flow in the other instrument would cause too large a particle to be deposited on the filter. The proper rate of air flow is thus extremely critical to both instruments.

Assuming both instruments are properly adjusted, the graph on page 3 of Information Circular 8503, [Figure I herein] shows that neither instrument collects on its filter, dust exactly corresponding to that collected by the lungs. The graph indicates that the MRE instrument will collect particles up to 7.1 microns in diameter whereas the personal sampler will collect particles up to 10 microns in diameter. While the graph is not exactly clear as to the pulmonary deposition, it appears to indicate deposition of particles up to somewhere between slightly over 6 microns and 7 microns in the lungs. There are other significant differences in the graphs. For example, both the personal sampler and the MRE instrument collect between 90 and 100 percent of the coal mine dust 2 microns in diameter whereas the lungs collect only

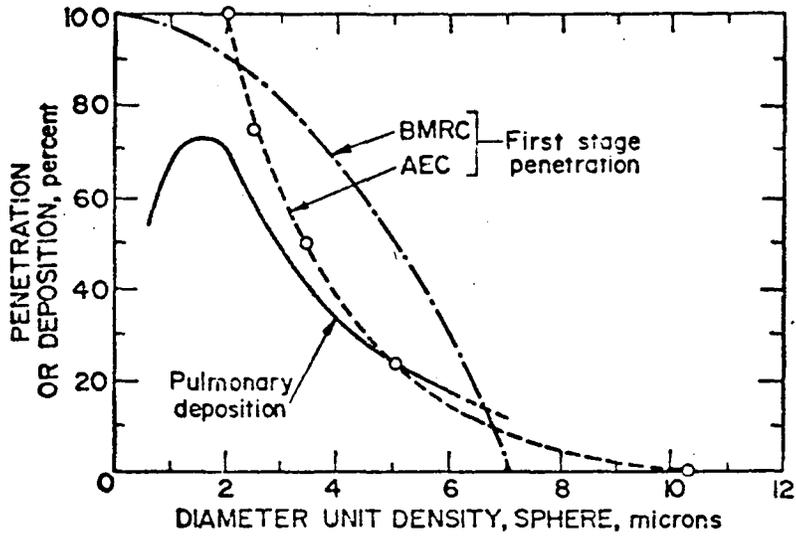


FIGURE 1. - Comparison of Respirable Size Criteria With Pulmonary Deposition Curve.

FIGURE I

somewhere between 70 and 75 percent of that size particle. The lungs collect only 54 percent of the particles that are a half micron in diameter whereas both instruments collect almost 100 percent of that size of particle. But it must be assumed that the Congress knew of the collection curves involved when it passed the Act and defined respirable dust as those particles of coal mine dust 5 microns or less in diameter. And, in the area between 5 micron particles and 2 micron particles the personal sampler curve is very close to the pulmonary curve. While the personal sampler does collect particles up to 10 microns in size, it collects a very small percentage of particles with a diameter in excess of 7 microns. The fact remains, however, that the instruments do collect particles larger than the statutory definition of respirable dust. 6/

From the aforementioned distribution curve, it appears that both the lungs and the personal sampler collect slightly more than 20 percent of the particles that are 5 microns in diameter. The personal sampler collects almost no particles that are 10 microns in diameter, and from observing the curve it would appear that the personal sampler collects approximately 10 percent of those particles between 5 microns in diameter and 10 microns in diameter. The fact that the personal sampler collects 10 percent of the dust that is larger than the statutory definition of respirable dust, however, does not mean that 10 percent of the dust collected by the sampler is too large to be considered respirable dust. It means that whatever quantity of that size particles is contained in the mine atmosphere, the personal sampler will collect 10 percent of that total quantity on its filter.

6/ The fact that in Section 202(e) of the Act it states "references to concentrations of respirable dust in this title means the average concentration of respirable dust if measured with an MRE instrument or such equivalent concentration as measured with another device approved by the Secretary of Health, Education and Welfare" does not mean that anything measured by an MRE instrument or another equivalent device would be respirable dust. While concentrations of such dust are to be measured in such instruments, there is no equivocation or uncertainty about the proscriptions of Section 318(k) which states in no uncertain terms "'respirable dust' means only dust particles 5 microns or less in size ..." (Underscoring supplied)

While there was no testimony on the point, it would seem reasonable that a slight increase in the air flow of the personal sampler would tend to prevent the larger particles of dust in excess of 5 microns in diameter from being deposited upon the filter. I must assume, however, that if such a simple solution would work, it would have been undertaken and that, therefore, any increase of air flow would affect the accuracy of the device in collecting the smaller particles of respirable dust. Also, it may be that rather than trying to approximate the human respiration system, the technicians should seek to devise an instrument which will measure and weigh only particles of dust 5 microns or less in diameter, but such a determination is not within the province of this hearing. We deal here with the devices as they exist, not as they might be.

The dust sampling procedure established by the Bureau of Mines has been described in Information Circulars 8484, 8520, and 8503, as well as in other publications of the Bureau of Mines and MESA. The testimony in this case agrees with the descriptions referred to and will only be explained herein in general terms. In general, the mine operator purchases cassettes for the purpose of measuring respirable dust from a manufacturer who has its cassettes and the empty filter weight data checked by the Bureau of Mines on a routine basis. The cassette has a serial number and a mine data card accompanying it has the same number. After the test has been run in the personal sampler the cassette and mine data card, filled out so far as required, are forwarded to the Pittsburgh testing laboratory.

The Pittsburgh testing laboratory is maintained under controlled temperature and humidity and at a pressure slightly higher than the surrounding areas so that there will be no dust drawn into the laboratory. The cassettes received from the mine operator are opened in the laboratory, and the mine data card and capsule containing the filter are placed on trays and the numbers on the card and capsule are checked. They are then desiccated i.e. dried, to remove any moisture that might otherwise affect the weight, and moved to an electronic balance where devices are placed to nullify any electrostatic effect that might distort the actual weight of the filter. The filter is weighed on the electronic balance and an operator notes the weight and writes it down on the mine data card. At that point the technician performing the weighing operation makes a mental calculation to determine if the weight gain, that is the difference between the recorded empty weight of the filter and the weight of the filter with the dust particles deposited thereon, is greater than 6 milligrams.

If it is, the sample is put aside for testing for oversize particles, but if there is a weight gain of 6 milligrams or less, the sample is discarded and destroyed. No record is kept on the mine card or anywhere else as to which of a number of technicians made the actual weighing on any particular sample. After the weighing, the results are punched out on a keypunch teletype system by one operator and then a different person keypunches the same data again. The system is such that if the two operators do not punch out exactly the same data, an automatic notification is given so that the operators can check to see if one or the other made an error in transcribing the information from the mine data card. The data punched into the system, goes directly to the computer in Denver, Colorado which, at a later date, determines if any 10 consecutive valid samples comply or do not comply with the standard in effect.

Throughout this procedure, at several places, the mine data card and filter identification numbers are checked. But there was at the time of the violations involved in this case, no double check of the visual weight display observed by the person operating the balance. At a later time, subsequent to Mr. Parobeck's deposition (Respondent's Exhibit 14) but prior to the hearing, a spot check system was instituted whereby a certain number of these weighings were later duplicated by a different operator on a random basis to see if a discrepancy had occurred.

The testimony indicated that the decision to check filters showing a weight gain greater than 6 milligrams was an arbitrary decision not based on any particular studies. With respect to those capsules, showing the 6 milligram weight gain, first they are examined to see if oversized particles appear visually without the aid of a microscope. If such particles appear the sample is voided. If they do not appear, however, the filter is examined under a microscope with various sections of the filter designated as fields. It is not stated in the testimony the exact size of a field, but 10 of these fields are examined and the sample is voided if these 10 fields each show three or more particles that are in excess of 10 microns in size. Mr. Parobeck's testimony made it clear that if nine of these fields all show more than 3 particles in excess of 10 microns but the 10th field did not show such particles, the sample would not be voided. It is thus fairly clear that in addition to the particles over 5 microns in diameter, particles in excess of 10 microns in diameter and thus also not respirable are counted against a Respondent whether the sample

weight gain is more than 6 milligrams or less than 6 milligrams since no test is taken regarding the weight gains of less than 6 milligrams. 7/

In the Castle Valley case, supra, the Board of Mine Operations Appeals stated that a notice of non-compliance which is a computer print-out from the Denver computer, is prima facie evidence of a violation which can be rebutted. The Board indicated that in view of the discovery procedures available to a Respondent, he could challenge any notice of non-compliance that might be issued. As testimony has indicated in this case, however, discovery techniques will help a Respondent very little in determining whether or not his sample was actually tested properly. It is clear that he cannot discover who made the actual weighing, he cannot test the sample prior to sending it in because it would then be voided for tampering, and he cannot send in experts to test his sample after it has shown a greater than 3 milligrams result. There is in effect absolutely nothing a Respondent can do to defend itself if the computer print-out shows that it is in violation of the respirable dust standard.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 12 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 79-110
Petitioner	:	A/O No. 01-00347-03023
v.	:	
	:	Docket No. SE 79-82
ALABAMA BY-PRODUCTS CORPORATION,	:	A/O No. 01-00347-03021
Respondent	:	
	:	Docket No. SE 80-8
	:	A/O No. 01-00347-03030
	:	
	:	Segco No. 1 Mine
	:	
	:	Docket No. SE 79-33
	:	A/O No. 01-00515-03015
	:	
	:	Docket No. SE 79-74
	:	A/O No. 01-00515-03019
	:	
	:	Docket No. SE 79-108
	:	A/O No. 01-00515-03020
	:	
	:	Docket No. BARB 79-215-P
	:	A/O No. 01-00515-03008
	:	
	:	Mary Lee No. 1 Mine
	:	
	:	Docket No. SE 79-123
	:	A/O No. 01-00340-03024
	:	
	:	Gorgas No. 7 Mine

DECISION

Docket No. SE 79-110 was originally assigned to me. The other listed docket numbers were subsequently consolidated with SE 79-110 because of the similar parties and issues. While all of the files do not contain identical documents, Respondent's motion for summary decision and supporting papers, together with MSHA's opposition and supporting affidavit, are applicable to all of the consolidated cases. After the motion was filed and briefed, the

parties entered a stipulation resolving all factual disputes and submitted the matter for decision on the stipulation and further briefing. By submitting the stipulation and further briefing based thereon, Respondent has abandoned its motion for summary decision. This decision is therefore based on the stipulation and arguments. Also, there is another sizable group of cases which have been consolidated under the caption Secretary of Labor v. North American Coal Corporation, et al., Docket Nos. LAKE 79-118, et al., which involve the identical issue although facts were not stipulated in those cases.

The question before me is whether there is a valid and enforceable respirable dust standard. On June 28, 1974, in Secretary of Labor v. Olga Coal Company, Docket No. HOPE 79-113-P, I issued a decision in which I held that "there is not now and never has been a valid enforceable respirable dust program * * *" (Dec., p. 2). I had previously made a similar ruling in MSHA v. B.B.W. Coal Company, Docket No. PIKE 76-149-P on January 9, 1979. Those rulings were made without the benefit of briefing and I think it is necessary that I reexamine the matter at this time.

Respirable dust, is an extremely important part of both the 1969 and 1977 Mine Acts. Respirable coal mine dust causes coal miners pneumoconiosis or black lung, and it has been estimated that 173,000 miners and 333,000 survivors are receiving black lung compensation from the Federal Government (see statement of John A. Breslin contained in Bureau of Mines' Information Circular 8753 published in 1973). It is because I consider it such an important program that I have been disturbed by the way the Bureau of Mines, MESA, and MSHA have dealt with that program.

I first considered respirable dust in a decision issued on July 9, 1973, in Valley Camp Coal Company, Docket No. MORG 72-88-P. I was unsatisfied with the quality of the proof offered in the respirable dust violations and rejected the evidence as being unconvincing. Subsequently, the Board of Mine Operations Appeals decided the Castle Valley Mining Company case, 3 IBMA 10 (January 25, 1974), in which it held that a computer print-out, standing alone, would establish a violation of the respirable dust standard. I next considered respirable dust in Eastern Associated Coal Corporation, Docket Nos. MORG 73-131-P et al. (December 16, 1974). In that case, I heard experts from MESA's respirable dust laboratory in Pittsburgh, as well as the testimony of Dr. Corn, who had done extensive research in connection with respirable dust. It was during the course of those hearings that I learned that MESA had been completely ignoring the statutory definition of respirable dust since the inception of the program. Instead of attempting to modify its equipment or work out some conversion factor, MESA chose to pretend that Congress had not defined respirable dust as only those dust particles of 5 microns or less in diameter. The evidence clearly established that MESA had been counting, as respirable coal mine dust, particles not only in excess of 5 microns in diameter, but also in excess of 10 microns in diameter. I am attaching as Appendix I excerpts from my opinion in that case which describe the dust-collecting instruments and the procedure at the Pittsburgh laboratory.

The Interior Department's Board of Mine Operations Appeals eventually ruled that the respirable dust procedures were invalid because MSHA had collected, and counted as respirable coal mine dust, particles which did not meet the statutory definition of respirable dust. Eastern Associated Coal Corporation, 7 IBMA 14 (1976), and 7 IBMA 133 (1976). Again, instead of attempting to modify its equipment, MESA sought, and obtained an order from the Secretary of the Interior staying the effect of the decision of the Board of Mine Operations Appeals. Such an appeal to the Secretary was not provided for in the published rules of the Department and, in my opinion, would not have survived a court test, but the stay was eventually dissolved and the Board's opinion became final.

The golden opportunity for the enforcement branch came on November 9, 1977, when Congress eliminated the statutory definition of respirable dust in the old Act and amended section 202(e) of the Act to read: "References to concentrations of respirable dust in this title mean the average concentration of respirable dust measured with a device approved by the Secretary and the Secretary of Health, Education and Welfare." While this is not a definition of respirable dust, it does appear to give the Secretary of Labor and the Secretary of Health, Education and Welfare the opportunity to establish a definition of respirable dust based on the size and type of dust which certain equipment collects. The Solicitor has taken the position that because section 202(e) of the Act became effective before the other sections of the Act, the definition of "Secretary" contained in the 1977 Act as the Secretary of Labor was not effective and that therefore, "Secretary" in section 202 means the Secretary of the Interior. The argument goes on that since the Secretary of the Interior and the Secretary of Health, Education and Welfare approved certain devices for the collection of respirable dust back in the 1970, Congress intended to ratify that 7-year old agreement and define as respirable dust anything collected by the MRE or the personal sampling device. This is obviously a contrived piece of backfilling because at no time has MSHA or MESA or anyone else contended that the oversized particles collected by both of these pieces of equipment was respirable dust. To do so would be to contravene the sworn testimony of the experts in the field and would be despite the "Report to the Senate Committee on Labor and Public Welfare", issued December 1975 and the Report of W. G. Courtney, research supervisor, dust control and life support group, dated November 29, 1974. The latter contains the following statements.

* * * * *

3. Sampler precision. MESA enforces the dust standard by stipulating that (1) the company use approved personal samplers and (2) the company-obtained 10-shift average for the dust level be less than 2.1mg/m³.

Using data obtained by MESA personnel using approved personal samplers, we have established that the approved samplers have a precision of only 30 pct (standard deviation) when routinely used in the field. Thus, if 100 MESA inspectors went

into the field to measure with approved dust samplers a dust cloud known to have a concentration of 2.0 mg/m^3 (MRE equivalent), 68 of their measurements would be between 1.4 and 2.6 mg/m^3 and 32 of the measurements would be outside this range.

Assuming that the precision of operator samples is as good as the precision of MESA inspector samples (a dubious assumption), the operator 10-shift average must be greater than 2.36 mg/m^3 to be 95 pct confident that the true average concentration is actually above 2.0 mg/m^3 . More important, a 10-shift average of less than 1.64 mg/m^3 is required to assure that the worker is not being exposed to hazardous dust levels as established by law. With the present limited precision of approved personal dust samplers in the field, 129 shifts must be sampled and averaged to reduce the width of the uncertainty to $\pm 0.1 \text{ mg/m}^3$.

* * * * *

5. Sampler flowrate. However, the MESA 0.1 mg/m^3 standard for respirable quartz dust does not match any known medical standard. MESA-coal requires that the approved personal sampler be operated at 2.0 l/min when used for enforcement purposes in coal mines, while the semi-official ACGIH recommendation of 0.1 mg/m^3 for the respirable quartz dust is based on a sampler flowrate of 1.7 l/min . Our field tests have indicated that similar masses of respirable dust are obtained when the approved personal sampler is operating at 1.7 or 2.0 l/min . Therefore, a quartz dust level of only 0.085 mg/m^3 when sampled at 2.0 l/min should be permitted in order to match the ACGIH standard of 0.1 mg/m^3 when sampled at 1.7 l/min . The percentage of coal miners being subjected to excessive amounts of respirable quartz dust thus is even higher than 20 pct.

* * * * *

We conducted a detailed comparison of company-obtained dust levels with MESA-obtained dust levels for the same sections. Results indicated that, on the average, MESA dust levels are about 30 pct higher than operator dust levels. This poor comparison casts grave doubts about the veracity of operator data and thus the entire MESA enforcement program.

* * * * *

In summary, the MESA enforcement program to ensure that coal mine personnel are working in a healthful dust-free environment involves seven major features. We have shown that, for

each of these features, the MESA procedure is unsatisfactory. As a result of this inadequate enforcement program, our coal mine personnel are being subjected to flagrantly hazardous environments, despite public reports to the contrary.

In view of these comments, I cannot believe Congress intended to perpetuate the discredited program. It intended that the Secretary of Labor and the Secretary of Health, Education and Welfare come up with a new definition. They have not done so.

But even if it could be said that it was the Secretary of the Interior and the Secretary of Health, Education and Welfare that could have established a new respirable dust definition, the fact is that such a new definition has not been established. To this day, 30 CFR 75.2(k) states "'Respirable dust' means only dust particulates 5 microns or less in size." It is axiomatic that an agency binds itself by its own regulation even though the Act of Congress would allow a different result. Vitarelli v. Seaton, 359 U.S. 535 (1959); Accardi v. Shaugnessy, 347 U.S. 260 (1945); Service v. Dulles, 354 U.S. 363 (1957); Pacific Molasses Company v. Federal Trade Commission, 356 F.2d 386, 389 (5th Cir. 1966). Under these authorities, the definition of respirable dust is still particles (particulates) of 5 microns or less in diameter. Under that standard, the program cannot be enforced using the type of collection equipment which MSHA currently uses. */

In my view, MSHA has two choices in order to institute an effective and enforceable respirable dust program. One, it can either develop equipment or modify equipment so as to collect and weigh only particles 5 microns or less in diameter or two, it can amend its regulations so as to rescind the definition contained in 30 CFR 75.2(k) and have the Secretary of Labor and the Secretary of Health, Education and Welfare agree on a new definition for and a device for the measurement of respirable dust.

In view of the importance of any early resolution of this matter, I urge the Commission to review this case on its own motion under 29 CFR 2700.71 and set an accelerated briefing schedule.

Judgment is for Respondent and the citations are vacated.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

*/ I realize this paragraph is contrary to some of my previous rulings regarding respirable dust, but I now believe that the 5-micron definition is still in effect.

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APPENDIX I

EXCERPTS FROM JUDGE MOORE'S DECISION IN
EASTERN ASSOCIATED COAL CORPORATION
DOCKET NOS. MORG 73-131-P et al (Dec. 16, 1974)

With reference to these 22 respirable dust violations, (footnote omitted) in Castle Valley Mining Company, 3 IBMA 10 (January 25, 1974) the Board of Mine Operations Appeals decided that the computer printout designated as a Notice of Noncompliance creates prima facie proof of the facts asserted therein regarding the respirable dust content of tested samples. In the absence of any rebutting evidence the printout's introduction into evidence may establish the violation. MESA relied almost exclusively on Castle Valley in its presentation of the instant case.

In the Castle Valley case, however, there were a number of other holdings by the Board that bear on the outcome of the instant decision. In that case there had been no evidence, except for that contained in various circulars of which the Board of Mine Operations Appeals took official notice, of the testing procedures employed by MESA's testing laboratory in Pittsburgh, Pennsylvania. The Board took official notice also that the techniques employed by MESA in respirable dust testing "are based upon scientific principles generally recognized in the scientific community." But, as pointed out by Respondent, the Board relied on facts "officially noticed" without giving the parties an opportunity to rebut such facts as required by the Administrative Procedure Act. Inasmuch as the Respondent in that case did not appear at the hearing before the Board, however, the Board may have reasoned

that Respondent was in default and thus not entitled to the opportunity to rebut officially noticed evidence. In any event, Respondent Eastern Associated Coal Corporation is challenging the scientific validity of MESA's testing procedures in the instant case, and its right to do so was specifically recognized by the Board on page 14 of its Castle Valley decision where it stated "of course, either the operator or MESA may question the reliability of the system at any stage."

Other statements about notices of noncompliance made by the Board in Castle Valley which bear on the decision in the instant case are:

[at page 19] All other circumstances of the making of such writing or record, including lack of personal knowledge by the enterant or maker, may be shown to affect its weight, but the circumstances shall not affect its admissibility.

[at page 21] This section does not make a government document received in evidence conclusive, irrefutable, or immutable. If such papers do not speak the truth, the defense can prove the untruth of the document.

[at page 22] Full discovery procedures were available to Castle Valley had they had any reason to question the reliability of the information recorded in the Notice of Noncompliance.

Respondent in this case has taken advantage of the discovery procedures provided by our rules and has attempted to prove the unreliability of the testing procedure. Although it has not actually demonstrated the untruth of any particular Notice of Noncompliance, Respondent has made such a showing that I cannot simply rely on Castle Valley and rule that the Notices of Noncompliance in evidence in this case establish the fact that Respondent has violated the respirable dust standard.

Regarding respirable dust, its definition, and measurement, we were indeed fortunate to have as witnesses such eminent experts as Dr. Morton Corn who has studied the subject for many years, Mr. Murray Jacobson who has also been involved in the respirable dust program for many years and who in fact set up the testing program in issue in this case, and Mr. Paul Parobeck who is currently in charge of the MESA respirable dust laboratory in Pittsburgh.

Respirable dust does not consist of coal dust exclusively. It is coal mine dust which would include fine particles of coal as well as any other fine particles of rock or other dust that may be found in a coal mine. When a miner breathes the dust contained in the atmosphere of a coal mine, a certain portion of that dust is filtered out in the nose, trachea and bronchial areas of the respiration system and another portion is deposited in the lungs or pulmonary compartment. Years of study have shown that it is the larger particles that are filtered out or deposited on surfaces of the respiratory system before reaching the lungs. It is only those small particles that pass through the filtering system and are deposited in the lungs which will lead to the disease known as coal miner's pneumoconiosis and which are accordingly called respirable dust.

Some of the testimony concerning respirable dust referred to a Bureau of Mines information circular dated February, 1971, entitled Sampling and Evaluating Respirable Coal Mine Dust bearing the number IC8503. On page three of that document, there appears a graph which plots the diameter and density of the particles of coal mine dust against the percentage of penetration or deposition of such dust in the lungs, in a personal sampler device and in an MRE instrument. ^{5/} While it is not exactly clear from the graph itself, the solid line indicates the manner in which various sizes of dust are deposited in the lungs, the dashed line designated "AEC", (a development of the Atomic Energy Commission,) indicates the same information with respect to deposition in the personal respirable dust sampler, developed by the Bureau of Mines and the line consisting of both dashes and dots and designated "MRE" indicates the amount of dust deposited in an MRE Isleworth Gravometric Dust Sampler, which is referred to as the MRE instrument. So far as the two instruments are concerned, deposition as depicted by the graph, indicates that part of the coal mine dust which is deposited in the section of the instrument which is designed to be equivalent to the lungs, i.e. the filter. Both instruments contain areas which are designed to eliminate dust that would ordinarily be deposited in the nose, trachea or bronchial areas of the human respiration system. The two instruments do this filtering out of the larger non-respirable particles by taking

^{5/} A copy of the referenced graph is designated Figure I.

advantage of the fact that if two spherical particles composed of the same substance are allowed to fall in an atmosphere, the larger particle will fall faster. This is because, as the size of spherical particles increase the cross-sectional diameter and therefore the air resistance is not increased to the same extent as the volume, (thus the mass of the particle) increases. In moving air, therefore, the larger particle will fall out sooner than the smaller particle. In the MRE instrument the air flow rate is such that the large particles fall out along the horizontal elutriator and only the smaller particles are deposited upon the filter which is later weighed. The air flow rate in this instrument is 2.5 liters per minute. It is obvious, that if the air flow in this instrument were increased, the larger particles would be deposited upon the filter whereas if it were decreased, particles normally reaching the filter might be deposited in the elutriator.

The personal sampler works on the same principle except that a cyclonic system is used to cause increased acceleration for the purpose of driving larger (i.e. heavier) particles to the outside of the circling atmosphere. The personal sampler must operate with an air flow of 2 liters per minute, and it is equally obvious that in this system an increase in the air flow will increase the G loads and thus cause the particles which might ordinarily reach the filter to drop out earlier, whereas too low an air flow would cause such larger, non-respirable particles to reach the filter. Any variation in the air flow in the two instruments therefore has the opposite effect. In one, increased air flow would cause an error of too small a particle being deposited on the filter whereas the same increased air flow in the other instrument would cause too large a particle to be deposited on the filter. The proper rate of air flow is thus extremely critical to both instruments.

Assuming both instruments are properly adjusted, the graph on page 3 of Information Circular 8503, [Figure I herein] shows that neither instrument collects on its filter, dust exactly corresponding to that collected by the lungs. The graph indicates that the MRE instrument will collect particles up to 7.1 microns in diameter whereas the personal sampler will collect particles up to 10 microns in diameter. While the graph is not exactly clear as to the pulmonary deposition, it appears to indicate deposition of particles up to somewhere between slightly over 6 microns and 7 microns in the lungs. There are other significant differences in the graphs. For example, both the personal sampler and the MRE instrument collect between 90 and 100 percent of the coal mine dust 2 microns in diameter whereas the lungs collect only

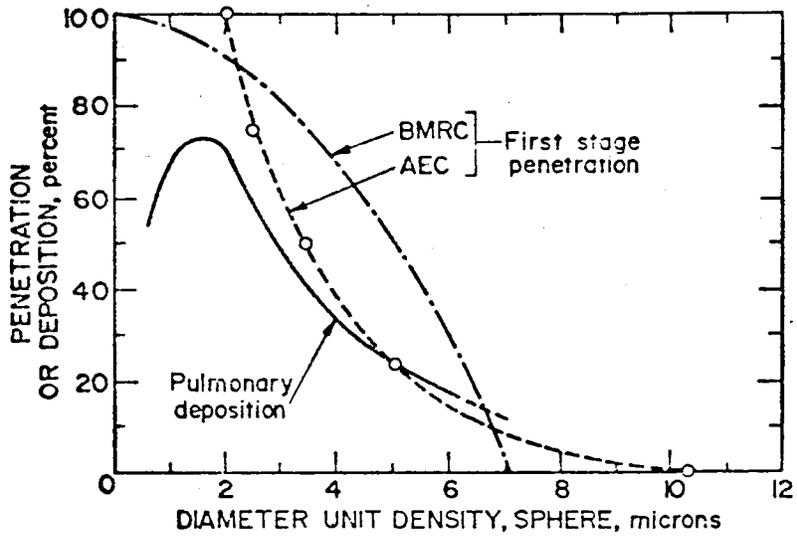


FIGURE 1. - Comparison of Respirable Size Criteria With Pulmonary Deposition Curve.

FIGURE I

somewhere between 70 and 75 percent of that size particle. The lungs collect only 54 percent of the particles that are a half micron in diameter whereas both instruments collect almost 100 percent of that size of particle. But it must be assumed that the Congress knew of the collection curves involved when it passed the Act and defined respirable dust as those particles of coal mine dust 5 microns or less in diameter. And, in the area between 5 micron particles and 2 micron particles the personal sampler curve is very close to the pulmonary curve. While the personal sampler does collect particles up to 10 microns in size, it collects a very small percentage of particles with a diameter in excess of 7 microns. The fact remains, however, that the instruments do collect particles larger than the statutory definition of respirable dust. 6/

From the aforementioned distribution curve, it appears that both the lungs and the personal sampler collect slightly more than 20 percent of the particles that are 5 microns in diameter. The personal sampler collects almost no particles that are 10 microns in diameter, and from observing the curve it would appear that the personal sampler collects approximately 10 percent of those particles between 5 microns in diameter and 10 microns in diameter. The fact that the personal sampler collects 10 percent of the dust that is larger than the statutory definition of respirable dust, however, does not mean that 10 percent of the dust collected by the sampler is too large to be considered respirable dust. It means that whatever quantity of that size particles is contained in the mine atmosphere, the personal sampler will collect 10 percent of that total quantity on its filter.

6/ The fact that in Section 202(e) of the Act it states "references to concentrations of respirable dust in this title means the average concentration of respirable dust if measured with an MRE instrument or such equivalent concentration as measured with another device approved by the Secretary of Health, Education and Welfare" does not mean that anything measured by an MRE instrument or another equivalent device would be respirable dust. While concentrations of such dust are to be measured in such instruments, there is no equivocation or uncertainty about the prescriptions of Section 318(k) which states in no uncertain terms "'respirable dust' means only dust particles 5 microns or less in size ..." (Underscoring supplied)

While there was no testimony on the point, it would seem reasonable that a slight increase in the air flow of the personal sampler would tend to prevent the larger particles of dust in excess of 5 microns in diameter from being deposited upon the filter. I must assume, however, that if such a simple solution would work, it would have been undertaken and that, therefore, any increase of air flow would affect the accuracy of the device in collecting the smaller particles of respirable dust. Also, it may be that rather than trying to approximate the human respiration system, the technicians should seek to devise an instrument which will measure and weigh only particles of dust 5 microns or less in diameter, but such a determination is not within the province of this hearing. We deal here with the devices as they exist, not as they might be.

The dust sampling procedure established by the Bureau of Mines has been described in Information Circulars 8484, 8520, and 8503, as well as in other publications of the Bureau of Mines and MESA. The testimony in this case agrees with the descriptions referred to and will only be explained herein in general terms. In general, the mine operator purchases cassettes for the purpose of measuring respirable dust from a manufacturer who has its cassettes and the empty filter weight data checked by the Bureau of Mines on a routine basis. The cassette has a serial number and a mine data card accompanying it has the same number. After the test has been run in the personal sampler the cassette and mine data card, filled out so far as required, are forwarded to the Pittsburgh testing laboratory.

The Pittsburgh testing laboratory is maintained under controlled temperature and humidity and at a pressure slightly higher than the surrounding areas so that there will be no dust drawn into the laboratory. The cassettes received from the mine operator are opened in the laboratory, and the mine data card and capsule containing the filter are placed on trays and the numbers on the card and capsule are checked. They are then desiccated i.e. dried, to remove any moisture that might otherwise affect the weight, and moved to an electronic balance where devices are placed to nullify any electrostatic effect that might distort the actual weight of the filter. The filter is weighed on the electronic balance and an operator notes the weight and writes it down on the mine data card. At that point the technician performing the weighing operation makes a mental calculation to determine if the weight gain, that is the difference between the recorded empty weight of the filter and the weight of the filter with the dust particles deposited thereon, is greater than 6 milligrams.

If it is, the sample is put aside for testing for oversize particles, but if there is a weight gain of 6 milligrams or less, the sample is discarded and destroyed. No record is kept on the mine card or anywhere else as to which of a number of technicians made the actual weighing on any particular sample. After the weighing, the results are punched out on a keypunch teletype system by one operator and then a different person keypunches the same data again. The system is such that if the two operators do not punch out exactly the same data, an automatic notification is given so that the operators can check to see if one or the other made an error in transcribing the information from the mine data card. The data punched into the system, goes directly to the computer in Denver, Colorado which, at a later date, determines if any 10 consecutive valid samples comply or do not comply with the standard in effect.

Throughout this procedure, at several places, the mine data card and filter identification numbers are checked. But there was at the time of the violations involved in this case, no double check of the visual weight display observed by the person operating the balance. At a later time, subsequent to Mr. Parobeck's deposition (Respondent's Exhibit 14) but prior to the hearing, a spot check system was instituted whereby a certain number of these weighings were later duplicated by a different operator on a random basis to see if a discrepancy had occurred.

The testimony indicated that the decision to check filters showing a weight gain greater than 6 milligrams was an arbitrary decision not based on any particular studies. With respect to those capsules, showing the 6 milligram weight gain, first they are examined to see if oversized particles appear visually without the aid of a microscope. If such particles appear the sample is voided. If they do not appear, however, the filter is examined under a microscope with various sections of the filter designated as fields. It is not stated in the testimony the exact size of a field, but 10 of these fields are examined and the sample is voided if these 10 fields each show three or more particles that are in excess of 10 microns in size. Mr. Parobeck's testimony made it clear that if nine of these fields all show more than 3 particles in excess of 10 microns but the 10th field did not show such particles, the sample would not be voided. It is thus fairly clear that in addition to the particles over 5 microns in diameter, particles in excess of 10 microns in diameter and thus also not respirable are counted against a Respondent whether the sample

weight gain is more than 6 milligrams or less than 6 milligrams since no test is taken regarding the weight gains of less than 6 milligrams. 7/

In the Castle Valley case, supra, the Board of Mine Operations Appeals stated that a notice of non-compliance which is a computer print-out from the Denver computer, is prima facie evidence of a violation which can be rebutted. The Board indicated that in view of the discovery procedures available to a Respondent, he could challenge any notice of non-compliance that might be issued. As testimony has indicated in this case, however, discovery techniques will help a Respondent very little in determining whether or not his sample was actually tested properly. It is clear that he cannot discover who made the actual weighing, he cannot test the sample prior to sending it in because it would then be voided for tampering, and he cannot send in experts to test his sample after it has shown a greater than 3 milligrams result. There is in effect absolutely nothing a Respondent can do to defend itself if the computer print-out shows that it is in violation of the respirable dust standard.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 13 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 79-92-M
Petitioner : A/O No. 41-01163-05002
v. :
: Plant 53 Seagoville
GENERAL PORTLAND, INC., :
Respondent :

DECISION APPROVING SETTLEMENT

The Solicitor has filed a motion to approve a settlement in the above-captioned proceeding.

Citation No. 153605 was issued when a back-up alarm on a bulldozer was found to be inoperative, a violation of 30 CFR 56.9-2. The assessed penalty was \$72 and the recommended settlement is \$40. In support of the recommended settlement, the Solicitor states that there was little operator negligence as the violation could not have been reasonably predicted. The Solicitor gives no basis for this representation. In the future the Solicitor should give reasons. Bare conclusions will not suffice. The Solicitor also states that the probability of injury was over-evaluated since very few employees were exposed to the risk, they were not exposed to the risk with any great frequency and they were not working in a situation where their attention would be distracted. I accept the Solicitor's representations and on the basis of low gravity conclude that the recommended settlement should be approved. The Solicitor further advises that respondent has already paid the \$40 penalty sought by MSHA.

ORDER

The recommended settlement is hereby APPROVED.



Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

David S. Jones, Esq., Office of the Solicitor, U.S. Department of
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

FEB 13 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 79-109
Petitioner : A/O No. 33-01357-03003
v. :
: West Point Strip Mine
BUCKEYE COAL MINING COMPANY, INC., :
Respondent :

DECISION APPROVING SETTLEMENTS

ORDER TO PAY

The Solicitor has filed a motion to approve settlements in the above-captioned proceeding.

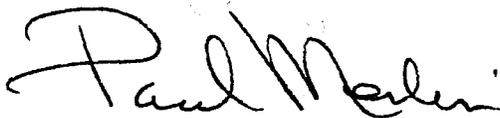
Citation No. 273083 was issued for a failure to conduct noise level surveys at six month intervals, as required by 30 CFR 71.303(a). The original assessment was \$150 and the recommended settlement is \$52. In support of her motion, the Solicitor states that both operator negligence and gravity had been overassessed: the operator's safety director thought he had conducted the survey, and the probability of occurrence was improbable as previous surveys had demonstrated no excessive noise exposures. I accept the Solicitor's representations, which indicate a low level of negligence and a lack of gravity. Accordingly, the recommended settlement is hereby approved.

Citation No. 784608 was issued when a portable fire extinguisher was found to be unusable and inoperative, a violation of 30 CFR 77.1110. The original assessment was \$34 and the recommended settlement is \$25. In support of her motion, the Solicitor states that the probability of injury was minimal as there were other fire extinguishers present in the area. I accept the Solicitor's representations. Accordingly, the recommended settlement is hereby approved. I would however, note that the original assessment was low. I cannot understand why the Solicitor would agree to any reduction. However, the difference involved is so small that further expenditure of the taxpayers' money on this matter is not justified.

The Solicitor further states that Citation Nos. 784606 and 784607 have been settled for the original amounts of \$48 and \$66, respectively. However, she gives no reasons for the recommended settlements. Proceedings before the Commission are de novo, and a sufficient basis must be provided for the approval of all settlements. Rather than disapprove these settlements, I have reviewed the citations, the assessment sheets and the inspector's statements. Based upon my own review of the violations, I conclude the recommended settlements are consistent with and will effectuate the purposes of the Act. The recommended settlements are therefore, approved. In the future, however the Solicitor should given reasons.

ORDER

The operator is ORDERED to pay \$191 within 30 days from the date of this decision.

A handwritten signature in cursive script that reads "Paul Merlin".

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

Linda Leasure, Esq., Office of the Solicitor, U.S. Department of
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12
FEB 13 1980

STEVE SHAPIRO, : Complaint of Discharge,
Complainant : Discrimination and Interference
v. :
 : Docket No. WEVA 79-238-D
 :
BISHOP COAL COMPANY, : Docket No. WEVA 79-445-D
Respondent :
 : Bishop No. 34 Mine
SECRETARY OF LABOR, :
ON BEHALF OF STEVE SHAPIRO, :
Complainant :
v. :
 :
CONSOLIDATION COAL COMPANY :
(BISHOP COAL COMPANY), :
Respondent :

DECISIONS APPROVING SETTLEMENT

Appearances: Barbara K. Kaufmann and Kenneth Stein, Esqs., Office of the Regional Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Complainants; Kendrick King, UMWA, District #29, Beckley, West Virginia, for complainant Steve Shapiro; Samuel P. Skeen, Esq., Pittsburgh, Pennsylvania, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern discrimination complaints filed by the complainants against the respondent pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. A hearing was conducted in Charleston, West Virginia during the term October 23-24, 1979, to commence again at a time and place convenient to the parties. Subsequently, complainant MSHA advised me by letter dated January 18, 1980, that the parties had reached a settlement in the cases and that a motion to withdraw the complaints would be forthcoming for my review and consideration.

By motion filed February 7, 1980, MSHA moves to withdraw its discrimination complaint on the ground that the parties have agreed to settle the matter and that the terms of the agreement finalizing the settlement are satisfactory to all concerned, including Mr. Shapiro, and that both the operator and Mr. Shapiro have signed and executed the settlement agreement, a copy of which as been submitted for the record.

Under the terms of the agreement respondent agrees that it will not discharge or in any manner discriminate against or interfere with any miner, representative of miners, or applicants for employment subject to the Act because of their engaging in activities protected by the Act or in the exercise of any rights granted to them under the Act, including the making of health or safety complaints to the respondent or to MSHA or the filing of charges with MSHA. Further, respondent agrees to immediately post on the mine bulletin board, or in a conspicuous place where notices to employees are customarily posted and maintained for a period of 60 consecutive days from the date of posting, the notice setting forth the terms of the settlement agreement between the respondent and Mr. Shapiro.

Discussion

Commission Rule 30, 29 CFR 2700.30, requires Commission approval for proposed civil penalty cases which have been contested but subsequently settled. Although the instant cases are complaints of discrimination filed pursuant to section 105(c)(2), MSHA's claims for relief included a proposal for assessment of an appropriate civil penalty in the event it prevailed on its discrimination claim. Accordingly, I believe that any proposed settlement in cases of this kind require a Judge's approval pursuant to rule 30. See, Secretary of Labor (MSHA) and John Koerner v. Arch Mineral Coal Company, DENV 78-564, March 9, 1979, a discrimination case decided by now retired Judge Littlefield on February 7, 1979. Judge Littlefield approved a settlement entered into by the parties on the ground that "the parties have successfully negotiated a settlement on all matters formally in issue", and he vacated a reinstatement order previously entered in the case. On review, the Commission remanded the case to the Judge in order to supplement the record with (1) the terms of the settlement and (2) to document the fact that the employee agreed to or otherwise acquiesced in the negotiated settlement. Further, in a recent case decided by Judge Steffey on January 8, 1980, MSHA and James Blevins, et al., v. Cedar Creek Coal Corporation, VA 79-55-D, he approved a discrimination case settlement and permitted withdrawal of the complaint on the basis of his findings that all of the affected miners signed the agreement and that it reflected a reasonable resolution of all issues presented in the proceedings.

Conclusion

After full consideration of the record adduced in these proceedings, including the transcripts of the testimony presented by the witnesses who testified in the two-day hearing session of October 23 and 24, 1979, and the settlement agreement entered into by the parties, I conclude that the proposed disposition of these proceedings is in the public interest and should be approved. It seems clear to me that both Mr. Shapiro and the respondent are satisfied with the agreed upon disposition of the complaints

which were filed in these proceedings, and that the Secretary is in accord with the agreement. Accordingly, pursuant to 29 CFR 2700.30, the settlement is approved, and MSHA's motion to withdraw and dismiss is granted.

Order

Respondent is ordered to comply forthwith with the terms of the settlement as set forth above and to post the notice of the agreement as agreed. Upon compliance, these proceedings are dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

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Philadelphia, PA 19104 (Certified Mail)

Steve Shapiro, P.O. Box 137, Newhall, WV 24866 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

(703) 756-6225

FEB 14 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 79-39
Petitioner : A.O. No. 15-11014-03002
v. :
H & H COAL COMPANY, : Mine: Freedom No. 1 Surface
Respondent :

DECISION

Pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), the Secretary of Labor petitioned for the assessment of a civil penalty. A hearing was held on January 9, 1980 in Louisville, Kentucky.

The parties stipulated and I find:

1. Respondent, H & H Coal Company, is subject to the Act's jurisdiction, is a small operator, and operates Freedom No. 1 Surface.
2. I have jurisdiction over this case.
3. On November 20, 1978, Earl T. Leisure, a duly authorized MSHA representative, inspected Freedom No. 1 Surface and properly issued the citation in question.
4. Exhibit P-1 accurately reflects Respondent's history of previous violations.
5. Any penalty that I assess will not adversely affect Respondent's ability to continue in business.
6. Respondent acted in good faith in connection with this matter.

At the conclusion of the hearing, the parties waived the filing of written briefs, proposed findings of fact, and conclusions of law and I rendered the following decision from the bench:

Petitioner alleged that pursuant to Section 110 of the Act a civil penalty should be assessed against Respondent for violating the Safety Standard at 30 CFR 77.404(a).

That Standard reads "mobile and stationary machinery and equipment shall be maintained in safe operating condition, and machinery or equipment in unsafe condition shall be removed from service immediately."

