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Secretary of Labor, MSHA v. Alabama By-Products Corporation, SE 79-110, etc. (Judge Moore, February 12, 1980)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 7, 1980

SECRETARY OF LABOR,	:	Docket Nos. HOPE 78-627-P
MINE SAFETY AND HEALTH	:	HOPE 78-672-676-P
ADMINISTRATION (MSHA),	:	HOPE 78-687-P
	:	HOPE 78-696-P
v.	:	HOPE 79-112-P
	:	HOPE 79-195-P
DAVIS COAL COMPANY	:	HOPE 79-233-P
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	:	
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	:	WEVA 79-130-133

DECISION

We directed review on our own motion on April 23 and October 17, 1979, and January 8, 1980, of several decisions of administrative law judges granting motions to approve settlements in these cases. The issue in these civil penalty cases is whether the reasons given for the proposed settlements, and the facts offered in their support, warranted approval of the settlements. The motions set forth information relevant to the six statutory criteria in section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq., and extensively discussed the detrimental effect that assessment of the originally proposed penalties would have had on Davis' ability to remain in business. The judges in each case considered the reasons for the proposed settlements and weighed the criteria set forth in Rule 2700.30(c); the reasons for the settlements are also on the public record. We have reviewed the records, and we find no basis to