Petitioner contends that in permitting a vehicle, which was used for drilling to be operated with its front, rear and side windows removed, Respondent did not maintain that vehicle in a safe condition in that the vehicle's driver could have been injured by the sharp edges of the window frames and by dust or the debris flying back from the drill to the front window opening. I agree.

I find that the operation of this vehicle without windows constituted an unsafe operating condition, and this violated the Standard at 30 CFR 77.404.

I find that there was some danger of the driver being struck by dust and/or debris that might come into the front of the vehicle through the front window opening. A window would have protected the driver against this danger.

To a lesser extent, there was possible danger from the windows' edges.

There is some dispute as to the sharpness of the edges in and about the window frames, and in view of the fact that the vehicle moved slowly and the driver generally kept his hands on the controls, this danger was slight.

There was little negligence involved since the violation was based upon an interpretation of the regulation, which the operator legitimately disagreed with and of which the operator had no advance notice.

In consideration of the above, as well as the other criteria under Section 110(i), including H & H's rapid compliance and good faith and its efforts to prevent repetition of this violation, I assess a penalty of \$15 against the operator for this violation.

Accordingly, it is ordered that H & H Coal Company pay a penalty of \$15 on or before 30 days after it receives a copy of my signed decision and Order in this matter.

The bench decision is AFFIRMED.

ORDER

Respondent is ORDERED to pay \$15.00 in penalties within 30 days after receipt of this Order.

Edwin S. Bernstein

Edwin S. Bernstein
Administrative Law Judge

Distribution:

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

Byron W. Terry, Safety Director, The Hoke Company, Inc, Box 61, Cromwell, KY 42333 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

(703) 756-6225

FEB 14 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 79-124
Petitioner : A.O. No. 15-10364-03003
v. :
: Mine: Prep Plant
GOLDEN R COAL COMPANY, :
Respondent :

DECISION

Pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), the Secretary of Labor petitioned for the assessment of a civil penalty. Petitioner alleged that Respondent violated the mandatory safety standard at 30 CFR § 77.1707(b), which reads:

The first aid equipment required to be maintained under the provisions of paragraph (a) of this section shall include at least the following:

- (1) One stretcher;
- (2) One broken-back board (if a splint-stretcher combination is used it will satisfy the requirements of both subparagraph (1) of this paragraph and this subparagraph (2));
- (3) Twenty-four triangular bandages (15 if a splint-stretcher combination is used);
- (4) Eight 4-inch bandage compresses;
- (5) Eight 2-inch bandage compresses;
- (6) Twelve 1-inch adhesive compresses;
- (7) An approved burn remedy;
- (8) Two cloth blankets;
- (9) One rubber blanket or equivalent substitute;
- (10) Two tourniquets;

(11) One 1-ounce bottle of aromatic spirits of ammonia or 1 dozen ammonia ampules; and,

(12) The necessary complements of arm and leg splints or two each inflatable plastic arm and leg splints.

Paragraph (a) reads:

Each operator of a surface coal mine shall maintain a supply of the first aid equipment set forth in paragraph (b) of this section at or near each working place where coal is being mined, at each preparation plant and at shops and other surface installation where ten or more persons are regularly employed.

A hearing was held on January 9, 1980, in Louisville, Kentucky. The issues are whether Respondent violated the standard and, if so, the appropriate civil penalty to be assessed, based upon the six criteria in Section 110(i) of the Act. At the hearing, Earl T. Leisure, the MSHA inspector who issued the citation, testified for Petitioner and Byron W. Terry, Respondent's safety director, testified for Respondent.

The parties stipulated, and I find:

1. Respondent, Golden R Coal Company, is subject to the jurisdiction of the Act.

2. Respondent operates a coal preparation plant called the "Prep Plant."

3. Earl T. Leisure is a duly authorized representative of the Mine Safety and Health Administration, and in his official capacity inspected the "Prep Plant" on September 18, 1978.

4. Respondent was properly issued the citation in question.

5. Respondent is a small operator.

6. Any penalty which I assess will not adversely affect Respondent's ability to continue in business.

7. The certified computer printout marked as Exhibit P-1 reflected an accurate history of previous violations.

Mr. Leisure testified that on September 18, 1978, he inspected the Prep Plant, accompanied by Respondent's plant manager, Larry Gwinn. During this inspection, Mr. Leisure discovered that the plant's first-aid kit was missing certain items which are required by the standard. The missing items included one broken back board, 21 triangular bandages, three 4-inch bandage compresses, 12 1-inch adhesive compresses, an approved burn remedy, two cloth blankets, and one tourniquet. Mr. Leisure stated that the missing

items represented more than half of the required contents of the kit, and that in his opinion, they were "major items as opposed to small items." Although Mr. Leisure felt that Mr. Gwinn should have known of these shortages, he also felt that Respondent exercised good faith in rapidly abating the condition. The abatement notice, which was issued by another inspector, stated that the Prep Plant later procured a complete first-aid kit.

Mr. Terry testified that the operator read Section 77.1707(a) as requiring a full first-aid kit (i.e., one meeting all the requirements of Section 77.1707(b)) only at preparation plants where 10 or more persons are regularly employed. He stated that only three people were working at the Prep Plant at the time of the alleged violation. With respect to specific shortages in the Prep Plant's equipment on the day in question, Mr. Terry stated that additional blankets were available at the owner's house, which was 120 yards from the plant. The absence of a stretcher or broken back board was explained by the close proximity of ambulance service in Morgantown, Kentucky, which was apparently 5 to 10 minutes from the plant. On cross-examination, however, Mr. Terry admitted that if the standard applied to the Prep Plant, the availability of ambulance service did not provide the type of protection that compliance with the standard would. Finally, Mr. Terry stated that after the citation was issued, plant employees drove 89 miles to obtain a full first-aid kit, and that the kit was in the plant office the morning after the citation was issued.

The parties filed posthearing submissions directed to Respondent's argument that the requirements of Section 77.1707(b) do not apply to preparation plants employing less than 10 persons. Petitioner argues that Section 77.1707(a) designates working places and preparation plants specifically with the use of the word "each," while "shops and other surface installation(s)" are only generally designated. Thus, in Petitioner's view, the "10 or more persons" requirement relates back only to shops and other surface installations.

Respondent argued that the comma after the word "mined" in Section 77.1707(a) was intended to divide the sentence into those installations where a first-aid kit would be required regardless of the number of employees at the facility, and those installations where a kit would be required only if 10 or more persons were regularly employed.

I commend both parties on their arguments concerning the interpretation of a standard which is, admittedly, drafted in an ambiguous and confusing manner. However, on balance, I believe that Petitioner's interpretation is more persuasive. In reaching this conclusion, I am guided not only by the wording of the regulation, but by the Act's underlying remedial purposes.

As a general proposition, rules of statutory construction can be employed in the interpretation of administrative regulations. See C. D. Sands, 1A Sutherland Statutory Construction, § 31.06, p. 362 (1972). According to 2 Am. Jur. 2d, Administrative Law, § 307 (1962), "rules made in the exercise of a power delegated by statute should be construed together

with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason."

Section 2 of the 1977 Mine Act attests to the statute's remedial purpose as follows:

SEC. 2 Congress declares that--

(a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

(f) the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and

(g) it is the purpose of this Act (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health, Education, and Welfare and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining industry, research and development and training programs

aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.

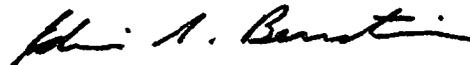
Remedial legislation such as the 1977 Mine Act must be interpreted in light of the express Congressional purpose of providing a safe work environment, and the regulations promulgated pursuant to such legislation must be construed to effectuate Congress' goal of accident prevention. Brennen v. Occupational Safety and Health Review Commission, 491 F.2d 1340, 1343 (2d Cir. 1974). "Should a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise of safety, the first should be preferred." District 6, UMWA v. Department of the Interior Board of Mine Operations Appeals, 562 F.2d 1260, 1265 (D.C. Cir. 1972).

Turning to the regulation itself, I do not agree with Respondent's contention that the comma after the word "mined" was intended to substantively separate the sentence so as to include preparation plants in the "10-person" limit. If such a meaning had been intended, I believe that the word "and" would have been placed after the word "mined", rather than after "preparation plant." I find Petitioner's argument concerning the use of the word "each" before "working place" and "preparation plant," but not before "shops and other surface installation(s)" to be more convincing. Accordingly, I find that Respondent violated 30 CFR § 77.1707(b).

However, I do not agree with the Assessment Office's proposed penalty of \$98. The language of this regulation is so unclear that it did not provide this operator with adequate notice of its meaning. Therefore, I assess a penalty of \$10.

ORDER

Respondent is ORDERED to pay \$10 in penalties within 30 days of the date of its receipt of this Order.



Edwin S. Bernstein
Administrative Law Judge

Distribution:

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Byron W. Terry, Safety Director, Golden R Coal Company, R.R. No. 1, Cromwell, KY 42333 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

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FEB 14 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 79-138
Petitioner : A.O. No. 15-11129-03003
v. :
THE HOKE COMPANY, INC. : Mine: Land Fill Strip
Respondent :

DECISION

Pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), the Secretary of Labor petitioned for the assessment of civil penalties for six citations issued to Respondent. A hearing was held on January 9, 1980, in Louisville, Kentucky.

The parties stipulated and I find:

1. Respondent, The Hoke Company, Inc., is subject to the Act's jurisdiction, is a small operator, and operates the surface coal mine designated as "Land Fill Strip."

2. On January 16, 1979, Earl T. Leisure, a duly authorized MSHA representative, inspected Land Fill Strip and properly issued the citations in question.

3. Exhibit P-1 accurately reflects Respondent's history of previous violations.

4. Any penalty that I assess will not adversely affect Respondent's ability to continue in business.

After submitting evidence, the parties waived filing briefs and proposed findings of fact and conclusions of law and I issued the following decisions from the bench.

Citation No. 399161

The violation, alleged under the Section 110 of the Act, is of 30 CFR § 77.410, which reads: "Mobile equipment such as trucks, forklifts, front-end loaders, tractors and graders shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse."

It is undisputed that Respondent violated that safety provision, and I so find.

There was a high degree of negligence. Knowing that the backup alarm on the vehicle was disabled, Respondent operated the vehicle. This constituted a willful violation of the standard.

The gravity was moderate. No one was in the area, according to Mr. Terry's testimony and the testimony of Mr. Leisure.

As Mr. Leisure testified, it is difficult to see behind this vehicle. The vehicle was in reverse at least 50 percent of the time, and the vehicle is extremely heavy, many tons in weight. Therefore, the risk of death or serious injury as a result of this violation can be quite great. Because of this violation and the negligence involved, sufficient penalty to encourage future voluntary compliance is required. However, taking into consideration the fact that the operator is a small operator and exercised good faith efforts to correct the condition, in this case, I assess a penalty of \$200. But for these factors, I would assess a larger penalty, and I would expect that the next time such a violation occurs, given this type of factual situation by this operator, the penalty would be larger.

Citation No. 399162

This citation involves an alleged violation of 30 CFR § 77.404(a), which reads: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Petitioner contends that in operating this truck with its muffler and tailpipe missing, Respondent exposed the occupants of that truck to the danger of being seriously injured by carbon monoxide fumes.

I find that Respondent was in violation of that provision. There was a fair degree of negligence. Respondent knowingly violated that provision.

The gravity was moderate. It was wintertime. There was a danger of the operators of that vehicle keeping the windows closed and of the fumes poisoning the occupants. However, there is no evidence that on this occasion the windows were rolled up.

This is a small operator, and the evidence is that the operator did achieve prompt compliance. Therefore, I find the amount of the penalty warranted for this violation in order to encourage voluntary compliance is \$125.

Citation No. 399163

I find that by not providing this explosive truck with a working horn, Respondent violated several safety standards of this Act.

In my opinion, Respondent violated all three standards that were discussed.

It was a violation of 30 CFR § 77.404(a) which reads: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

This was mobile machinery or equipment. A working horn is a requirement of operating a vehicle in a safe operating condition. In not having a working horn, Respondent violated that safety provision.

A similar violation occurred with respect to 30 CFR § 77.1302(b), which reads: "Vehicles containing explosives or detonators shall be maintained in good condition and shall be operated at a safe speed and in accordance with all safe operating practices."

In not having a working horn, this vehicle was not maintained in good condition.

Finally, although I agree with Mr. Terry that there is some question as to the applicability of the Section, 30 CFR § 77.1605(d), I agree that of the three sections, this may be the least applicable. I find that the language in this section is sufficiently broad to apply.

Therefore, I find a violation. I find moderate gravity. A horn is an important safety device in a vehicle of this kind. There is a question as to the degree of negligence. There is no evidence that the supervisory personnel of Respondent knew of this condition before the inspector discovered it, although there is some hearsay evidence that a driver stated that the condition existed for quite some time.

There was good faith compliance, and this is a small operator. As I have indicated, I consider these standards to be quite important. I assess a penalty of \$65, which I hope would be sufficient enough to encourage voluntary compliance of these standards on the part of the operator in the future.

Citation No. 399164

In view of what I have heard and upon consideration of the six criteria set forth in Section 110(i) of the Act, I will approve the settlement proposed by the parties and I will assess a penalty of \$84 for Citation No. 399164.

Citation No. 399165

After hearing the testimony of the witness and upon consideration of the six criteria set forth in Section 110(a) of the Act, I will approve the proposed settlement and I will approve the assessment. I will assess a penalty of \$106 for the violation in Citation No. 399165.

Citation No. 399200

The citation involves an alleged violation of the mandatory standard at 30 CFR § 77.1109(c)(1), which reads: "Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher."

The undisputed testimony of Mr. Leisure is that at the time of his inspection, the Caterpillar D9E tractor did not have a portable fire extinguisher. Therefore, Respondent violated the safety standard.

The operator was negligent in that this condition was readily observable. The extinguisher was reasonably large. It would have been a bright color, and it was the type of item that could have been noted upon an inspection.

The fact that there is no evidence that the officials in charge of the mine knew that the extinguisher was not on the vehicle does not nullify the fact that they should have or could have known upon inspection that the extinguisher was not on the vehicle.

A lack of an extinguisher could have caused serious injury to the driver of the vehicle in the event of a fire.

The gravity of the violation is somewhat mitigated by the fact that, as testified to by Mr. Terry, there were other extinguishers nearby. However, the regulation does require an extinguisher on each vehicle.

There was good faith correction by the operator, and this is a small operator.

I therefore assess a penalty for this violation in an amount of \$65, which I hope would be high enough to deter further violations of this kind and assure voluntary compliance of this Standard by the mine operator.

I affirm these six bench decisions.

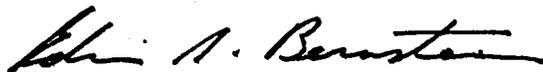
Summary

The following table summarizes the citation numbers, the amounts originally proposed by the Assessment Office, and the final assessments to be paid by Respondent:

<u>Citation No.</u>	<u>Proposed Assessment</u>	<u>Final Assessment</u>
399161	\$ 72.00	\$200.00
399162	\$106.00	\$125.00
399163	\$ 48.00	\$ 65.00
399164	\$ 84.00	\$ 84.00
399165	\$106.00	\$106.00
399200	\$ 40.00	\$ 65.00

ORDER

Respondent is ORDERED to pay \$645.00 in penalties within 30 days after its receipt of this Order.



Edwin S. Bernstein
Administrative Law Judge

Distribution:

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

Byron W. Terry, Safety Director, The Hoke Company, Inc., Box 61, Cromwell, KY 42333 (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
FEB 14 1980

SECRETARY OF LABOR; : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 79-53
Petitioner : Assessment Control
v. : No. 11-00614-03007
: :
SOUTHWESTERN ILLINOIS COAL : Streamline Strip Mine
CORPORATION, :
Respondent :

DECISION

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

Before: Administrative Law Judge Steffey

Pursuant to written notice dated September 4, 1979, a hearing in the above-entitled proceeding was held on October 10, 1979, in St. Louis, Missouri, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

MSHA's Petition for Assessment of Civil Penalty was filed in Docket No. LAKE 79-53 on May 14, 1979, seeking assessment of a civil penalty for an alleged violation of 30 CFR 77.1710(a).

Issues

Simultaneous posthearing briefs were filed on December 13, 1979, by counsel for MSHA and Southwestern Illinois Coal Corporation. The briefs raise the issues of (1) whether a violation of section 77.1710(a) occurred and, if so, what civil penalty should be assessed based on the six criteria set forth in section 110(i) of the Act and (2) whether Southwestern Illinois Coal Corporation should be required to pay a civil penalty for an alleged violation which was committed by an independent contractor.

Findings of Fact

My decision in this proceeding will be based on the findings of fact set forth below:

1. Southwestern Illinois Coal Corporation operates the Streamline Strip Mine which is located in Randolph County, Illinois. The mine employs 176 miners to produce about 5,600 tons of coal per day from the Illinois No. 6 coal seam which is 72 inches thick (Exh. 1, p. 3). Southwestern is controlled by Arch Mineral Corporation whose total annual coal production for the year 1978 was 7,783,693 tons. Ashland Oil Incorporated owns a 48.9-percent interest in Arch Mineral Corporation (Exh. 1, pp. 1 & 2).

2. Southwestern Illinois Coal Corporation, hereinafter referred to as the operator, entered into a contract dated June 22, 1977, with Darryll Waggle Construction, Inc., hereinafter referred to as Waggle. Under the contract, Waggle agreed to assemble and erect a Model No. 8200 Marion Dragline at the operator's Streamline Mine in accordance with blueprints and other specifications to be provided by the operator. The operator reserved the right to make changes in the drawings and specifications. Waggle was obligated to provide all labor and supervision and all tools except that the operator agreed to provide all welding machines, torches, grinders, air motors, and derrick or crawler cranes (Operator's Br., Exh. 1, pp. 1-3).

3. Waggle was obligated under the contract to provide a competent foreman or superintendent, satisfactory to the operator, at the site of the work at all times and Waggle was obligated under the contract to enforce strict discipline and good order among its employees (Op. Br., Exh. 1, p. 3). The contract provided that Waggle should complete the assembly and erection of the dragline within a period of 14 months after sufficient material had been received at the erection site for work to begin. The operator agreed to provide (1) a graded and drained erection site at the Streamline Mine, (2) an all-weather access road to the erection site, and (3) a railroad spur and unloading area for unloading dragline components, other equipment, and supplies (Op. Br., Exh. 1, pp. 4 & 5). Waggle was obligated under the contract to perform all work on a "cost-plus" basis and the operator reserved the right to inspect, audit, and make photocopies of all of Waggle's records (Op. Br., Exh. 1, p. 7). Under the contract, Waggle could not subcontract any work without obtaining the operator's express permission in writing (Op. Br., Exh. 1, p. 9). Waggle was obligated under the contract to reimburse the operator for any claims, damages, or lawsuits arising from the assembly of the dragline, including any claims or expenses arising under the Federal Coal Mine Health and Safety Act of 1969, as amended (Op. Br., Exh. 1, p. 10). Waggle was obligated under the contract to take all necessary precautions for the safety of employees and to comply with all applicable provisions of Federal, State, and local safety laws and building codes to prevent accidents or injuries to persons on or about or adjacent to the premises where the work was being performed (Op. Br., Exh. 1, p. 12).

4. An MSHA inspector on January 9, 1979, went to the operator's Streamline Mine and advised the operator's safety director, Mr. Allan Byrd, that he would be making an inspection at the site where Waggle was assembling the Marion dragline (Tr. 9). The inspector then went to the construction site office where he examined Waggle's preshift and accident reports. The inspector was accompanied on his examination of the construction site by

Waggle's safety representative, Mr. Sam Higginson, and the UMWA's safety representative (Tr. 10).

5. When the inspector was about 40 feet northwest of the dragline, he observed two of Waggle's employees at a point about midway of the boom. When the inspector first saw the workmen, they were about 220 feet from him. It appeared to the inspector that one of the employees was cutting metal with an oxygen-acetylene torch while the other watched or assisted in the cutting operation. The inspector started walking toward the men to determine whether they were wearing safety goggles. The man who was doing the actual cutting was wearing goggles, but the man who was watching the cutting operation was not wearing goggles. When the inspector was between 100 and 10 feet from the men, he calculated that the face of the man without goggles was within 2-1/2 feet of the cutting torch. The workmen did not realize that the inspector was in their vicinity until he was about 10 feet from them. At that time, they stopped working and turned to face the inspector (Tr. 12; 29; 55; 63; 86; Exhs. B and C).

6. The inspector learned from Waggle's construction site representative that the name of the workman who was observing the cutting process was Mr. Doug Hepp. The inspector advised Mr. Higginson, Waggle's safety representative, that Mr. Hepp was in violation of section 77.1710(a) which provides "[p]rotective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist." The inspector wrote Citation No. 771428 at 11:30 a.m., citing the operator for a violation of section 77.1710(a) because (Tr. 12; Exh. 2):

Doug Hepp, a classified welder, was observed assisting another welder in cutting out pieces of metal from a section of 1-1/2" plate. Mr. Hepp's eyes were within 2-1/2 feet from the cutting tip and he was not wearing any eye protection. The violation occurred in the boom area of the 8200 Dragline on the construction site. Mr. Hepp was under the supervision of Ralph Gaither.

7. Although Mr. Hepp testified that he keeps goggles in his tool box and wears them when he is cutting with a torch, it was necessary for Mr. Hepp to go to the welding shanty and procure a pair of goggles after he was cited by the inspector for not wearing them (Tr. 80-81). Both Mr. Horton, who was doing the cutting when Citation No. 771428 was written, and Mr. Hepp testified that Mr. Hepp was standing behind Mr. Horton while metal was being cut (Tr. 68; 76). Waggle provided the goggles used by its workers and Waggle always had plenty of goggles at the construction site (Tr. 81-82).

8. A master mechanic employed by the operator presented a diagram of a Model 8200 Marion dragline and testified that, in his opinion, it would have been difficult for the inspector to have determined from a distance of approximately 220 feet that Mr. Hepp's face was within 2-1/2 feet of

the tip of the cutting torch (Tr. 63). The master mechanic also testified that there were two buildings in the general area where the inspector was standing at the time he claims to have seen Messrs. Horton and Hepp working. The master mechanic expressed the opinion that the two buildings might also have obstructed the inspector's view of the place where Messrs. Horton and Hepp were working (Tr. 63). The master mechanic, however, was not present when the inspector made the investigation which resulted in the issuance of Citation No. 771428 (Tr. 66). Messrs. Horton and Hepp also expressed a belief that the inspector would not have been able to tell how close Mr. Hepp was to the cutting torch when the inspector was 220 feet from the cutting operation (Tr. 69; 77).

9. The inspector gave Waggle a period of 5 minutes within which to abate the violation of section 77.1710(a) and the violation was abated within the time allowed. Therefore, the inspector was of the opinion that the operator had shown a good faith effort to achieve rapid compliance (Tr. 19; Exh. 2).

10. The danger associated with Mr. Hepp's failure to wear goggles lies in the fact that a piece of molten metal could have flown up from the cutting torch and could have caused a serious eye injury (Tr. 15). The inspector believed that the operator had tried to the best of its ability to get all employees to wear protective eyewear (Tr. 17-18).

11. The inspector stated that it was MSHA's policy to cite the operator for violations attributable to work performed for an operator by an independent contractor. At the time the inspector wrote Citation No. 771428, he was solely concerned with bringing about compliance with section 77.1710(a) rather than with a question of whether he should have written the citation in the name of Waggle, instead of the operator of the Streamline Mine (Tr. 42-43). The inspector was aware of the fact that the Secretary has published some proposed regulations governing the issuance of citations or orders in the name of independent contractors and he recognized that MSHA's policy of citing the operator for violations committed by independent contractors might have to be revised after the regulations have been finalized (Tr. 49).

The Issue of Whether the Operator or Waggle Should Have Been Cited

In its brief (pp. 6-7), the operator correctly notes that all of the persons working at the construction site were employees of Waggle except for a construction superintendent who was employed by the operator to make sure that Waggle was conforming with the operator's blueprints and specifications for assembly of the dragline. The operator argues that Waggle was in the best position to control health and safety matters and that there is no justification to allow MSHA to carry out its policy of administrative convenience in citing operators rather than independent contractors who are in actuality responsible for violations.

MSHA's brief (pp. 9-10) appropriately cites the inspector's statement that he had issued the citation in the name of the operator because it was

MSHA's policy to cite operators for violations committed by an independent contractor's employees pending such time as the Secretary finalizes his proposed regulations governing the procedures to be used for citing independent contractors (Finding No. 11, supra).

The Commission has so far upheld MSHA in citing operators for violations committed by independent contractors (Secretary of Labor v. Republic Steel Corporation, 1 FMSHRC 5; Secretary of Labor v. Kaiser Steel Corporation, 1 FMSHRC 343; Secretary of Labor v. Consolidation Coal Company, 1 FMSHRC 347; Secretary of Labor v. Old Ben Coal Company, 1 FMSHRC 1480; and Secretary of Labor v. Monterey Coal Company, 1 FMSHRC 1781). In the Old Ben case the Commission noted, however, that MSHA's policy of citing operators for independent contractors' violations should be an interim policy and that if MSHA unduly prolongs that interim policy, instead of implementing direct enforcement procedures against the independent contractors, MSHA "* * * will be disregarding the intent of Congress" (1 FMSHRC at 1486).

The Commission's decision in the Old Ben case, supra, was not issued until 20 days after the hearing in this proceeding was completed. In the Old Ben case, the Commission held that citing an operator for contractor violations solely as a mere administrative expedient would be an abuse. The inspector was specifically asked on cross-examination if he had cited the operator for the contractor's violation as an administrative convenience. The inspector denied that he had cited the operator for mere convenience and stated that he had cited the operator in this instance because that was MSHA's policy (Tr. 42-43). Subsequently, the inspector stated that he was aware that regulations pertaining to citing independent contractors had been proposed and that he was aware that MSHA's policy of citing the operator would probably have to be changed after those regulations have been finalized (Finding No. 11, supra). In such circumstances, I find that the inspector's citing of the operator for Waggle's violation was permissible in this case and that MSHA's Petition for Assessment of Civil Penalty filed in this proceeding should be upheld as a proper way to proceed under the 1977 Act at the time Citation No. 771428 was issued.

The Issue of Whether MSHA Proved that a Violation Occurred

The operator's brief (pp. 3-6) contends that the inspector's testimony was not sufficiently probative to establish that a violation of section 77.1710(a) actually occurred. The operator bases its contention that no violation was proven on two primary arguments. First, the operator claims that the inspector was unable to give sufficient details about the actions of Mr. Hepp to establish that Mr. Hepp was assisting another welder in cutting pieces of metal, as was alleged in Citation No. 771428.

It is true that the inspector did not know precisely what Mr. Hepp was doing. The inspector said that Mr. Hepp (1) could have been merely observing the other welder cut the metal, (2) could have been picking up fallen pieces with a pair of tongs, or (3) could have been marking metal. The inspector

candidly conceded that although Mr. Hepp might have been doing any of the aforementioned acts, he could not recall the exact nature of Mr. Hepp's assistance. The inspector said that all he was really claiming was that Mr. Hepp was so close to the cutting torch that he should have been wearing goggles (Tr. 45).

Mr. Hepp corroborated the inspector's statement by testifying that both he and Mr. Horton had been told to cut pieces of metal from a large section of plate. Mr. Hepp stated that he had assisted Mr. Horton in marking the pieces before they were cut. Mr. Hepp further said that although both he and Mr. Horton normally would cut and weld each day, he did not recall that he had personally done any cutting on January 9, 1979, prior to the time that the citation was issued (Tr. 80; 83).

Mr. Horton also corroborated the inspector's testimony by stating that Mr. Hepp was helping him mark the pieces of metal for cutting (Tr. 68). Therefore, I find that the preponderance of the evidence supports the inspector's statement in Citation No. 771428 to the effect that Mr. Hepp was "* * * assisting another welder in cutting out pieces of metal" (Finding Nos. 6 and 7, supra).

The second argument made in the operator's brief (p. 4) is that the inspector could not have determined that Mr. Hepp's eyes were only 2-1/2 feet from the torch while the inspector was 220 feet away, particularly when consideration is given to the fact that two buildings were situated some place between the inspector and the site where the cutting was being done.

A distance of 220 feet is less than the length of a football field. Yet it is easy for a spectator with normal vision at a football game to tell when a player at the most remote part of the field is lying on the ground or running or catching a pass. I find that the inspector made a credible statement when he said he could determine from a distance of about 220 feet that Mr. Hepp was kneeling beside the man who was using the cutting torch. Moreover, it should be recalled that the inspector stated that he first observed the workmen when he was about 220 feet from them. He then said that while he was walking toward the men, he made his determination that Mr. Hepp's eyes were about 2-1/2 feet from the cutting torch. It is unreasonable for the operator to argue that the inspector should be able to specify the exact distance he was from Mr. Hepp when he made his determination that Mr. Hepp's eyes were 2-1/2 feet from the cutting torch. The inspector said that Messrs. Hepp and Horton did not realize that he was approaching them until he was about 10 feet from them. It is certain that the inspector would have been able to determine at some point before he was within 10 feet of the men that Mr. Hepp's eyes were within 2-1/2 feet of the cutting torch. The inspector's last statement on the subject was that he did not think that he made his determination that Mr. Hepp's eyes were within 2-1/2 feet of the torch at a distance of 220 feet, but he is certain that he was able to make that determination by the time he reached the 10-foot distance when the men stopped cutting and turned to face the inspector (Tr. 87-88).

The most that the operator's witnesses said about the inspector's ability to determine the 2-1/2-foot distance was that it would have been hard for the inspector to determine at a distance of approximately 220 feet that Mr. Hepp's eyes were within 2-1/2 feet of the cutting torch (Finding No. 8, supra). None of the operator's witnesses were asked to give an opinion as to whether the inspector could have made that determination when he was somewhere between 100 and 10 feet from the men. I find that the preponderance of the evidence supports a finding that the inspector made a credible statement when he said that he was able to determine that Mr. Hepp's eyes were within 2-1/2 feet of the cutting torch.

The operator's brief (pp. 5-6) also contends that its witnesses' testimony to the effect that Mr. Hepp always stood behind Mr. Horton when Mr. Horton was cutting is more credible than the inspector's testimony to the effect that Mr. Hepp was kneeling down and was within 2-1/2 feet of the torch while Mr. Horton was cutting. The operator's brief cites Mr. Horton's statement that Mr. Hepp stood to the rear of Mr. Horton while Mr. Horton was cutting. Mr. Horton also claimed that while he was cutting, Mr. Hepp was not engaged in marking the metal (Tr. 68; 71; 74). The operator's brief also cites Mr. Hepp's testimony to the effect that he always stood up and turned around when Mr. Horton started cutting with the torch. Mr. Hepp also testified that he was about 5 feet 7 inches tall and that his face was about 6 or 7 feet from the cutting torch when Mr. Horton was cutting (Tr. 76; 84).

The operator's brief (p. 6) additionally argues that the inspector's inability to be certain as to details is fatal to MSHA's case. In order for the inspector's lack of certainty as to what Mr. Hepp was doing to be fatal to MSHA's case in this proceeding, the lack of certainty would have to bear directly on the nature of the violation charged. The inspector was certain as to the vital point necessary for his testimony to support his allegation that a violation of section 77.1710(a) occurred, namely, the inspector said that he was certain that Mr. Hepp's eyes were close enough to the cutting torch to make it essential for him to wear goggles in order to protect his eyes from possible injury (Tr. 45). Moreover, as I have previously indicated above, the inspector's inability to know what Mr. Hepp had been doing before he came within the inspector's scrutiny did not prevent the inspector from correctly concluding that Mr. Hepp had unnecessarily exposed himself to the hazard of a possible eye injury by kneeling down close to the cutting torch.

As to the operator's credibility arguments, I find, for at least two reasons, that the inspector's testimony was more credible than that of Mr. Hepp. First, it should be recalled that Mr. Hepp testified that when Mr. Horton began cutting with the torch, he stood up and turned around (Tr. 76). At no time did Mr. Hepp ever deny that the inspector was within 10 feet of him before he realized that the inspector was in his vicinity. If Mr. Hepp had actually stood up and turned around while Mr. Horton was cutting with the torch, Mr. Hepp would have been in a position to see the

inspector approaching and would have been able to assert when the inspector cited him for failing to wear goggles that he was not even looking in the direction of the cutting torch, must less close enough to be injured by flying bits of molten metal.

The second reason for downgrading the credibility of Mr. Hepp's testimony is that Mr. Hepp testified that it was his practice to cut and weld every day that he was at the construction site. He stated that when he did cut or weld that he always wore goggles or an eye-shield. He further said that he kept his goggles in his toolbox. Despite Mr. Hepp's assertion that he kept his goggles in his toolbox, it was necessary for Mr. Hepp to go to the welding shanty in order to obtain goggles when he was cited by the inspector for failure to wear goggles (Tr. 80-81). If Mr. Hepp had been accustomed to wearing goggles when he was cutting, it is very unlikely that he would have had to go all the way to the welding shanty to procure goggles when his supervisor asked him to get them.

Finally, the operator's brief claims that MSHA could have produced other witnesses to substantiate the inspector's claim as to the 2-1/2-foot distance and to fill in other details lacking in the inspector's testimony. The choice of witnesses was a defect which was more apparent in the operator's presentation than it was in MSHA's. The inspector stated that Waggle's safety representative, Mr. Sam Higgerson, was with him at the time he observed Mr. Hepp violating section 77.1710(a) (Finding No. 4, supra). Yet the operator tried to cast doubt on the inspector's ability to see the cutting operation from a distance of 220 feet by bringing in a witness who was not even with the inspector at the time the violation was observed. Clearly, the only person who could have placed a real cloud of doubt over the inspector's testimony would have been another person who was standing at the same place the inspector was standing when the inspector first observed the cutting operation. The operator's failure to present Mr. Higgerson as a witness is a strong indication that Mr. Higgerson was also able to see Messrs. Horton and Hepp at a distance of 220 feet. Moreover, Mr. Higgerson would have been able to draw a diagram showing the exact location of the two buildings which were allegedly close to the west end of the dragline and Mr. Higgerson would have been able to state with certainty whether the inspector was standing in a place where the buildings would have blocked his view of the boom area where the cutting operation was in progress.

Based on my credibility determinations and the foregoing discussion, I find that the preponderance of the evidence shows that a violation of section 77.1710(a) occurred. It is now necessary to consider the six criteria set forth in section 110(i) of the Act to determine what civil penalty is appropriate.

Size of the Operator's Business

On the basis of the facts set forth in Finding No. 1, supra, I find that Southwestern Illinois Coal Corporation is a large operator and that

any penalty assessed in this proceeding should be in an upper range of magnitude insofar as it is based on the criterion of the size of the operator's business.

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

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

History of Previous Violations

Counsel for the operator and MSHA introduced at the hearing as Exhibit No. 1 some data which the Assessment Office used in this proceeding to arrive at a determination that the operator's history of previous violations would result in assignment of 8 points for the purpose of determining penalties in accordance with the procedures set forth in 30 CFR 100.3. The Commission held in Secretary of Labor v. Shamrock Coal Co., 79-6-5, 1 FMSHRC 469, that a judge is not bound by the procedures used by the Assessment Office in determining penalties and that de novo assessments are within the authority of the Commission and its judges. When I am considering motions for approval of settlements, there is reason for me to review the Assessment Office's findings as to the number of points which have been assigned under the six criteria. In a contested case, however, I would prefer that counsel for MSHA introduce a listing of respondent's actual previous violations, if any, so that I can make findings regarding the criterion of history of previous violations without having to examine the findings of the Assessment Office.

Normally, I increase penalties when there is evidence before me to show that a given operator has previously violated the same section of the regulations which is charged in MSHA's Petition for Assessment of Civil Penalty in the case under consideration. In this case, the parties stipulated that the operator has not previously violated section 77.1710(a). Therefore, I find that respondent has no history of previous violations which has to be considered when a penalty is assessed for the violation of section 77.1710(a) which is before me in this proceeding.

Good Faith Effort To Achieve Rapid Compliance

Citation No. 771428 gave Mr. Hepp a period of 5 minutes within which to procure goggles. Mr. Hepp was able to obtain goggles within the time given and the inspector terminated the citation 5 minutes after it had been issued. It was the inspector's opinion that a good faith effort to achieve rapid compliance had been shown (Tr. 19). Therefore, I find that a good faith

effort to achieve rapid compliance was made and the operator will be given full credit for that mitigating factor in the assessment of a penalty.

Negligence

Counsel for MSHA introduced as Exhibit No. 3 a form on which the inspector had indicated his views with respect to the criteria of negligence and gravity. On Exhibit No. 3, the inspector checked a box which states that "[t]he condition or practice cited could not have been known or predicted; or occurred due to circumstances beyond the operator's control." At the hearing, the inspector testified that the operator had tried to the best of its ability, short of discharging employees, to get the workers to wear protective eyewear (Tr. 18).

I find on the basis of the evidence in this proceeding that the violation of section 77.1710(a) was accompanied by a low degree of negligence.

Gravity

On the basis of Finding No. 10, supra, I find that the violation was moderately serious. The piece of metal which was being cut with the torch was supported by two crib blocks so that the molten metal would drop to the ground (Tr. 73). In such circumstances, there was not a very strong likelihood that Mr. Hepp would have received a severe injury because of his failure to wear goggles.

Assessment of Penalty

The inspector made the following recommendation with respect to the assessment of a penalty (Exh. 3, p. 2):

On this particular site, management has repeatedly attempted to enforce safe working habits. Some employees, however, attempt to circumvent the using of protective equipment. Although management is ultimately responsible for violations, I feel that in this case leniency should be exercised when assessing the penalty. It is impossible for management to accompany and supervise each employee every minute of the day.

Exhibit 1 indicates that the Assessment Office proposed a penalty of \$84.00 for the violation of section 77.1710(a) here involved. MSHA's brief (p. 11) requests that a penalty of not less than \$84.00 be assessed. As indicated above, I am not bound by the Assessment Office's recommended penalties, but my findings must be based on the evidence presented by the parties. The inspector testified that the operator was not negligent and the inspector made a special plea for leniency in the assessment of the penalty. The facts show that the violation was only moderately serious. In such circumstances, I find that the penalty of \$84.00 proposed by the Assessment Office is fair and reasonable in light of the evidence presented by the parties in this proceeding.

Findings and Conclusions

(1) Under the facts in this proceeding and current Commission precedents, MSHA's Petition for Assessment of Civil Penalty should be sustained in citing respondent for the independent contractor's violation of section 77.1710(a).

(2) Southwestern Illinois Coal Corporation should be assessed a penalty of \$84.00 for the violation of section 77.1710(a) alleged in Citation No. 771428 dated January 9, 1979.

(3) As the operator of the Streamline Mine and controller of the erection site involved in this proceeding, Southwestern Illinois Coal Corporation is subject to the Act and to all regulations promulgated thereunder.

WHEREFORE, it is ordered:

Within 30 days from the date of this decision, Southwestern Illinois Coal Corporation shall pay a penalty of \$84.00 for the violation of section 77.1710(a) alleged in Citation No. 771428 dated January 9, 1979.

Richard C. Steffey

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

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 14 1980

ALABAMA BY-PRODUCTS : Contest of Citation
CORPORATION, :
Petitioner : Docket No. SE 80-41-R
v. :
: Mary Lee No. 2 Mine
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent :

DECISION AND ORDER GRANTING
MOTION FOR SUMMARY DECISION

On December 12, 1979, Petitioner was issued Citation No. 748714 which alleged a violation of section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(f) (hereinafter the Act). That section provides that miners may accompany inspectors on mine inspections and suffer no loss of pay. 1/ On December 19, 1979, Petitioner filed a notice of contest of that citation which contended that it had not violated section 103(f) of the Act. Petitioner here moves for summary decision of its contest of citation.

1/ "Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

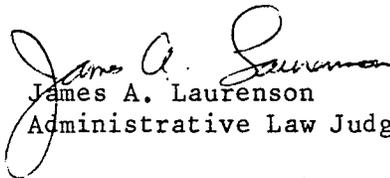
Summary decision shall be granted "only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law." 29 CFR 2700.64(b).

The facts in this case as outlined in Petitioner's affidavits are not disputed by Respondent. On November 29, 1979, 12 MSHA inspectors conducted a "blitz" inspection of Petitioner's mine. The inspection was not a "regular" inspection of the mine under section 103(a) of the Act. Miners were permitted to accompany the inspectors but were not compensated for the time they spent accompanying them.

The issue here is whether those undisputed facts constitute a violation of Section 103(f) of the Act. In Secretary of Labor v. Helen Mining Company, Docket No. Pitt 79-11-P (November 21, 1979) (appeal pending No. 79-2537 (D.C. Cir., Dec. 21, 1979)), the Federal Mine Safety and Health Review Commission (hereinafter Commission) held that section 103(f) requires payment to miner representatives accompanying inspectors only during "regular" inspections of mines.

The case does not involve a "regular" inspection of a mine. Pursuant to the Commission's decision in Helen Mining, supra, the miners therefore are not entitled to be compensated for the time they spent accompanying the inspectors. Petitioner did not violate section 103(f) of the Act and is therefore entitled to summary decision as a matter of law.

Accordingly, it is ORDERED that the motion for summary decision is GRANTED, and the citation is VACATED.


James A. Laurenson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 15, 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WILK 79-149-P
	:	A.C. No. 36-02011-03001
v.	:	
	:	Stoudt's Ferry Preparation
STOUDT'S FERRY PREPARATION COMPANY,	:	Plant
Respondent	:	

ORDER APPROVING SETTLEMENT AND
DIRECTING PAYMENT

On February 11, 1980, Petitioner filed a motion to approve a settlement in the above-captioned proceeding. The Petitioner states that the amount of the original assessment is \$470 and the amount of the settlement is \$200.

As grounds for its motion, the Petitioner states that the citation in question was issued for the operator's denial of entry to an authorized representative for the purpose of conducting an inspection. The third circuit, in Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3rd Ci. 1979), determined that the company was covered by the Mine Safety and Health Act and that MSHA has jurisdiction over its operations. The Supreme Court denied certiorari. The company was not exercising bad faith in denying entry. Petitioner further states that lack of negligence justifies a reduction in penalty.

Therefore, it is ORDERED that the motion to approve settlement is GRANTED and Respondent is ORDERED to pay \$200 within 30 days of the date of this order.

James A. Broderick
James A. Broderick
Chief Administrative Law Judge

Distribution:

Donald Brobst, Esq., Attorney for Stoudt's Ferry Preparation Company, Roseen, Jenkins & Greenwald, 15 South Franklin Street, Wilkes-Barre, PA 18711

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

Dkt1

Assessment Office, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 19 1980

CLIMAX MOLYBDENUM COMPANY, : Application for Review
Applicant :
v. : Docket No. WEST 79-325-RM
: :
SECRETARY OF LABOR, : Citation No. 333105; 7/27/79
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Climax Open Pit
Respondent :

DECISION

Appearances: W. Michael Hackett, Esq., Richard W. Manning, Esq., Climax Molybdenum Company, Golden, Colorado;
Robert A. Cohen, Esq., Michael Bolden, Esq., Office of the Solicitor, Arlington, Virginia.

Before: Judge Charles C. Moore, Jr.

At 4:30 p.m. on July 18, 1979, Terry Carter, a 28-year old miner, lost his life in his M-120 Lectra-Haul haulage truck when it turned over while coming down the road that leads from Ceresco Ridge to the crusher. Joint Exhibit No. 1 1/ is a drawing of the area of the accident and has the victim's route from shoveling on Ceresco Ridge Road to the accident site marked thereon. No one disputes the fact that the victim lost control of the haulage truck after passing the lower 835 curve and that he turned over about 2,000 feet farther down the hill in the vicinity of the K stockpile. As to the cause of the accident, there is complete disagreement.

MSHA itself has two positions. The enforcement branch, that is the inspectors and the Solicitor's Office, contend that the accident was caused because both the dynamic brakes and the air hydraulic brakes failed and that they failed because of poor maintenance practices and that management knew or should have known of the condition of the brakes. An unwarrantable failure order was issued by the inspectors. MSHA's technical support branch, however, conducted an extensive examination of the haulage truck after the accident and concluded that both the dynamic brakes and the air hydraulic brakes were functioning. The State of Colorado, on the other hand, says the accident was caused by the poor training program conducted by Climax and Climax contends that the accident was caused by the driver's failure to operate the haulage rig and the two sets of braking devices properly.

1/ The exhibit is attached to this decision.

The two sets of brakes on the Lectra-Haul M-120 haulage rig are a standard air-over hydraulic mechanical braking system and an electric dynamic retarding system. The air-over hydraulic system is sometimes referred to in the testimony as the "air brakes" and sometimes as the "service brakes," but they are not intended to act as the normal slowing system. The instructions given to the drivers and contained in the operator's manual are that unless there is an emergency, these brakes are not to be used when the vehicle is moving in excess of 3 miles per hour. They can be engaged by a foot pedal, by a knob on the instrument panel or by a lever on the floor. If they are not engaged by the foot pedal, the system is referred to as "dump brakes" (I gather from the testimony this is similar to parking brakes) or emergency brakes, but regardless of how actuated, the system involves air at a pressure in excess of 60 pounds per square inch actuating the hydraulic system which applies hydraulic pressure to cylinders which force brake pcuks (sometimes referred to in the testimony as "pads" or "brake linings") against the disks which are affixed to the wheels. The disks do not float laterally as in some braking systems where the hydraulic pressure is applied from only one side, but are firmly fixed and hydraulic pressure is applied from both sides of each disk. There are four disks in the rear section of a Lectra-Haul truck, two disks for each set of dual rear wheels. The devices containing the hydraulic cylinders and brake linings are called "calipers" and there are four cylinders and two brake linings to each caliper. One caliper is attached to each of the four disks in the rear section of the truck and to each of the two disks in the front section of the truck. These brakes would be damaged if used in excess of 3 miles per hour, but there is no dispute that they are capable of stopping the Lectra-Haul M-120 even if the dynamic braking system fails unless the rig is being operated at a speed in excess of 30 miles per hour (see testimony of Linda Knight).

The dynamic brakes are designed to slow the rig down to 3 miles an hour, but will not actually stop it. The driving mechanism in this type of rig is similar to a diesel electric locomotive. A diesel engine runs a generator and the generator provides the power to operate the truck. There is an electric motor for each rear dual wheel and when the dynamic retarding pedal (a pedal similar to and located next to the air brake pedal) is depressed, the electric motors in the wheels create some kind of magnetic retardation that will slow the truck in ordinary circumstances to 3 miles per hour. Several witnesses explained that when the dynamic retardation pedal is pressed the electric motors turn into generators and generate electricity which is dispersed into grids, thus slowing the truck. I have no idea what that means or why dispersing electricity created by the generators would slow the truck, but I suspect that the electricity is used to actuate an electromagnet which acts against the movement of the rig. But in any event, there was no dispute about the fact that, if working properly, the dynamic system would slow the haulage rig to 3 miles per hour.

There were 30 of these Lectra-Haul M-120 rigs at Applicant's mine. The No. 16 rig was the one in which Terry Carter lost his life on July 18, 1979, and there was considerable testimony that this was a troublesome piece of

equipment. Truck driver Linda Knight testified that she had driven rig No. 16 on several occasions and that the last time, on July 8, it had weak dynamic brakes. She testified that she was bringing it down unloaded from the Cirque Dump (see Joint Exhibit No. 1) on a route very similar to the one that Terry Carter had taken on July 18, and that she had had to use full dynamics to control the speed of the rig even though she had no load in the hopper. There was some documentary evidence indicating she had not driven the truck on July 8 but she was such an impressive witness that I believe her testimony rather than the entries in the documents. Mr. Miller is a truck driver trainer, that is, a truck driver who also trains new drivers. He testified that he had driven rig No. 16 on occasion and that he found the service brakes (air hydraulics) spongy and the dynamics bad. Carlos Archuleta testified that he was assigned regularly to rig No. 16 and that he had lost his dynamics approximately a month prior to the accident. He used his air hydraulic brakes to control the truck at that time. He stated that he did not like rig No. 16 because of the brakes and that he used several excuses to refuse it during the month before the accident. On the day of the accident when he heard that Terry Carter had been assigned to rig No. 16, he made a hand motion to Mr. Carter to refuse to drive the rig. Mr. Carter did not do so, however. Mr. William Harbuck testified that he had driven rig No. 16 on July 13 and that he noticed leaky brake hydraulics, poor suspension and weak dynamics. He had had to use his service brakes to control his speed and did not want to drive rig No. 16 anymore. During the accident investigation, however, the one conducted by MSHA shortly after the accident, he stated that the dynamics on rig No. 16 were as good as those of any of the other rigs. Truck driver Dries, on the other hand, who was the driver of rig No. 16 immediately preceding the shift during which the fatality occurred, stated that he was satisfied with rig No. 16 and that he had made eight trips using the same route as the victim without trouble. He did state, however, that because of a previous incident where a wheel fell off of a rig, he was extremely conscious of speed and never exceeded what he considered to be a safe speed with rig No. 16.

The haulage rigs at this mine are equipped with two-way radios so they can inform the base coordinator of any problems and also so they can receive instructions from the base coordinator as to what functions they are to perform and where they are to perform them. Shortly before the accident, evidently within 2,000 feet of the accident scene itself, Mr. Carter transmitted a message to the base coordinator that he was having trouble with his dynamics. According to the base coordinator, Lee Heilman, he stated that he was losing dynamics. She asked for his location and he replied "upper K." She asked him if he could make it to the F stockpile and said that he replied in the affirmative. According to Linda Knight, he said either "I'm losing dynamics" or "I have lost dynamics," but she could not state exactly which he had said. Mr. Miller heard Mr. Carter say "I lost my dynamics." He heard someone else say "Hit your service brake" and then heard the statement "I tried." Mr. Archuleta heard Mr. Carter say "Hello, base, I have lost my dynamics." Then he heard something like "I can't " or "It won't work now." He did not hear the intervening conversation that would indicate what Mr. Carter was referring to and no one has been able to identify who stated

"Hit your service brake." No witness indicated there was panic in Mr. Carter's voice when he reported his service brake problem and while there is obviously a difference between losing dynamics and lost dynamics, there is no way to determine whether Mr. Carter had actually lost his complete dynamic braking system or whether it was not performing to his satisfaction. He was obviously having trouble, but there was no indication that he was frightened. Like many radio communications, all statements were not heard in the same way by all of the people listening. A common feature of radio communication is having a transmission cut out by another transmission for one listener while another listener hears the original transmission intact. Someone heard Mr. Carter ask if he could use the service brakes, meaning the air hydraulic system. In a panic situation, I doubt that he would ask permission.

Mr. Carter's location at the time he announced that he was losing or had lost his dynamics, can be fixed with reasonable accuracy. The route he was traveling from the No. 3 shovel (all of the areas which I am now discussing are depicted upon Joint Exhibit No. 1) to the accident scene involved first negotiating a sharp curve known as the 835 upper curve. According to Linda Knight, it was clear that his dynamics had been working when he negotiated this curve or he could not possibly have made it. At the lower 835 curve, there is a road where, if the victim had been having trouble with his brakes, he could have turned up hill and thus stopped. It is therefore fairly clear that he had passed the lower 835 curve when he complained about his dynamics. He told Coordinator Heilman that he was in upper K, but all this means is that he was above the K stockpile where the accident occurred. But the transmission must have been made shortly after the victim went over the level spot at 835 lower curve and started down hill again on a grade that is between 8 and 9 percent. The location can also be fixed by the fact that Carlos Archuleta was driving the rig immediately preceding the one driven by Mr. Carter and was in the vicinity of the K stockpile when he heard the first transmission. He looked in his mirror and could not see rig No. 16, but when he turned around and looked directly back over his shoulder, he could see it and then when he turned back to make sure that he was still in the proper part of the road, he could pick up rig No. 16 in his mirror and he observed it for a few seconds noting that it was going at an excessive rate of speed. There are lights on the front of these rigs which indicate whether the dynamic or air hydraulic braking systems are being actuated. He did not see either of these lights on. It was later determined that the lights are actuated by the pedals themselves and do not indicate whether the braking system is actually working, but merely whether the pedals are being depressed. It was also later agreed that sometime before the accident Mr. Carter probably ceased his efforts to stop the truck and was preparing to abandon it. The fact that the door was open at the time of the rollover lends credence to this proposition. It is also supported by the fact that pictures taken at the scene and the testimony as to the description of the tire tracks indicate that the air hydraulic brakes were working at one point, but that no braking was evident immediately before the area where the rig struck the berm on the K stockpile. The photographs themselves are not convincing, but they do support the testimony that was given.

Inspector Stoutenger issued the first citation, but shortly after the accident investigation began, he left town. Inspector Marti, who accompanied Inspector Stoutenger during the initial field investigation at the scene of the accident, after studying numerous records provided by the company, amended the citation to charge an unwarrantable failure. 2/

Inspector Marti relied on the radio communication from the victim as evidence of the failure of the dynamic brakes and he relied on his inspection of the left rear dual after the rig was righted as evidence that the air hydraulic brakes were not working. In issuing the modification to allege an unwarrantable failure he relied on the maintenance records that he examined for a total of about 40 hours as indicating that management knew or should have known that the brakes were defective.

There were a number of discrepancies between the two inspectors' testimony and the testimony of the company witnesses and they disagreed on the interpretation of the photographs that were offered in evidence. There was disagreement between the inspectors themselves as to when the photographs were taken and as to whether the inspectors were present when the rig was righted and when it was moved approximately 25 feet. There is disagreement as to how some air may have gotten into the left dual wheel hydraulic system. There is disagreement about whether damage was done to the braking system when Applicant was moving the rig to the shop area, but it is clear that one of the MSHA officials authorized the move.

It is also clear that there was some tampering with the rig after the accident and before the physical investigation supervised by MSHA's technical support staff commenced. The throttle control lever was found to be hooked up improperly, in such a fashion that neither the dynamic braking system nor the electrical tramming system would work. It was therefore obvious, since the tramming system had worked during the climb to the No. 3 shovel and since the dynamic braking system must have been working when the rig came around the upper 835 curve, that someone for some reason unhooked this particular device and then reattached it in the wrong place. But no motive was speculated upon by either side and the wheels and other components were padlocked to prevent tampering. In the absence of any indication as to the motive for tampering or how such tampering could have affected the final results of the inspection, I see no alternative but to disregard it. If the MSHA investigators or attorneys know something about this tampering that they did not wish to present in evidence before me, they may wish to present it in a criminal case, but since I have heard no evidence as to who did the tampering or why it was done, it will not affect this decision.

2/ A key element of an unwarrantable failure citation is the absence of an imminent danger. If a violation causes the death of a miner, how can it be said that the violation did not create an imminent danger? The parties have not addressed this issue, however, so I will not pursue it further.

There are many other troublesome factors involved in this case. For example, batteries are important components of the dynamic braking system. If they are not fully charged, the system will be impaired. When the truck overturned, the battery electrolyte spilled and had to be replaced before the technical support tear-down and investigation could be completed. Also, since the rig had lost its air pressure as a result of the destruction of air hoses in the accident, the service or air hydraulic brakes were mechanically locked at the time the truck was righted.

In order to remove it to the shop, it was necessary to back off on some nuts or bolts to release the spring pressure on the brakes because when all air is lost or when it goes below 60 pounds per square inch, the brakes are spring loaded to set automatically. Therefore, when the technical support inspectors were preparing for their inspection, they had to reset the spring loading bolts or nuts and thus were not inspecting the braking systems in the exact condition in which they were at the time of the accident. The technical support recommendation was that more care should be taken in the future to avoid destroying evidence while moving a piece of equipment.

The technical support group nevertheless concluded that the dynamics and air hydraulic systems were working properly. When Mr. McGuire of the technical support group was testifying, there was an attempt to pin him down as to whether he meant the brakes were operable on the day of the accident or the day of the inspection and while he had apparently previously testified during the initial investigation that they were operable on July 18, he qualified this to say that they were operable on the date that he conducted the inspection. I think that is all that he could properly testify to.

Inspector Marti relied on an entry in a document in Government Exhibit No. 9 to show that a dynamic complaint about rig No. 16 on an earlier date had been ignored. The entry on the document said "Could not fix, maybe next time." When Applicant's first class electrician, Mr. Valverde testified, however, and identified Applicant's Exhibit No. 12, it became absolutely clear that before the rig left the shop, Mr. Valverde fixed the dynamics. He did so by replacing one or more of the so-called "cards" which are in fact devices containing a printed circuit on one side and various electrical components such as condensers and transistors on the other side. These are plugged in at various places in the electrical system of the M-120 rig and if certain ones heat up and fail, it affects the dynamics. Mr. Valverde replaced the particular one that concerned stabilizing the current and it appeared to work. He then tested the machine and released it. There was evidence in the case that this was all explained to Inspector Marti, but that he either ignored it or did not understand it. I noticed during the trial that Inspector Marti did have some trouble understanding questions put to him but I attribute this to the stress of being on the witness stand. It is to this same stress that I attribute his erroneous statement that no photographs were taken by MSHA after July 19 when it was perfectly obvious that at least one of the photographs was taken after the truck had been righted on July 20. His explanation was that he was talking about photographs he took and I believe him, but it was nevertheless his earlier

testimony that none of the MSHA officials had taken pictures of the rig at the accident site after July 19 (Tr. 336). Inspector Stoutenger at first stated that the pictures were taken on the 19th and that he was present when the rig was uprighted. He later agreed that he was not present when the rig was uprighted, but he was of the opinion that he and Inspector Marti had examined the left rear dual brakes on July 19 sometime after 1:30. Inspector Marti said that the examination had been on the next day and he is apparently correct since the rig was not righted until July 20. All these factors I attribute to the stress of being a witness, but in a case where both parties have conducted extensive discovery and have reviewed their notes in a serious manner, I am surprised that such discrepancies occurred.

There was testimony that rig No. 16's suspension system was so bad that it "threw you all over the cab" when you were trying to drive it. There were complaints about its steering. Either the suspension system or the steering system may have caused Mr. Carter to lose control of rig No. 16, but that is not the charge that the Government has brought in this case. It has charged that he lost control of the rig because neither the dynamic braking system nor the air hydraulic braking system was working and that Climax knew or should have known that these systems were defective. I will not speculate as to whether the State of Colorado or Climax have the correct answer to the cause of this accident. There are certain facts, however, that convince me that the cause was not the cause alleged by MSHA.

First, truck driver Dries had no trouble with either the dynamic system or the air hydraulic system on the previous shift. Second, as testified by Linda Knight, the dynamic system must have been working when rig No. 16 negotiated the upper 835 curve on the afternoon of the accident. Third, skid marks on a portion of the distance between the lower 835 curve and the K stockpile supported by the testimony of two witnesses that upon examining the brakes during the technical support investigation, they found heat checks and glazed cracks indicating extremely heavy use of the mechanical braking system, and their further testimony that the components appeared to be almost new (brake linings thicker than required, disks thicker than required and calipers properly positioned) indicated to me that the air brakes were working. Fourth, two witnesses testimony that when the vehicle was righted and pulled off the berm on July 20, the rear brakes were set and locked and caused the tires to skid when the vehicle was moved. In addition, the vehicle could not be moved to the shop without loosening the bolts or nuts which are attached to the springloaded braking system. There was some evidence that Inspector Stoutenger saw company personnel attempt to move the rig back up the hill, but that does not overcome the fact that the wheels skidded when the attempt was made to move the vehicle forward; the direction it was traveling at the time of the accident. I cannot ignore these facts despite the sympathy I have for miners who may be driving rigs that they consider unsafe. If the M-120 Lectra-Haul truck is inherently unsafe for this type of mining operation MSHA should act to prohibit its use. In this case, however, I cannot find that Applicant's maintenance procedures were insufficient. I am also somewhat surprised that a complete autopsy was not performed. Although I understand the examining physicians declared neither

drugs nor alcohol were involved in the accident, there was no investigation as to whether a heart attack or other disabling condition could have developed during the course of the accident.

The citation is VACATED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

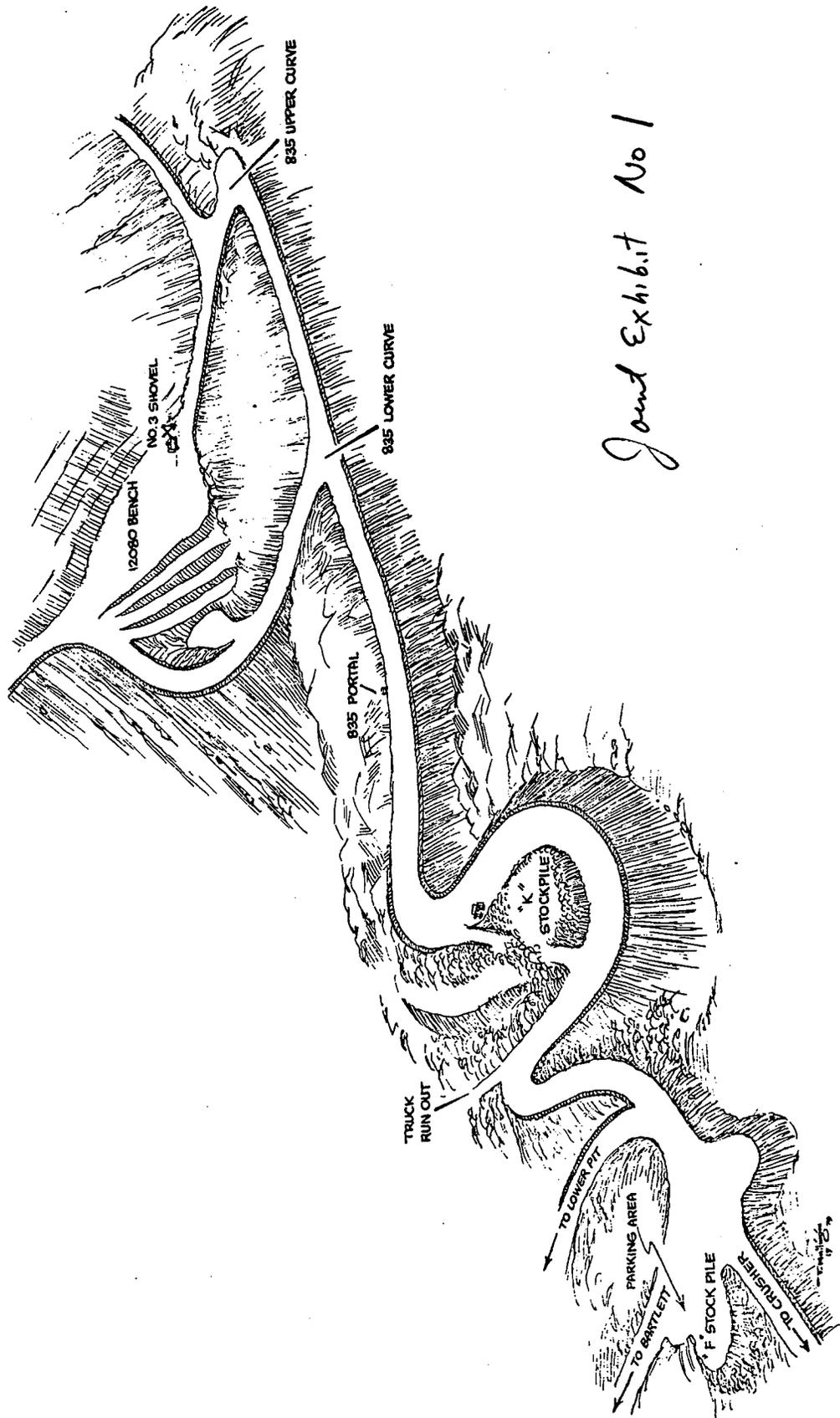
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Robert A. Cohen, Esq., Michael Bolden, Esq., MSHA, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

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David A. Jones, Jr., President, Oil Chemical & Atomic Workers International Union, Local No. 2-24410, P.O. Box 949, Leadville, CO 80461 (Certified Mail)

Edwin Matheson, Chairman, International Brotherhood of Electrical Workers International Local No. 1823, P.O. Box 102, Minturn, CO 81645 (Certified Mail)



Land Exhibit No 1

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 19 1980

CONSOLIDATION COAL COMPANY, : Application for Review
Applicant :
v. : Docket No. WEVA 79-351-R
: :
SECRETARY OF LABOR, : Ireland Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent :

DECISION

Appearances: Michel Nardi, Esq. Consolidation Coal Company, Pittsburgh,
Pennsylvania, for Applicant.

Barbara K. Kaufmann, Esq., Office of Solicitor, U.S.
Department of Labor, Philadelphia, Pennsylvania, for
Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This a proceeding filed by Consolidation Coal Co. (hereinafter "Consol")
under section 107 (e) of the Federal Mine Safety and Health Act of 1977,
30 U.S.C. § 817(e), to vacate an order of withdrawal due to imminent danger
issued by a federal mine inspector employed by the Mine Safety and Health
Administration (hereinafter "MSHA") pursuant to section 107 (a) of the Act.
The parties filed prehearing statements and the case was heard in Pittsburgh,
Pennsylvania, on January 8, 1980.

This matter involves a "fall" or "sag" of a concrete floor supporting an elevated conveyor belt in the preparation plant at the Ireland Mine. Consol concedes that there was a structural failure but contends that it had voluntarily corrected or abated the condition prior to the issuance of the order of withdrawal. Hence, Consol asserts that no imminent danger existed at the time the inspector issued the order in question.

ISSUES

The general issue is whether the issuance of the order of withdrawal due to imminent danger was proper. The specific issue is whether the voluntary correction or abatement of the condition by the operator prior to the issuance of the withdrawal order precludes a finding of imminent danger.

APPLICABLE LAW

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

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

Section 3(j) of the Act, 30 U.S.C. § 802(j), states: "'imminent danger' means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

STIPULATIONS

The parties stipulated the following:

1. Ireland Mine is owned and operated by Applicant, Consolidation Coal Company.
2. Consolidation Coal Company and the Ireland Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to Section 105 and Section 107 of the 1977 Act.
4. The inspector who issued the subject Order was a duly authorized representative of the Secretary of Labor.
5. A true and correct copy of the Subject Order was properly served upon the operator in accordance with Section 107(d) of the 1977 Act.
6. Copies of the Subject Order and Termination are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.
7. The alleged violation was abated in a timely fashion and the operator demonstrated good faith in attaining abatement.

8. Consolidation Coal Company agrees that a violation of the cited standard, 30 C.F.R. § 77.200 did exist on July 31, 1979.

SUMMARY OF THE EVIDENCE

The undisputed evidence shows that Consol operated a refuse conveyor belt through a gallery in its coal preparation plant at the Ireland Mine. The gallery in question was 23 years old and ran a distance of sixty feet from one wing of the plant to another on a grade which caused the gallery to be elevated between 10 feet and 27 feet above ground. The conveyor belt carried refuse and the structure was hosed down twice a day. The conveyor belt was 30 inches wide and was contained in an 8-1/2-foot wide gallery structure. All four sides of that structure were enclosed. The floor of the structure consisted of concrete reinforced with corrugated steel and steel wire mesh. On each side of the floor was a series of channels joined by plates which gave the appearance of an I beam. The channels were connected to steel angle bars which formed the sides of the gallery. The angle bars were covered with Transite which enclosed the structure.

Sometime between 1:55 a.m. and 2:10 a.m. on July 31, 1979, a "fall" or "sag" occurred in the gallery structure. All witnesses agreed that approximately 15 feet of the 60-foot structure "fell" or "sagged" approximately 1 foot. Shortly thereafter, Leon Heck, general foreman of the preparation plant was called to the site. He testified that he arrived at the plant at about 2:30 a.m. The conveyor belt was running but there was no material on the belt at the time of the occurrence. As to the structural failure itself, Mr. Heck observed that the channels forming one joint of the bottom

I beam failed. Six angle bars on each side of the structure separated from the floor during the occurrence. The area of the sag was identified as beginning approximately 10 feet from one wing of the plant and extending for a distance of approximately 15 feet. The sag was readily visible from the ground outside the structure. The I beam, constructed out of channels and cover plates, appeared to be bent.

Mr. Heck testified that after he inspected the structure he thought that the condition was serious and he turned off the conveyor belt and called the general superintendent of the mine. Thereafter, a conference occurred between Mr. Heck, the general superintendent, the master mechanic, and the shop foreman. It was agreed that a crib should be constructed under the sagged area. The conferees felt that the remainder of the structure had stabilized. Although Mr. Heck conceded that other angle bars were rusted or deteriorated at the floor level, he thought that they were sufficiently strong to support the remainder of the structure.

A work crew then constructed a crib out of 6-foot railroad ties. At the top of the crib, 10 foot railroad ties were used. A hydraulic jack was used to raise the structure 6-inches and lower it onto the crib. Although the inspector recalled seeing only one crib under the structure, Mr. Heck testified that a second smaller crib was constructed out of 30 inch railroad ties and situated adjacent to the first crib. Both cribs were constructed in approximately two hours.

After the cribs were constructed, the miners expressed concern to Mr. Heck about the possibility of Transite falling from the sides of the

structure and falling debris from a hole in the wall of the structure. The hole in the wall occurred when the structure sagged. Mr. Heck agreed with the miners and ordered that the area under and around the structure be roped and "dangered off." However, he left a walkway in the area under the structure so that miners could enter and leave the plant. The gallery and conveyor belt were not "dangered off." At approximately 7:30 a.m. a Consol vice-president arrived at the site and ordered the employment of a structural engineer and contractor to determine what permanent repairs were necessary. Upon completion of construction of the cribs and "dangerring off" the area under the gallery structure, normal operations were resumed.

At approximately 9:30 a.m. on the morning of July 31, 1979, MSHA inspector, Kenneth Williams, arrived at the Ireland Mine to conduct a regular inspection. At that time, two members of the union safety committee approached him, informed him that there was problem in the preparation plant and asked him to inspect it. These men informed him that the structure containing the conveyor belt fell during the prior shift and that although some repairs had been made, they were afraid of another fall. Thereupon, he entered the preparation plant and inspected the interior of the gallery. The conveyor belt was operating. He observed 20 angle irons on each side of the structure which formed the walls. Ten of these supports on the left side were deteriorated and separated from the beam at floor level. The walkway on each side of the conveyor belt was covered with wet debris of up to 1 foot in depth. The bottom support I beam appeared to be badly deteriorated as it was rusty and corroded. He entered the gallery from low side of the structure and he walked up to the high side on the left of the conveyor belt. He

testified that he did not cross over to the right of the conveyor belt but that side appeared to be worse than the left side. There is evidence that two angle bars on the left side had been recently welded to the beam. However, 10 other angle bars had deteriorated to the point that they were no longer attached to the beam. He spent approximately 20 minutes inside the gallery and walked back and forth several times. He testified that he did not feel safe inside the gallery but that he is exposed to hazards as part of his job.

Upon completion of his inspection of the interior of the building, inspector Williams went outside to complete his inspection. He observed that the I beam supporting the structure was bent. The structure had sagged to a depth of approximately 1 foot in an area extending for approximately 15 feet of the 60-foot structure. He observed one crib constructed out of railroad ties which was under part of the sagged area but not totally supporting it. The crib did not appear to eliminate the sag. There may have been two cribs close together but, if so, they gave the appearance of one crib. He denied the fact that the area under the structure had been "dangered off." The conveyor belt was operating at this time and the gallery structure was visibly vibrating. Although some vibration can be expected for a structure housing a conveyor belt, the inspector believed that the vibration he observed at that time was excessive and abnormal. He was afraid that the vibration would cause the crib to shake loose and of a total collapse of the structure due to its overall deteriorated condition. Inspector Williams testified that, "This is the worst deteriorated building that I've ever seen." If the structure collapsed, it would result in death or serious injury to miners. At that time he issued the order of withdrawal.

Consol called Leon Heck, general plant foreman, as its first witness. Mr. Heck testified that when he arrived at the preparation plant at about 2:30 a.m. on July 31, 1979, he inspected the area that had sagged and concluded that the problem was serious and could not be corrected immediately. He closed down the conveyor belt. He observed that both ends of the structure were still tightly connected to the walls of the building. Although he agreed that many of the angle bars were deteriorated, he believed that there was sufficient strength to support the structure. He also believed that the collapse was due to the deterioration and rusting of the gallery. He made no notes or drawings covering the number of angle bars that were separated or deteriorated. None of the miners complained to him about the safety of operating the conveyor belt after the cribs were installed. The only safety concerns expressed by any of the miners related to a fear of falling refuse from a 6 to 8 inch hole in the wall of the structure and falling Transite from the wall itself. Mr. Heck also testified that the conveyor belt was closed down during part of inspector Williams inspection and that the inspector walked on both sides of the belt. Thereafter, it was reactivated when the inspector went outside. Mr. Heck acknowledged the fact that the structure vibrated but stated that he had seen other galleries vibrate more than the one in controversy here. In any event, Mr. Heck stated his opinion that the structure was not dangerous at the time the withdrawal order was issued.

Consol next called Alan T. Olzer, an inspector escort employed by Consol, as a witness. Mr. Olzer essentially corroborated the testimony of Mr. Heck and added his opinions that the structure appeared to be stable prior to the arrival of the inspector and that he didn't believe anyone would be seriously injured.

The withdrawal order was terminated at 5:00 p.m. on July 31, 1979, after another crib was erected in the middle of the structure and two 85 pound rails were erected and welded under the higher side of the structure. On direct examination, Mr. Heck testified that the structure was subsequently replaced.

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of counsel have been considered. The evidence shows that in the early morning hours of July 31, 1979, the elevated structure housing the refuse conveyor belt at Consol's Ireland Mine failed. At a point approximately 20 feet above ground level, the concrete floor of the structure "fell" or "sagged" about 1 foot for one quarter of the length of the structure. The initial status of this condition was described by Consol's general plant foreman as serious. After consultation with other Consol employees, it was decided to support the structure by constructing two cribs under the structure. One crib was constructed out of 6 foot railroad ties and the adjoining crib was constructed out of 30-inch railroad ties. Since the overall appearance of the cribs was that of a single crib, I do not find any significant inconsistency in the inspector's testimony that he saw only one crib.

The issue is whether an "imminent danger" existed after Consol completed voluntary repairs. It should be noted that for the purposes of this case, the definition of "imminent danger" in section 3(j) of the 1977 Act is identical to the definition of that term in the same section of the 1969

Federal Coal Mine Health and Safety Act. Therefore, it is appropriate to look to decisions of the Circuit Courts and the Interior Board of Mine Operations Appeals which have construed that term.

The Interior Board of Mine Operations Appeals, in a decision affirmed by the Seventh Circuit Court of Appeals, construed "imminent danger" as being a situation in which "a reasonable man would estimate that, if normal operations designed to extract coal in the disputed area should proceed, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger." Freeman Coal Mining Company, 2 IBMA 197, 212 (1973), aff'd Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F.2d 741, 745 (7th Cir. 1974).

In a case involving an imminent danger order, the Fourth Circuit Court of Appeals stated: "[t]he Secretary determined and we think correctly, that 'an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.'" Eastern Associated Coal Corporation v. Interior Board of Mine Operations Appeal, 491 F.2d 277, 278 (4th Cir. 1974), aff'g Eastern Associated Coal Corporation, 2 IBMA 128 (1973). See also Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975).

In UMWA District No. 31 v. Clinchfield Coal Company, 1 IBMA 31 (1971), the coal mine operator asserted that since it had voluntarily closed its mine prior to the issuance of an order of withdrawal, the order was of no

moment. This argument was rejected by the Board which stated, "The purpose of a withdrawal order is not only to remove the miners but also to insure that they remain withdrawn until the conditions or dangers have been eliminated." Id. at 41.

In Eastern Associated Coal Corporation, 3 IBMA 303, 305 (1974), the Interior Board of Mine Operations Appeals held that "initiation of the abatement process on a voluntary basis, while laudable, does not in itself preclude the issuance of a section 104(a) [now section 107(a) under the 1977 Act] closure order where an inspector observes a condition or conditions constituting imminent danger, as that term is defined in the Act."

In the instant case, Consol had completed its voluntary temporary repairs to the gallery structure prior to the arrival of the MSHA inspector. The question to be decided is whether the condition of the structure, as repaired by Consol, constituted an imminent danger at the time the order of withdrawal was written. However, in order to properly evaluate the voluntary repairs, the underlying condition must be assessed. The undisputed evidence shows that there was a failure, "fall", or "sag" of the floor of an elevated structure at a coal preparation plant. This failure was initially evaluated by Consol's general plant foreman as serious. He ordered temporary repairs prior to an assessment by an engineer and a contractor whose employment was authorized by a Consol vice-president. The general plant foreman conceded that the failure was caused by deterioration and rusting inside the structure. Although two angle bars had been welded to the I beam after the failure, he admitted that there was additional deterioration to other joints of angle bars and the I beam. Inspector Williams was more

precise in his testimony that of the 20 angle bars on the left side of the structure, half were deteriorated to the point that they had separated from the I beam on the floor. The cribs which had been constructed voluntarily by Consol did not fully support the sagged area. Inspector Williams testified to excessive vibration which was visible from ground level. During the initial failure, the wall of the structure broke causing a hole to open in the wall. There was a danger that refuse from the conveyor would fall through this hole. There was further danger that pieces of the Transite wall might fall. Inspector Williams testified that he believed the excessive vibration combined with the deteriorated condition of the structure could result in a total collapse. He did not believe that the cribbing constructed by Consol would prevent such a collapse.

It is conceded that in normal operation of the plant, employees frequently are inside and under the structure. Consol agrees that it did not "danger off" the interior of the structure but asserts that it "dangered off" most of the area underneath the structure. However, it concedes that a walkway was maintained through the "dangered off" area so that miners could enter and leave the plant. Whether Consol "dangered off" the area as it alleged is not dispositive of the instant case. This is so because the test to be applied is whether "the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." (Emphasis supplied.) Eastern Associated Coal Corporation v. Interior Board of Mine Operations Appeals, 491 F.2d 277, 278

(4th Cir. 1974). Thus, "if normal mining operations were permitted to proceed in the area," miners going under the structure would be exposed to debris falling from a height of approximately 20 feet.

The evidence establishes that a sudden and unexpected structural failure occurred in the early morning of July 31, 1979 at the Ireland Mine preparation plant. Consol voluntarily made some interim repairs pending a subsequent study by an engineer and a contractor. After completion of the repairs the condition of the structure was as follows: (1) ten of twenty welds between the angle bars and the beam on the left side of the gallery were broken; (2) the interior of the gallery was deteriorated and rusted; (3) there was a hole in the side wall of the gallery through which refuse from the conveyor could drop for a distance of twenty feet to the ground; (4) there was excessive vibration of the structure when the conveyor was operating; and (5) miners were required to be in and under the structure during normal mining operations.

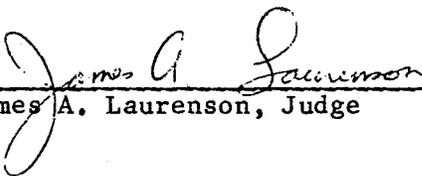
The MSHA inspector testified that the structure in question was the worst deteriorated one that he had seen. Because of the overall poor condition of the structure, the excessive vibration during operation, and the failure of the voluntary repairs to provide adequate support, he concluded that an imminent danger existed. Consol did not present any expert testimony to rebut these charges. Its primary witness, Leon Heck, testified that he had experience as an electrician but not as a construction engineer. While Leon Heck and Alan Olzer testified that, in their opinion, the crib which Consol constructed provided adequate support for the structure, I find

that the physical facts support the opinion of the MSHA inspector that it was just as likely as not that death or serious physical harm would occur due to a total collapse of the structure or from falling debris.

In conclusion, I find that MSHA has established, by a preponderance of the evidence, that an imminent danger existed at the time the order of withdrawal was issued.

ORDER

WHEREFORE, IT IS ORDERED that the Application for Review is DENIED and the subject withdrawal order is AFFIRMED.


James A. Laurenson, Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 20 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-155-PM
Petitioner : A.C. No. 39-00055-05001
v. :
: Yates Shaft Mine
HOMESTAKE MINING COMPANY, :
Respondent :

DECISION

Appearances: Steven P. Kramer, Esq., Trial Attorney, Office of the Solicitor, Mine Safety and Health Administration, for Petitioner;
Timothy M. Biddle, Esq., Crowell & Moring, Washington, D.C., and Robert Amundson, Esq., Amundson & Fuller, Lead, South Dakota, for Respondent.

Before: Judge Fauver

This case was brought by the Secretary of Labor under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for assessment of civil penalties for alleged violations of mandatory safety standards. The case was heard at Rapid City, South Dakota, on August 13, 1979. Both sides were represented by counsel, who have submitted their proposed findings, conclusions and briefs following receipt of the transcript.

Having considered the evidence and contentions of the parties, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent, Homestake Mining Company, operated a gold mine known as the Yates Shaft, in Lawrence County, South Dakota, which produced gold ore for sales in or affecting interstate commerce.

Citation No. 328801

2. On March 20, 1978, Iver Iverson, a federal mine inspector, accompanied by the relief foreman, Horace Randel, inspected Respondent's crushing

plant at the Yates Shaft. The facility housed four conveyor belts in a large building about 10 stories high, 200 to 300 feet long, and 100 to 150 feet wide.

3. They traveled into the crusher room to the head of the No. 4 belt and walked down about 100 feet of steps that ran alongside the belt. At the bottom of these stairs was a cement floor and passages to the right and left. To the left was the No. 3 belt and to the right was a stairway down to the tail end of the No. 4 feeder belt. The tail pulley of the No. 4 belt, protected by a metal frame, was located in a small recessed area (about 8 x 10 feet) and was about 4 feet directly in front of the stairway, which was the only means of access to this area. Just past the tail pulley was a dead end.

4. The stairway consisted of three metal grating stairs and descended about 3 feet. Each step was about 10 inches wide and 40 inches long. On one side of the stairs was a handrail and on the other side a concrete wall. Overhead lighting was provided.

5. The steps were covered with an accumulation of fine and loose rock pieces about 1 inch to 1-3/4 inches large. The accumulation covered the steps at about a 45-degree angle from the the bottom to the top. Only the metal of the bottom portion of the middle step was at all visible through the accumulation of material.

6. The loose material came from the No. 3 conveyor where it dumped onto the No. 4 belt. The manner in which the material had settled and was packed on the stairs indicated that it had been there for some time. The condition created difficulty in walking down the stairs, and posed a hazard that someone using the steps might fall, including the hazard of falling forward into the metal frame around the tail pulley.

7. At 2:15 p.m., Inspector Iverson issued a citation to Respondent, reading in part:

Stairway leading to the bottom of No. 4 feeder belt Yates crusher was covered with loose rock, loose material covered each step from front to back at approximately 45 degrees from horizontal. Three steps measured 10 inches wide, 40 inches long with each having a 8 inch drop, measured by a standard rule. Poor footing on step surface created a unsafe condition. Stairway was used by maintenance crew.

The citation was abated the following day.

8. There were three shifts per day, each with three men. One ran the crusher from the crusher platform, one removed chips from the belt, and the third did general cleanup work. In addition, from time to time crusher mechanics performed maintenance on the crusher and screens and greased the conveyors.

9. The cleanup man cleaned around the stairways and belts and through the travelways each shift. He would clean around the equipment in the cited area whenever he found it dirty. The crusher mechanics greased and checked the tail pulley about once a week.

10. Men used the plant's travelways routinely for maintaining the equipment, cleaning the travelways, and while supervising work activities. The travelways would also be used in the event of an injury to one of the crew.

11. The cleanup man would try to keep the cited stairway free from accumulations of loose material; however, a spillage could occur within a matter of a few minutes if a rock became lodged in the conveyor. When the conveyor was in operation, some spillage was expected and occurred frequently. The frequency of spillages was unpredictable and sometimes 2 or 3 hours could elapse without a spillage.

12. Rocks would occasionally become caught in the conveyor and cause a back up or spillage at the tail pulley. The excess load would ultimately trigger a mechanism to shut down the belt. When this occurred, the crusher's panel lights would be activated, indicating that debris was probably accumulating around the tail pulley.

13. This type of blockage and spillage would occur several times per shift depending on the amount of moisture in the rock and on how many rocks became caught in the hopper; it was very difficult to prevent completely.

14. The accumulation cited was left over from at least one prior shift.

15. A preshift examination on each shift consisted of the foreman traveling all the walkways and passageways and checking for safety conditions. No record of these examinations was made. A preshift examination of the cited area had not been made prior to the citation because the Government inspection was already in progress when the supervisor, Gene Pfarr, arrived.

16. Considering that the spillage was left over from at least one prior shift, management knew or reasonably should have known of the condition before it was found by the inspector.

Citation No. 328810

17. As part of its cut and fill mining sequence, Homestake constructs vertical shafts used as ore bins and adjacent manways between levels where mining is taking place. The purpose of the ore bins or "binlines" is to provide a vertical receptacle for loose ore to fall into as it is pulled to the top opening with a "slusher." The mouth of the shaft is 5' x 10' and of this the ore bin is 5' x 5'. The top of the ore bin is normally protected by two "grizzly bars" equally spaced across the opening; these prevent oversized pieces of ore from falling into the ore bin and act as a guard to

protect the miners from falling in. Also inside the shaft, and adjacent to the ore bin, is a manway containing ladders between the stope and the lower level where the ore is loaded. The ladders are offset on a series of landings about 20 feet apart.

18. The manway is separated from the ore bin by a solid wall. At the top of the shaft the ore is kept from falling into the manway by a "yankee bin." This is a wooden platform that begins over part of the opening of the manway and slants down at about 45 degrees into the ore bin. Most of the remainder of the manway opening is protected by lagging. Normally, only about 18" of the manway entry is open when the manway is used as a travelway.

19. As ore is mined in the stope, the height of the stope increases. Periodically, it becomes necessary to extend the ore bin and manway by adding a vertical extension at the top. This process, called "standing chimney timber," is performed by a small construction crew. After the chimney is installed backfill is placed around it to create a new working surface.

20. On March 30, 1978, construction was underway to extend an ore bin and manway in the 34D stope above the 4250 level. The Government did not prove that any other activity was occurring in the stope at the time.

21. The grizzly bars had been removed from the opening over the ore bin and all lagging boards had been removed from the opening above the manway.

22. In this particular stope, the ore bin descended about 80 feet to the 4250 level, where the ore came out at the bottom of the bin and was loaded into mine cars. The manway in the shaft consisted of offset ladders between landings about 20 feet apart vertically. A cable had been strung across the passageway on the 4250 level which led to the bottom entry of the manway. The cable had a sign on it indicating that the manway was closed. At the top of the manway, which was the only other entry to the manway, the first section of ladder had been removed.

23. At the time of the inspection, three of Respondent's employees were changing a broken cap at the top of the shaft in preparation for standing the chimney. As the shaft was being extended the top of the old timber would first be cleaned off. Six 11-foot, 10" x 10" posts would be placed on top of the old frame and braced. Caps and ties would be placed on the top and then the posts would be laced up with lacing and cement. A platform on which the men could work would also be built.

24. After all the muck was cleared out of the stope, the equipment would be torn down and the slusher would be placed in an area so that when the chimney was finished they could hoist it to the top before backfilling. The inspector estimated that it would take about 2 hours to change the broken cap, and the slusher would not have been used again until a new chimney section had been built and backfilled. There were several steps involved for backfilling and sometimes a stope would sit idle for quite a while. There

were about 100 chimneys at the Homestake mine. The chimney on the 34D stope was extended about once every 2 months and it required about three shifts to complete an extension.

25. At the time of the inspection, the stope had already been cleaned out and the slusher had been pulled up. There were two 11-foot, 10" x 10" posts leaning vertically against each other at about a 45-degree angle. The grizzly bars had been removed from the ore bin and the first 8-foot section of ladder in the manway had been removed near the top. Both halves of the shaft top were uncovered.

26. At 11:30 p.m., Inspector Iverson issued a citation (No. 328810) to the supervisor, which read in part:

Miners were standing chimney timber over open raised top measuring 5 feet wide and 10 feet in length with an 18 inch by 5 foot manway opening on the north end, 30 feet to the 4250 level manway landing. The muck in the raise was at a 45 degree from horizontal which bottomed out 10 feet from the top of raise. Location of chimney & raise was in the 34D stope 4250 level 9 ledge.

The condition was promptly abated by placing a 3-inch thick wooden covering over the opening. The Government proved the above-quoted factual allegations.

27. It was the inspector's opinion that one of the 11-foot posts or broken material being handled by the workmen could have fallen down the unobstructed manway injuring someone on the 4250 level or inside the manway. He also believed that one of the men could have stumbled or fallen through the opening to the ore bin. There have been about three fatalities and three or four serious injuries (none while a chimney was under construction) when men, who were working around the opening or were passing over it, stepped backward or stumbled over a loose rock and fell into the opening.

28. At the time of the inspection, the grizzly bars were not in place, the lagging boards had been removed, and the men were not using safety belts. This condition created a hazard to the miners working on the chimney construction.

Citation No. 328401

29. On April 4, 1978, Stanley Sims, a federal mine inspector, inspected Homestake's Yates shaft. In the area of the No. 3 borehole machine at the 1700 level he cited Respondent for a violation of 30 CFR 57.12-18 as follows: "Principal Power Switches at the No. 3 borehole machine, 1700 level, 7 ledge, 46 crosscut, were not labeled to show what units they control."

30. At the time of this inspection, the drill was set up at the right-hand side of the drift. There were three switch boxes on the opposite side

of the drift about 15 feet from the drill. The boxes were not marked to show the units they controlled. The middle box was much larger than the other two. It had two parallel lines of the same color that went from the bottom of the box to the power pack of the borehole machine, but the path of these lines was not clear to the eye as going to the borehole machine. It also had a red plastic handle that controlled the power to the area. The box on the right, the welder's box, and the one on the left, a 110-volt transformer box that controlled the slusher lights, both fed off the large box. There were two other smaller boxes about the size of the welder's box in the drift about 6 feet from the power unit. At the location of the borehole machine, the drift was about 15 feet wide. In other respects, this was a standard size drift--about 90 feet high and 7 to 8 feet wide.

31. There was a separate control panel next to the borehole machine. The buttons on the panel were properly labeled and were not the subject of a citation. A red stop button on the panel could deenergize the machine. Although it would stop the machine, the circuit to the power pack could be re-energized by pushing the start button again. If the stop button were inoperable, the main power box would have to be used to shut off the machine. The borehole machine had no "dead man" control.

32. The inspector considered the switch boxes on the wall as the primary switches because they controlled the feed to the secondary controls. By sight, the inspector was unable to determine readily which units the boxes controlled. He assumed the larger box was the master because it usually was, and that the welding machine and slusher lights were controlled by the other two.

33. There was a danger that, if the driller were in an emergency and unable to reach the drilling machine control panel, others might not know how to shut off the power at the wall immediately because the wall boxes were not marked.

34. It was rare at this mine that a primary switch box would not be labeled to indicate which unit it controlled.

35. The borehole machine would be moved into an area that had been mined out and it would normally take about 3 weeks to drill a 150-foot raise. The power unit had a 200-horsepower electric motor that powered two hydraulic pumps. The helper usually greased the machine, placed the rods in the rocker, and performed normal maintenance duties. He was usually present during periods of drilling. About 6 months of training would be required to become competent in running the drill. One of the first things a helper would learn was how to turn off the borehole machine. He would be the first to turn it on at the start of a shift and the first to turn it off by throwing the switch on the large circuit box on the wall.

36. As of the day of the inspection, the Respondent had recently obtained another borehole machine and the crews were divided. The driller at the site had not yet chosen a permanent helper and was using laborers instead. No laborer had shown up for work that day.

37. The citation was abated by placing a stencil label: "borehole" on the large circuit breaker box.

DISCUSSION WITH FURTHER FINDINGS

Citation No. 328801

On March 20, 1978, Inspector Iverson charged Respondent with a violation of 30 CFR § 57.11-1, which provides: "Mandatory. Safe means of access shall be provided and maintained to all working places." The inspector observed that the stairway leading to the tail pulley of the No. 4 feeder belt was covered with loose material that created an unsafe condition.

The basic issue as to this citation is whether section 57.11-1 applies to stairways such as the one involved here.

Respondent contends that the standard applies only to travelways since section 57.11 is introduced by the heading, "Travelways and Escapeways." By definition, Respondent argues, for an area to be considered a travelway it must be used on a regular basis (which implies more than just being accessible). "Travelway" is defined in 30 CFR § 57.2 as a "passage, walk or way regularly used and designated for persons to go from one place to another." Respondent states that "the evidence was clear that the stairs were used on an occasional basis for the sole purpose of access to the tail pulley for infrequent maintenance work * * *."

Petitioner asserts that the stairway was a travelway within the meaning of section 57.2 because mechanics traveled the stairway to check and grease machinery in the course of their regular maintenance duties, supervisory personnel traveled this area, and cleanup people regularly traveled this area.

Respondent also asserts that even if the stairway leading to the tail pulley was a travelway, section 57.11-1 was not violated because the alcove was not a "working place". "Working place" is defined in section 57.2 as "any place in or about a mine where work is being performed." Relying on the present tense of the definition, Respondent contends the standard applies only while work is in progress and notes that there was no evidence that at the time of the citation work activity was taking place or would be taking place in the area in the immediate future.

Petitioner contends that an area in which regular maintenance, such as greasing and repair work, is performed is a "place in or about a mine where work is being performed."

Finally, Respondent asserts that section 57.11-1 does not apply to the stairs because a more specific section, 57.11-8, applies. Section 57.11-1 speaks generally of maintaining safe access to working places. Section 57.11-8, which is not a mandatory standard, specifically applies to stairways. That section reads: "Ladderways, stairways, walkways, and ramps

should be kept free of loose rock and extraneous materials." Because section 57.11-8 is not a mandatory standard, Respondent contends, it cannot be enforced.

Petitioner agrees that section 57.11-8 is not a mandatory standard and states that it has since been revoked. Federal Register, August 17, 1979, Vol. 44, No. 161, p. 48530. Petitioner contends that section 57.11-1 was the proper standard to cite.

I conclude that at the time of the inspection, 30 CFR § 57.11-1 applied to the cited area.

The stairway was used about once a week by the crusher mechanics to maintain and grease the tail pulley. It was also inspected by supervisors and traveled by cleanup men whenever they cleaned a spill or an accumulation of loose materials. Those activities satisfy the requirement of regular use within the meaning of 30 CFR § 57.2. The stairway, by its nature, was designed for people to gain access from one area to another and was, therefore, a "travelway" under that section.

I also find that the tail pulley area was a "working place" as defined in 30 CFR § 57.2. During periods of maintenance and cleanup around the tail pulley, "work is being performed." In El Paso Rock Quarries, DENV 79-139-PM (December 17, 1979), Judge Moore said: "Inasmuch as employees are required to go into the tunnel to clean and repair, it is a workplace within the meaning of the regulation." I find Respondent's characterization of section 57.11-1 as requiring a safe means of access only "while work is in progress" incorrect.

Citation No. 328810

On March 30, 1978, Inspector Iverson charged Respondent with a violation of 30 CFR § 57.11-12 for failing to guard openings above the manway and ore bin. Section 57.11-12 provides: "Mandatory. Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed."

The threshold issue with respect to this citation is whether the manway was a travelway at the time of the inspection. Respondent asserts that the manway was not a travelway because at the time of the citation the manway was (1) closed at the top where construction was underway and an 8-foot section of ladder had been removed and (2) closed at the bottom by a cable with a danger sign.

The inspector considered the manway to be a travelway within the meaning of 30 CFR § 56.11-12. He said the manway remained open around the top while construction was underway and the last step would be to close it off when backfilling started. He believed that while men were still working

around the top the manway could be used as a travelway. At the time of the citation, it had not yet been closed off, and although he would not have expected anyone to descend into the manway (without first replacing the 8-foot section of ladder), he considered the manway subject to travel from above. There was no proof that such travel had ever occurred during this chimney extension or any other. The inspector did not inspect the bottom entry to the manway.

I conclude that the Government failed to prove that the manway was a "travelway" at the time of the citation. Use of the manway as a travelway was effectively stopped at the top by the fact of ongoing construction of the chimney, the removal of the 8-foot ladder section, and the existence and actual use of one or more alternative travelways, such as the one used by the inspector to get to the construction site. Respondent's evidence made a prima facie showing that, at the bottom of the manway, entry to the manway was effectively closed by placing a cable across it and hanging a danger sign. The inspector did not inspect or investigate conditions at the bottom entry; the Government's evidence did not rebut the prima facie showing made by Respondent. There was no solid evidence that miners had ever crossed a cable and danger sign to enter the bottom of the manway, during this chimney extension or any other.

Structurally, the 5' X 10' set of frame timber around which the construction crew was working consisted of two 5' X 5' openings. One of the openings was an ore bin; the other was what had been used as a manway and a Yankee bin. While the chimney was being extended, this half of the top portion became altered to a 5' X 5' opening that was not structurally or functionally intended to be a travelway. As mentioned, there was also a prima facie showing that, at the bottom of the manway, entry to the manway was effectively closed.

The openings at the top of the shaft were a sine qua non of a construction activity: standing chimney timber. Before the 11-foot timbers could be put in and braced, the coverings had to be removed and could not be replaced until this activity was completed.

The Government's evidence did show a dangerous construction activity (the absence of safety belts or lagging over a deep opening) but this did not prove a travelway violation as alleged in the citation. The safety standard on which the citation was based applied specifically to "openings above, below or near travelways." Because the construction sequence of standing chimney timber changed the structure and function of the manway to a construction site, there no longer existed a factual basis for the citation. Since the travelway standard did not apply to this activity, the relevant safety issue was whether the construction activity constituted an "imminent danger" under section 107(a). Since the Secretary did not allege an imminent danger, such issue is not before me.

Citation No. 328401

On April 4, 1978, Inspector Sims charged Respondent with a violation of 30 CFR § 57.12-8, which provides: "Mandatory. Principal power switches shall be labelled to show which units they control, unless identification can be made readily by location." The citation reads: "Principal power switches at the No. 2 borehole machine, 1700 level, 7 ledge, 46 X cut were not labelled to show what units they control."

The controlling issues as to this citation are whether the three circuit boxes were principal power switches and, if so, whether the units they controlled could be readily identified by their location.

Respondent asserts that there were two principal power switches at the location in question: The red "stop" button on the control panel controlled the hydraulic power for the borehole machine and the large circuit breaker box controlled the electrical power for the area. It contends that, by their location, these power switches were readily identifiable by "those miners who could reasonably be expected to be present when an emergency occurred and who might be called upon to stop the equipment."

I find that each of the circuit breaker boxes was a principal power switch, that the units they controlled could not be readily identified by their location, and that this condition created a safety hazard.

There were three circuit breaker boxes with power switches on the wall of the drift opposite the borehole machine and about 15 feet from the machine. The large box controlled three units--the borehole machine and the other two boxes; the two boxes controlled, respectively, the slusher lights and the welding machine. Each machine also had its own separate power switch. The borehole machine control panel included a prominent red stop or panic button to stop the machine immediately.

None of the wall boxes was marked. In an emergency, the borehole machine operator could be in danger but unable to reach the borehole control panel. In such an event, his safety could depend on the swiftness with which another person (whether his helper or any other person) could turn off the power at the wall. The existence of three boxes without markings could confuse someone as to the right switch to pull to cut off the power to the borehole machine. Such delay could be significant in an emergency.

CONCLUSIONS OF LAW

1. The undersigned judge has jurisdiction over the parties and the subject matter of the above proceeding.

2. Respondent violated 30 CFR § 57.11-1 by allowing loose material to accumulate on the stairway as alleged in Citation No. 328801. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of \$100 for this violation.

3. Petitioner did not meet its burden of proving a violation as alleged in Citation No. 328810.

4. Respondent violated 30 CFR § 57.11-18 by failing to label principal power switches as alleged in Citation No. 328401. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of \$100 for the above violation.

ORDER

WHEREFORE IT IS ORDERED that (1) the charge based on Citation No. 328810 is DISMISSED, and (2) Homestake Mining Company shall pay the Secretary of Labor the above-assessed civil penalties, in the total amount of \$200, within 30 days from the date of this decision.


WILLIAM FAUVER, JUDGE

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 20, 1980

SECRETARY OF LABOR, : Complaint of Discharge,
MINE SAFETY AND HEALTH : Discrimination, or Interference
ADMINISTRATION (MSHA), :
ex rel Billy Gene Kilgore, : Docket No. VA 79-144-D
Applicant :
v. :
: :
PILOT COAL COMPANY, :
Respondent :

DECISION

Appearances: James H. Swain, Esq., and Kenneth L. Stein, Esq.,
Office of the Solicitor, U.S. Department of Labor,
Philadelphia, Pennsylvania for Applicant;
J. Robert Stump, Esq., Sturgill & Stump, Norton,
Virginia for Respondent.

Before: Chief Administrative Law Judge Broderick

Statement of the Case

The complaint filed in this proceeding on September 20, 1979, alleges that Billy Gene Kilgore was discharged by Respondent on or about May 18, 1979, because of activity protected under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). Pursuant to notice, a hearing on the merits was held in Norton, Virginia, on November 29, 1979. Billy Gene Kilgore and Donnie Brickley testified for the Applicant. Bruce Arwood, Darrell Baker, Mack Thacker and Kelly Fultz testified for the Respondent. Both parties were afforded the opportunity to submit post hearing briefs. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

Statutory Provision

Section 105 of the Act provides in part:

(c)(1) 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 miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

(2) any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such

affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his paragraph.

Issues

1. Whether Applicant Billy Gene Kilgore was discharged by Respondent on or about May 18, 1979?
2. If so, whether the discharge was because of activity protected under section 105 of the Act?
3. If Applicant was not discharged but resigned, was his resignation a constructive discharge?
4. If so, was it because of activity protected under section 105 of the Act?

Stipulation

The parties made the following stipulation on the record:

Number one, Pilot Coal Corporation is a coal mining corporation doing business in the Commonwealth of Virginia and maintains its principal offices in Wise, Virginia.

Number two, the corporation, as of this date, operates one underground mine and one surface mine. Surface mine No. 2 employs approximately [eight] employees on one production shift per day. The mine operations of the Respondent would be classified as "small". Total daily tonnage from the underground mine is 100 tons and 200 tons from the surface mine.

Number three, Respondent has never been found guilty civilly or criminally of a violation of the discrimination provisions of the Federal Mine Safety and Health Act (Coal Mine Health and Safety Act).

Number four, the Complainant, after termination did not seek reinstatement with the Respondent, and the Respondent did nothing to hinder the resolution of the instant matter.

Number five, if Clarence A. Goode were called to testify he would state: (A) I have been employed by MSHA

(MESA) since January of 1971. (B) I have been a special investigator since October, 1977. (C) As a special investigator I investigate complaints under Section 105(c) and Section 110 of the 1977 Act. (D) I have received extensive training totaling 240 hours in regard to the execution of my duties as a special investigator. Further, I have conducted to date approximately twelve discrimination cases and have supervised other investigations of discrimination complaints conducted by my staff. These supervised investigations total about 85 cases.

Number six, in the instant case, from my investigation, I conclude that the alleged discrimination which may have taken place did not indicate a pattern or practice of any general discriminatory action by the Respondent.

Seven, in the event that the maximum penalty authorized under this Act were assessed against the Respondent, the payment of said penalty would not significantly affect the Respondent's ability to continue in business.

Number eight, if Respondent were called to testify, Kelly Fultz, corporation president, would testify that if the maximum penalty were assessed against the Respondent, it would significantly affect the Respondent's ability to continue in business. And that is the end of the stipulation.

Findings of Fact

1. The facts stated in the above stipulation are accepted and adopted as Findings of Fact.
2. Applicant was hired by Respondent in or about January, 1978, primarily to operate a front-end loader, but also to operate dozers and haulers.
3. On one occasion prior to May 1979, Applicant quit his job after spilling some oil on his person while waiting to fuel his front-end loader. After about a week, he returned, and was accepted back on the job.
4. On May 14, 1979, the front-end loader was having problems with its turbo charger and was removed from service until a needed part could be procured.
5. On May 15, 1979, Applicant was assigned to drive a 35 ton hauler truck. His only previous experience on such a vehicle was about 7 years previously when he intermittently drove a truck for about a month.

6. On May 15, 1979, Applicant drove the hauler, most of the driving being on level ground. He complained of the brakes and brake fluid was added. Applicant did not have any other difficulties driving the hauler on that day.

7. On May 16, Applicant was required to drive his truck up a newly-made incline to the loading point. Because there was not room to turn around at the loading point, the truck had to be backed up the incline. The road was soft and with an empty truck it was difficult to back up. Applicant was unable to back up the incline and was afraid of turning the truck over. After another driver hauled several loads, there was enough room to turn around at the loading point.

8. Applicant then drove up forward and hauled approximately six loads. He testified that he was having difficulty with the retarder brakes and was unable to slow the truck sufficiently to successfully negotiate the curve coming down the incline.

9. After he got his last load that day while turning, one wheel dropped into a hole and the other ran up on a rock. Applicant got out of the hauler and it was righted by another driver.

10. Applicant then told the mechanic and the foreman that he did not think he could operate the hauler safely and he was quitting.

11. The road was over 16 feet wide, had a berm on one side and the bank on the other. There was loose material where the road had been recently regraded.

12. The foreman attempted to persuade Applicant not to quit, and offered to put him on sick leave for the remainder of the day. Applicant refused the offer.

13. On May 18, 1979, Applicant returned to the mine, having filed a complaint with MSHA the previous day, and was told that the loader was not fixed and that driving the hauler was the only work available for him.

14. Applicant was not told on May 16 or May 18 that he was discharged.

15. Applicant Billy Gene Kilgore was not discharged from his employment by Respondent on or about May 18, 1979, but voluntarily left the employment.

16. Applicant quit his job in part because he was afraid of driving the hauler up and down the incline.

17. Neither the hauler nor the road were unsafe for normal operation.

18. The circumstances surrounding applicant's resignation did not constitute a constructive discharge.

Conclusions of Law

1. At all times relevant to this decision, Applicant and Respondent were subject to the provisions of the Federal Mine Safety and Health Act of 1977.

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

3. Applicant was not discharged, interfered with, or otherwise discriminated against because of activity protected under section 105 of the Act.

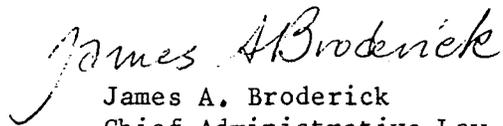
Discussion

The evidence establishes that Kilgore was not discharged but voluntarily quit his job. The evidence further establishes that there were no safety hazards related to the road or the hauler. He did not wish to continue work because he was fearful that he would be injured due to his lack of experience with the vehicle. I do not believe that refusal to work under these conditions is activity protected under 105(c) of the Act, or that it can be construed as a discharge or discrimination by Respondent forbidden by that section.

4. Since Respondent did not violate the Act as alleged in the complaint, no penalty is assessed.

ORDER

Based upon the above findings of fact and conclusions of law, the complaint is DISMISSED.


James A. Broderick
Chief Administrative Law Judge

Distribution:

J. Robert Stump, Esq., Attorney for Pilot Coal Company, Sturgill & Stump, P.C., 464 Park Avenue, Norton, VA 24273 (Certified mail)

James H. Swain, Attorney, Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified mail)

Mr. Billy G. Kilgore, Box 1241, Wise, VA 24293

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

(703) 756-6210/11/12

FEB 21 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. MORG 79-26-P
Petitioner : A.O. No. 46-05452-03001
: :
v. : No. 1 Strip Mine
: :
COALTRAIN CORPORATION, :
Respondent :

DECISION AND ORDER

The parties have failed to show cause why the findings and conclusions contained in the attached Order of January 28, 1980, should not be entered as the decision and order of the Presiding Judge in this matter with respect to the seven citations in question.

Accordingly, it is ORDERED that said findings as to liability and the penalties warranted be, and hereby are, CONFIRMED and incorporated herein. It is FURTHER ORDERED that the operator pay the penalty finally assessed, \$280.00, on or before Friday, March 14, 1980, and that subject to payment the captioned matter be DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

(703) 756-6210/11/12

JAN 23 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. MORG 79-26-P
Petitioner	:	A.O. No. 46-05452-03001
	:	
v.	:	No. 1 Strip Mine
	:	
COALTRAIN CORPORATION,	:	
Respondent	:	

ORDER

The captioned petition for assessment of civil penalties was filed on November 22, 1978, and answered by the operator in a letter filed on December 21, 1978. Upon the operator's failure to fully comply with the requirements of the Pretrial Order of May 1, 1979, a default order issued assessing as final the reduced penalties recommended by counsel for the Secretary in his pretrial response filed May 25, 1979. The Commission directed the matter for review *sua sponte*, found there was no default, and by decision of November 30, 1979 remanded the matter to the Presiding Judge for further proceedings. On January 17, 1980, counsel for the Secretary responded to the order of December 11, 1979 directing that he address the defenses and mitigating circumstances raised by the operator.

An independent evaluation and *de novo* review of the parties' submissions discloses that there is no dispute as to the material facts, and that the record supports the following findings of fact and conclusions of law:

1. Citation No. 015441 alleges failure to provide a working, audible reverse alarm on a front end loader as required by 30 CFR 77.410. The operator admits the fact of violation, but asserts in mitigation that the machine operator was the only person allowed in the pit so as to assure that no miner would possibly be harmed by the lack of an alarm. Counsel for the

Secretary does not dispute this. Thus, the record supports a finding that the violation occurred as charged, that the operator was ordinarily negligent, and that the violation was non-serious. Accordingly, and after considering the other statutory criteria, I conclude that a penalty of \$100.00 is warranted for the violation found.

2. Citation No. 015478 alleges failure to provide an approved sanitary toilet facility in a location convenient to the worksite as required by 30 CFR 71.500. The operator denies that a violation occurred, and maintains that a complete indoor bathroom was located within 50 feet of the haulage road leading to the worksite. The operator further claims that these facilities were approved by a previous inspector, and that they were also subsequently approved by the inspector who issued the instant Citation. Counsel for the Secretary does not deny this, but states merely that "the manner of compliance does not negate the existence of the violation," thus suggesting that a violation occurred solely because the facilities were not approved by the inspector at the time he issued the citation, notwithstanding his subsequent approval of the same facilities. I reject this contention. The record supports a finding that toilet facilities were provided in accordance with the requirements of the standard, and the citation should accordingly be vacated and the petition dismissed as to this charge.

3. Citation No. 015479 alleges failure to provide berms or guards on the outer bank of an elevated roadway as required by 30 CFR 77.1605(k). Counsel for the Secretary asserts that although the lack of berms or guards can create a serious risk of injury or death if equipment were to topple from the roadway, the operator was not negligent because winter snows had washed out the existing berms. The operator does not deny the fact of violation, but asserts that there were ruts made by the trucks at least 12 inches deep for the entire length of the roadway. Thus, the record supports a finding that the violation occurred as charged and that the violation was serious, but that the operator was not negligent since the condition was beyond its control. Accordingly, and after considering the other statutory criteria, I conclude that a penalty of \$100.00 is warranted for the violation found.

4. Citation No. 015480 alleges failure to provide first aid equipment at or near a working place as required by 30 CFR 77.1707(a). Counsel for the Secretary asserts that although the operator was negligent in failing to provide such equipment, it is unlikely that serious injury or death would result from the violation. The operator does not deny the fact of violation, but states that the inspector arrived shortly after miners had moved to a new work site and that first aid equipment was located five minutes away at a previous site. Counsel for the Secretary does not dispute this. Thus, the record supports a finding that the violation occurred as charged and that the operator was negligent, but that the violation was non-serious. Accordingly, and after considering the other statutory criteria, I conclude that a penalty of \$50.00 is warranted for the violation found.

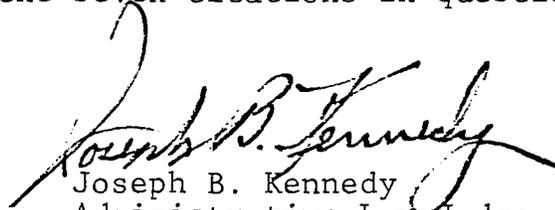
5. Citations Nos. 015481 and 015483 allege failure to post safety regulations in conspicuous locations throughout the mine as required by 30 CFR 77.1708. Counsel for the Secretary maintains that this failure could result in injuries to the miners, and that the operator should be aware of the requirement and was therefore ordinarily negligent. The operator maintains that the subject mine employs only five miners and that the safety regulations were posted at the company garage where all personnel saw them each day. Since the standard apparently contemplates that safety regulations be posted at more than one conspicuous location, I find that the violations alleged did in fact occur. However, the record supports further findings that the operator did in fact have the safety regulations conspicuously posted at one place, and that the violations are purely technical in nature involving no negligence on the part of the operator. Accordingly, and after considering the other statutory criteria, I conclude that a penalty of \$5.00 is warranted for the two violations found.

6. Citation No. 015487 alleges that compressed gas cylinders were lying on the ground and not secured in a safe manner as required by 30 CFR 77.208(d). Counsel for the Secretary maintains that failure to protect and secure these cylinders could result in serious injury, and that the operator was ordinarily negligent since the condition was obvious. The operator does not deny the fact of violation, but asserts that the cylinders were empty and not in use. Thus, the record supports findings that the violation occurred as charged, that

the operator was ordinarily negligent, and that the condition was non-serious and remote in that the only hazard presented was one of falling or tripping over the cylinders. Accordingly, and after considering the other statutory criteria, I conclude that a penalty of \$25.00 is warranted for the violation found.

I further find that because there is no triable issue of fact, an evidentiary hearing is unnecessary to a prompt, just and practical disposition of this matter. Reliable Coal Co., 1 IBMA 50, 65 (June 10, 1971); Mitchell v. National Broadcasting Co., 533 F.2d 265, 271 (2d Cir. 1977); Bell Telephone Company of Pa. v. FCC, 503 F.2d 1250, 1267, n. 25 (3rd Cir. 1974), cert. den. 422 U.S. 1026, reh. den. 423 U.S. 886 (1975).

Accordingly, it is ORDERED that on or before Wednesday, February 13, 1980, the parties SHOW CAUSE why the foregoing findings as to liability and the penalties warranted should not be entered as the decision and order of the Presiding Judge in this matter with respect to the seven citations in question.


Joseph B. Kennedy
Administrative Law Judge

Distribution:

Leo McGinn, Esq., U.S. Department of Labor, Office of the
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

FEB 22 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),)	
	)	Civil Penalty Proceeding
)	
Petitioner,)	
v.	)	DOCKET NOS. WEST 79-214-M
	)	and WEST 79-279-M
	)	A/O Nos. 45-00572-05002
	)	and 45-00572-05003
)	
ACME CONCRETE COMPANY,)	
	)	Mine: Acme Pit and Plant
Respondent.)	
)	

APPEARANCES:

Rochelle Kleinberg, Esq., Office of Robert A. Friel,
Regional Solicitor, United States Department of Labor,
Seattle, Washington
for the Petitioner,

Kevin Bredesen, Safety Coordinator and E.J. Ziegler,
Plant Supervisor, appearing pro se,
for the Respondent.

Before: Judge John J. Morris

DECISION

Petitioner charges Respondent failed to secure gas cylinders and failed to provide a backup alarm for its equipment. Petitioner asserts the cited conditions violate standards promulgated under the authority of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976), (amended 1977).

ISSUES

The issue is whether any violations occurred.

This citation alleges a violation of 30 CFR 56.16-5.^{1/}

The uncontroverted evidence establishes the following facts.

1. Three oxygen cylinders were outside Acme's grease storage building (Tr 20, Exhibit P6).
2. One of the cylinders was unsecured; it could tip over, rupture, and rocket off (Tr 22).
3. The cylinder, purchased commercially, was delivered by a vendor just prior to the inspection (Tr 35,46).
4. The cylinders, 50 feet from the plant office, are to be secured by the vendor, however, the vendor had not secured them on two or three prior occasions (Tr 46,48).

Acme contends the events involving unsecured cylinder were outside of its control.^{2/}

I reject Acme's argument. The fact that the vendor left the two cylinders unsecured on two prior occasions are sufficient facts to alert Acme to the likelihood of a violation. The obligations imposed by the Federal Coal Mine Act cannot be delegated to another by contract, cf Frohlich Crane Service, Inc., v OSHRC 521 F2d 628, (10th Cir., 1975); Central of Georgia Railroad Company v OSHRC 576 F2d 620, (5th Cir., 1978).

^{1/}The cited standard reads as follows:

56.16-5 Mandatory. Compressed and liquid gas cylinders shall be secured in a safe manner.

^{2/}This conclusion was reached by the inspector and entered in his report (Tr 35, R1).

CASE NO. WEST 79-279-M
CITATION 345271 and 345272

These citations allege violations of 30 CFR 56.9-87.^{3/}

The uncontroverted evidence establishes the following facts.

5. Acme's 980 loader was being operated without a backup alarm and without a person acting as an observer (Tr 9).
6. On the loader, the driver sits to the front and the engine is to the rear (Tr 12,13).
7. A driver in his position could not see a person as close as 3 to 4 feet from the rear of the vehicle (Tr 16,19,P-5).
8. The inspector observed one or two workers in the vicinity of the loader (Tr 12,23-24,36-37).
9. The 966 loader was not equipped with a backup alarm nor was there an observer available (Tr 17).
10. One or two workers were in the area of the 966 loader; the 966 loader is similar in design but smaller than the 980 loader (Tr 17-18,24-27,36-37, P-5).

Acme contends no violations occurred since the operator's view was not obstructed. In addition, Acme argues, in effect, that there was a lack of employee exposure since no employees, other than the operator, were working in the cited areas.

^{3/}The cited standard provides:

56.9-87 Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

Acme's first contention is not supported by the record. The rebutted testimony of the compliance officer establishes the limitations of the operator's view (Fact's paragraph 7). In addition, photograph P-5 confirms this testimony.

Acme's second contention is rejected. Employee exposure to a prohibited hazard is an essential element of MSHA's proof.

In the evidence presented here there is such exposure.

Concerning the 980 loader: The loader operator, as well as Acme's truck drivers, can load in this area (Tr 44-46). Exposure arises when workers leave their trucks, an event observed "quite often" by the inspector (Tr 24-27).

Concerning the 966 loader: A loader was stuck and the inspector observed a worker fastening a 10 foot cable to the disabled vehicle so it could be moved (Tr 25-26,32-34). Even though the operator of the 966 loader would generally be isolated from any other workers, the described circumstances constitute exposure to the involved employee.

JURISDICTION

The parties concede jurisdiction (Tr 6).

FINDINGS OF FACT

I find the facts as outlined in Paragraphs 1 through 10 of this **decision.**

CONCLUSIONS OF LAW

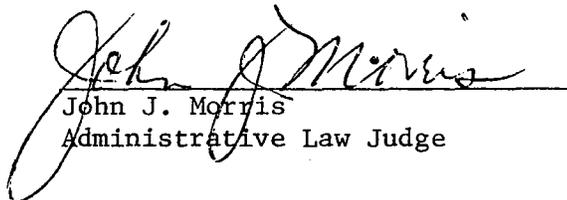
1. Respondent violated 30 CFR 56.16-5 and Citation 345301, (Case No. West 79-214-M) should be affirmed. (Facts 1-4.)

2. Respondent violated 30 CFR 56.9-87 and Citations 345271 and 345272, (Case No. West 79-279-M) should be affirmed. (Facts 5-10.)

Based on the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

1. In Case No. West 79-214-M, Citation 345301 and the proposed penalty of \$38 are affirmed.
2. In Case No. West 79-279-M, Citations 345271 and 345272 and the proposed total penalty of \$228 are affirmed.


John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 25 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. HOPE 79-197-P
Petitioner : A/O No. 46-01863-03003
v. :
: Pond Fork Mine
ISLAND CREEK COAL COMPANY, :
Respondent :

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
William K. Bodell, II, Esq., Island Creek Coal Company, Lexington, Kentucky, for Respondent.

Before: Judge Cook

I) Procedural Background

On January 16, 1979, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty against Island Creek Coal Company (Respondent) in the above-captioned proceeding. The petition was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a)(1978)(1977 Mine Act), and alleges violations of two provisions of the Code of Federal Regulations. An answer was filed on February 12, 1979.

Notices of hearing were issued on June 19, 1979 and July 13, 1979. A continuance was granted at the Respondent's request on July 5, 1979. The hearing was held on August 16, 1979 in Bluefield, West Virginia. Representatives of both parties were present and participated.

A schedule for the submission of posthearing briefs was agreed upon after the presentation of the evidence. However, difficulties experienced by counsel necessitated a revision thereof. Under the revised schedule, briefs were due by October 19, 1979, and reply briefs were due by November 5, 1979.

The Respondent and the Petitioner filed posthearing briefs on October 19, and October 25, 1979, respectively. The Respondent filed a reply brief on November 5, 1979, and the Petitioner filed a response to the reply brief on November 13, 1979. 1/

II Violations Charged

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>
20053	6/19/78	75.302-1
21804	7/13/78	75.200

III Evidence Contained in the Record

A) Stipulations

The stipulations entered into by the parties are set forth in the findings of fact, infra.

B) Witnesses

The Petitioner called as its witness Billy R. Browning, an MSHA inspector.

The Respondent called as its witnesses Arvel Gartin, a section foreman at the subject mine; Tony Turyn, director of safety for the Respondent's Island Creek Division; and Douglas White, the day shift mine foreman at the subject mine.

C) Exhibits

1) The petitioner introduced the following exhibits into evidence:

M-1 is a copy of both Citation No. 20053, June 19, 1978, 30 CFR 75.302-1 and the termination thereof.

M-2 is a document styled "Assessed Violation History Report-Two Year Summary by Mine" compiled by the Directorate of Assessments. This document

1/ The Respondent argues that the Petitioner's brief should not be considered in making a decision in the instant case because it was not timely filed. (Respondent's Reply Brief, pg. 1). The Petitioner asserts that such action would be inappropriate because the Respondent has not alluded to having suffered prejudice as a result of the tardy filing. (Petitioner's Response to Respondent's Reply Brief, pg. 1)

In light of the absence of demonstrable prejudice resulting from the late filing, the arguments raised in the Petitioner's posthearing brief will be considered in deciding the instant case.

contains information on the history of violations for which the Respondent had paid assessments between July 20, 1976 and July 19, 1978.

M-3 is a copy of both Citation No. 21804, July 13, 1978, 30 CFR 75.200 and the termination thereof.

M-4 is a drawing produced during the hearing by Inspector Browning during his testimony relating to Citation No. 21804, July 13, 1978, 30 CFR 75.200.

- 2) The Respondent did not introduce any exhibits into evidence.

IV Issues

Two basic issues are involved in the assessment of a civil penalty (1) did a violation of the 1977 Mine Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V Opinion and Findings of Fact

A) Stipulations

1) Island Creek Coal Company owns and operates the Pond Fork Mine and both are subject to the jurisdiction of the 1977 Mine Act. (Tr. 5)

2) The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Mine Act. (Tr. 5).

3) Inspector Billy R. Browning was a duly authorized representative of the Secretary at all times relevant hereto (Tr.5).

4) Island Creek Coal Company is a large operator and a civil penalty assessment herein will not affect its ability to continue in business. (Tr. 5).

5) Island Creek Coal Company mines over ten million tons per year, and the Pond Fork Mine mines from fifty to sixty thousand tons a year. (Tr. 89).

B) Occurrence of Violations, Negligence, Gravity and Good Faith

- 1) Citation No. 20053, 6/19/78, 30 CFR 75.302-1

MSHA Inspector Billy R. Browning conducted a spot inspection of the Respondent's Pond Fork Mine on June 19, 1978 (Tr. 10-12). He arrived at the

mine at approximately 3:50 p.m. and entered the mine with the evening shift at approximately 4:00 p.m. (Tr. 12-13). He testified that the shifts at the Pond Fork Mine change at 4:00 p.m. (Tr. 13). He arrived on the section at approximately 4:30 p.m. (Tr. 21). At 4:55 p.m., he issued the subject citation alleging a violation of mandatory safety standard 30 CFR 75.302-1 as follows:

The line brattice and check curtain were not properly installed and maintained from the last open crosscut out to within 10 feet of the point of deepest penetration in the 014-04 unit in that the line brattice was terminated 20 feet outby the point of deepest penetration in the No. 6 entry, 27 feet outby the point of deepest penetration in the No. 5 entry and the line brattice and check fly were nailed to the roof in the No. 3 and 4 entries.

(Exh. M-1; see also Tr. 13).

The inspector's testimony is in accord with the statements contained in the citation. (Tr. 13-14, 30-35). In addition, he testified that the check flies and line brattices were rolled up and nailed to the roof in the Nos. 3 and 4 entries. (Tr. 31-33). As relates to the No. 3 entry, they were rolled up for a distance of approximately 32 to 34 feet (Tr. 31-32). His testimony indicates that line brattice had been installed to within 8 feet of the "toe of the coal." (Tr. 31). As relates to the No. 4 entry, they were rolled up for a distance of approximately 30 feet (Tr. 33-34).

The ventilation plan identified the area as a working section (Tr. 13.)

The testimony of both Inspector Browning and Mr. Arvel Gartin, the evening shift section foreman, establishes that coal was not being cut, mined or loaded from the working faces in any of the four subject entries between the time the inspector and the evening shift miners arrived on the section and the time the citation was issued. (Tr. 22, 29, 36, 43). In fact, there was no power on the section while the inspector was present (Tr. 36, 41-42).

The first question presented is whether the above-stated facts establish a violation of 30 CFR 75.302-1 occurring on the June 19, 1978, second shift at the Pond Fork Mine. For the reasons set forth below, I answer this question in the negative.

The Petitioner argues that an interrelationship exists between 30 CFR 75.302-1 and 30 CFR 75.302(a) whereby the former must be interpreted as defining an area of the mine and not time periods during the mining process. The Petitioner correctly observes that 30 CFR 75.302(a) is merely a verbatim restatement in the Code of Federal Regulations of section 303(c)(1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 863(c)(1) (1970) (1969 Coal Act). Section 303(c)(1) of the 1969 Coal Act was unchanged by the enactment of the 1977 Mine Act. Compare 30 U.S.C. § 863(c)(1) (1970) and 30 U.S.C. § 863(c)(1) (1978). According to the Petitioner, the statutory

provision requires the continuous use of line brattice in by the last open crosscut. The Petitioner then argues that the sole construction of 30 CFR 75.302-1 consistent with the statutory language is that 30 CFR 75.302-1 further clarifies the distance requirements for hanging line brattice in areas where coal is being cut mined or loaded. (Petitioner's Posthearing Brief, pp. 5-7). Thus, according to the Petitioner, a violation of 30 CFR 75.302-1 can occur absent actual cutting, mining or loading operations at a given working face.

The Respondent disagrees, arguing that 30 CFR 75.302-1 describes not only an area of the mine, but also specifies activities which must be in progress before the 10 foot rule applies. The Respondent argues that the regulation is clear and requires little interpretation. The Respondent submits that the purpose of the regulation is to assure that cutting, mining or loading, which constitute activities requiring greatest protection from dust and methane concentrations, are not conducted when curtains are farther than 10 feet from the face. According to the Respondent, the regulation seeks to assure proper ventilation at the face during these crucial operations, not at all times. (Respondent's Posthearing Brief, pp. 2-3; see also Respondent's Reply Brief).

The Petitioner characterizes the Respondent's interpretation as misconstruing the intent of the two provisions and as directly contrary to the Congressional directive that newly promulgated regulations cannot reduce existing levels of protection. (Petitioner's Posthearing Brief, pg. 7 citing Sen. Rep. No. 95-181, 1977 U.S. Code Cong. and Admin. News 3401 at 3411); see also section 301(a) of the 1969 Coal Act, 30 U.S.C. § 861(a) (1970) and section 301(a) of the 1977 Mine Act, 30 U.S.C. § 861(a) (1978).

Although an interrelationship exists between the two provisions, I disagree with the Petitioner's interpretation of that interrelationship. I conclude that the ten foot requirement contained in 30 CFR 75.302-1 applies only when coal is actually being cut, mined or loaded from the working face. 2/

30 CFR 75.302 addresses ventilation of the working face and provides, in part, as follows:

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

2/ For a similar interpretation see United States Steel Corporation, MSHA and United Mine Workers of America, Docket Nos. BARB 79-276 and 79-277 (August 10, 1979, Judge Forrest E. Stewart).

requirement, where such exception will not pose a hazard to the miners. When damaged by falls or otherwise, such line brattice or other devices shall be repaired immediately.

30 CFR 75.302-1, addresses the installation of line brattice and other devices and provides, in part, as follows:

(a) Line brattice or any other approved device used to provide ventilation to the working face from which coal is being cut, mined or loaded and other working faces so designated by the Coal Mine Safety Manager, in the approved ventilation plan, shall be installed at a distance no greater than 10 feet from the area of deepest penetration to which any portion of the face has been advanced unless a greater distance is approved by the Coal Mine Safety District Manager of the area in which the mine is located.

Thus, the two provisions collectively establish the following general requirements: Properly installed and adequately maintained line brattice or other approved devices must be continuously used from the last open crosscut of an entry or room of each working section 3/ to provide adequate ventilation to the working faces. 4/ However, when coal is actually being cut, mined or loaded from the working face, the line brattice or other approved device used to provide ventilation to that working face must be installed at a distance no greater than 10 feet from the area of greatest penetration to which any portion of the face has been advanced.

30 CFR 75.302-1(a) simply sets forth a detailed requirement for the installation of the line brattice in relation to working faces from which coal is actually being cut, mined or loaded. It cannot be concluded that the regulation, by delimiting its coverage to areas of actual cutting, mining or loading, violates the Congressional mandate prohibiting the promulgation of regulations according less protection to the miners than is provided by the interim mandatory safety standards.

In view of the fact that neither cutting, mining nor loading of coal had occurred on the second shift, it cannot be found that a violation of 30 CFR 75.302-1 occurred on the second shift. 5/

3/ "'Working section' means all areas of the coal mine from the loading point of the section to and including the working faces." 30 CFR 75.2(g)(3).

4/ "'Working face' means any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle." 30 CFR 75.2(g)(1).

5/ It is possible that a violation of 30 CFR 75.302(a) (statutory provision) existed. But it is unnecessary to decide such an issue because the petition for assessment of civil penalty does not allege a violation of the statutory provision.

The second question presented is whether the allegations contained in the petition for assessment of civil penalty are sufficient to charge a violation of 30 CFR 75.302-1 occurring on the June 19, 1978, day shift.

The inspector testified that the cited conditions in the four subject entries had been present while coal was being produced on the June 19, 1978, day shift. He did not observe any mining activities on the day shift because he was not present in the mine at that time. (Tr. 24). Rather, he testified as an expert basing his opinion on inferences drawn from observations in the four entries. (Tr. 14-15, 24-25, 27-28, 30-35).

The Respondent contends that the allegations contained in the petition are inadequate to allege a violation occurring on the prior shift. (Respondent's Posthearing Brief, pp. 4-5).

It is clear that the Petitioner's case centered on a violation allegedly occurring on the second shift as evidenced by both the evidence presented at the hearing and the arguments set forth in the Petitioner's posthearing brief. Counsel for the Petitioner argued only at the hearing that if actual cutting, mining or loading is required to support a violation of 30 CFR 75.302-1, then the reasonable inferences drawn from the inspector's observations would support a finding that a violation had occurred on the prior shift. (Tr. 92-97). The argument is not specifically reasserted in the Petitioner's brief.

The Interior Board of Mine Operations Appeals observed that timely and adequate notice is necessary to enable a mine operator "to determine with reasonable certainty the allegations of violations charged so that it may intelligently respond thereto and decide whether it wishes to request formal adjudication." Old Ben Coal Company, 4 IBMA 198, 208, 82 I.D. 264, 1974-1975 OSHD par. 19,723 (1975). Additionally, section 5(b)(3) of the Administrative Procedure Act, 5 U.S.C. §554(b)(3) (1978), provides that "[p]ersons entitled to notice of an agency hearing shall be timely informed of * * * the matters of fact and law asserted."

The Respondent was entitled to notice sufficient for it to determine with reasonable certainty the violation charged.

The citation sets forth the time of issuance as 4:55 p.m., June 19, 1978; i. e., approximately 55 minutes into the second shift. No statement is made in the citation alleging that cutting, mining or loading occurred on the day shift in the face areas of the four subject entries with the line brattices and check flies installed at a distance greater than ten feet from the area of deepest penetration. Since the allegations contained in the citation are incorporated by reference into the petition for assessment of civil penalty, the petition can only be construed as alleging a violation occurring on the second shift. Indeed, the evidence adduced by the Respondent was directed toward disproving a violation on the second shift. A review of all the evidence reveals that the question of whether a violation occurred on the day shift was not tried with the express or implied consent of the parties.

Accordingly, the petition for assessment of civil penalty will be dismissed as relates to Citation No. 20053, 6/19/78, 30 CFR 75.302-1.

2) Citation No. 21804, 7/13/78, 30 CFR 75.200

MSHA inspector Billy R. Browning visited the Respondent's Pond Fork Mine on July 13, 1978 to begin a regular inspection of the mine (Tr. 55-56). He rode into the mine on a jeep and was accompanied by Mr. Douglas White, the day shift mine foreman. (Tr. 56, 75-76). As they were riding through the mine, the inspector observed that a roof fall had occurred in the crosscut in which stopping No. 34 was located (Tr. 57, 63). The roof fall had been corrected by the mine operator sometime prior to the inspector's arrival in the area. (Tr.59-60). The fall area was supported according to the minimum requirements of the roof control plan, but a new area of deterioration had developed (Tr. 71). The inspector observed indications that a fresh crack had developed, extending to a point 25 or 27 feet inby the fall area along the right rib. (Tr. 57-59, 65). He testified that the crack was tied "directly into the fall area" and that the roof over the track was a somewhat hazardous area as a result of the crack (Tr. 65). A visual estimate revealed that loose and broken roof was present for a distance of six to twelve inches beyond each side of the crack. (Tr. 69-70). The inspector's observations led him to conclude that additional support was required (Tr. 60). The subject citation was issued at 9:30 a.m. encompassing both the roof over the track to the left of the fall area and the crack in the rib (Tr. 65), and states the following:

The roof over the main line track was inadequately supported in the crosscut intersection located at the No. 34 stopping in that loose and broken roof was present along the right side and signs of cutting was present for a distance of [25 or 27] feet.

(Exh M-3; Tr. 58).

The above-cited conditions observed along the track haulageway (Tr. 61) allegedly constitute a violation of 30 CFR 75.200, which provides, in pertinent part, as follows: "The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." It is not alleged that the cited conditons constituted a violation of the Respondent's roof control plan. (Tr. 60). However, it is well established that where the evidence is sufficient to establish that the roof or ribs of a mine were not adequately supported to protect persons from falls, it is unnecessary to prove a violation of the roof control plan in order to sustain a violation of 30 CFR 75.200. In Zeigler Coal Company, 2 IBMA 216, 80 I.D. 626, 1973-1974 OSHD par. 16,608 (1973), the Interior Board of Mine Operations Appeals held "that an operator is under a duty to maintain a safe roof irrespective of any roof control plan and that the failure to do so constitutes a violation of [30 CFR 75.200]." 2 IBMA at 222.

There was no substantial disagreement between Inspector Browning and Mr. White as to the existence of the crack. In fact, Mr. White testified that the crack existed as designated by the inspector on Exhibit M-4. In addition, I am unable to detect any meaningful discrepancies in their testimony material to the issue of whether the conditions described by the inspector establish the area as one in need of additional support. The inspector testified that the crack was an indication of roof deterioration (Tr. 66). I find the inspector's assessment a credible one, especially in view of the presence of loose and broken roof for a distance of 6 to 12 inches on each side of the crack.

Mr. White candidly admitted that it would have been possible for the roof to collapse in the near future, but qualified his assertion by indicating that it would be difficult to affirmatively state that it would or would not have collapsed (Tr. 79). However, he testified that if he had observed the condition without the inspector present, he would have installed supports (Tr. 79). I interpret this testimony as a further indication that prudent mining practice required the installation of additional supports in the cited area.

Therefore, I find that the conditions described by the inspector existed as set forth in both the citation and his above-noted testimony, and that the cited area was not supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.

Accordingly, I conclude that a violation of 30 CFR 75.200 has been established by a preponderance of the evidence.

Negligence of the Operator

The inspector testified that he did not feel that the condition existed as a result of a lack of due diligence or negligence on the operator's part (Tr. 60). He based his opinion on the apparent freshness of the crack. He did not believe that it had been in existence for a very long period of time (Tr. 61). Mr. White shared the inspector's view that the crack appeared fresh, basing his opinion on the absence of rock dust or float dust on it (Tr. 83). He could not express an opinion as to how long the condition had been present (Tr. 83).

Operator negligence is established when the evidence or the inferences drawn therefrom establish that the operator knew or should have known of the condition. The testimony of both Inspector Browning and Mr. White fails to establish that the Respondent had actual knowledge of the condition. Mr. White testified that he did not know the crack existed prior to observing it (Tr. 77). In addition, the inspector testified that if the Respondent had known about the condition it would have undertaken corrective action. He based his opinion on his experience in inspecting the Pond Fork Mine (Tr. 64-65).

Accordingly, I conclude that there has not been a showing of negligence on the part of the Respondent.

Gravity of the Violation

The length of the crack and the condition of the roof adjacent to the crack have been set forth previously.

As noted previously, the inspector testified that the crack in the rib was tied directly into the fall area (Tr. 65). The inspector testified that the area of the fall was not extremely large. He testified that it was a normal roof fall, entry wide, 4 or 5 feet thick and ten or 15 feet long (Tr. 63). The fall area had been cribbed off (Tr. 63-64). Thus, the fall area was behind the cribs, not in the travelway (Tr. 62-63). Specifically, the inspector testified that when he arrived in the cited area he observed that three cribs had been installed and 3 to 5 additional crossbars had been installed across the roof with 5 by 7 or 6 by 8 square-sawed posts on the left side of the track (Tr. 59-60, 66-70, Exh M-4). The inspector further testified that this support had been installed at the time of the fall (Tr. 59-60).

Mr. White testified that the roof above the main track was in "pretty fair shape." (Tr. 78). He further testified that a hairline crack was present in the roof over the main track extending a bit past where the crossbars had been installed (Tr. 79).

The inspector indicated that the condition was potentially serious. Defective roof is in itself, a dangerous condition (Tr. 61).

The cited area was along a track haulageway. All persons entering the mine's underground workings via the track entry would have been exposed to the condition (Tr. 61).

Accordingly, I conclude that the violation was very serious.

Good Faith in Attempting Rapid Abatement

The condition was abated by installing four 42-inch cribs along the right side of track and seven 5-inch by 7-inch by 14 foot headers against the roof over the track. The headers were supported by five-by 7-inch square-sawed posts located on the left side of the track (Exh M-3, Tr. 58-59). The inspector opined that management took extraordinary steps to abate the violation, based on the fact that Mr. White immediately ordered the supply crew to load, transport and install cribs, crossbars and posts (Tr. 61-62).

Accordingly, I conclude that the Respondent demonstrated good faith in attempting rapid abatement.

C) History of Previous Violations

Exhibit M-2 is a computer printout compiled by the Directorate of Assessments containing information on the history of previous violations for which the Respondent had paid assessments from July 20, 1976 to July 19, 1978, as relates to the Pond Fork Mine.

During this two year period, the Respondent had paid assessments for 113 violations. Forty-two occurred in 1976, 42 occurred in 1977 and 29 occurred in 1978.

D) Appropriateness of Penalty to Operator's Size

Island Creek Coal Company Mines over 10 million tons per year, and the Pond Fork Mine mines from fifty to sixty thousand tons a year (Tr. 89). Furthermore, the parties stipulated that Island Creek Coal Company is a large operator (Tr. 5).

E) Effect on Operator's Ability to Continue in Business

The parties stipulated that the assessment of any penalty in this proceeding will not affect the Respondent's ability to continue in business (Tr. 5). Furthermore, the Interior Board of Mine Operations Appeals has held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

IV Conclusion of Law

1. Island Creek Coal Company and its Pond Fork Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.
2. Under the Act, this Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.
3. MSHA Inspector Billy R. Browning was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the citations which are the subject matter of this proceeding.
4. The violation charged in Citation No. 21804, 7/13/78, 30 CFR 75.200, is found to have occurred as alleged.
5. The violation charged in Citation No. 20053, 6/19/78, 30 CFR 75.302-1 is found not to have occurred as alleged.
6. All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.

VII Proposed Findings of Fact and Conclusion of Law

Petitioner and Respondent submitted posthearing briefs. Respondent submitted a reply brief, and Petitioner submitted a response to the reply

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

VIII Penalties Assessed

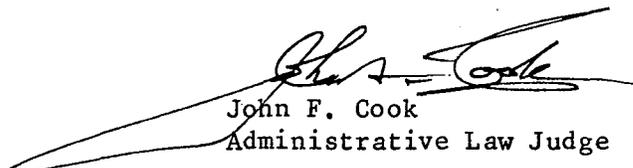
Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that assessment of a penalty is warranted as follows:

<u>Citation</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Penalty</u>
21804	7/13/78	75.200	\$200

ORDER

The Respondent is ORDERED to pay a civil penalty in the amount of \$200 within 30 days of the date of this decision.

IT IS FURTHER ORDERED that Citation No. 20053, 6/19/78, 30 CFR 75.302-1 be, and hereby is VACATED and that the petition for assessment of civil penalty be, and hereby is, DISMISSED as relates to such citation.


John F. Cook
Administrative Law Judge

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 25 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. NORT 79-63-P
Petitioner : A/O No. 44-03614-03003
v. :
: No. 5-B Mine
HARMAN MINING CORPORATION, :
Respondent :

DECISION

Appearances: Inga A. Watkins, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Robert M. Richardson, Esq., Richardson, Kemper, Hancock & Davis, Bluefield, West Virginia, for Respondent.

Before: Judge Cook

I. Procedural Background

On January 31, 1979, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty against Harman Mining Corporation (Respondent) in the above-captioned proceeding. The petition was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1978) (1977 Mine Act), and alleged violations of two provisions of the Code of Federal Regulations. The Respondent filed its answer on March 5, 1979.

Pursuant to notices, the hearing was held on July 17, 1979, in Beckley, West Virginia. Representatives of both parties were present and participated. Counsel for the Petitioner made two motions during the course of the hearing: First, to dismiss the petition for assessment of civil penalty as relates to Citation No. 321765, August 10, 1978, 30 CFR 75.523 (Tr. 4); second, to amend the petition for assessment of civil penalty as relates to Citation No. 321763, issued on August 10, 1978, to allege that the condition described therein constitutes a violation of both 30 CFR 75.523 and 30 CFR 75.523-1 (Tr. 67). Both motions were granted (Tr. 4, 71).

A schedule for the submission of posthearing briefs was agreed upon after the presentation of the evidence. However, subsequent events necessitated a revision thereof. The Petitioner and the Respondent filed posthearing briefs on November 14, 1979, and November 29, 1979, respectively. Neither party filed a reply brief.

II. Violations Charged

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>
321763	8/10/78	75.523
		75.523-1
321765	8/10/78	75.523 <u>1/</u>

III. Evidence Contained in the Record

A. Stipulations

The stipulations entered into by the parties are set forth in the findings of fact, infra.

B. Witnesses

The Petitioner called as its witness James O. Vandyke, a Mine Safety and Health Administration (MSHA) inspector.

The Respondent called as its witnesses Eugene Carter, a repairman and mechanical leader employed by the Respondent; and Paul Hurley, the Respondent's vice president of operations.

C. Exhibits

1. The Petitioner introduced the following exhibits into evidence:

(a) M-1 is a copy of Citation No. 321763, August 10, 1978, 30 CFR 75.523.

(b) M-2 is a copy of the inspector's statement pertaining to M-1.

(c) M-3 contains notes made by Inspector Vandyke.

(d) M-4 is a computer printout compiled by the Directorate of Assessments listing the history of violations for which the Respondent had paid assessments beginning August 10, 1976, and ending August 10, 1978.

2. The Respondent did not introduce any exhibits into evidence.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of 1977 Mine the Act occur, and (2) what amount should

1/ As noted previously, the petition for assessment of civil penalty was dismissed as relates to this citation.

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

V. Opinion and Findings of Fact

A. Stipulations

1. Harman Mining Corporation is a large operator, mining over 500,000 tons of coal per year and employing approximately 300 employees. (Tr. 4).

2. The proposed penalty would not affect the operator's ability to continue in business (Tr. 4).

B. Occurrence of Violation

MSHA inspector James O. Vandyke visited the Respondent's No. 5-B Mine at approximately 9 a.m., August 10, 1978, to make a complete health and safety inspection (Tr. 16). He was accompanied on the inspection tour by Mr. Roy Owens, an employee of the Respondent (Tr. 16, 18; Exh. M-1).

The inspector observed a canopy-equipped coal drill operating in the face area of the No. 2 entry of the 001 section (Tr. 18, 100, Exh. M-1). At the inspector's request, the coal drill operator tested the machine's deenergizing device at which time the inspector observed that the device would not deenergize the machine (Tr. 18). A close examination revealed the presence of a wooden cap wedge driven behind the device, propping it open (Tr. 18, 73). The inspector testified that absent the wedge it would have been possible to cut the machine's electrical power by depressing the deenergizing device (Tr. 73). Accordingly, the inspector issued the subject citation alleging that "[t]he device being used to deenergize the coal drill on the 001 section quickly in the event of an emergency was inoperative" (Exh. M-1). The petition for assessment of civil penalty, as amended, alleges that the condition sets forth a violation of 30 CFR 75.523 and 30 CFR 75.523-1. The latter regulation will be addressed first, and provides, in part, as follows:

(a) Except as provided in paragraphs (b) and (c) of this section, all self-propelled electric face equipment which is used in the active workings of each underground coal mine on and after March 1, 1973, shall, in accordance with the schedule of time specified in paragraphs (a)(1) and (2) of this section, be provided with a device that will quickly deenergize the tramping motors of the equipment in the event of an emergency. The requirements of this paragraph (a) shall be met as follows:

(1) On and after December 15, 1974, for self-propelled cutting machines, shuttle cars, battery-powered machines, and roof drills and bolters;

(2) On and after February 15, 1975, for all other types of self-propelled electric face equipment. [2/]

The coal drill was trammed by two hydraulic tramping motors. A pump turned by an electric motor provided the hydraulic pressure necessary to operate the tramping motors. It pumped hydraulic fluid at the rate of approximately 15 to 18 gallons per minute at a pressure of 1,200 to 1,400 pounds. After leaving the pump, the pressurized hydraulic fluid was transmitted to a control box, or valve bank, and, in turn to the hydraulic motors (Tr. 73-74, 129, 139-141). All hydraulic levers, including those used to operate the tramping motors, were self-centering (Tr. 130), meaning that the levers automatically returned to a neutral position when released by the machine operator (Tr. 28, 112-113, 130). Releasing the tramping motor levers would stop the flow of hydraulic fluid to the tramping motors and thus stop the movement of the machine, assuming the levers self-centered (Tr. 29-30, 37, 75-76). Machine movement would be arrested almost instantaneously (Tr. 112, 132). However, the electrically-powered pump would still be in operation, providing pressure to the valve bank (Tr. 81). The lever could then accidentally be pushed again starting movement of the drill.

The Respondent sets forth essentially two arguments germane to the question of whether a violation of 30 CFR 75.523-1 occurred: First, the regulation applies solely to electrical tramping motors and has no application to hydraulic tramping motors. Second, the coal drill was equipped with a device that would quickly deenergize the tramping motors in the event of

2/ The exceptions set forth at 30 CFR 75.523-1(b) and (c) provide as follows:

"(b) Self-propelled electric face equipment that is equipped with a substantially constructed cab which meets the requirements of this part, shall not be required to be provided with a device that will quickly deenergize the tramping motors of the equipment in the event of an emergency.

"(c) An operator may apply to the Assistant Administrator-Technical Support, Mine Safety and Health Administration, Department of Labor, 4015 Wilson Boulevard, Arlington, Va. 222203 for approval of the installation of devices to be used in lieu of devices that will quickly deenergize the tramping motors of self-propelled electric face equipment in the event of an emergency. The Assistant Administrator-Technical Support may approve such devices if he determines that the performance thereof will be no less effective than the performance requirements specified in § 75.523-2."

The coal drill in question was canopy-equipped and thus not within the 30 CFR 75.523-1(b) exception to the general requirement. The Respondent presented no evidence establishing the applicability of 30 CFR 75.523-1(c).

an emergency as required by 30 CFR 75.523-1. (Respondent's Posthearing Brief, pp. 5-6). I disagree with both arguments. The purported distinction between electrical tramming motors and hydraulic tramming motors is superficial in view of the presence of the electrically-powered pump on the hydraulic system. This electric motor was the primary source of power for the hydraulic system. Any deenergizing device meeting 30 CFR 75.523-1(a)'s requirement for "a device that will quickly deenergize the tramming motors of the [self-propelled electric face equipment which is used in the active workings] in the event of an emergency" must, of necessity, deenergize the electric pump motor.

Additionally, 30 CFR 75.523-1(a) must be read in conjunction with the requirements of 30 CFR 75.523-2(a), which provides as follows:

(a) Deenergization of the tramming motors of self-propelled electric face equipment, required by paragraph (a) of § 75.523-1, shall be provided by:

(1) Mechanical actuation of an existing pushbutton emergency stopswitch,

(2) Mechanical actuation of an existing lever emergency stopswitch, or

(3) The addition of a separate electromechanical switch assembly.

This regulation mandates the use of one of three types of switches in order to meet the requirements of 30 CFR 75.523-1(a). The term "switch" is defined in Paul W. Thrush (ed.), A Dictionary of Mining, Mineral, and Related Terms (Washington D.C.: U.S. Department of the Interior, Bureau of Mines) (1968) at page 1111 as: "A mechanical device for opening and closing an electric circuit; a mechanism for shifting a moving body in another direction." Given the context of electric face equipment, a "switch" must be construed as referring to a mechanical device for opening and closing an electric circuit.

It is clear from the evidence contained in the record that the coal drill's self-centering hydraulic levers were not "switches" within the meaning of 30 CFR 75.523-2(a), since they did not open and close an electric circuit. It would be accurate to state that they opened and closed a hydraulic circuit, but as such were inadequate to provide complete deenergization of the tramming motors. That could only be achieved through the deenergization of the electrically-driven pump.

In addition we find that 30 CFR 75.523-2 went on to provide further performance requirements for such deenergization equipment by providing as follows in subsections (b) and (c):

(b) The existing emergency stopswitch or additional switch assembly shall be actuated by a bar or lever which

shall extend a sufficient distance in each direction to permit quick deenergization of the trammig motors of self-propelled electric face equipment from all locations from which the equipment can be operated.

(c) Movement of not more than 2 inches of the actuating bar or lever resulting from the application of not more than 15 pounds of force upon contact with any portion of the equipment operator's body at any point along the length of the actuating bar or lever shall cause deenergization of the trammig motors of the self-propelled electric face equipment.

Such panic bar did exist on the subject equipment but a wooden wedge had been driven behind it to stop it from functioning. It is clear from 30 CFR 75.523-2 that such a panic bar is what was contemplated by the regulations in question.

In light of these considerations, it cannot be concluded that the levers were adequate to meet the requirements of 30 CFR 75.523-1(a). Accordingly, the Respondent's arguments are not persuasive on the issue of whether a violation occurred.

The presence of the wooden cap wedge is, however, determinative. I read 30 CFR 75.523-1(a) as requiring an operable emergency deenergizing device on the coal drill. Since the evidence establishes that the placement of the wedge rendered the device inoperable, it must be found that a violation of 30 CFR 75.523-1(a) has been established by a preponderance of the evidence.

In view of this finding, it is unnecessary to determine whether the above-stated facts establish a violation of 30 CFR 75.523.

C. Negligence of the Operator

Mr. Carter testified that the machine had been purchased as used mine equipment from Mercer Welding in Bluefield, West Virginia. He did not know whether the emergency deenergizing device had been installed by the original manufacturer but his testimony indicated that it had been installed prior to the purchase by the Respondent (Tr. 126).

The testimony of both Inspector Vandyke and Mr. Carter indicates that the deenergizing device had been rendered inoperative through the placement of the wooden cap wedge in order to compensate for the device's poor design and installation. This design and installation deficiency rendered it virtually impossible to operate the machine without blocking-out the deenergizing device, as attested to by the inspector's conversation with the coal drill operator:

Q. Mr. Vandyke, were any statements made to you by the operator or any of the miners concerning this alleged violation?

A. Well, the operator of the machine said that the device, when it was operative and not being blocked out, would, in the normal functions of the machine, in tramming the machine from one face to another, the vibrations and so on, and being that the deck was narrow, he said that he was required to lean into close proximity of the device and he said that he would bump it off several times because of the design of the working deck of the machine.

(Tr. 24).

I find this hearsay testimony entitled to great probative weight because the testimony of Mr. Carter confirms, in part, the assertions of the hearsay declarant. Mr. Carter testified that he could understand why the wedge had been used to render the deenergizing device inoperable (Tr. 120). During cross-examination, he testified as follows:

THE WITNESS: [The deenergizing devices] are trouble. They are balanced out. A rough botton [sic] or vibration will knock them off; shut you down. I mean, you will working [sic] and all of a sudden it will de-energize the machine and it will stop. If you want to stop, turn loose your lever; it will stop.

They're not supposed to do it, but sometimes the operator will -- I suppose that's the way it got there. I don't think it got there by accident; it may have.

(Tr. 119).

It can be inferred that the deficiency had existed for a considerable period of time. Corrective action should have been taken at the time of purchase or as soon as the deficiency was apparent. Given the nature of the deficiency, the Respondent should have foreseen the miners blocking out the device in order to perform their assigned mining tasks.

Additionally, the condition should have been detected during the weekly examinations of electric equipment required by 30 CFR 75.512-2.

Accordingly, I conclude that the Respondent demonstrated far more than ordinary negligence.

D. Gravity of the Violation

The No. 5-B Mine has an uneven surface with water and mud in various locations (Tr. 16, 124). The inspector testified that the machine operator requires the ability to deenergize the machine in emergency situations to prevent striking another control lever prior to regaining his composure (Tr. 20). According to Inspector Vandyke, the coal drill operator could lose control of the machine due to the uneven surface and, in a state of fright

or panic, pull the wrong levers (Tr. 21). The machine could pin him against a rib, timber, or another machine (Tr. 21, 97). The uneven surface could also result in a loss of control while tramping to another working face. Pulling the wrong lever could result in injuries to other miners (Tr. 21). Additionally, the machine operator could encounter other persons or another machine while traveling through one of the fly curtains used to help ventilate the working faces (Tr. 21-22).

The inspector indicated that all miners on the section would have been exposed to the hazard, a figure placed at approximately eight men (Tr. 18, 22). However, he testified that only one person would sustain injury during a given occurrence (Tr. 22). Anticipated injuries ranged from broken bones and contusions to death (Tr. 97).

These considerations, standing alone, point to a very serious violation. However, an appropriate assessment of the gravity of the violation requires that consideration be accorded to the characteristics of the self-centering hydraulic levers bearing upon safety. Messrs. Carter and Hurley testified that the machine moved at approximately 70 to 75 feet per minute, i.e., slowly (Tr. 112, 132). Releasing the levers would cause the machine to stop in less than 1 foot, depending on the conditions (Tr. 132), and also lock the wheels (Tr. 117). Thus, according to Mr. Hurley, the machine would stop quickly in the event of an emergency (Tr. 131).

It should be noted that the machine could coast for approximately 6 to 10 feet by leaving the hydraulic lever in the forward position with the pump motor deenergized (Tr. 133). However, I find it unlikely that such an event would occur in the event of an emergency if the levers self-centered properly. There was no evidence adduced establishing that they were defective in any manner. Once the lever is self-centered there is the possibility that it could be accidentally pushed forward again.

Considering all aspects, I conclude that the violation was moderately serious.

E. Good Faith in Attempting Rapid Abatement

The Respondent abated the violation in 15 minutes (Tr. 18, Exh. M-1). Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement.

F. History of Previous Violations

The history of previous violations at the Respondent's various mines for which the Respondent had paid assessments during the 24 months prior to August 10, 1978, is set forth as follows:

<u>Violations of</u> <u>30 CFR</u>	<u>Year 1</u> <u>8/11/76 - 8/10/77</u>	<u>Year 2</u> <u>8/11/77 - 8/10/78</u>	<u>Totals</u>
All Sections	176	89	265
Section 75.523-1	8	2	10

G. Appropriateness of Penalty to Operator's Size

The parties stipulated that Harman Mining Corporation is a large operator, mining over 500,000 tons of coal per year and employing over 300 employees (Tr. 4).

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

The parties stipulated that the proposed penalty would not affect the operator's ability to continue in business (Tr. 4). Furthermore, the Interior Board of Mine Operations Appeals has held that evidence relating to the issue as to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

1. Harman Mining Corporation and its No. 5-B Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.
2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.
3. MSHA inspector James O. Vandyke was a duly authorized representative of the Secretary of Labor on August 10, 1978.
4. The oral determination made at the hearing granting the Petitioner's motion to dismiss the petition for assessment of civil penalty as relates to Citation No. 321765, August 10, 1978, 30 CFR 75.523, is AFFIRMED.
5. The oral determination made at the hearing granting the Petitioner's motion to amend the petition for assessment of civil penalty as relates to Citation No. 321763, issued on August 10, 1978, to allege a violation of both 30 CFR 75.523 and 30 CFR 75.523-1 is AFFIRMED.
6. The condition set forth in Citation No. 321763, issued on August 10, 1978, is found to have occurred and to constitute a violation of 30 CFR 75.523-1.
7. All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

Both parties submitted posthearing briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have

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

VIII. Penalty Assessed

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

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Penalty</u>
321763	8/10/78	75.523-1	\$175

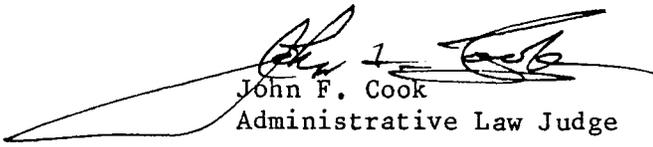
ORDER

A. The oral determination made at the hearing granting the Petitioner's motion to dismiss the petition for assessment of civil penalty as relates to Citation No. 321765, August 10, 1978, 30 CFR 75.523, is AFFIRMED.

B. The oral determination made at the hearing granting the Petitioner's motion to amend the petition for assessment of civil penalty as relates to Citation No. 321763, issued on August 10, 1978, to allege a violation of both 30 CFR 75.523 and 30 CFR 75.523-1 is AFFIRMED.

C. The Respondent is ORDERED to pay a civil penalty in the amount of \$175 within 30 days from the date of this decision.

D. IT IS FURTHER ORDERED that Citation No. 321765, August 10, 1978, 30 CFR 75.523, be, and hereby is, VACATED and that the petition for assessment of civil penalty, be, and hereby is, DISMISSED as relates to said citation.


John F. Cook
Administrative Law Judge

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Administrator for Coal Mine Safety and Health, U.S. Department of Labor
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 25 1980

CLIMAX MOLYBDENUM COMPANY, : Contest of Citation and Order
A division of AMAX, Inc., :
Contestant : Docket No. WEST 79-92-RM
v. :
: Citation No. 334415
SECRETARY OF LABOR, : April 18, 1979
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Order No. 33417
Respondent : April 18, 1979
:
SECRETARY OF LABOR, : Climax Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Civil Penalty Proceeding
Petitioner :
v. : Docket No. WEST 80-108-M
: A.O. No. 05-00354-05032R
CLIMAX MOLYBDENUM COMPANY, :
A division of AMAX, Inc., : Climax Mine
Respondent :

DECISIONS

Appearances: W. Michael Hackett, Esquire, Golden, Colorado, and
Todd D. Peterson, Esquire, Crowell & Moring,
Washington, D.C., for contestant-respondent Climax
Molybdenum Company;
Robert A. Cohen, Attorney, Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
petitioner-respondent MSHA.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a section 104(a) citation and subsequent 104(b) order issued by MSHA pursuant to the Federal Mine Safety and Health Act of 1977, charging Climax Molybdenum Company with a violation of section 103(a) of the Act for its refusal to permit MSHA inspectors to bring cameras on its mine property in the course of their inspections for the purpose of documenting violations of the Act and safety and health

standards promulgated thereunder. The parties waived an evidentiary hearing, and submitted the case for decision on the record, which includes the pleadings and legal arguments presented in the proposed findings, conclusions, and supporting briefs filed by the parties.

There does not appear to be any dispute as to the facts which precipitated the controversy at issue in these proceedings. On April 18, 1979, MSHA inspectors commenced a regular safety and health inspection of the Climax Mine. The inspectors carried with them instamatic cameras with flash attachments for the purpose of recording potential violations of the Federal Mine Safety and Health Act of 1977. Climax spokesman David Helmer refused to permit the MSHA inspectors to bring the photographic equipment along on the inspection. Climax's refusal of permission was based upon a uniform company policy that prohibits non-employees from using photographic equipment on Climax property and upon Climax's belief that MSHA was not statutorily permitted to use the equipment for the purpose of documenting violations.

As a result of the refusal, inspector Richard H. White issued a section 104(a) citation, No. 334415, which alleged a violation of section 103(a) of the Act. Subsequently, Inspector White issued a section 104(b) order, No. 334417, for failure to abate the citation. Climax subsequently filed a contest under section 105 of the Act in order to challenge the citation and order, and based on a stipulation of the facts, and at the request of the parties, I cancelled the scheduled hearing and ordered the parties to file briefs.

Petitioner's pleadings filed in the civil penalty proposal (Docket No. WEST 80-108-M) states that Citation No. 334415 was issued pursuant to section 104(a) of the Act, and that the specific standard cited was "30 CFR 103(A)." A copy of the citation attached to the pleadings and proposal reflects that it was issued on April 18, 1979, at 10:03 a.m., by MSHA inspector Richard H. White, and the condition or practice alleged to be a violation is described as follows on the face of the citation: "A spokesman for the company in the pre-inspection conference would not let MSHA inspector carry cameras underground for the purpose of taking pictures of violations which were to be a citation or order."

The inspector fixed the abatement time as 10:33 a.m., April 18, 1979, and at 10:45 a.m. that same day he issued a section 104(b) order of withdrawal citing a violation of section 103(a) of the Act, and the condition or practice is again described as follows: "The spokesman for the company still will not allow MSHA inspectors to take cameras underground for the purpose of taking pictures of violations." The area required to be closed by the withdrawal order is described as "none."

In its answer filed in response to the proposal for assessment of a civil penalty for the alleged violation, Climax states that there was no violation of section 103(a) because there is no authority under the Act or its regulations for MSHA to utilize photographic equipment during the course of regular health and safety inspections. In contesting both the citation and order, Climax asserts that:

1. The provisions of § 103(a) of the Mine Act, cited by the inspector as the basis for the issuance of the citation/order, do not authorize the use of photographic equipment in underground mines during the course of regular health and safety inspections conducted by the MSHA inspectors.

2. MSHA has no specific regulatory authority which justifies the use of photographic equipment during regular health and safety inspections of underground mines.

3. The use of photographic equipment underground by MSHA inspectors may actually expose miners to unsafe conditions.

4. The use of photographic equipment on Climax company property by non-employees is in violation of Climax policy.

5. The use of photographic equipment by MSHA inspectors is in violation of the interim rules of the Commission concerning the proper manner for taking discovery in administrative litigation cases.

6. Utilization of photographic equipment by MSHA inspectors creates the potential for disclosure of information which is proprietary in nature, and thus would divest Climax of the right to have this information remain outside the domain of public knowledge.

7. The improvement of safety is not advanced by the utilization of photographic equipment during the course of MSHA regular health and safety inspections.

Applicable Statutory and Regulatory Provisions

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

2. Section 103(a) of the Act provides, in pertinent part:

Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering of information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with

any citation, order or decision issued under this title or other requirements of this Act * * *. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare shall have a right of entry to, upon, or through any coal or other mine. [Emphasis added.]

Section 103(b) states in pertinent part:

For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal or other mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths.

Section 103(e) provides:

Any information obtained by the Secretary or by the Secretary of Health, Education, and Welfare under this Act shall be obtained in such a manner as not to impose an unreasonable burden upon operators, especially those operating small businesses, consistent with the underlying purposes of this Act. Unnecessary duplication of effort in obtaining information shall be reduced to the maximum extent feasible.

Section 104(a) provides:

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

Issues Presented

1. Does section 103(a) of the Act grant MSHA inspectors the authority to take cameras into or onto mine property for the purpose of taking

photographs of alleged conditions or practices which they believe constitute violations of mandatory safety or health standards?

2. Can MSHA inspectors use photographic equipment during a regular health and safety inspection irrespective of formal Secretarial rulemaking authorizing the use of cameras by MSHA personnel?

3. Can a mine operator be cited under section 103(a) of the Act for refusal to permit MSHA inspectors to take photographic equipment with them underground?

Additional issues raised by the parties are discussed in the course of these decisions.

DISCUSSION

Contestant's Arguments

In support of its position, Climax asserts that since the Climax Mine is private property, and since freedom from unreasonable Government intrusion is one of the fundamental guarantees of the Constitution, in the absence of any statutory authority to the contrary, Climax may regulate the Government's entry and activity in the mine. Thus, if the Government seeks to transgress upon the established privacy rights of Climax, it must at the very least, possess some explicit statutory authority to do so. Assuming, arguendo, that there exists such statutory authority, Climax asserts that it is found in section 103(a) of the Act, and that from its point of view, the issue here is whether that section of the Act unequivocally authorizes MSHA to intrude upon Climax's privacy and property rights by taking photographs solely for use as evidence at trial in a contested proceeding.

In further support of its arguments, Climax asserts that the strictness or liberality with which the words of section 103(a) are construed must be determined by reference to the nature of that particular section as it applies to the issue in this case, and that it is well settled that a remedial statute may be broadly construed for most purposes, yet strictly construed where it is punitive or treads close to constitutionally-protected areas. 3 C. Sands, Sutherland Statutory Construction, §§ 58.03, 60.04 (1973). Even though the substantive provisions of the Act, as remedial legislation, may be construed liberally, Climax argues that the proper focus in the context of the present case is not upon the nature of the Act as a whole, but rather on the specific statutory provision at issue, as it impacts upon the parties in this case. Thus, the effect of section 103(a) alone must determine the nature of the construction given that provision. Foremost among the factors justifying a strict construction of section 103(a), argues Climax, is the danger that MSHA's use of photographic equipment, particularly in the context of a warrantless inspection, would further encroach upon Climax's constitutionally-protected right of privacy. The fourth amendment guarantees of freedom from unreasonable searches applies to

Climax as it does to any homeowner, and the Supreme Court has consistently refused to uphold otherwise unreasonable searches simply because commercial establishments were the subject of the search. Go-Bart Importing Company v. United States, 282 U.S. 344 (1931); Amos v. United States, 255 U.S. 313 (1921); Silverthorne Lumber Company v. United States, 251 U.S. 385 (1920). "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." See v. City of Seattle, 387 U.S. 541, 543 (1967), accord, Marshall v. Barlow's, Inc., 436 U.S. 307, 311-12 (1978).

Climax argues that the Supreme Court has specifically emphasized that fourth amendment rights must be protected by limitations on the right of the Government to invade premises during an administrative search. Camara v. Municipal Court, 387 U.S. 5223 (1967); See v. City of Seattle, *supra*; Marshall v. Barlow's, Inc., *supra*. Since MSHA inspections may result in criminal as well as civil liability (see, e.g., section 110(d) of the Act), Climax asserts that the full range of constitutionally-based self-protection, as well as privacy guarantees, shield the Climax Mine from unreasonable Government intrusion, Camara v. Municipal Court, *supra*, 387 U.S. at 520, and that "[i]f the government intrudes upon a person's property, the privacy interest suffers whether the government's motivation [*sic*] is to investigate violations of criminal laws or breaches of other statutory or regulatory standards," Marshall v. Barlow's, Inc., *supra*, 436 U.S. at 312-13.

Climax suggests that the danger of unreasonable Government interference is even greater in the case of a warrantless search, and even assuming that the warrantless search of its mine did not run afoul of the fourth amendment, the warrantless nature of the search created greater dangers for invasion of Climax's constitutionally-protected privacy, and in such a setting, the Supreme Court has always strictly limited the scope of permissible warrantless searches, citing Michigan v. Tyler, 436 U.S. 499 (1978), a case in which fire officials had made repeated warrantless entries of a building in order to search for evidence of arson. The Court held that fire officials needed no warrant to enter a burning building because entry to extinguish a fire was "reasonable." The Court further held that once in the building, the fire fighters could remain for a reasonable time to take only evidence in plain view and to investigate the cause of the fire. After the initial exigency, however, any further reentry to investigate required either a warrant or the consent of the property owner. Thus, Climax asserts that the scope of a permissible warrantless search is restricted by the fourth amendment privacy rights of the property owner, and even where a warrantless search is permitted, the scope of the authorized search is exceedingly narrow; citing Chimel v. California, 395 U.S. 752 (1969) (searches incident to arrest); Terry v. Ohio, 392 U.S. 1 (1968) (pat-downs for weapons); and even where the courts have upheld the right of MSHA to conduct warrantless searches, they have recognized that the searches must be limited in scope, Marshall v. Nolichecky Sand Corporation, 606 F.2d 693 (6th Cir. 1979).

Climax asserts that to grant the inspector wide latitude to engage in activities not expressly authorized would result in an unwarranted and unreasonable intrusion upon Climax's constitutionally-shielded right of privacy, and that the problem is exacerbated in the case of photographs for a number of reasons. Photographs have the great potential of revealing trade secrets or other proprietary information, and MSHA could unwittingly reveal sensitive information about Climax's production or mining practices. The creation of a permanent pictorial record of Climax's private mining facilities thus compounds the invasion of privacy severalfold; it opens up Climax property not only to the inspector, but effectively to all who might see the photographs. This multiplier effect therefore enhances Climax's need for protection and justifies a close reading of MSHA's statutory powers on this specific issue.

Climax argues further that the impact on its privacy and proprietary operations is further increased by the fact that the use of photographic equipment and its accompanying flash attachments could distract miners whose attention must be focused entirely on the safe operation of massive machinery in confined underground spaces. The mere presence of Government inspectors is distracting enough to Climax's miners; taking pictures with a flash has much greater potential for disrupting normal operations and diminishing safety during the mining process. This factor simply reinforces Climax's protected privacy interest in avoiding added MSHA intrusion into its property.

Finally, Climax asserts that strict construction is even more appropriate where there is no explicit regulation or formal MSHA action authorizing the use of photographic equipment, and points to the fact that by contrast, OSHA inspectors are specifically authorized by regulation to take photographs during the course of an inspection, 29 CFR 1903.7(b), and which may be used in a subsequent enforcement hearing. MSHA, however, has no comparable regulation; in fact, there appears to be no official MSHA authorization at all for the attempted use of photographic equipment by Inspector White. In the absence of a formal authorizing regulation, MSHA inspection practices ought to be strictly limited. Since MSHA has not officially sanctioned the use of photographic equipment, the informal practices of individual inspectors or district managers are not entitled to great deference. Particularly in an area where privacy rights are implicated, the scope of an inspector's informal power, unauthorized by specific regulation, ought to be carefully circumscribed.

In addition to its fourth amendment arguments, Climax asserts that section 103(a) of the Act contains no explicit authorization to take photographs, and that any such authority must be inferred from the general inspection power. The photographs, and the use to which they are put, must achieve in some direct and concrete manner one of the four statutorily-prescribed purposes for MSHA inspections. If the photographs are not reasonably calculated to achieve one of the four-stated purposes, then their use is not authorized by the statute.

Climax asserts that the purpose for which MSHA intends to use photographs taken in the course of an inspection was made clear in a recent case involving the same parties, Climax Molybdenum v. MSHA, DENV 78-581-M (Judge Cook; hearing date, January 31, 1979), where MSHA inspector James Enderby testified as follows:

Well, since our first meeting here in November, the District Manager has issued cameras as inspection equipment to every inspector in the district. We are instructed as a policy from now on, from that point forward, if we think we are going to have a citation that we write or whatever, that could come into litigation, to take a picture of that particular violation.

* * * * *

Now, anytime we write a violation that we think will be, or has a possible chance of being litigated, to take a picture of it in all the surrounding circumstances.

Climax argues that this testimony makes it clear that MSHA inspectors in this district are attempting to use photographic equipment in preparation for potential litigation, and that the sole conceivable justification is to develop evidence for use at trial. In these circumstances, Climax believes that the inspector ceases to be an enforcement officer of MSHA and instead becomes an agent of the Solicitor to aid the lawyer in preparing his case, and in this context his inspection is not for violations, but a form of extrajudicial pretrial discovery. In support of its arguments, Climax asserts that the taking of photographs to be used as evidence in a later hearing does not further any of the statutorily-enumerated purposes of section 103(a) and therefore is not authorized by the Act. The first two purposes clearly do not apply to the present situation. The use of photographs as evidence in a hearing does not involve "obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines." This section is aimed at the generation of publicity and public information relating to mine safety and health, not to the development of evidence for use in a hearing. Thus, while it might authorize the taking of photographs for the purpose of studying some specific condition or disseminating information to the public, it does not justify the use of photographic equipment for the purpose of corroborating an inspector's testimony at a hearing.

The second statutory purpose, "gathering information with respect to mandatory health or safety standards," grants power to conduct research in order to develop effective regulations for the protection of safety and health. It does not contemplate use in an enforcement proceeding of the information gathered pursuant to its provisions. Thus, it cannot authorize the taking of photographs for use as evidence in an enforcement hearing.

The third and fourth purposes authorize inspections only for "determining whether an imminent danger exists" and "determining whether there is compliance with the mandatory health and safety standards * * *." Simply stated, this section authorizes an inspector to travel the mine to assure himself that no imminent dangers exist and that the operator is complying with the mandatory standards. It does not authorize an inspector to do whatever is helpful to the Solicitor's Office for the purpose of persuading an administrative law judge that a violation existed when the inspector visited the mine.

Photographs for use in a hearing are not taken to help the inspector to determine whether a violation or imminent danger exists; rather, the photographs are used later to support the Solicitor's case that a violation did exist. Thus, the taking of photographs is distinguishable from the taking of air samples, measurements, or other physical evidence where the evidence is used by the inspector to determine whether a standard has been violated rather than as corroboration of the inspector's judgment that a violation existed. The section does not authorize unlimited sleuthing solely for the purpose of preparation for trial. The development of trial evidence is more properly within the scope of prehearing discovery and is therefore outside the ambit of the explicit authority granted by section 103(a).

Climax asserts that when Congress intended MSHA to have evidence-gathering capabilities similar to pretrial discovery, it explicitly granted such authority in very limited instances. Pursuant to section 103(b) of the Act, MSHA is empowered to take testimony and compel production of documents in the course of an investigation, but no such powers are authorized for use during an inspection. Thus, although the Solicitor could take depositions and compel production of documents in preparation for a hearing on a challenged citation, MSHA inspectors are not authorized to gather such evidence during the course of an inspection. This provision confirms the division between those activities that are required in order to enable an inspector to determine the existence of a violation and those activities that are solely for the purpose of gathering evidence for trial. Citing the legislative history of both the 1969 and 1977 Acts, Climax asserts that nowhere is there any indication that Congress authorized inspectors to gather, in the course of a warrantless inspection, evidence to be used at a later trial, and the only authority granted is the power to determine whether the inspector believes there is a violation of the Act.

Finally, Climax argues that any statutory authority granted by section 103(a), must be strictly construed in light of the important privacy rights at stake, and it does not include the power to take photographs solely for the use as evidence at trial. Such evidence is not necessary to make a determination that a violation exists, rather, it is more appropriately considered a part of pretrial discovery that is best carried out under some form of judicial supervision, as for example, Commission Procedural Rule 57, 29 CFR 2700.57, which specifically provides that good cause must be shown to obtain an order to permit, inter alia, "photographing of designated documents or objects, or to permit a party or his agent to enter upon designated land to inspect and gather information."

'SHA' s Arguments

MSHA argues that section 103(a) of the Act authorizes frequent mine inspections for the purpose of obtaining information concerning compliance with mandatory health or safety standards, and that section 103(e) mandates that this be done in such a manner as to not impose unreasonable burdens upon mine operators. MSHA points out that the basic method utilized by an inspector to determine compliance is by visual observations of mine conditions and practices. However, since there are many occasions when an inspector is required to use certain types of equipment or testing devices to determine if an operator is in compliance, the equipment could include methane detectors, respirable dust-sampling equipment, and smoke tubes. Here, the MSHA inspector sought to bring a camera with him as part of his regular equipment in order to better establish the existence of certain conditions, and any photograph taken would have been a part of the regular inspection process. Since there is little doubt that an inspector has the right to take and remove from a mine air and dust samples, MSHA asserts that the use of a camera to take photographs to support his belief that a violation has occurred is also appropriate, and in fact, necessary to adequately perform his duties.

In support of its position, MSHA argues that inherent in the inspector's duty to gather information under the Act is the right to preserve that information in a form in which it can be used at a later time if the inspector's enforcement actions are contested. Since the Act sets forth a procedure for contesting MSHA's enforcement actions, an inspector should be allowed to support his findings by any means which are consistent with section 103(a). While inspectors' notes and drawings of conditions observed are helpful, photographs taken at the time violations are cited can be especially useful in documenting findings that have previously been made, and the use of cameras by MSHA personnel to support enforcement actions will be helpful in resolving credibility questions which arise when citations are contested by mine operators.

MSHA asserts further that the Act requires all underground mines to be inspected at least four times a year, and because of the limited number of inspectors available to carry out the mandate of the Act, an inspector may be in an area of a mine where he is required to take some enforcement action for only a short period of time. If a particular enforcement action is contested by an operator, an inspector may not have the opportunity to revisit the mine prior to a hearing before an administrative law judge. Any hearing of a contested violation may take place many months after the initial enforcement action was taken by the MSHA inspector. All of these factors may result in the testimony of MSHA inspectors being found too vague when it comes to describing the conditions they actually observed prior to issuing a citation or withdrawal order. Operators who are seeking to contest MSHA enforcement actions may have similar problems when presenting evidence to support their position. Mine management personnel who appear at hearings frequently base their testimony concerning contested conditions on hearsay statements of other employees who are not available

for cross-examination. This type of testimony can result in difficult credibility problems which must be resolved by an administrative law judge before he can determine if a violation of the Act has occurred.

MSHA takes the position that the use of photographs would serve to reduce the amount of time spent by its inspectors, as well as mine operators, in exploring the circumstances under which a violation has occurred. MSHA states that many times a judge is not fully apprised of the severity of a violation because of the inability of an inspector to accurately describe all of the conditions which lead to the issuance of his enforcement action. However, since courts have generally upheld the use and admission of photographs to give the trier of facts a better understanding of conditions at the scene of an accident, Louisville & N.R. Company v. Brown, 127 Ky. 732, 746, 196 S.W. 795, 798 (Ky. 1908), MSHA asserts that the same rationale which makes the use of photographs admissible in accident cases in supporting the testimony of witnesses is directly applicable to their use by MSHA inspectors to support their judgments that a violation of the Act has occurred. Under certain circumstances, the use of photographs will be able to convey to an inspector's supervisor, an assessment officer, or to an administrative law judge, a better impression as to whether or not a violation of the Act has occurred than could the inspector's verbal description of the conditions he observed. Of course, said photographs must usually be taken at the time the violation is observed. Recognizing the fact that before a photograph can be introduced at a hearing, it has to be authenticated that the photograph is substantially accurate and purports to represent accurately the condition or practice that it is seeking to portray, MSHA emphasizes that a photograph will not itself establish a violation of the Act, but will merely be used to support an inspector's testimony in those situations where conflicts in testimony arise. Any photograph which is not material to the condition or practice sought to be established by the inspector will be subject to objection for reasons of relevancy and materiality.

With regard to Climax's contention that the Secretary has not formally conducted any rulemaking with respect to the use of cameras as part of MSHA's enforcement scheme, similar to the OSHA regulation cited by Climax, MSHA asserts that Climax ignores the fact that administrative agencies are not required to resort to formal rulemaking in order to develop all policies and procedures necessary to aid in the enforcement process, and cites Human Resources Management, Inc. v. Weaver, 442 F. Supp. 241, 251 (1978), and the Supreme Court's holding that: "Absent constitutional constraints or extremely compelling circumstances administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties. Vermont Yankee Nuclear Power Corp. v. NRDC, 55 L.Ed 2nd 460, 479 (1978)."

In further support of its position, MSHA states that it is clear that the Act authorizes a mine entry by its inspectors to observe conditions in the mine, and that the use of a camera to preserve those conditions underground is a natural extension of the right of entry since a photograph is

a mere picture of those conditions already observed, and the act of taking a photograph cannot support a claim for invasion of privacy. MSHA further believes that when an inspector uses a camera to support his judgments made with respect to the enforcement provisions of the Act, he is engaging in an efficient recognized method of inquiry. No individual rights of mine operators are affected, nor is the authorizing of the use of cameras by MSHA inspectors as part of their equipment, a substantive rule or policy that relates to the public and therefore must be published in the Federal Register. Therefore, no new rulemaking is necessary.

MSHA has submitted a copy of an April 30, 1979, policy memorandum from its Metal and Nonmetal Mine Safety and Health Administrator addressed to its Metal and Nonmetal Mine Safety and Health District Managers, regarding the use of cameras by inspectors during mine inspections. That memorandum states as follows:

Pursuant to section 103(a) of the Mine Act, inspectors make frequent inspections of mines for purposes of (1) obtaining information relating to health and safety conditions, and the causes of accidents, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or other requirements of the Mine Act. Inasmuch as the Mine Act establishes the purposes of inspections, it follows that an inspector may take into the mine the equipment necessary to accomplish his mission.

This equipment could include, in appropriate circumstances, methane detectors, torque wrenches, additional lights, and a camera. Hence, if an inspector, in his judgment, needs a particular piece of equipment to accomplish his statutory mission, the Mine Act implicitly authorizes him to use such equipment.

Frequently, inspectors feel that taking photographs of the scene of an alleged violation, imminent danger or accident would be of great assistance in verifying and correcting the conditions or practices resulting in the violation, danger, or accident. The use of cameras may also be of great assistance in subsequently resolving differences of opinion between the mine operator and the inspectors as to the conditions present at the time of citation. Such photographs could also be of benefit to both parties by expediting assessment and review proceedings by providing a pictorial illustration of the scene of a violation. Accordingly, when the use of a camera would be necessary or helpful in an inspection, the District Manager or Subdistrict Manager may authorize such use during inspections of metal and nonmetallic mines subject to the following special restrictions:

1. All non-gassy metal and nonmetallic mines - none.
2. All gassy metal and nonmetallic mines - tests for methane will be performed prior to any use of a camera. If methane is present at levels in excess of 1%, or if the inspector has reason to believe methane is present, only photographic equipment approved for use in gassy mines by Approval and Certification Center shall be used.
3. All gilsonite mines - prohibited.

Because questions have arisen in the past regarding the use of cameras, I am initially requiring District Manager's or Subdistrict Manager's approval of the use of cameras in each instance. I want you and the Subdistrict Managers to exercise discretion in the approval of the use of cameras.

You should also be sure the inspectors are instructed in the use of cameras. The inspectors should make a record of the physical conditions under which the photographs are taken and the date and time and place.

A refusal to permit the inspector to carry a camera into the mine will be considered a violation of section 103(a) of the Act and could also be considered an interference or hindrance of the inspector in carrying out the provisions of the Act. If there is a refusal of permission to take a camera into the mine, the inspection should nevertheless be completed and a record made of any special reasons for taking the camera into the mine.

The Solicitor's Office has reviewed this memorandum and concurs with the position taken.

In view of the policy memorandum regarding the use of cameras, MSHA maintains that since it restricts the use of cameras in certain gassy mines and in all gilsonite mines, the safety problems resulting from their use in underground mines have been minimized and that unless Climax can demonstrate that there are important overriding circumstances why MSHA's use of cameras in specific situations should not be permitted underground, inspectors should be free to perform their duties using the best investigative tools available.

With respect to the alleged violation of section 103(a) for Climax's refusal to permit the use of cameras on its mine property, MSHA argues that section 104(a) authorizes the issuance of a citation or withdrawal order for violations of the Act as well as any mandatory safety or health standards. MSHA believes that the refusal of Climax to allow an inspector to carry a camera underground during an inspection amounts to hindering and impairment by an operator of MSHA's ability to carry out its duties specified under

section 103 of the Act, and Climax should not be allowed to dictate to an inspector the type of equipment which he may use underground. The gathering of information to determine compliance with the requirements of the Act must proceed in an atmosphere free from attempts to intimidate or limit the activities of the inspector during the course of his duties, and given the remedial nature of the Act, an inspector must be allowed broad latitude and discretion in carrying out his duties, St. Mary's Sewer Pipe Company v. Director of the United States Bureau of Mines, 262 F.2d 378, 381 (3d. Cir. 1959); Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F.2d 741, 744 (7th Cir. 1974). Should Climax claim that the use of an individual photograph by MSHA violates a company trade secret or some other rights, it would be free to challenge the use of that particular photograph. However, that potential challenge by Climax should not be persuasive in supporting a general refusal to permit the use of cameras in underground mines. Thus, anytime an operator prevents an inspector from carrying out his investigatory functions, he violates the provisions of section 103 and can be cited accordingly.

Reply Brief Arguments

Contestant

In its reply brief, Climax views the issue in this case to be the narrow question of whether MSHA is statutorily authorized to take photographs during a warrantless inspection solely for use as evidence in an enforcement hearing. Climax does not view the issue to include whether MSHA may ever use photographic equipment; nor does it believe that the case calls for a determination as to whether photographs may be used as evidence in an enforcement hearing. Climax's position is that the taking of photographs for use in a hearing is explicitly contemplated by the Commission's Rules of Procedure, 29 CFR 2700.57, but the photographs must be taken as part of the judicially-supervised pretrial discovery process. Climax makes no objection to the gathering of evidence in this specifically-authorized and well-regulated manner. Climax does, however, object to the gathering of photographic evidence under the pretense of an inspector's determination whether to issue a citation. This form of extra-judicial discovery infringes upon Climax's privacy rights and is unauthorized by the Act. Regarding MSHA's reliance on section 103(a), Climax asserts that this section is not relevant because the conference report demonstrates that it deals only with recordkeeping requirements, S. Rep. No. 461, 95th Cong., 1st Sess. 45 (1977).

Climax reiterates its strict construction arguments, and conceding the fact that substantive provisions of the act should be liberally construed in order to effectuate the remedial purposes of the Act, it maintains that the warrantless inspection provision should be strictly construed to avoid conflict with Climax's constitutionally-protected right of privacy, and it distinguishes the cases of St. Mary's Sewer Pipe Company v. Director of the United States Bureau of Mines, 262 F.2d 378 (3d. Cir. 1959), and Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F.2d 741

(7th Cir. 1974), relied on by MSHA for its liberal construction arguments. Climax points out that these cases dealt with substantive provisions directly related to safety precautions that are readily distinguishable from the provisions of the Act in issue in the instant proceedings. Since the inspection provisions of section 103(a) authorize warrantless entry and impinge directly on Climax's constitutionally-protected right of privacy, Climax asserts that the effect of this particular provision, not the Act as a whole, is the key to the type of construction that should be applied in this case. The extent to which MSHA may invade Climax's protected privacy rights must be construed strictly in order to avoid any unnecessary infringement of Climax's privacy rights. Climax points out that MSHA's policy memorandum was issued after the citations in these proceedings were issued, and that contrary to MSHA's arguments, there is no suggestion in these proceedings that MSHA inspectors were intimidated in any way. Climax officials simply requested that they not use photographic equipment in what Climax believed to be an unauthorized manner. Further, Climax asserts that MSHA assumes that the burden is on Climax to demonstrate "over-riding circumstances" in order to prevent the use of photographic equipment, and that implicit throughout MSHA's arguments is the assumption that an inspector can enter a mine and do whatever he pleases, regardless of whether there is specific statutory authorization for his actions.

Climax believes that the MSHA approach is best illustrated in its analysis of the statutory foundation of an inspector's right to take photographs. Commenting on MSHA's argument that the use of a camera during an inspection "is a natural extension of the right of entry," Climax agrees that the use of cameras to develop evidence for trial extends the right of entry, but it is an extension that is unjustified by the specific language of section 103(a). In fact, states Climax, MSHA makes no effort to cite specific statutory language in support of its position; its arguments are all based on general assertions as to what is helpful or convenient for MSHA, and the essence of its argument is that inspectors may develop photographic evidence for trial during the course of a regular inspection in that it would be helpful to MSHA to have pictures to introduce at a hearing, and the regular inspection is the most convenient time to take the photographs. Even if the above were true, maintains Climax, it would not mean that MSHA is statutorily authorized to obtain photographic evidence at the time of an inspection. First, the fact that photographs may, in general, be useful does not mean that photographs are statutorily authorized. The whole point of the fourth amendment is to prevent the Government from taking actions that would be useful in the Government's enforcement efforts, but would infringe upon a citizen's protected right of privacy.

In this case, the general usefulness of photographs at trial does not indicate that they may be taken as part of an inspection, and in fact, Climax believes the Act authorizes an inspector only to do that which is necessary in order to determine whether to issue a citation. Photographs are not required in order to make that determination, and their use may be distinguished from methane detectors, smoke tubes, and dust sampling devices. Moreover, even assuming that photographs would be helpful at a hearing, the

Act does not authorize the extra-judicial gathering of such evidence in the course of a warrantless inspection. The inspector's statutorily-prescribed role is to determine whether a violation exists; photographs do not further that goal. If the Solicitor desires to obtain photographic evidence for a hearing, he should follow the explicit Commission procedures that have been established for that type of pretrial discovery. See 29 CFR 2700.57.

MSHA

Addressing contestant's warrantless search arguments, MSHA cites two recent U.S. Circuit Court decisions concluding that MSHA's warrantless inspections and enforcement procedures are reasonable with respect to gaining access to the nation's mines, Marshall v. Nolicheckey Sand Company, Inc., 606 F.2d 693 (6th Cir. 1979), and Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3rd Cir. 1979), cert. denied, No. 79-614 (January 7, 1980). MSHA takes the position that once it has been determined that a Federal inspector has a lawful right to gain access to a mine without a warrant, the warrantless search and right of privacy issues become moot. MSHA asserts that the real issue in this case concerns the investigatory methods an inspector may use to preserve evidence and document his findings, after he has gained access to the premises. Since mining has been a heavily-regulated industry for a number of years, MSHA argues that Congress intended that MSHA's right to make warrantless searches be interpreted broadly, and cites the following excerpt from the legislative history:

Safety conditions in the mining industry have been pervasively regulated by Federal and state law. The Committee intends to grant a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under the Act without first obtaining a warrant. S. R. No. 95-181, 95th Cong., 1st Session, p. 27

In further support of its arguments, MSHA asserts that its broad right-of-entry not only applies to the actual entry itself, but also to what an MSHA inspector may do during the course of his inspection. The fact that he gains access to a mine without a warrant does not in any way limit or restrict his investigatory duties under the Act, and the use of a camera to preserve evidence and to document his findings are clearly reasonable and important parts of his investigatory functions. The actual taking of a photograph does not enlarge MSHA's original right-of-entry, since an inspector already has the right to visually observe all conditions in a mine which a photograph could depict.

In response to Climax's privacy arguments, MSHA points out that inspectors are at the Climax Mine on almost a daily basis, and citing United States v. Biswell, 406 U.S. 311 (1972), argues that the court there held that owners of highly-regulated industries have little expectation of privacy since Federal regulation of these industries serves an important Governmental interest. Since a photograph merely preserves a visual picture of what an inspector has already observed, MSHA suggests that no privacy rights of Climax are affected.

Regarding Climax's characterization of an inspector as an "agent" of the Solicitor's Office, MSHA states that this is absurd since the same argument could be made about an inspector who takes good notes or makes detailed drawings of conditions he observes in a mine. Moreover, the Solicitor's Office only becomes involved in a small percentage of the total enforcement actions taken by MSHA. It is clear that photographs can serve many important functions in assisting MSHA in carrying out the Congressional mandate, aside from litigation preparation; and photographs are frequently used in resolving credibility problems and therefore may actually serve to eliminate the need for litigation in a particular situation. MSHA concludes that Climax's reliance on a narrow interpretation of MSHA's right-of-access to its mine should be rejected.

Findings and Conclusions

Warrantless Searches

The authority of Government officials to conduct inspections for law enforcement purposes is limited by the fourth amendment to the Constitution which proscribes unreasonable searches and seizures. As a general rule, to conduct a search, a law enforcement official must first obtain a warrant based on probable cause, See v. City of Seattle, 387 U.S. 541 (1967). Where authorized by Congress, however, warrantless searches without probable cause may be conducted for legitimate regulatory purposes, United States v. Biswell, 406 U.S. 311 (1972). Although the courts in the past have deferred to the discretion of the legislature in granting administrative investigative powers, recent decisions indicate that the courts may not be hesitant to prevent the abuse of these powers or to discharge their role as protectors of individual rights.

Two cases decided by the Supreme Court in 1967 dealt with the administrative searches by non-federal Government officials, and both found administrative searches sufficiently significant intrusions to require prior judicial authorization. In Camara v. Municipal Court, 387 U.S. 523 (1967), a case cited by Climax, a public health inspector sought to make a routine annual inspection of appellant's premises for possible violations of a local housing code. Without requiring that a search warrant be obtained, a local municipal ordinance provided that inspectors should have the right to enter at reasonable times to permit such inspections, and refusal to permit entry was subject to a fine and jail sentence. Upon refusal by the appellant to permit a warrantless inspection of his premises, he was arrested and charged with a violation of the local ordinance. Noting that even a law-abiding citizen has a strong interest in preserving the sanctity of his home from official intrusion, the Court rejected the notion that the fourth amendment interests at stake in inspection cases are merely "peripheral" and held that the constitutional guarantee applies with full force to such searches, and further found administrative searches sufficiently significant to require prior judicial authorization.

In See v. Seattle, supra, a municipal ordinance authorized compulsory warrantless inspections of certain buildings, except the interior of dwellings, as often as necessary to discover violations of the city's fire code. The Court ruled that there is no justification for relaxing fourth amendment safeguards simply because the inspection is of commercial premises, since a businessman's constitutional right to be free from unrestricted official entries is of no less significance than that of a private resident. The Court applied the warrant procedure outlined in Camara to commercial inspections, and while noting that each demand for entry should be measured against a flexible standard for reasonableness, noted that "the decision to enter and inspect should not be the product of unreviewed discretion of the enforcement officer in the field." 387 U.S. at 544-45.

Although Camara and See involved local municipal administrative searches and may arguably be distinguishable from Federal administrative agencies on the basis of the subject matter regulated, it would seem that for the most part, the interests generally advanced for Federal agency searches are no more compelling than those at issue in the cases concerning local, state, and municipal agencies. As a matter of fact, as pointed out by Climax in the cases footnoted at page 7 of its initial brief, the issue of warrantless searches, insofar as it may affect Climax's constitutionally-protected right of privacy, is not free of doubt, particularly in the context of the metal and nonmetal mining industry.

The issue of warrantless searches pursuant to section 103(a) of the Act was previously raised in two Commission proceedings decided by Judge Broderick in MSHA v. Waukesha Lime and Stone Company, Inc., VINC 79-66-PM, June 5, 1979, and MSHA v. Halquist Stone Company, VINC 79-118-PM, June 8, 1979. Addressing the general proposition that an administrative agency does not have the power to rule on constitutional challenges to an organic statute of an agency, Weinberger v. Salfi, 422 U.S. 749 (1975); Johnson v. Robison, 415 U.S. 361 (1974); Public Utility Commission v. United States, 355 U.S. 543 (1958); Sprengel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976), Judge Broderick nonetheless ruled that it is the responsibility of an administrative agency to determine whether a provision of the statute it administers may constitutionally be applied to the facts found by the agency, that construction of its organic statute is peculiarly the duty of the agency, and that a cardinal rule of construction requires that if possible, a statute be construed to avoid conflict with the Constitution, NLRB v. Home Center Management Corporation, 473 F.2d 471 (8th Cir. 1973). Judge Broderick concluded that the mining industry is a pervasively-regulated industry, and that as such, warrantless nonconsensual inspections are mandated by the Act and do not constitute unreasonable searches prohibited by the fourth amendment to the Constitution. I agree with his conclusions.

In disposing of the constitutional challenges on the warrantless search issues raised in Waukesha Lime and Halquist Stone, Judge Broderick relied on the requirements of section 103(a) that MSHA inspectors make frequent inspections of mines, and the Senate Committee Report stating that the language

"shall have a right of entry to, upon, or through any coal or other mine" was intended by the Committee "to be an absolute right of entry without need to obtain a warrant." S. Rep. No. 95-181, 95th Cong., 1st Sess., 14 (1977), note 3 at 615. Further, Judge Broderick relied on recent court decisions holding that warrantless searches of coal mines authorized by the Act do not contravene the fourth amendment. Youghiogeny & Ohio Coal Company v. Morton, 364 F. Supp. 45 (S.D. Ohio, 1973); accord United States v. Consolidation Coal Company, 560 F.2d 214 (6th Cir. 1977), vacated and remanded, 436 U.S. 942, 98 S. Ct. 2481 (1978), reinstated, 579 F.2d 1011 (1978).

I believe it is clear from the legislative history of section 103(a) that Congress intended to confer on the Secretary broad inspection authority over the mining industry under his jurisdiction for the purpose of insuring compliance with mandatory health and safety standards. This authority granted by Congress includes the right-of-entry to a mine without advance notice and without the necessity of obtaining a warrant. The authority granted the Secretary under section 103(a) permits mine entry and access by MSHA to places from which it would normally be otherwise excluded by persons having fourth amendment rights in such places. Further, it seems clear to me that in order to carry out an effective enforcement program, Congress deemed it necessary to confer on the Secretary the right-of-entry for the purpose of ascertaining and insuring compliance with the Act and the promulgated mandatory health and safety regulations. As the Supreme Court noted in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978):

[C]ertain industries have such a history of government oversight that no reasonable expectation of privacy could exist. Thus, there is a well-established exception to the search warrant requirements of the Constitution, Fourth Amendment, * * * for 'pervasively regulated businesses' * * * and for 'closely regulated' industries 'long subject to close supervision and inspection' * * * Idem, quoting from United States v. Biswell, 406 U.S. 311, 316 (1972), and Colonnade Catering Corp. v. United States, 397 U.S. 72, 74 (1970).

In Marshall v. Nolichecky, supra, the district court observed that since Congress determined that the mining industry is such a closely-regulated industry, regulation of that industry falls within the Biswell-Colonnade exception to the fourth amendment's warrant requirements, and the court cited the legislative history of the 1977 Act which noted that "[s]afety conditions in the mining industry have been pervasively regulated by Federal and State law." 3 U.S. Code Cong. & Admin. News (1977), p. 3427. The court also took note of the fact that:

[A]s to the coal mining industry, it has been determined in this circuit that such industry has a history of close federal regulation under the aegis of the commerce clause, United States v. Consolidation Coal Co., 560 F.2d 214, 220 (6th Cir. 1977), vacated and remanded (1979) ___ U.S. ___, 56 L.ed 783, Judgment and opinion reinstated on remand,

579 F.2d 1011 (1978), Youghiogeny and Ohio Coal Company v. Morton, 364 F. Supp. 45, 49 (D.C. Ohio 1973).

On appeal and affirmance, the Sixth Circuit in Nolichuckey, observed as follows at 606 F.2d 693, slip op., page 7:

We conclude that the enforcement needs in the mining industry make a provision for warrantless inspections reasonable. The Act also contains privacy guarantees which are sufficient. As construed by this court, Section 201(a) and (b) of the Act permits warrantless inspections only of the "active workings" of coal mines. A warrant is required for the inspection of offices and other areas where the operator has a general expectation of privacy. See United States v. Consolidation Coal Co., 560 F.2d 214, 217 (6th Cir. 1977), vacated and remanded, 436 U.S. 942 (1978), judgment reinstated, 579 F.2d 1011 (1978). The same limitation would apply to sand and gravel "mines." Further, the statute provides for participation in all inspections by a representative of the operator. Finally, refusal of an operator to permit an inspection does not lead to summary imposition of sanctions. The Act provides for institution of a civil action by the Secretary of Labor seeking an injunction or other appropriate order.

In Marshall v. Stoudt's Ferry Preparation Company, supra, the Fourth Circuit stated as follows at 602 F.2d 593-94:

Mindful of the Supreme Court's reluctance to foreclose the incremental protection afforded a proprietor's privacy by a warrant, we are persuaded that the Mine Safety Act's enforcement scheme justifies warrantless inspections and its restrictions on search discretion satisfy the reasonableness standard reasserted in Barlow's. Although the Mine Safety Act's coverage of enterprises has been broadened from that of the predecessor Coal Mine Safety Act to include other than coal mining, the statute is still much more limited than OSHA and is aimed at an industry with an acknowledged history of serious accidents. Moreover, unlike OSHA, the Mine Safety Act mandates periodic inspections and is specific in that no advance warning is to be given when the inspection is to determine whether an imminent danger exists or whether there is compliance with mandatory health and safety standards or with any citations, orders, or decisions outstanding, 30 U.S.C.A. § 813(a).

In another recent Fourth Circuit decision, Marshall v. Charles T. Sink, d/b/a Sink Coal Company, No. 77-2614, January 24, 1980, the court affirmed the district court's decision upholding the warrantless routine inspection of a mine, and relied on Barlow's, the Colonnade-Biswell exception, Stoudt's

Ferry, Nolichuckey, and Youghiogheny. See also, Marshall v. Texoline Company, Civil No. CA 4-78-49, Northern District of Texas, March 23, 1979, where the court upheld the Secretary's warrantless search of a limestone mine on the basis of Barlow's, Colonnade-Biswell, and Youghiogheny. I take note of the court's observation in Sink that the Secretary must seek an injunction when he is refused entry to a mine and that this procedure permits operators to present their objections to a district court before an inspection takes place to any sanctions that are imposed. This statement by the court is not altogether accurate since the injunction provision of 30 U.S.C. § 818 is permissive and not mandatory, and refusal of entry may result in a citation or closure order pursuant to section 104(a).

It seems clear to me from the aforementioned decisions, that the courts have accepted the strong presumption of the constitutionality of the warrantless inspection provisions of section 103(a), as well as the proposition that the Barlow's situation regulating business in general is readily distinguishable from the enforcement scheme fashioned by Congress under the 1977 Mine Safety and Health Act which relates to a single mining industry which has had a history of close Federal regulation and supervision, a fact specifically recognized by the Supreme Court in Barlow's.

May An MSHA Inspector Use A Camera To Document Conditions Or Practices Which He Believes Constitutes Violations Of Mandatory Health Or Safety Standards?

In my view, the taking of a photograph by an inspector at the time the condition or practice which he believes constitutes a violation of a mandatory standard is observed is no different than an inspector taking notes, making diagrams of the scene, making measurements with a rule or tape, or otherwise documenting the conditions observed by him with the naked eye. If a citation results from such an inspection, the inspector's concern should be to fully document the conditions and to describe them in such a manner so as to put the mine operator on full and fair notice as to what is required to achieve abatement so as to timely correct the hazard. If this is done, the inspector not only achieves compliance with the least amount of friction, but is also in a position to back up his citation with credible evidence in the event the citation is challenged. During the initial inspection, if a citation should issue, the inspector does not at that point in time know that it will be formally challenged through the hearing process, and in this setting, Climax's suggestion that he is acting as an agent of the Solicitor's Office is somewhat farfetched. The taking of a photograph merely documents the inspector's visual observations, and I conclude that it is an extension of his inspection and the camera is merely a tool to aid him in that inspection. In my view, a pocket instamatic or similar camera carried by the inspector during his inspection rounds, so long as it is confined to that use while making observations of conditions or practices which he believes constitute a violation, is no different than a pad of paper and pencil on which the inspector records notes and other observations.

I believe that the use of cameras by an inspector may, under the circumstances discussed above, serve as a useful tool to resolve credibility questions surrounding routine violations which may involve judgment calls on the part of the inspector which are at odds with those of mine management officials who may view the same conditions and come to different conclusions. The use of a camera is particularly useful and critical in situations involving imminent dangers, accidents resulting from violations, and situations where the conditions are likely to change after the occurrence of the event which prompted the citation or order. Further, the use of a camera cuts both ways; for just as an inspector may use a photograph to support a violation, a mine operator is free to use a camera to establish the lack of a violation. As an example, I cite the following three OSHA cases, recognizing the fact that OSHA has a specific regulation authorizing the use of cameras by its compliance officers.

In Beall Construction Company, 1971-1973 CCH OSHD 15,223, the judge observed that conflicting testimony as to the condition of a ladder on a construction site could have been easily resolved by a photograph. The Secretary's failure to submit a photograph resulted in his failure to prove a violation.

Marino Development Corporation, 1971-1973 CCH OSHD 15,478, concerned an unshored trench cave-in fatality, and one of the witnesses called by the Secretary was a police sergeant who was called to the scene and who took pictures within minutes after the occurrence of the event. The judge found the pictures to be of great value in determining the weight and credibility to be given to the testimony of the witnesses with respect to the critical issue of the depth and width of the trench as well as other prevailing conditions.

W. J. Lazynski, Inc., 1971-1973 CCH OSHD 15,184, concerned a case in which the judge concluded that the Secretary had failed to establish by his evidence that two nonserious violations had occurred as a result of the alleged presence of debris in a working area in violation of a mandatory standard. Photographs taken by the respondent, coupled with the testimony of the company president, convinced the judge that the materials cited were not "debris," but in fact materials stored and stacked for reuse. The judge found no violation.

The use of photographs in proceedings before the Department of the Interior and the Commission pursuant to the 1969 and 1977 statutes has been an ongoing practice by both MSHA and mine operators, and as far as I know, no prior objections or questions have been raised as to the right of an inspector or a mine operator to use a camera to support their respective positions with respect to the fact of a violation. Of course, the use of photographs has been limited to questions of their admissibility at the hearing pursuant to the established rules of evidence; see, e.g., Mountaineer Coal Company, 6 IBMA 308 (1976), where the judge attributed no weight to an operator's photographs of a mine area submitted to establish that float coal dust did not exist as alleged in the notice of violation on the

ground that the photographs distorted the true prevailing conditions. See also, my decision of July 3, 1979, in MSHA v. Lone Star Industries, VINC 79-21-PM, July 3, 1979, where photographs taken and submitted by the mine operator were extremely useful in resolving credibility problems concerning certain alleged unguarded pinch points on a conveyor belt system. In Lone Star, a number of photographs were taken by the operator to support its conclusions that the locations cited were adequately guarded, and at the hearing MSHA utilized some of the photographs (with the consent of the mine operator's counsel) to establish some of the citations, while others were used as the basis for vacating several citations.

In Climax Molybdenum Company v. MSHA, DENV 78-581-M, an imminent danger review proceeding decided by Judge Cook on December 28, 1979, MSHA sought to introduce as evidence at the hearing, photographs of a piece of equipment taken by an MSHA inspector after the case was in litigation. The withdrawal order was issued on August 31, 1978, Climax filed its application for review on September 28, 1978, and the hearings were conducted between November 28, 1978, and February 1, 1979. The pictures were taken by the inspector on December 13, 1978, while at the mine lawfully during the course of his normal inspection duties.

Climax strenuously objected to the admission of the photographs into evidence in the proceeding and noted that the issue presented was not whether the photographs were accurate representations of what the inspector observed at the time they were taken, but rather, Climax framed the issue as "whether photographs or other evidence obtained after litigation on a citation or order is begun can properly be admitted when those photographs are not obtained in compliance with the Discovery Rules" (Cook decision, p. 8). Quoting from Climax's brief, its argument as posed to Judge Cook, was as follows:

Climax has no right of access to either interview inspectors or obtain copies of inspector's notes outside of the context of the Discovery Rule. MSHA must be required to follow those rules also and the only suitable means for requiring that is to exclude from evidence all documents, photographs, or similar materials which are obtained outside the bounds of the Commission's Discovery rules. This is not to say that MSHA inspectors should be prohibited from returning from the scene of alleged violations after a citation has been issued is [sic] a part of determining whether abatement has been accomplished. It is to say however that if that matter is in litigation that any photographs or statements taken by an inspector after the application for review has been filed or any documents which are obtained by inspector requests after litigation has been initiated should not be admitted into evidence unless those documents are obtained through the Discovery processes provided for in the Rules. To rule otherwise would establish an unfair and arbitrary scheme which cannot be sustained,

particularly in view of the presence of the Discovery Rules. Climax is obligated to comply with the Commission's Rules and MSHA must comply with them as well. It would clearly be inappropriate to give MSHA this unfair advantage in administrative litigation.

No effort was made to comply with the Discovery Rules in taking the photographs. Because litigation was pending and those rules were not complied with, and further because in addition Climax was given no opportunity to have either a knowledgeable electrician or its attorneys involved in the taking of the photographs, Exhibits M-14 [sic] through M-17 inclusive should not be admitted into evidence.

MSHA's arguments concerning the admissibility of the photographs were that (1) there was no showing that Climax was in any way prejudiced by the introduction of the photographs, which were offered solely as an aid to the court in perceiving the work area of the mine involved; (2) the taking of photographs did not involve an attempt to question Climax's agents without the presence of counsel; and (3) at the time the photographs were taken, MSHA personnel were present in the mine lawfully during the course of their normal inspection duties.

In overruling Climax's objections and admitting the photographs, Judge Cook cited McCormick, Handbook of the Law of Evidence, section 214 at 530-31 (2nd ed., E. Cleary, 1972), which discussed the use of photographic evidence in judicial proceedings as follows:

The principle upon which photographs are most commonly admitted into evidence is the same as that underlying the admission of illustrative drawings, maps, and diagrams. Under this theory, a photograph is viewed merely as a graphic portrayal of oral testimony, and becomes admissible only when a witness has testified that it is a correct and accurate representation of relevant facts personally observed by the witness. Accordingly, under this theory, the witness who lays the foundation need not be the photographer nor need he know anything of the time, conditions, or mechanisms of the taking. Instead he need only know about the facts represented or the scene or objects photographed, and once this knowledge is shown he can say whether the photograph correctly and accurately portrays these facts. Once the photograph is thus verified it is admissible as a graphic portrayal of the verifying witness' testimony into which it is incorporated by reference. [Footnotes omitted.]

Relying on the aforesaid passage from McCormick, Judge Cook concluded that a photograph serves merely as a graphic portrayal of a witness' oral testimony, into which the photograph is incorporated by reference, and that unlike evidence submitted under an exception to the hearsay rule, a photograph is not introduced ordinarily as independent proof of the truth of

the matters asserted therein. Noting that the photographs were offered as graphic aids in interpreting what the MSHA inspectors observed at the time the order issued, Judge Cook reasoned that to the extent that they set forth an accurate graphic portrayal of the conditions observed by the witnesses at the time of the event in question, they were relevant to the subject matter of the hearing within the meaning of Commission Interim Rule 29 CFR 2700.50, which was then in effect and which provided that "[a]ny relevant evidence may be received at the discretion of the Judge. The Judge may exclude evidence which he finds to be unreliable or unduly repetitious." Judge Cook also took note of the fact that the record did not support the conclusion that the inspector who took the photographs attempted to interrogate Climax's agents, and that since the photographs merely related back to conditions already observed at the time the order issued, he concluded further that the taking of the photographs did not amount to an interrogation of Climax's agents.

Commenting on MSHA's failure to comply with Commission Rule 29 CFR 2700.46, which provided in part, "For good cause shown, the Judge may order a party to produce and permit inspection, copying or photographing of designated documents or objects relevant to the proceeding," Judge Cook nonetheless observed that:

[W]e are now faced with an accomplished fact and a consideration of whether evidence which would be helpful to the ultimate determination of the case should now be received in evidence. It could be argued that MSHA's request for admission of the pictures in evidence is in effect a motion for ratification of the act of obtaining discovery by photographing of objects.

He concluded that Climax had not been prejudiced by the admission of the photographs and that they were helpful in understanding the issues presented in the case (Cook Decision, pp. 10-11).

Climax requests that I take official notice of the record adduced in the case before Judge Cook (Initial Brief, p. 11), and it seems obvious that it wishes me to take official notice of the fact that the photographs in that case were taken in the midst of litigation while the hearings were in recess. I have noted this fact, and I conclude that there is a distinction in a situation where an inspector takes pictures after the fact and while the case is in litigation without notice to the operator, and the facts presented in the instant proceedings where Climax apparently seeks to deny MSHA the right to take pictures at any time. In Judge Cook's situation, I may have sustained Climax's objections to the introduction of photographs taken after the citation was issued and while the case was in a litigation and hearing posture without notice to Climax's attorneys. In other words, although Climax may arguably be correct in its conclusion that photographs taken after litigation is begun is in the nature of discovery and may only be introduced in compliance with the Commission's discovery rules, the question of whether photographs in general are permissible at all is, in my

view, a question of first impression to be decided by me on the basis of the record presented in the instant proceedings.

In a series of OSHA cases involving alleged violations of fourth amendment rights for failure by OSHA's compliance officers to properly identify themselves by displaying their credentials or affording the respondent the opportunity to accompany the inspector on his inspection rounds, both of which were statutory requirements, both the Commission and the courts, on the facts presented, viewed these requirements as procedural defects which did not prejudice the respondents or otherwise violate their fourth amendment rights. See Accu-Namics, Inc. v. OSHRC, 515 F.2d 828 (5th Cir. 1975); Hoffman Construction Company v. OSHRC, 546 F.3d 281 (9th Cir. 1976).

In United States v. Minton, 488 F.2d 37 (4th Cir. 1973), the court affirmed the conviction of a defendant for violation of certain liquor laws which was based on evidence seized as a result of observations of illegal activities through binoculars and the subsequent seizure of evidence without the benefit of a search warrant resulting from those observations. The court there ruled that the illegal activity was in "plain view," and that in these circumstances there was no reason for expectation or privacy and no requirement for a search warrant.

In Environmental Utilities Corporation, 1977-1978 OSHD 21,709, April 4, 1977, an OSHA inspector entered the premises for the purposes of an inspection, and after observing certain conditions which he believed were violations of safety regulations, returned to his car to get a camera. Upon his return, he photographed the alleged violative conditions and testified that photographs were required because there was an immediate possibility that working conditions would change. The photographs were taken at a time when a company representative was not present, and the Commission rejected the company's fourth amendment arguments that the inspector had not identified himself as an inspector and did not afford the company an opportunity to be present when the photographs were taken. The Commission noted that the nature of the work practices in effect at the time the violation was cited supported the inspector's belief that immediate action was necessary to preserve evidence.

Minotte Contracting & Erection Corporation, 1978 OSHD 22,551, February 7, 1978, concerned a case where an OSHA inspector took photographs of certain conditions which he believed were violations from a public roadway prior to presenting his credentials to the company upon his arrival on the premises. The citations based on these photographs were affirmed by the Commission, and it rejected the company's fourth amendment arguments seeking to exclude the photographs and it did so on the ground that the conditions were in "plain view," that the company was not prejudiced, and that in the circumstances, the company could not claim a reasonable expectation of privacy protected by the fourth amendment particularly where the worksite was open to public view.

In Laclede Gas Company, 1979 OSHD 24,007, October 31, 1979, the Commission rejected a company's assertion that photographs taken by an OSHA compliance officer by means of a telephoto lens camera from a highway prior to his arrival on the premises and displaying his credentials should be excluded as evidence of any violations, and it did so on the basis of the "plain view" doctrine, and its prior decisions in Environmental Utilities Corporation and Minotte Contracting, supra.

Although I recognize the fact that in these OSHA cases the Commission's application of the "plain view" doctrine involved situations where the work-site and the resulting violations were in effect in the public domain, I see little distinction in a situation where an MSHA inspector has a statutory right of access to mine property without the necessity of a warrant and while there in the course of his authorized inspection duties observes conditions which he believes violate the law. Although an underground mine area is not necessarily in the public domain, the fact is that the conditions observed by an inspector are in his plain view, and in these circumstances, I conclude that an operator may not at that point in time reasonably claim any right of privacy insofar as the documentation of those conditions are concerned. Just as the inspector is free to take notes, measurements, and make sketches and diagrams of the scene, I believe he is also free to record the conditions observed by means of a camera. Any subsequent use to be made of those photographs is a matter which I believe should be left to the adjudicatory discretion of the judge on a case-by-case basis. Since Congress and the courts have recognized the fact that the mining industry is a pervasively-regulated industry, I am not convinced that the use of cameras to assist the Secretary in his regulation of that industry is a practice which should generally be proscribed by the fourth amendment or the Act.

There is one area of contention in these proceedings which I believe the Secretary should take serious note of and take some corrective action. This concerns Climax's argument that the Secretary has engaged in no formal rulemaking to fix the circumstances and guidelines under which cameras are to be used. As pointed out by Climax, OSHA has a specific regulation authorizing the use of cameras and has also published detailed instructions to its compliance officers with respect to the circumstances under which they are to be used. Climax's arguments that the lack of specific guidelines gives rise to possible abuses and unwarranted intrusions into its mining business and operations are well taken. While I do not believe that its arguments may serve as a basis for interdicting the general use of cameras during an inspection, I believe that reasonable ground rules should be established by the Secretary and communicated to the industry in order to preclude potential abuses and to ensure even-handed enforcement. The practice of some MSHA districts using cameras, while others do not, and the practice of using them to regulate one class of mining operations as opposed to another, may in certain circumstances result in arbitrary and confused enforcement practices which I believe should not be permitted. For example, MSHA's reliance on its April 30, 1979, memorandum to support its contention that cameras are authorized and used throughout its inspector force is somewhat suspect because that memorandum is addressed only to metal and nonmetal

district managers, and not to coal districts, and its effective date is after the refusal incident which prompted the instant proceedings. If distinctions are to be made, MSHA should address this question head on and communicate this to the industry as a whole. Care should also be taken that in this process, MSHA does not put itself in the position of having its inspectors act as trial lawyers. Further, it should be readily apparent to MSHA that reasonable precautions should be taken to insure that hazardous conditions will not be created by flash or spark-producing camera equipment. Inspectors should be adequately trained in the use of camera equipment, and they should insure that the taking of pictures are not done in such a manner as to distract the workforce while they are engaged in their mining duties. Such distractions may expose a miner to hazards and potential injuries which he otherwise would not have been exposed to but for the presence of an inspector armed with camera equipment.

After careful consideration of all of the arguments presented, I conclude that Climax's suggestions that the taking of photographs is per se prohibited must be rejected. Of course, if an operator can establish that the inspector abused his authority by taking photographs unrelated to a citation, that the taking of a photograph posed a mine safety or health hazard in a given situation, or that the taking of photographs unduly interferes with or disrupts the mining process, he can raise this with the judge on a case-by-case basis, and seek remedial action for such enforcement practices. In the instant proceedings, Climax does not assert that this is the case. Rather, it seeks a general exclusion of the use of cameras by MSHA's inspectors during the course of their mine inspection.

I recognize the fact that Climax has a legitimate right to protect the confidentiality of its mining processes as well as any unwarranted disclosure of any trade secrets which may result from an entry by an inspector to its mine property and the subsequent taking of pictures which may end up as part of a public record in any subsequent adversary litigation. However, the possibility of this happening may not, in my view, serve as a general prohibition of the use of cameras or the taking of pictures by an inspector during the course of an authorized inspection of the mine for the purpose of insuring compliance with mandatory health and safety standards.

In my view, the use of cameras should be limited to the specific condition or practice which the inspector believes is a violation. If the taking of the photograph exposes the operator to a possible disclosure of trade secrets and mine procedures which he believes should be protected from public disclosure, he is free to seek an appropriate protective order or to request an "in-camera" limitation on the use of such photographs. This was precisely the method used in several OSHA-reported cases which held that the appropriate method for protecting such secrets was the use of protective orders. See: American Can Company, November 30, 1979, 7 Occupational Safety and Health Reporter, 1947, noted in 48 L.W. 2431, January 1, 1980; Owens-Illinois, Inc., 1978 OSHD 23,218.

May An MSHA Inspector Use A Camera And Take Photographs After Litigation Is Begun Solely For The Purpose Of Use At A hearing Without Prior Discovery Notice Given To the Operator?

In its reply brief, Climax seemingly concedes that MSHA is not forever precluded from using photographic equipment or from introducing photographs as evidence in a hearing. Climax views the "sole issue" to be whether MSHA is statutorily authorized to take photographs during a warrantless inspection solely for use as evidence in an enforcement hearing, and in support of this argument takes the position that the taking and use of photographs for hearing purposes must be governed by the Commission's discovery rules, 29 CFR 2700.57, and must be authorized and regulated by the presiding judge. Climax's argument seems to be that photographs taken by an inspector during his initial inspection, and which are limited to documenting the conditions he observes is permissible, but if the photographs are to be taken after litigation begins, their taking and use must be specifically authorized and regulated by the judge pursuant to the normal discovery rules.

As indicated earlier, I have concluded that the use of cameras and photographs taken at the time the inspector initially observes conditions and practices which he believes constitute violations of the Act or any mandatory safety standards is within the authority granted an inspector under the right-of-entry provisions of section 103(a) of the Act, and it matters not that the photographs will at some future time be used by the Solicitor to establish a contested violation at the hearing. However, on the facts presented in these proceedings before me, there is no indication that the inspectors attempted to take photographs after the start of litigation and solely for use at the hearing as was the situation in the prior Climax case before Judge Cook. As a matter of fact, the stipulation entered into and filed by the parties in the instant proceedings on October 17, 1979, is limited to the question of whether MSHA inspectors may use cameras and take photographs during the course of regular mine inspections, and the stipulated facts reflect that MSHA inspectors were refused the right to bring their instamatic cameras with them onto mine property when they appeared for regular inspections. The citation and order at issue in these proceedings resulted from Climax's refusal to permit the inspector to use a camera in the mine to document any violations which may result from his routine inspection.

Climax's counsel has attempted to expand the factual situation in these proceedings to those which were presented in the case before Judge Cook by expanding his legal arguments in the brief and reply brief to the question of whether photographs taken solely for the purpose of use at an adversary hearing are permissible. The problem with this approach is that there are no facts present in these proceedings which lead me to conclude that the inspectors attempted to use cameras solely for litigation purposes when they appeared at the mine on April 18, 1979, for the purpose of conducting a regular mine inspection. The fact that I have taken note of the prior litigation before Judge Cook cannot serve as the basis for my deciding an issue which was before him and not before me. It seems to me that Climax should have preserved its appeal rights by filing an appeal of Judge Cook's

decision addressing the very issue which Climax is attempting to address here by means of legal arguments based on proposed stipulated facts which are not before me. Under the circumstances, my findings and conclusions in these proceedings are limited to the question of whether MSHA inspectors may generally use cameras and take photographs of conditions and practices alleged to be violations at the time of their initial inspections. I have answered this question in the affirmative, but I make no findings or conclusions as to whether the use of cameras or the taking of photographs after litigation is begun solely for the purpose of use at a hearing without notice or without resort to the appropriate discovery rules of the Commission is permissible under the Act, and I have declined to do so because those facts are not before me.

May A Mine Operator Be Cited Under Section 103(a) Of The Act For Refusal To Permit MSHA Inspectors To Take Photographs Of Mine Conditions Which They Believe Constitute Violations?

In view of my finding and conclusion that the use of cameras by MSHA inspectors is not an invasion of privacy prohibited by the fourth amendment but merely an extension of the inspection specifically authorized by section 103(a), without the need for a warrant, I conclude that Climax's refusal to permit the use of cameras, while not directly a refusal of the right-of-entry, does constitute a violation of that section for which a civil penalty may be assessed. The amount of such a penalty must, however, be determined on the facts of each case, and my findings and conclusions on this issue follow.

As indicated earlier in this decision, the civil penalty proceeding has been consolidated with the contest filed by Climax. MSHA takes the position that the refusal of Climax to permit the use of cameras constitutes a violation of section 103(a), and that pursuant to section 104(a), which mandates a civil penalty for violations of the Act, Climax may be assessed a civil penalty for a violation of section 103(a). In support of its argument, MSHA asserts that the refusal by Climax to permit the use of cameras amounts to hindering and impairing MSHA's ability to carry out its inspection duties under section 103(a). MSHA equates this refusal by Climax to allow the taking of photographs to intimidation of the inspector. Climax takes the position that there is no evidence of intimidation or harrassment of the inspector, and the record is devoid of any facts to suggest that this occurred in this case. I agree. There is no evidence of record to support the conclusion that that inspector was refused entry or was otherwise prohibited from conducting his normal inspection. The inspector was simply advised that he could not use a camera, and there is nothing to suggest that he was otherwise limited in the manner in which he conducted his inspection on the day in question.

MSHA's initial proposed civil penalty was for \$500. The Assessment Office "worksheet" which is part of MSHA's pleadings, simply reflects a proposed penalty of \$500, and no assessment "points" were assigned for any of the six statutory criteria set forth in section 110(i) of the Act. Since

it is well settled that any civil penalty assessment levied by me is de novo, without regard to any assessment formula utilized by MSHA in its initial evaluation of the penalty, I will assess a penalty based on the facts of record.

The parties filed supplemental briefs addressing the question of an appropriate civil penalty for Climax's refusal to permit the use of cameras. MSHA takes the position that Climax's refusal to permit the use of cameras hindered its ability to carry out its duties under the Act and that the violation was serious. MSHA also believes that since the violation resulted from Climax's intentional conduct to test the extent of MSHA's inspection authority, Climax was negligent, and since an order resulted from Climax's refusal to abate the citation, MSHA concludes that no finding of good faith is warranted. MSHA also cites Climax's moderate history of prior violations and now seeks a civil penalty assessment of \$150.

Climax concedes that it is a large mine operator and that MSHA's proposed penalty will have no effect on its ability to continue in business. However, Climax argues that its refusal to permit the use of cameras was based solely on its desire to administratively challenge MSHA's use of photographic equipment, and that it in no way harrassed, intimidated or otherwise disturbed the inspectors. In fact, Climax asserts that it cooperated with the inspectors with respect to the remainder of the inspection and made known to the inspectors the purpose of its objection to the use of photographic equipment. In these circumstances, Climax argues that it should not be penalized for exercising its right administratively to challenge the validity of an MSHA procedure by the imposition of a severe civil penalty. Further, since the application of the six statutory criteria of section 110(i) are specifically designed for the purpose of deterrence, and since operators should not be deterred from bringing genuine test cases, Climax asserts that the statutory criteria should be disregarded in favor of the imposition of a nominal or token penalty of no greater than \$10.

After careful review of the arguments presented, including the record here presented, I conclude that Climax has the better part of the argument and I agree with its position with respect to the assessment of a civil penalty on the basis of the facts presented in these proceedings. I cannot conclude that Climax intimidated or otherwise harrassed the inspectors in this case. To the contrary, I conclude that Climax's refusal to permit the use of cameras on its mine property was based on what it honestly believed to be a constitutionally-protected right of privacy and its desire to challenge MSHA's assertions to the contrary. As correctly pointed out by Climax in its arguments, it must first exhaust its administrative remedies before seeking court review of its asserted right to be left alone, and the initial step in this administrative review process is to provoke the issuance of a citation. Absent any credible evidence that Climax harrassed the inspector or otherwise impeded him in the conduct of his inspection, I cannot conclude that the refusal to permit him to use a camera constituted a refusal of entry per se warranting a substantial civil penalty assessment. Since

this case is a case of first impression, and considering the prior proceeding before Judge Cook, I am convinced that Climax's refusal to permit the use of a camera was based on its desire to provoke a "test case," rather than to deliberately obstruct the right of the inspector to go about his normal inspection duties. This is not the first enforcement proceeding involving Climax Molybdenum Company, and to my knowledge, it has never refused an MSHA inspector the right-of-entry on its mine property for the purpose of conducting an inspection.

MSHA's argument regarding the severity of the violation, including its arguments and conclusions that the refusal to permit the use of cameras is per se harrasment and intimidation of its inspectors, are rejected. While the refusal by an operator to permit an inspector to take with him equipment directly related to safety may be considered serious, on the facts in this case, I cannot categorically characterize a camera as a safety-oriented piece of equipment. For example, while a methanometer, anemometer, and noise-measuring devices directly measure compliance or noncompliance with a specific mandatory safety standard, the use of a camera during the inspection is in the final analysis an additional tool to aid the inspector in pictorially preserving conditions he observes. Those conditions may or may not amount to a violation, and in this context, the value of a camera is in the credibility it lends to any testimony by the inspector in a contested case.

Climax concedes that the citation resulted from its intentional conduct to test MSHA's authority to use cameras during an inspection. While this may amount to negligence in the ordinary sense, given the factual setting which provoked the citation in the first place, I cannot conclude that an increase in any civil penalty is warranted because of the negligence factor.

I take note of the fact that in this case, once the citation was issued and an abatement time fixed, the inspector issued a withdrawal order based on Climax's continued objections to the use of a camera and he specifically noted on the face of the order that no area of the mine should be closed. Under the circumstances, I fail to understand the rationale in issuing an order. The order did nothing to achieve compliance. It simply documented Climax's continued refusal to permit the use of cameras after being put on notice that the inspector believed he had a right to use a camera. In my view, the use of an order in these circumstances was inappropriate. However, since it did not close down mining operations, I can find no prejudice to Climax and I consider the order as simply a further documentation and indication of Climax's continued refusal to permit the use of cameras and do not believe that its mere issuance should serve as a basis for increasing any civil penalty assessment resulting from the violation. On the basis of the entire record here presented, I find that a civil penalty of \$10 is appropriate.

Conclusion and Order

In view of the foregoing findings and conclusions, the citation and order issued in these proceedings are AFFIRMED, and Climax is assessed a

civil penalty in the amount of \$10 for its refusal to permit the use of a camera in its underground mine by an MSHA inspector during the course of an inspection, and Climax is ordered to pay that amount within thirty (30) days of the date of these decisions.


George A. Koutras
Administrative Law Judge

Distribution:

W. Michael Hackett, Esquire, Climax Molybdenum Company, 13949 West Colfax Avenue, Golden, CO 80401 (Certified Mail)

Todd D. Peterson, Esquire, Crowell & Moring, 1100 Connecticut Avenue, NW., Washington, DC 20036 (Certified Mail)

Robert A. Cohen, Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

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David A. Jones, Jr., President, Oil, Chemical & Atomic Workers International Union, Local No. 2-24410, P.O. Box 949, Leadville, CO 80641

Edwin Matheson, Chairman, International Brotherhood of Electrical Workers, Local Union No. 1823, P.O. Box 102, Minturn, CO 81645 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 26 1980

LOCAL UNION #6594, DISTRICT 17, : Application for Compensation
UNITED MINE WORKERS OF AMERICA, on :
behalf of: Willard Newsome, : Docket No. HOPE 77-128
Kyle Cline, Keith McCoy, :
Charles R. Stover, Walter Cooper, : No. 1 Mine
Orville Napier, Jack Matney, :
Robert Fields, Isaac Bryant, :
Frank Evans, Alvin Chapman, :
Bruce Cooley, Gregory Boggs, :
Andrew Miller, Phillip Springer, :
Bobby Robinson, Earl Hall, :
Tennis Canterbury, George Tiller, :
Larry Lester, William Workman, :
Kirby Cisco, Mearl Fields, :
Philip Jones, Danny Mahon, :
Kenneth Whited and Taby Cooley :
Applicants :
v. :
FMV COAL CORPORATION, :
Respondent :

DECISION

Appearances: Peter Mitchell, Esq., United Mine Workers of America,
Washington, D.C., for the Applicant.

Before: Judge Cook

I. Procedural Background

On January 24, 1977, Local Union #6594, District 17, United Mine Workers of America (Applicant) filed an application for compensation in the above-captioned proceeding pursuant to section 110(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970) (1969 Coal Act). The application was filed with the Office of Hearings and Appeals of the United States Department of the Interior and the proceeding was pending on the effective date of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) (1977 Mine Act). Accordingly, the case is before the undersigned Administrative Law Judge of the Federal Mine Safety and Health Review Commission for decision. 30 U.S.C. § 961 (1978). The remainder of the procedural history subsequent to the filing of the application for compensation is set forth below.

On February 18, 1977, the Applicant filed a photocopy of a post office return receipt indicating that service of the application for compensation had been made upon FMV Coal Corporation (Respondent). Additionally, on the same day, the Applicant filed a motion to permit late filing of interrogatories to the Respondent in conjunction with copies of the proposed interrogatories. This motion was granted by an order dated March 3, 1977.

On March 9, 1977, the Applicant moved for an order to show cause why judgment in default should not be entered. On March 11, 1977, the Respondent filed a motion to file a late answer but failed to submit an answer in conjunction with the motion. The Applicant filed a statement in opposition to the Respondent's motion on March 21, 1977. Additionally, on March 21, 1977, the Respondent filed a letter in response to the Applicant's March 9, 1977 motion stating its opposition to the entry of a default judgment.

On March 25, 1977, a notice of hearing was issued setting the matter for hearing on April 21, 1977, in addition to an order granting the Respondent's motion to file a late answer and denying the Applicant's motion for an order to show cause why judgment in default should not be entered. The Respondent was accorded 10 days in which to file its answer. The answer was subsequently filed on April 4, 1977.

Pursuant to a mutual agreement by counsel for the parties, an order was issued on April 15, 1977, cancelling the hearing scheduled for April 21, 1977. The order noted that a telephone conference would be conducted on May 9, 1977, to determine whether a hearing would be necessary and, if so, to agree upon the date thereof.

The May 9, 1977, telephone conference was conducted as scheduled. It was agreed that the Respondent would mail answers to the Applicant's interrogatories by May 13, 1977. It was also agreed that a telephone conference would be held on June 20, 1977, absent a request by the parties for an alternate date. This agreement was reflected in an order dated May 9, 1977. The answers to interrogatories were filed on May 16, 1977.

The June 20, 1977, telephone conference was conducted as scheduled during which counsel for the Applicant stated that he contemplated the filing of further interrogatories and a request for admissions. Counsel for the Applicant further stated that he would consider the filing of a motion for summary decision depending upon the response received to the interrogatories and request for admissions. Counsel for the parties agreed to participate in a telephone conference on July 15, 1977, to determine both the status of the case and whether a hearing would be necessary. These matters were reflected in an order dated June 20, 1977.

The Applicant's requests for admissions were filed on July 1, 1977, and the Respondent's reply was filed on July 15, 1977.

The July 15, 1977, telephone conference was held as scheduled. Counsel for the Applicant indicated that he was considering the filing of a motion

for summary decision. Accordingly, counsel for the parties were informed that no further telephone conferences would be held absent a specific request from either party, and that no further action would be taken by the undersigned Administrative Law Judge until either the receipt of such a request or the filing of a motion for summary decision or the filing of a request for a hearing.

Approximately 6 months elapsed during which no communications were received from the parties as to the status of the case. On January 17, 1978 and February 6, 1978, the undersigned Administrative Law Judge sent letters to counsel for the Applicant, with copies sent to the Respondent, requesting a written statement as to what further action the Applicant contemplated taking so that the disposition of the case could be expedited. On February 24, 1978, a communication was received from counsel for the Applicant stating both his reasons for the delay and that he would be filing a motion for summary decision. This motion was subsequently filed on April 14, 1978. On May 15, 1978, the motion was denied without prejudice to the right of the Applicant to renew a motion which would be properly documented.

On August 11, 1978, a letter was sent to counsel for the Applicant stating the necessity of taking action, either in the form of a motion for summary decision or a request for a hearing, in order to expeditiously bring the case to a conclusion. On September 1, 1978, counsel for the Applicant filed a letter which apprised the Judge that consultations with counsel for the Respondent had disclosed matters that could only be resolved at a hearing. Accordingly, a notice of hearing was issued on September 7, 1978, scheduling the case for hearing on the merits on November 21, 1978, in Charleston, West Virginia, contingent upon the Applicant's filing an amended application for compensation by October 16, 1978.

On October 17, 1978, the Applicant filed a motion for production of documents. On October 31, 1978, the Applicant filed a communication indicating that he was pursuing informal avenues to obtain the information sought by the motion for production of documents and suggested that a ruling on the motion be held in abeyance. Counsel further indicated that he would either withdraw or renew the motion upon completion of the informal steps previously undertaken. Additionally, counsel indicated that a postponement of the hearing would be needed by both parties.

On November 6, 1978, an order was issued continuing the hearing indefinitely and scheduling a telephone conference for November 22, 1978, which conference was held as scheduled. It was agreed that the following three steps would take place: First, the Applicant's attorney was to file an amended application for compensation after receiving certain information from the Respondent's attorney and from other sources. Second, the Respondent's attorney was to be accorded time to file an answer to the amended application. The attorney for the Respondent was to communicate with the attorney for the Applicant within 2 weeks after receipt of the amended application to indicate whether he would stipulate that the Applicant could file a second motion for summary decision in spite of the fact that a notice

of hearing had already been issued. Third, the Applicant's attorney was to either file a motion for summary decision or request the Judge to set the matter for hearing. This agreement was reflected in an order issued on November 28, 1978.

A telephone conference was held on or around April 30, 1979, to determine the status of the case since no communication had been received from either party subsequent to the issuance of the November 28, 1978, order. The parties agreed to make arrangements for the receipt of certain information so that the Applicant's attorney could file an amended application by May 21, 1979. It was understood that the remaining two steps outlined in the November 28, 1978, order then would be executed as expeditiously as possible.

On May 11, 1979, the Applicant served interrogatories and a request for admissions on the Respondent. Copies were filed with the Judge on May 14, 1979.

As of June 25, 1979, 7 weeks following the above-noted telephone conference, the amended application had not been filed. Therefore, counsel for the Applicant was requested to apprise the Judge of the status of the amended application by July 5, 1979.

On July 6, 1979, the Applicant filed a document styled "Amended Application for Compensation and to Show Cause Why Default Judgment Should Not Be Entered." On August 13, 1979, an order was issued addressing issues relating to the Applicant's May 14, 1979, and July 6, 1979, filings and setting forth a schedule stating, in part, as follows:

On May 14, 1979, the Applicant filed copies of interrogatories to Respondent and a request for admissions along with a certificate of service stating that copies of such documents had been mailed on May 11, 1979, to the Secretary-Treasurer of the FMV Coal Corporation as well as the Office of the Solicitor of the Department of Labor. However, the certificate of service did not show that it was mailed to the Respondent's attorney.

On July 6, 1979, the Applicants filed an amended Application for Compensation and a request that an order be issued to the Respondent to show cause why judgement in default should not be entered in Local Union 6594's favor, on the application as amended, since the Respondent had not replied to either the interrogatories or the requests for admissions. The certificate of service attached to such document states that copies were mailed to the attorney for the Respondent as well as other persons. No response to such amended application or request for order to show cause has been received from the Respondent and the time permitted for response to such motions has expired. In addition, it has now been

somewhat over 30 days since the amended Application for Compensation was served and no answer to that amendment has been filed by the Respondent.

In view of the regulations relating to discovery, it is not considered that an order to show cause for default judgment is proper at this stage of the proceedings. However, in view of the facts contained in the record, it is considered good cause has been shown for the completion of discovery procedures beyond the time limitations set forth in the regulations applicable to these proceedings.

Accordingly, IT IS ORDERED that the Respondent reply to such interrogatories and requests for admissions referred to above by August 31, 1979. 1/ As relates to the amendment to the application, such amendment is accepted as partial fulfillment of the directions contained in my order of May 15, 1978, which pointed out that the applicable regulations required the application to set forth the total amount of compensation claimed as well as the period for which such compensation is claimed. However, the period of the claim as set forth in paragraph 4 of the amended application filed July 6, 1979, is not sufficiently definite. Therefore, after the interrogatories have been answered, a further amendment to such application will be necessary to definitely set forth the specific days for which compensation is claimed.

Accordingly, the Applicant will have until September 20, 1979, for the filing of such amendment to the application.

Thereafter the Respondent will have until October 20, 1979, to answer the application as amended.

Thereafter the hearing in this matter will commence at 9:30 a.m., October 30, 1979, unless agreement has been reached by the parties as to the right of the Applicants to file a motion for summary decision if such is in order at that time.

Footnote No. 1, supra stated that: "In view of the fact that the certificate of service relating to such documents did not show service upon the Respondent's attorney a copy of each of these two documents is attached as Appendix A."

On October 1, 1979, an order of continuance was issued stating the following:

The hearing in the above-captioned case is now set for October 30, 1979. In the order setting such hearing, the date was premised upon the occurrence of two steps which had

to occur prior to the hearing. They were the filing of an amended application which would specifically set forth the dates for which compensation is claimed by each of the miners involved, and thereafter the passage of 30 days after service of such amended application upon the respondent, during which the respondent could answer such amended application.

Since the above referred to amendment to such application has not been served or filed, the time schedule will not permit the commencement of the hearing on October 30, 1979.

In view of the fact that the Respondent did not respond to the interrogatories and requests for admissions served by the Applicant, a telephone conference was arranged by the undersigned Administrative Law Judge with the attorneys for the Applicant and the Respondent on September 24, 1979. During such telephone conference the attorney for the Respondent stated that the Respondent no longer desired that an attorney represent it because of financial problems. The result is that the Respondent's attorney apparently will not be filing answers to said interrogatories and requests for admissions. During such conference the Administrative Law Judge stated that the procedures for the subpoena of Respondent's officers for the purpose of a deposition could be carried out by the Applicant's attorney if such was necessary for the purpose of serving and filing an amended application.

The attorney for the Applicant stated that some action would be forthcoming, as to an amended application, in the near future as to the service of an amended application.

Accordingly the hearing in this case is CONTINUED INDEFINITELY pending the filing of the amended application and the passage of 30 days for answer thereto by the Respondent.

As soon as action is taken by the Applicant as to such amended application, an order will be issued setting the matter for hearing.

On October 25, 1979, the Applicant filed a document styled "Supplemental Application for Compensation." The Respondent failed to file answers to either the July 6, 1979, amended application for compensation or the October 25, 1979, supplemental application.

An amended notice of hearing was issued on November 8, 1979, scheduling the case for hearing on the merits on December 18, 1979, in Logan, West Virginia. Subsequent thereto, the Applicant requested that the hearing be changed to a date in January, 1980. Amended notices of hearing were issued on November 27, 1979, and January 15, 1980, scheduling the case for

hearing on the merits to commence at 10 a.m., January 30, 1980, in Bluefield, West Virginia. Additionally, on January 15, 1980, a prehearing order was issued advising the parties that a 5 day transcript would be ordered and that the time for filing any proposed findings of fact, conclusions of law or briefs would expire 10 days after each party ordering a copy of the transcript received its copy from the reporter.

The hearing was conducted as scheduled. The Applicant was represented by counsel. No one appeared to represent the Respondent (Tr. 5-6). 1/

During the course of the hearing, the Applicant moved to amend the caption to reflect the names of all miner-claimants and also moved to amend the supplemental application for compensation to conform with the proof. Both motions were granted (Tr. 49, 51-56).

The Applicant also moved for the entry of a default (Tr. 9, 58). However, in view of the decision in Rushton Mining Company v. Morton, 520 F.2d 716 (3rd Cir. 1975), discussed infra, it is deemed inappropriate to dispose of this case by way of a default.

The Applicant filed proposed findings of fact and conclusions of law on February 19, 1980. No posthearing filings were made by the Respondent.

Additionally, on February 19, 1980, the Applicant filed proof that on October 24, 1979, a copy of the October 25, 19789, Supplemental Application for Compensation was served on both Mr. T. I. Varney, the Respondent's Secretary-Treasurer, and John M. Richardson, Esq., the Respondent's then counsel of record.

II. Witness and Exhibits

(A) Witness

The Applicant called as its witness Richard C. Cooper, a safety inspector for the United Mine Workers of America.

(B) Exhibits

The Applicant introduced the following exhibits into evidence:

1/ It should be noted that the Respondent was represented by counsel during the prehearing stage of the proceeding. On November 9, 1979, counsel for the Respondent filed a motion for permission to withdraw his appearance. In spite of repeated requests, no certificate of service was filed prior to the hearing showing service of the motion on the Applicant. The motion was granted on the record after counsel for the Applicant acknowledged receipt of a copy of the motion and after counsel stated that he had no objection to the granting of the motion (Tr. 6-8).

A-1 is the affidavit of Fred T. Casteel, Subdistrict Manager in the Madison, West Virginia Subdistrict Office of the Mine Safety and Health Administration.

A-2 is the affidavit of Helen O. Mockabee, Chief of the Docket Section of the Federal Mine Safety and Health Review Commission.

A-3 is a copy of Order No. 1 GRB, December 13, 1976, 30 C.F.R. § 75.1101-5.

A-4 is a copy of Order No. 2 GRB, December 13, 1976, 30 C.F.R. § 75.1103-4(a).

A-5 is a copy of Order No. 3 GRB, December 13, 1976, 30 C.F.R. § 75.1100-2(b).

A-6 is a copy of Order No. 4 GRB, December 13, 1976, 30 C.F.R. § 75.200.

III. Issues

(1) Whether the miner-claimants are entitled to compensation under that portion of section 110(a) of the 1969 Coal Act which provides as follows:

If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title for an unwarrantable failure of the operator to comply with any health or safety standard, all miners who are idled due to such order shall be fully compensated, after all interested parties are given an opportunity for a public hearing on such compensation and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

(2) If the miner-claimants are entitled to compensation under the above-noted provision of section 110(a), then what is the amount of compensation due each miner-claimant?

IV. Opinion and Findings of Fact

On December 13, 1976, George Bowman, an authorized representative of the Secretary of the Interior, issued to the Respondent the following orders of withdrawal at the Respondent's No. 1 Mine: 1 GRB, December 13, 1976, 30 C.F.R. § 75.1101-5; 2 GRB, December 13, 1976, 30 C.F.R. § 75.1103-4(a); 3 GRB, December 13, 1976, 30 C.F.R. § 75.1100-2(b); and 4 GRB, December 13, 1976, 30 C.F.R. 75.200. The first three orders were issued at 9:45 a.m. and

the remaining order was issued at 10:30 a.m. All four orders were issued pursuant to section 104(c)(1) of the 1969 Coal Act 2/ alleging violations of the above-noted mandatory safety standards caused by an unwarrantable failure on the Respondent's part to comply with the respective standards. (Exhs. A-1, A-3, A-4, A-5, A-6; Applicant's Requests for Admissions, Nos. 6, 7, 8, 9, 13, 14, 15, 16, filed July 1, 1977, and Respondent's Reply thereto, filed July 15, 1977). No modifications were issued as relates to any of the four orders and the four orders remained in full force and effect until their termination in March, 1977 (Exh. A-1). The records of the Federal Mine Safety and Health Review Commission were searched, and failed to show that the Applications for Review were filed by the Respondent as relates to the four orders (Exh. A-2).

The Respondent's No. 1 Mine had one coal producing section during December, 1976, and each of the four orders of withdrawal effectively idled the entire mine from the moment of their issuance. (See, Applicant's Requests for Admissions, No. 2, filed July 1, 1977 and Respondent's Reply thereto, filed July 15, 1977; Application for Compensation, Paragraph No. XII, filed January 24, 1977 and Respondent's Answer, Paragraph XII, filed April 4, 1977).

Between December 1, 1976, and December 10, 1976, the Respondent operated two daily production shifts at the No. 1 Mine, the 7 a.m. to 3 p.m. shift and the 3 p.m. to 11 p.m. shift. (See, Applicant's Requests for Admissions, No. 3, filed July 1, 1977 and Respondent's Reply thereto, filed July 15, 1977.) There were no non-production shifts. (See, Applicant's Interrogatories to Respondent, No. 6, filed February 18, 1977 and Respondent's Answers thereto, filed May 16, 1977).

2/ Section 104(c)(1) of the 1969 Coal Act provides:

"(c)(1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any notice given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

The Respondent's No. 1 Mine is a bituminous coal mine whose operations or products affect interstate commerce. (See, Applicant's Requests for Admissions, No. 1, filed July 1, 1977 and Respondent's Reply thereto, filed July 15, 1977).

The Applicant seeks one week's compensation on behalf of 27 miners idled by the above-noted orders of withdrawal. Compensation is sought under that portion of section 110(a) of the 1969 Coal Act, which provides that:

If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title for an unwarrantable failure of the operator to comply with any health or safety standard, all miners who are idled due to such order shall be fully compensated, after all interested parties are given an opportunity for a public hearing on such compensation and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

As noted by the Court in Rushton Mining Company v. Morton, 520 F.2d 716, 720 (3rd Cir. 1975), compensation under this portion of section 110(a) is explicitly predicated on the order's being held valid after a hearing. 3/

3/ The pertinent portions of the Court's analysis of the compensation provisions of the 1969 Coal Act are set forth as follows:

"Reading § 820(a) in its entirety, one sees that clause [1] concerns withdrawal orders issued under § 814(a) or (b); clause [2] concerns withdrawal orders which the inspector has certified, under § 814(c)(1), to be caused by "an unwarrantable failure of [the] operator to comply with . . . mandatory health or safety standards;" and clause [3] concerns situations in which the operator "violates or fails or refuses to comply with any order issued under" § 814. Compensation of idled miners varies with the three situations covered by the three clauses. Miners idled by § 814(a) and (b) withdrawal orders are entitled under clause [1] to compensation for the balance of the shift during which the withdrawal order was issued, and half of the next shift, if that shift also was idled. Where there has been a § 814(c)(1) certification, clause [2] provides the basis for giving the idled miners full compensation up to one week, but only after a hearing and after the withdrawal order has become "final." If the operator fails to comply with the withdrawal order, clause [3] gives the miners double compensation for the time during which they should have been idled, through the point at which the withdrawal order is "complied with, vacated, or terminated."

"We believe that it is clear that in drafting § 820(a) Congress understood the difference between an order which is ultimately upheld and one which is ultimately vacated, that in clause [2] Congress intended to compensate miners only where the order is ultimately upheld, but that in clauses [1] and [3] Congress intended to compensate miners even where the order is ultimately vacated. Any other reading of the section would be inconsistent

Bearing these principles in mind it must be concluded that the Applicant's prima facie case in the instant proceeding consists of three basic elements: First, the existence of the underlying 104(c)(1) notice of violation must be established. Second, it must be established that one or more of the 104(c)(1) orders was served on the operator or his agent, and that the condition or practice set forth in such order or orders constituted a violation of the cited mandatory safety standard caused by an unwarrantable failure on the Respondent's part to comply with such standard. See generally, Kentland-Elkhorn Coal Corporation, 4 IBMA 166, 82 I.D. 234, 1974-1975 OSHD par. 19,633 (1975). Finally, the Applicant must establish the amount of compensation due each miner idled by such order or orders of withdrawal.

In Zeigler Coal Company, 7 IBMA 280, 84 I.D. 127, 1977-1978, OSHD par. 21,676 (1977), the Interior Board of Mine Operations Appeals (Board) set forth the governing test for unwarrantable failure. The Board held that a violation of a mandatory standard is caused by an unwarrantable failure to comply with the standard where "the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care." 7 IBMA 295-296.

At the outset, it is found that the Applicant has made a prima facie showing of the existence of the underlying 104(c)(1) notice of violation. Each of the four subject orders makes reference to the notice. (Exhs. A-3, A-4, A-5, A-6). Furthermore, it is significant to note that Paragraph IX of the application for compensation, filed on January 24, 1977, alleged, in part, that "[n]o known Orders to date have modified or terminated Unwarrantable Failure Withdrawal Order Nos. 1 GRB, 2 GRB, 3 GRB or 4 GRB." Paragraph No. IX of the Respondent's answer, filed on April 4, 1977, states that "[t]he Respondent denies Paragraph IX and states that all orders and notices that were issued have been abated as of March 29, 1977." (Emphasis added). This statement in the Respondent's answer seems to imply that the underlying 104(c)(1) notice was issued, and, when read in conjunction with the statements contained in the subject orders, confirms a prima facie showing of its existence.

In view of the times for issuance of the four withdrawal orders, if any, one of the orders were found valid a basis for 1 week's compensation would be established.

Certain questions arise as to the validity of some of the orders, however, there is no question as to the adequacy of a prima facie case concerning the validity of Order No. 3 GRB, December 13, 1975, 30 C.F.R. § 1100-2(b).

fn. 3 (continued)

with the section's overall design, since it would ignore the fact that clause [2] explicitly predicates compensation on the order's being held valid after a hearing, whereas clauses [1] and [3] have no such requirement. 520 F.2d at 719-720.

Accordingly, we will discuss that order.

Order No. 3 GRB, December 13, 1976, 30 C.F.R. § 1100-2(b), states that "[o]nly one (1) outlet valve was installed in the water line that [par-alleled] the Nos. 1, 2 and 3 belt conveyors for a distance of about 1,650 feet and fittings suitable for connection was not provided at the one outlet valve. This condition was observed after a fire was extinguished at the No. 3 belt conveyor drive." (Exh. A-5). Mandatory safety standard 30 C.F.R. § 75.1100-2(b), provides as follows:

(b) Belt conveyors. In all coal mines, waterlines shall be installed parallel to the entire length of belt conveyors and shall be equipped with firehose outlets with valves at 300-foot intervals along each belt conveyor and at tailpieces. At least 500 feet of firehose and fittings suitable for connection with each belt conveyor waterline system shall be stored at strategic locations along the belt conveyor. Waterlines may be installed in entries adjacent to the conveyor entry belt as long as the outlets project into the belt conveyor entry.

The waterline in question should have been equipped with outlets with valves at 300-foot intervals along each belt conveyor and at the tailpieces. However, the cited waterline was provided with only one outlet valve for a distance of approximately 1,650 feet. In light of the nature of the condition, the Respondent should have known of its existence. Accordingly, it is found that a violation of mandatory safety standard 30 C.F.R. § 75.1100-2(b), existed, and that such violation was caused by an unwarrantable failure on the Respondent's part to comply with the mandatory safety standard. The order of withdrawal was valid within the meaning of section 110(a) of the 1969 Coal Act.

In view of the foregoing, it is found that miners idled by the issuance of Order No. 3 GRB, December 13, 1976, 30 C.F.R. § 75.1100-2(b) are entitled to one week's compensation at their regular rate of pay under section 110(a) of the 1969 Coal. ^{4/} The idled miners and the amount of compensation to which each miner is entitled are identified as follows:

^{4/} It is found that the dates and hours the miners would have worked during the one week period following the issuance of the order are as set forth in the supplemental application for compensation as amended to conform with the proof. (See, Tr. 49-56 and references cited therein). These time periods are set forth for the individual miner-claimants as follows:

"(A) Keith McCoy, Water Cooper, Taby Cooley, Gregory Boggs, Jack Matney and Danny Mahon were idled from 9:45 a.m. until 3:00 p.m. on December 13, 1976, and for all of their shift on December 14, 15, 16, and 17, 1976, and from 7:00 a.m. until 9:45 a.m. on December 20, 1976.

"(B) George Tiller, Charles Stover, Larry Lester, William Workman, Orgille Napier, Kirby Cisco, Andrew Miller, Mearl Fields, Robert Fields, Philip Springer and Bobby Robinson were idled for all of the second shift on December 13, 14, 15, 16, and 17, 1976.

<u>NAME</u>	<u>HOURLY WAGE</u>	<u>December, 1976</u>							<u>TOTAL</u>
		13	14	15	16	17	20		
Keith McCoy	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60	
Walter Cooper	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60	
Taby Cooley	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60	
Gregory Boggs	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60	
Jack Matney	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60	
Danny Mahon 5/	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60	
George Tiller	8.145	65.16	65.16	65.16	65.16	65.16		325.80	
Charles Stover	8.145	65.16	65.16	65.16	65.16	65.16		325.80	
Larry Lester	8.145	65.16	65.16	65.16	65.16	65.16		325.80	
William Workman	8.145	65.16	65.16	65.16	65.16	65.16		325.80	
Orville Napier	7.74	61.92	61.92	61.92	61.92	61.92		309.60	
Kirby Cisco	7.74	61.92	61.92	61.92	61.92	61.92		309.60	
Andrew Miller	7.74	61.92	61.92	61.92	61.92	61.92		309.60	
Mearl Fields	8.145	65.16	65.16	65.16	65.16	65.16		325.80	
Robert Fields	7.74	61.92	61.92	61.92	61.92	61.92		309.60	

fn. 4 (continued)

"(C) Frank Evans, Kyle Cline, Alvin Chapman and Kenneth Whited were idled from 9:45 a.m. until 3:00 p.m. on December 13, 1976, and for all of their shift on December 14, 15, 20, and 21, 1976, and from 7:00 a.m. until 9:45 a.m. on December 22, 1976.

"(D) Earl Hall was idled for all of the second shift on December 13, 14, 15, 20, and 21, 1976.

"(E) Willard Newsome and Tennis Canterbury were idled from 9:45 a.m. until 3:00 p.m. on December 13, 1976, and for all of the first shift on December 14, 15, 16 and 20, 1976, and from 7:00 a.m. to 9:45 a.m. on December 21, 1976.

"(F) Bruce Cooley was idled from 9:45 a.m. until 3:00 p.m. on December 13, 1976, and for all of the first shift on December 20, 21, 22, and 23, 1976, and from 7:00 a.m. until 9:45 a.m. on December 24, 1976.

"(G) Philip Jones was idled for the second shift on December 13, 20, 21, 22, and 23, 1976.

"(H) Isaac Bryant was idled for all of the first shift on December 14, 15, 16, 17, and 20, 1976."

5/ The May 16, 1977 answers to interrogatory Nos. 8 and 9 contain information as relates to all miner-claimants except Danny Mahon. The Respondent expressly admitted that Danny Mahon was a regular day shift miner at the No. 1 Mine. (Application for Compensation, paragraph XIII filed January 24, 1977, and Answer thereto filed April 4, 1977). Additionally, the Respondent is deemed to have admitted the averment that Mr. Mahon's hourly wage was 7.59 per hour, as set forth in the Supplemental Application for Compensation, due to the Respondent's failure to file an answer to said pleading denying the allegation. See 29 C.F.R. 2700.1(b), reported at 44 Fed. Reg. 38227 (1979), Rules 8(d) and 15(a), of the Federal Rules of Civil Procedure.

Phillip Springer	7.74	61.92	61.92	61.92	61.92	61.92		309.60
Bobby Robinson <u>6/</u>	7.59	60.72	60.72	60.72	60.72	60.72		303.60
December		13	14	15	20	21	22	
Frank Evans	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Kyle Cline	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Alvin Chapamn	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80
Kenneth Whited	8.145	42.76	65.16	65.16	65.16	65.16	22.40	325.80
Earl Hall	8.145	65.16	65.16	65.16	65.16	65.16		325.80
December		13	14	15	16	20	21	
Willard Newsome	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Tennis Canterbury	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80
December		13	20	21	22	23	24	
Bruce Cooley	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80
Phillip Jones	8.145	65.16	65.16	65.16	65.16	65.16		325.80
December		14	15	16	17	20		
Isaac Bryant	7.59	60.72	60.72	60.72	60.72	60.72		303.60

(See, Applicant's Interrogatories to Respondent, Nos. 8 and 9, filed February 18, 1977 and Applicant's Responses thereto, filed May 16, 1977).

Interest computed at the rate of 6 percent per annum will be awarded covering the periods from the dates of idlement, commencing December 14, 1976, to the date upon which the compensation is paid. Local Union 5869 v. Youngstown Mines, 1 FMSHRC 990, 1979 OSHD par. 23,803 (1979).

The Applicant seeks an award of costs and attorneys fees based upon the "Respondent's flagrant refusal to respond to the process and jurisdiction of this Court" (Applicant's Proposed Findings of Fact and Conclusions of Law, pg. 9). Section 110(b)(3) of the 1969 Coal Act expressly permits the successful applicant in a discrimination proceeding to recover reasonable costs and reasonable attorney's fees. Section 110(a) accords no such right to the successful applicant in a compensation case. Accordingly, the Applicant's request must be denied. Accord, Local Union 9856, District 15, United Mine Workers of America v. CF&I Steel Corporation, Docket No. DENV 73-111 (October 4, 1973).

6/ The May 16, 1977, answers to interrogatory Nos. 8 and 9 list Bobby Robinson's hourly wage as \$7.74. Since the Applicant has sought one week's compensation for Mr. Robinson at the rate of 7.59 per hour, the award will be based on the hourly wage rate of \$7.59.

V. Conclusions of Law

1. The parties have been subject to the provisions of the 1969 Coal Act and the 1977 Mine Act at all times relevant to this proceeding.
2. Under the Acts, the Administrative Law Judge has jurisdiction over the subject matter of and parties to this proceeding.
3. Order No. 3 GRB, December 13, 1976, 30 C.F.R. § 75.1100-2(b) is valid within the meaning of section 110(a) of the 1969 Coal Act. Such order remained in full force and effect until terminated in March, 1977, and the Respondent never sought administrative review of such order.
4. All oral determinations made at the hearing granting various motions are affirmed.
5. All of the conclusions of law set forth in Part IV of this decision are reaffirmed and incorporated herein.

VI. Proposed Findings of Fact and Conclusions of Law

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

ORDER

The Respondent is ORDERED to pay compensation to the individual miners as set forth below, with interest computed at the rate of 6 percent per annum for the period commencing on the day following the day each amount was due in December of 1976, and ending on the date when the compensation is paid:

<u>NAME</u>	<u>HOURLY WAGE</u>	<u>December, 1976</u>						<u>TOTAL</u>
		13	14	15	16	17	20	
Keith McCoy	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Walter Cooper	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Taby Cooley	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Gregory Boggs	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Jack Matney	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Danny Mahon	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
George Tiller	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Charles Stover	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Larry Lester	8.145	65.16	65.16	65.16	65.16	65.16		325.80
William Workman	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Orville Napier	7.74	61.92	61.92	61.92	61.92	61.92		309.60

Kirby Cisco	7.74	61.92	61.92	61.92	61.92	61.92		309.60
Andrew Miller	7.74	61.92	61.92	61.92	61.92	61.92		309.60
Mearl Fields	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Robert Fields	7.74	61.92	61.92	61.92	61.92	61.92		309.60
Phillip Springer	7.74	61.92	61.92	61.92	61.92	61.92		309.60
Bobby Robinson	7.59	60.72	60.72	60.72	60.72	60.72		303.60

December 13 14 15 20 21 22

Frank Evans	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Kyle Cline	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Alvin Chapamn	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80
Kenneth Whited	8.145	42.76	65.16	65.16	65.16	65.16	22.40	325.80
Earl Hall	8.145	65.16	65.16	65.16	65.16	65.16		325.80

December 13 14 15 16 20 21

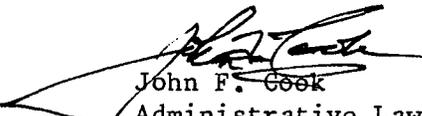
Willard Newsome	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Tennis Canterbury	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80

December 13 20 21 22 23 24

Bruce Cooley	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80
Phillip Jones	8.145	65.16	65.16	65.16	65.16	65.16		325.80

December 14 15 16 17 20

Isaac Bryant	7.59	60.72	60.72	60.72	60.72	60.72		303.60
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 John F. Cook
 Administrative Law Judge

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belt unit operated by a belt drive. The sensor is a device approximately 5 inches long, 2 inches wide and 1-1/2 inches thick. Each device has a plug and a socket by which it is connected to the sensor line. A single sensor line extends for the entire length of the belt system. As noted on the citation, the inspector observed that only one such device had been provided for the Nos. 2 and 2-1/2 belts. He directed that the condition be abated by 8 a.m. on February 26, 1979.

On Friday, February 23, at quitting time, Cecil Farley, a maintenance foreman at the No. 3 Mine, was charged by Contestant's chief electrician with the responsibility for correcting the condition. He was to correct it during the Saturday shift. On Saturday morning, Mr. Farley gave a sensor to an electrician and instructed him to install the device in the fire sensor line at the belt drive of the No. 2-1/2 belt. Because he was unaware on Saturday that a plug and socket were not located in the sensor line at the intersection of the Nos. 2 and 2-1/2 belts, Mr. Farley did not mention the necessity of splicing a plug and socket into the sensor line. The electrician walked along the belt in an outby direction until he located a plug and socket approximately two crosscuts outby the No. 2-1/2 belt drive. He connected the sensor at that location.

Mr. Farley did not see the electrician again that Saturday. He did not question the electrician or examine his work. As a consequence, he did not learn of the misplacement until Monday morning when the electrician informed him that he had installed the sensor two crosscuts outby the drive. Mr. Farley thereupon notified Denny Smith, a belt foreman, that the box had been installed at the wrong location so that Mr. Smith could, in turn, notify the inspector.

The inspector returned to the affected area on Monday, February 26, 1979, and was informed by Mr. Smith, that the sensor had been installed at a point along the belt a number of crosscuts outby the intersection of the two belts. The inspector thereupon issued order of withdrawal No. 0662348, pursuant to section 104(b) ^{1/} of the Act. He described the condition or practice which led to the order as follows: "Not enough effort has been made to install a device between Nos. 2 and 2-1/2 Bee Tree Belts on the sensor line to identify a fire within each belt flight." Order No. 0662348

1/ Section 104(b) of the Act reads as follows:

"If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (104(a)) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

was terminated 70 minutes later at 1:20 p.m., after the requisite device was installed between the Nos. 2 and 2-1/2 belts.

In order to abate the condition, the operator cut a plug and socket from a roll of cable, cut the existing sensor line at the drive, spliced the plug and socket into the sensor line, plugged in the monitoring device at the drive, and unplugged the device located two crosscuts outby. The spool of sensor cable from which the plug and socket used to abate the condition were taken had been ordered on Friday, February 23. It arrived at the mine on Monday.

Darrel Worley, a miner operator at the No. 3 Mine, testified that the materials necessary to abate the condition were available elsewhere. He observed available materials 1 week before the issuance of the order. These materials were located in an adjacent and accessible, but technically separate mine--the No. 4 Mine. Mr. Worley testified that materials could be and were regularly obtained from the No. 4 Mine for use in the No. 3 Mine

Inspector Hall related a conversation that he had with Mr. Beard, one of Contestant's superintendents. The inspector quoted Mr. Beard as admitting that there were "plugs all over the mine." ^{2/} The inspector also testified that he was told by another of Contestant's superintendents that the necessary materials were available in the mine.

Section 104(b) of the Act requires that an inspector shall issue an order under that subsection when he finds that a violation described in a citation issued pursuant to section 104(a) has not been totally abated within the time specified and that the time for abatement should not be further extended. Contestant admitted, through counsel, that the 104(a) citation was properly issued. That is, the monitoring device was not located at the belt drive as required. Moreover, it was clearly established that the device had not been installed at the No. 2-1/2 belt drive on Monday when the inspector issued the subject order. Counsel for Contestant asserted the following at the hearing: "The only reason for this hearing is whether or not the circumstances justified the issuance of the (b) order, whether or not (Contestant) made a reasonable effort under the circumstances."

The test as to whether a 104(b) order was properly issued was enunciated by the Board of Mine Operations Appeals in United States Steel Corporation, 7 IBMA 109, 116 (1976). ^{3/} It was stated therein that "the inspector's

^{2/} Throughout the transcript the term "plug" was used to refer to both sockets and plugs.

^{3/} The Board was addressing section 104(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970), which reads as follows:

"Except as provided in subsection (i) of this section, if, upon any inspection of a coal mine, an authorized representative of the Secretary

determination to issue a section 104(b) order must be based on the facts confronting the inspector at the time he issued the subject withdrawal order regarding whether an additional abatement period should be allowed." The critical question is whether the inspector acted reasonably in failing to extend the time for abatement and in issuing the subject order.

At the outset, it must be noted that the violation was nonserious in nature. The No. 2 belt was 1,360 feet in length, while the No. 2-1/2 belt was 1,852 feet long, for a total of 3,212 feet. When the violation was first noted, the Nos. 2 and 2-1/2 belts were monitored by a single device. This device would have warned of a fire which occurred anywhere along these two belts, but would not have distinguished between the two belts.

The placement of the sensing device two crosscuts outby the belt drive would have warned of any fire which occurred along the No. 2-1/2 belt and 160 feet of the No.2 belt. The sensor located at the No. 2 belt drive would have warned of any fire occurring along the No. 2 belt except for the most inby 160 feet.

The length of time specified for abatement by the inspector was more than adequate. The inspector estimated that the length of time needed to install the device would be 20 minutes. Darrell Worley estimated that the installation should take 30 minutes. Seventy minutes actually elapsed between the issuance and termination of the order. As noted above, the inspector allotted almost 3 full days for abatement.

Contestant interposed the argument that the materials with which to abate the condition were ordered on Friday, but were not on hand until Monday. 4/

fn. 3 (continued)

finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated."

This section of the 1969 Act and section 104(b) of the 1977 Act are substantially similar with respect to the requirements each imposes on an inspector confronted with an operator's failure to abate a violation within the time specified.

4/ Parenthetically, Contestant's assertion that materials were not on hand to abate the condition is at odds with its assertion that the failure to

This argument is rejected. The testimony of the inspector and Mr. Worley established that plugs and sockets were available. Although the plug and socket which were used for abatement were taken from a fresh spool of sensor wire, they could have been obtained within the mine during the 3 days set for abatement. For instance, a suitable plug and socket were located on the sensor line two crosscuts outby the No. 2-1/2 belt drive, at the point where the electrician connected the monitoring device on Saturday. Other plugs and sockets were located on the sensor line at intervals of 250 feet.

Contestant also maintained that reasonable efforts had been made to abate the condition prior to the issuance of the order--a superintendent ordered Mr. Farley to correct the situation and Mr. Farley had, in turn, directed an electrician to place a sensor at the No. 2-1/2 belt drive. The inference that these actions absolved Contestant of fault in the failure to abate is rejected. Blame for the failure cannot be laid entirely to the electrician. Mr. Farley did not know that the sensor line did not contain a socket and plug at the belt drive, and he could not, therefore, fully inform the electrician of the actions necessary for abatement. In addition, he did not question the electrician or examine his work afterwards. In sum, mine management did not adequately supervise the electrician's efforts. Applicant did not demonstrate that it made reasonable efforts to abate the condition prior to the issuance of the order.

Despite the fact that the condition was nonserious and rendered even less serious by Contestant's abatement efforts, the inspector reasonably exercised his authority in refusing to extend the time specified for abatement. The abatement effort requested by the inspector was appropriate and the time specified for abatement was ample. Although an extension of time might be appropriate when mine management through no fault of its own is unable to abate a condition within the time as originally set or extended, an extension in this instance would have amounted to condonation of Contestant's inadequate abatement efforts.

The facts with which the inspector was confronted on February 26, 1979, did not warrant an extension of time for abatement. The issuance of Order No. 662348 was, therefore, entirely proper.

ORDER

It is ORDERED that the above-captioned contest of order is hereby DISMISSED.



Forrest E. Stewart
Administrative Law Judge

fn. 4 (continued)

abate was the fault of a non-management employee rather than management. Contestant is asserting on the one hand that it was aware of a lack of materials necessary for abatement and, on the other hand, that management absolved itself by ordering an electrician to abate the condition on Saturday morning, but that he failed to abate the condition as ordered.

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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

FEB 26 1980

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. HOPE 79-128-P
Petitioner : A/O No. 46-03773-03003V
v. :
: Docket No. HOPE 79-129-P
AMHERST COAL COMPANY, : A/O No. 46-03773-03004V
Respondent :
: MacGregor No. 8 Mine

DECISION

Appearances: Inga A. Watkins, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Edward I. Eiland, Esq., Eiland & Bennett, Logan, West Virginia, for Respondent.

Before: Judge Cook

I. Procedural Background

On November 22, 1978, the Mine Safety and Health Administration (Petitioner) filed petitions for assessment of civil penalty in the above-captioned proceedings pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1978) (1977 Mine Act). The petitions collectively allege two violations of provisions of the Code of Federal Regulations. Answers were filed by Amherst Coal Company (Respondent) on December 12, 1978.

A notice of hearing was issued on June 5, 1979, scheduling the cases for hearing on the merits on July 19, 1979, in Beckley, West Virginia. The hearing was held as scheduled with representatives of both parties present and participating.

A schedule for the submission of posthearing briefs and proposed findings of fact and conclusions of law was agreed upon after the presentation of the evidence. The briefing schedule was subsequently revised at the Petitioner's request. Under the revised schedule, posthearing briefs and proposed findings of fact and conclusions of law were due on September 28, 1979. Reply briefs were due by October 12, 1979. The Petitioner's brief was filed on September 28, 1979. The Respondent did not file a brief.

II. Violations Charged

A. Docket No. HOPE 79-128-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>
29736	4/4/78	75.1725

B. Docket No. HOPE 79-129-P

<u>Order No.</u>	<u>Date</u>	<u>30 CFR Standard</u>
29738	4/4/78	75.1725

III. Evidence Contained in the Record

A. Stipulations

The parties entered into various stipulations which are set forth in the findings of fact, infra.

B. Witnesses

The Petitioner called as its witness Henry J. Keith, a Mine Safety and Health Administration (MSHA) inspector.

The Respondent called as its witnesses Ernest Marcum, company safety inspector for the Respondent; Shirley Adkins, a miner whose duties included the repair and inspection of electrical equipment at the subject mine in April 1978; Virgil Damron, chief electrician at the subject mine; Edward L. Chafin, a miner at the subject mine serving as chairman of the mine safety committee for his local union; and Charles Rhodes, a section foreman at the subject mine.

C. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

M-1 is a copy of Citation No. 29736, April 4, 1978, 30 CFR 75.1725 and a copy of the termination thereof.

M-2 is a two-page document containing photographs of a scoop.

M-3-A is a copy of Order No. 29738, April 4, 1978, 30 CFR 75.1725 and a copy of the termination thereof.

M-3-B is a copy of a modification of M-3-A.

M-4 is a diagram of a coal drill.

M-5 is a computer printout compiled by the Directorate of Assessments listing the history of previous violations for which the Respondent had paid assessments beginning April 4, 1975, and ending April 4, 1978.

2. The Respondent introduced the following exhibits in evidence: 1/
0-1 through 0-8 are photographs of the subject scoop.
0-9 through 0-15 are photographs of the subject coal drill. 2/
0-17 is a document styled "Examination of Electrical Equipment."

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the 1977 Mine Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations, (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

During the course of the hearing, the parties entered into the following stipulations:

1. The Amherst Coal Company is the owner and operator of the MacGregor No. 8 Mine and, as such, is subject to the jurisdiction of the 1977 Mine Act (Tr. 5, 8, 9).
2. The copies of the subject citation, order, termination and the modification of the order were properly served on Amherst Coal Company (Tr. 5, 8).

1/ Exhibit 0-16, a schematic diagram of the controls of the scoop, was withdrawn by the Respondent (Tr. 365).

2/ Exhibit 0-11, a photograph of a coal drill, was not received from the reporter when the exhibits received at the hearing were forwarded with the transcript in this case. The attorney for the Respondent, who had introduced the exhibit, in a letter dated February 11, 1980, stated that he was willing to have the case decided in the absence of Exhibit 0-11. The attorney for the Petitioner made a similar statement in a letter dated February 19, 1980.

3. Henry J. Keith is a duly authorized representative of the Secretary of Labor and was so during April, 1978 (Tr. 5, 8).

4. Amherst Coal Company exhibited good faith in attempting to rapidly abate the subject citation and order (Tr. 5, 8).

5. Amherst Coal Company is a large company (Tr. 5, 8).

6. The proposed penalty will not affect Amherst Coal Company's ability to continue in business (Tr. 5, 8, 9).

7. Amherst Coal Company's total tonnage during 1978 at all mines was 1,377,448 tons of coal (Tr. 9).

B. Opinion and Findings of Fact

1. Docket No. HOPE 79-128-P: Citation No. 29736, April 4, 1978, 30 CFR 75.1725

Occurrence of Violation

MSHA inspector Henry J. Keith arrived at the Respondent's MacGregor No. 8 Mine at approximately 8 a.m. on April 4, 1978, to conduct a spot inspection (Tr. 19). Mr. Ernest Marcum, the Respondent's safety inspector, accompanied Inspector Keith during the inspection (Tr. 20). At approximately 10:45 a.m., the subject citation was issued alleging a violation of mandatory safety standard 30 CFR 75.1725 in that the S & S scoop located in the 001 section:

[W]as not maintained in a safe operating condition in that the emergency switch on the control box was frozen and inoperative. The power lead to the battery was damaged with exposed wire. The inner parts of the rear light was missing with wire leads exposed. Exposed moving universal was not guarded, no fender over left drive wheel to protect persons from injury.

(Exh. M-1).

Mandatory safety standard 30 CFR 75.1725 provides, in part, that: "(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

The inspector's testimony is in accord with the statements contained in the citation. His testimony establishes the existence of the four cited defects on the S & S scoop and also establishes that the defects rendered the machine unsafe within the meaning of the subject regulation (Tr. 22-26, 28-39, 73, 75-76, 79, 84-86, 91, 241-242). Additionally, the inspector observed the machine in operation (Tr. 22, 71, 92-96).

The testimony of Inspector Keith is at variance with the testimony of the Respondent's witnesses on two key points: (1) the condition of the emergency switch, and (2) the condition of the power lead to the battery.

Messrs. Marcum and Chafin testified that the disconnect switch on the scoop was frozen and inoperative (Tr. 108-109, 195). The testimony of both witnesses collectively asserts that both the panic bar and the emergency switch were properly functioning (Tr. 129, 195).

The inspector testified that the power lead mentioned in the citation connected the battery to the power circuits (Tr. 76). According to the inspector, the power lead extended above the surface of the frame of the scoop on the operator's side. Some of the insulation had been torn off exposing the cable's metal wires (Tr. 31-32, 76-77).

Messrs. Marcum and Chafin disagreed, testifying that the exposed cable was inside the metal bell, or plug, which served to attach the cable to the battery. According to both witnesses, it was necessary to depress the cable and peer inside the bell in order to see the exposed cable (Tr. 113, 194, 204). Both witnesses testified that they did not see any exposed cable outside the bell (Tr. 113, 194) and indicated that Inspector Keith depressed the cable in order to see the exposed wire (Tr. 133, 204). However, the inspector testified that he did not have to depress the cable and peer under the bell in order to see bare wire (Tr. 79).

Numerous inconsistencies in the evidence presented by the Respondent serve to impeach the credibility of the Respondent's witnesses in those areas in which their testimony is at stark variance with the testimony of Inspector Keith. These inconsistencies cast a cloud over their testimony in all such areas depriving it of probative value. The major areas are set forth below.

First, Mr. Marcum, the company safety inspector, and Mr. Damron, the chief electrician, disagreed as to the identity of the disconnect switch on Exhibits O-6 and O-7 (Tr. 110-111, 172-173). Second, an inconsistency is present in the testimony of Mr. Marcum and Mr. Chafin as relates to the exposed universal. According to Mr. Marcum, the inspector issued this portion of the citation to obtain guarding on a rounded disc located near the universal, not to obtain a covering for the universal itself (Tr. 115, 138). However, Mr. Chafin indicated that this portion of the citation was issued because both the disc and the universal were uncovered (Tr. 208). Third, the conduct of Mr. Marcum at the time the citation was issued is inconsistent with his testimony on a crucial point. According to Mr. Marcum, the panic bar and emergency switch were in working order. He testified that Inspector Keith indicated that he was issuing the citation for the frozen disconnect switch (Tr. 129-130). However, the citation served to Mr. Marcum clearly states that "the emergency switch on the control box was frozen and inoperative" (Exh. M-1). (Emphasis added.) There is no indication that Mr. Marcum mentioned this to the inspector at the time and, in fact, he testified that he expected the inspector to give testimony at the hearing

concerning the disconnect switch, not the emergency switch (Tr. 129). In view of the clear statement contained in the citation, I find it highly improbable that Mr. Marcum would not have sought a clarification from the inspector at the time as to why the emergency switch was cited when the alleged conversation at the machine clearly indicated that another switch was being cited. Additionally, Mr. Damron testified during cross-examination that the emergency switch was repaired on April 4, 1978, subsequent to the inspection (Tr. 180-181). However, he retracted this testimony during redirect examination (Tr. 182-183).

Although Messrs. Marcum, Damron, and Chafin all claimed that the panic bar and emergency switch worked properly there was considerable inconsistency in their testimony as to (1) whether the panic bar was checked at all, (2) who checked it, (3) who was present, and (4) whether the power was turned on when it was checked.

On the first and second points Mr. Chafin said first that he checked the panic bar with no power on (Tr. 195), then later he said that no request was made for a test of the panic bar and he saw no one test it (Tr. 218). However, Mr. Marcum said the inspector tested it (Tr. 146). On the other hand, Mr. Damron said that he himself tested it (Tr. 174).

On the third point, Mr. Marcum and Mr. Chafin said Virgil Damron came to the scoop and told the inspector that the frozen switch was a disconnect switch (Tr. 129, 195). However, Mr. Damron, the chief electrician, said that he did not know where the inspector was when he tested the panic bar. He said that the inspector could have been there but he had no idea who was there and that he did not know if the inspector was present (Tr. 184-186). The inspector had stated that he did not see an electrician at the time of the scoop inspection (Tr. 75, 237, 250-251).

As to the fourth point, Mr. Marcum and Mr. Chafin said no power had been used on the scoop during the test of the panic bar (Tr. 146, 195). However, Mr. Damron said he tested the panic bar and emergency switch with the power on (Tr. 174).

Accordingly, I conclude that the conditions set forth in the citation existed as alleged and rendered the S & S scoop unsafe within the meaning of the regulation. A violation of 30 CFR 75.1725 has been established by a preponderance of the evidence.

Gravity of the Violation

The MacGregor No. 8 Mine was wet and muddy and possessed an irregular bottom contour (Tr. 21). Float coal dust was suspended in the air due to dry drilling being performed with a coal drill in the nearby face (Tr. 30). The miners working in the area had wet hands and clothing (Tr. 32). Sparks were observed emanating from the broken rear light while the machine was in operation (Tr. 22, 33-34). The condition of the rear light and the condition of the battery cable could have resulted in miners sustaining electrical burns or electrical shocks and, due to the float coal dust, could have

resulted in a mine fire or explosion (Tr. 23, 30-35, 177-178, 181-182). Four miners were exposed to the former hazard while eight to nine miners were exposed to the latter hazard (Tr. 33, 35).

The inspector testified that the inoperative emergency switch exposed the machine operator and miners working in the vicinity of the machine to injuries ranging from lacerations to a fatality and that the wet and muddy conditions and irregular bottom contour could contribute to an occurrence (Tr. 25-29). However, it is significant to note that the machine was equipped with a footbrake (Tr. 74). Four or five miners were exposed to this hazard.

The inspector testified that it is customary in the mining industry for miners to transport rock dust, half headers, wedges, bolts, and bolt plates on the frames of scoops (Tr. 24, 36-37). He testified that materials of this type were observed on the body of the subject scoop on April 4, 1978 (Tr. 83, 97). According to the inspector, an object could fall against the universal during the operation of the scoop and become a flying projectile. This could result in the loss of an eye or other serious injury. Four miners were exposed to the hazard (Tr. 23-24, 35-36).

The inspector testified that the absence of a fender over the left rear wheel made it possible for a miner to maneuver his body between the wheel and the frame in order to connect the cable to the battery. A similar condition had resulted in a fatality at another mine (Tr. 24, 84-86).

Based on the foregoing, I conclude that the violation was very serious.

Negligence of the Operator

The cited conditions were readily observable and should have been detected by the section foreman (Tr. 52-60). Accordingly, I conclude that the Respondent demonstrated ordinary negligence.

Good Faith in Attempting Rapid Abatement

The parties stipulated that the Respondent exhibited good faith in attempting rapid abatement (Tr. 5).

2. Docket No. HOPE 79-129-P: Order No. 29738, April 4, 1978,
30 CFR 75.1725

Occurrence of Violation

The subject order of withdrawal was issued by Inspector Keith during the course of his April 4, 1978, spot inspection of the Respondent's MacGregor No. 8 Mine (Tr. 259). The citation alleges, in pertinent part, that the coal drill in the 001 section "was not maintained in a safe operating condition in that * * * the stop and start switch was damaged and not connected to the deenergizing device. The coal drill could not be deenergized quickly in the

event of an emergency" (Exh. M-3-A), in violation of mandatory safety standard 30 CFR 75.1725. The coal drill was in operation at the time (Tr. 269-270, 298).

The testimony of the inspector differs radically from the testimony of the Respondent's witnesses as relates to the condition of the coal drill on the date in question. According to the inspector, the butterfly-type stop and start switch was damaged in such a manner that a piece of wire, extending from the top part of the switch to the leg of the coal drill's canopy, was being used to hold the switch in the "on" position (Tr. 261, 275, 294-295). Additionally, he testified that the deenergizing device, or panic bar, was supposed to be connected to the stop and start switch, but that it was not so connected (Tr. 262, 275, 277). According to the inspector, a bolt used to hold the panic bar in line down the side of the machine was missing, thus causing the end of the bar to drop (Tr. 289, 296). Accordingly, the end of the bar was lowered beyond the point where it made the connection with the start and stop switch (Tr. 351-352).

The Respondent's witnesses contradicted the inspector on both points. Mr. Marcum testified that he did not observe any wire around the panic bar (Tr. 315), and Mr. Chafin testified that the sole function of the wire observed by the inspector was to operate the light switch. Mr. Chafin also testified that wire was not used on the panic bar (Tr. 334-335). However, it is significant to note that the inspector's testimony addressed the presence of wire around the stop and start switch and not on the panic bar.

According to Messrs. Marcum and Damron, the panic bar was connected to the switch by an assembly consisting of a rod, a swivel sleeve and a spring. The rod was attached to the panic bar proper and the swivel sleeve was attached so as to operate the switch. The spring was located inside the swivel sleeve. The end of the rod was inserted into one end of the swivel sleeve and rested against the spring when the assembly was properly connected (Tr. 304-307, 329-330).

Messrs. Marcum and Chafin indicated that the panic bar had been rendered inoperative by the actions of Inspector Keith. According to Mr. Marcum, the inspector raised the panic bar causing the assembly to come apart. The swivel sleeve dropped and the spring fell out onto the deck of the machine. According to Mr. Marcum, the inspector thereupon indicated that the panic bar was not functioning adequately. Mr. Marcum also testified that Inspector Keith proceeded to replace the spring inside the sleeve and replace the panic bar in its proper position (Tr. 299, 308). This account was in accord with the testimony of Mr. Chafin (Tr. 333-334, 339).

Inspector Keith refuted this testimony. He testified that he did not touch or raise the bar in any manner because the defect was readily visible (Tr. 351). He testified that the spring and bar were already out when he commenced his inspection of the machine and that he did not repair it in any manner (Tr. 351). Additionally, he testified that he did not observe wire attached to the light switch (Tr. 352).

I am unable to accord probative value to the testimony of the Respondent's witnesses insofar as it conflicts with the testimony of Inspector Keith. Some of Respondent's witnesses were not in a position to know exactly what the inspector first observed as to the condition of the panic bar. The witness who appears to have been in the best position to see showed a marked inconsistency in his testimony as to what actually happened. At one point his testimony actually substantiated the position of the inspector. An example of inconsistency in testimony is found in the following statements of Mr. Marcum during cross-examination wherein he momentarily admitted that the rod, swivel sleeve and spring assembly was apart when the inspector arrived:

Q. Didn't you state it by pulling it up in an upward motion that that would render it inoperative, and at that time the spring fell out?

A. Yes, ma'am.

Q. And you are not saying that by doing that Mr. Keith broke it?

A. It wasn't together in the first place.

Q. So the spring was not there prior to Mr. -- it was not intact with the entire panic bar and stop-start switch prior to the inspection; is that correct?

A. Yes -- no. It was there, because it fell out when he pulled it up.

Q. I said "intact," sir.

A. No, ma'am. It was not intact, no.

(Tr. 312).

Additionally, the credibility of the Respondent's witnesses is further weakened by the assertion that the inspector proceeded to repair the panic bar assembly. I find it inconceivable that a federal mine inspector would engage in such conduct instead of confining his activities to identifying violations of mandatory standards and ordering their abatement (Tr. 351).

Based on the foregoing, I conclude that the conditions cited by the inspector existed as alleged and that the conditions constituted a violation of 30 CFR 75.1725.

Gravity of the Violation

The cited conditions would have prevented the machine operator from stopping the machine quickly should it have become necessary to do so (Tr. 262-263). Anticipated injuries to persons outside the machine ranged

from severe lacerations to death (Tr. 263-264, 266). An occurrence was classified as probable (Tr. 264).

Accordingly, I conclude that the violation was very serious.

Negligence of the Operator

The inspector testified that the missing bolt could have been removed by someone or could have simply fallen out during the shift due to machine vibration (Tr. 290). However, the conditions were readily visible (Tr. 265-266) and Mr. Charles Rhodes, the section foreman, was in the area (Tr. 223-224). Under these circumstances, the Respondent should have known of the conditions.

Accordingly, I conclude that the Respondent demonstrated ordinary negligence.

Good Faith in Attempting Rapid Abatement

The parties stipulated that the Respondent exhibited good faith in attempting rapid abatement (Tr. 5).

History of Previous Violations

The history of previous violations at the Respondent's mines for which the Respondent had paid assessments between April 4, 1975, and April 4, 1978, is summarized as follows:

<u>30 CFR Standard</u>	<u>Totals</u>
<u>All sections</u>	<u>1,961</u>
<u>75.1725</u>	<u>23</u>

(Exh. M-5). (Note: All figures are approximations).

Size of the Operator's Business

The parties stipulated that Amherst Coal Company is a large company (Tr. 5), and that Amherst Coal Company's total tonnage for 1978 at all mines was 1,377,448 tons of coal (Tr. 9).

Effect on Operator's Ability to Continue in Business

The parties stipulated that the proposed penalty will not affect Amherst Coal Company's ability to continue in business (Tr. 5).

VI. Conclusions of Law

1. Amherst Coal Company and its MacGregor No. 8 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of and the parties to these proceedings.

3. MSHA inspector Henry J. Keith was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the citation and order of withdrawal which are the subject matter of these proceedings.

4. The violations charged in the subject citation and order of withdrawal are found to have occurred as alleged.

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

VII. Proposed Findings of Fact and Conclusions of Law

The Petitioner filed a posthearing brief, the Respondent did not. Such brief, insofar as it can be considered to have contained proposed findings and conclusions, has been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in these cases.

VIII. Penalty Assessment

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

A. Docket No. HOPE 79-128-P

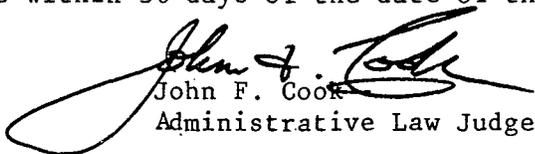
<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Penalty</u>
29736	4/4/78	75.1725	\$1,000

B. Docket No. HOPE 79-129-P

<u>Order No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Penalty</u>
29738	4/4/78	75.1725	\$1,000

ORDER

Respondent is ORDERED to pay the civil penalties in the amount of \$2,000 assessed in these proceedings within 30 days of the date of this decision.


John F. Cook
Administrative Law Judge

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Administrator for Coal Mine Safety and Health, U.S. Department of
Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 28 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 79-113
Petitioner : A.C. No. 36-00965-030411
:
v. : Westland Mine
:
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; William H. Dickey, Jr., Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), to assess a civil penalty against Consolidation Coal Company (hereinafter Consol) for violation of a mandatory safety standard. The petition alleges a violation of 30 C.F.R. § 75.1725(a), failure to immediately remove from service machinery or equipment in an unsafe condition. A hearing was held in

Pittsburgh, Pennsylvania, on January 23, 1980. Joseph F. Reid testified on behalf of MSHA. Richard Checca, Hugh Briggs, John Poskon, and David Cole testified on behalf of Consol. Both parties waived their rights to file briefs, proposed findings of fact, and conclusions of law. Instead, they made oral arguments at the conclusion of the taking of testimony.

The matter involves the alleged violation of 30 C.F.R. § 75.1725(a), failure to immediately remove from service machinery or equipment in an unsafe condition on October 3, 1978, at the Westland Mine loading ramp. This incident resulted in a miner suffering a disabling injury when he was squeezed between a moving mine car and a stationary shuttle car. Consol contends that it was engaged in "troubleshooting" at the time and did not violate the regulation.

ISSUES

Whether Consol violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

30 C.F.R. § 75.1725(a) provides as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

STIPULATIONS

The parties stipulated the following:

1. The Westland Mine is owned and operated by respondent, Consolidation Coal Company.

2. The Westland Mine was subject to the jurisdiction of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (Coal Act) and is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, Pub. L. 91-173, as amended by Pub. L. 95-164 (Act).

3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 109 of the Coal Act and section 301 of the 1977 Act.

4. The subject notice and any modification, extensions and terminations thereof, were properly served by a duly authorized representative of the Secretary of Labor upon an agent of respondent at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

5. The assessment of a civil penalty in this proceeding will not affect the respondent's ability to continue in business.

6. The appropriateness of the penalty, if any, to the size of the coal operator's business should be determined based on the fact that in 1978 the Westland Mine had an annual tonnage of 68,768 and the controlling company, Consolidation Coal Company, had an annual tonnage in excess of 10 million tons.

7. The alleged violation was abated in a timely fashion and the operator demonstrated good faith in attaining abatement.

8. An accident occurred on October 3, 1978, involving one man, John Corey, who suffered a disabling injury.

SUMMARY OF THE EVIDENCE

The undisputed evidence shows that a serious accident occurred at Consol's Westland Mine on October 3, 1978. John A. Corey, a miner, sustained a disabling injury in that accident. No representative of MSHA was present at the time of the accident.

The testimony of the eyewitnesses to the accident, who testified on behalf of Consol, established that on October 3, 1978, at approximately 6:15 a.m., section foreman Hugh Briggs was notified that the car spotter was not operating. The car spotter is a device which moves mine cars in the loading ramp area so that coal is evenly loaded from shuttle cars into mine cars. Mr. Briggs examined the car spotter and confirmed the fact that it was not operable. A mechanic, Richard Checca, was dispatched to the loading ramp area. After he was unable to activate the car spotter switch, he crossed the tracks to the car spotter tank and opened it. The car spotter tank contained the electrical panel and controls for the car spotter switch. At all times, mechanic Checca was accompanied by foreman Briggs.

At this time, in addition to foreman Briggs and mechanic Checca, the following miners were present: John Corey, a roof bolter helper; John Poskon, a roof bolter; and David Cole, a miner helper. There were several mine cars on the tracks. Two shuttle cars were loaded and placed one behind the other or "piggy-back" on the opposite side of the tracks from the car spotter tank.

Mechanic Checca spent 5 to 10 minutes "troubleshooting." He was unable to identify the problem. However, when he used a wooden wedge to manually lift the armature or contactor inside the car spotter tank, the mine cars moved forward on the tracks. During this entire period, foreman Briggs remained at his side but issued no orders to withdraw equipment or men. In fact, foreman Briggs testified that he did not know the whereabouts of any of the three other members of his crew who were in this area. Mechanic Checca testified that he manually lifted the armature three to five times. As the cars moved, the conveyor belt of the shuttle car was activated and coal was loaded in the mine car. John Poskon testified that when he observed the mine cars move, he activated the shuttle cars' conveyor belts to load coal into the mine cars. He did this so that the mine cars would not be as likely to derail as they would if they were half full. No one told him to activate the loading apparatus. Mechanic Checca saw the mine car fill up and he testified as follows:

I noticed it was--it was going to dump the coal all over the tracks and pile everything up, so I just run the spotter and tried to get it through so it wouldn't cause a big pile of coal, you know, that everything would--well, whatever it did; but I tried to run the car through as far as I could to get the coal in the other car. That's when I guess Corey noticed that the--no one was operating the buggy, and he went across.

(Tr. 49).

Foreman Briggs testified that he was "surprised" when the conveyor on the shuttle car was activated and it began to dump coal into the mine car. David Cole, a miner helper, testified that at the time the cars moved and

coal began to be loaded, he was standing next to John Corey on the same side of the tracks as were foreman Briggs and mechanic Checca but on the opposite side of the tracks from the shuttle cars and John Poskon. As coal from the shuttle cars began to spill out of the mine car, David Cole testified that "everyone started to yell." Someone yelled to shut off the shuttle car. No one saw John Corey cross the tracks. All of the witnesses assumed that John Corey ran across the tracks to shut off the shuttle car. At that point, everyone heard John Corey yelling and he was found to be squeezed between the mine car and the shuttle car. The shuttle car was moved and the victim was removed.

On October 3, 1978, at about 7:30 a.m., MSHA inspector Joseph F. Reid was conducting a regular inspection of the Westland Mine when he was informed by Consol management of the occurrence of a serious accident. At about 9 a.m., he arrived on the section where the accident occurred. Two Consol employees told him what happened. None of the parties involved in the accident was present. He found no violations evident at that time. He did not issue a citation. He returned to his regular inspection.

On October 11, 1978, the president of the local United Mine Workers of America submitted a written request to MSHA to investigate the instant accident. Inspector Reid was assigned this investigation. During the next 5 days, he made two trips to the mine and obtained statements from John Poskon, Hugh Briggs, and Richard Checca. Inspector Reid testified that he was told that a wooden wedge was used to "block out" the contactors causing the car spotter to operate continuously. As noted, supra, witnesses Poskon, Briggs, and Checca deny making any such statement. He wrote a citation for

a violation of 30 C.F.R. § 75.1725(a) for failure to remove unsafe equipment from service. He also issued a "safeguard" to the victim, John Corey, for not seeking refuge in a manhole or shelter while there was moving traffic on the track. To abate the violation, management met with the miners concerning reinstruction on removing unsafe equipment from service. Marshall Hunt, Consol's assistant superintendent, gave Inspector Reid a copy of Consol's report of its investigation of the accident (Exh. G-4).

In a Consol memorandum dated October 3, 1978, from Stanley R. Kretoski, Sr., to Joseph Kristoff, Jr., the facts of the accident in question are set forth. The memo concludes, in pertinent part, as follows:

Those of you who have been around for a few years are aware that this is not the first time this kind of accident has happened in our mines, and there will be others if safe haulage practices are not adhered to. With this thought in mind, the following recommendations are made:

1. Absolutely no one is to cross between moving mine cars.
2. When trips are being changed or maintenance work is being performed on the car spotter, shuttle cars are to be kept at least 8' away from the mine cars.
3. Only those people whose work duties require their presence at the ramp area shall be there.
4. The practice of "piggy-backing" is to stop unless both shuttle cars are attended.

(Exh. G-4).

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of counsel have been considered. The evidence shows that on October 3, 1978, the car

spotter in the loading ramp area of 10 East Section of Consol's Westland Mine was not operable. Although the car spotter was not in safe operating condition, it was not removed from service. At that time, foreman Briggs was present and he permitted "troubleshooting," involving the movement of mine cars, to proceed without taking any precaution to avoid injury to miners. Moreover, after the mine cars started to move, he took no action to prevent or stop the loading of coal while "troubleshooting" was being performed by the mechanic. I find this conduct to be a violation of 30 C.F.R. § 75.1725(a) as charged by MSHA.

Section 110(i) of the Act provides in pertinent part as follows:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Consol's prior history shows 490 violations at the Westland Mine in the 2 years prior to the instant violation. Of that number, only one violation was of regulation 30 C.F.R. § 75.1725(a) in controversy here.

Consol is a large operator. The assessment of a civil penalty will not affect its ability to continue in business.

Consol was negligent in failing to remove from service the car spotter which it knew was defective and unsafe. It was also negligent in permitting normal loading of mine cars while its mechanic was "troubleshooting." Moreover, by Consol's own admission, it had actual knowledge of the prior

occurrence of "this kind of accident" but failed to produce any evidence of a safety program to prevent the instant accident. Under these circumstances, Consol is chargeable with a high degree of negligence.

In determining the gravity of this violation, consideration must include the following: (1) the likelihood of injury; (2) the number of workers exposed to the potential injury; and (3) the severity of potential injuries. In this case, the facts show that mining cars were moving on the tracks at irregular intervals without warning. Foreman Briggs testified that he did not know the whereabouts of three members of his crew at the time the car spotter was manually activated. Under these conditions, death or serious physical injury could be expected to result. In fact, victim John Corey sustained a disabling injury. I conclude that the violation was severe.

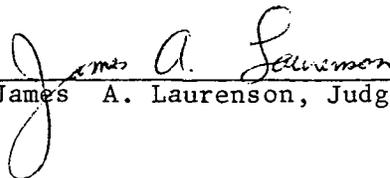
After notification of the violation, Consol discussed the hazards of this accident with its employees at the mine. Consol demonstrated good faith to achieve rapid compliance.

In conclusion, the evidence establishes a violation of 30 C.F.R. § 75.1725(a) in that the car spotter was neither in safe operating condition nor was it removed from service. An accident involving serious physical injury resulted because mine cars were being loaded with coal during the time that the car spotter was defective. The accident could have been prevented by the exercise of the degree of care mandated by the Act and regulations. The operator's negligence was of a high degree and the gravity was severe. Based upon all of the evidence of record and

the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty of \$7,500 should be imposed for the violation which was found to have occurred.

ORDER

Therefore, IT IS ORDERED that respondent pay the sum of \$7,500 within 30 days of the date of this decision as a civil penalty for the violation of 30 C.F.R. § 75.1725(a).


James A. Laurenson, Judge

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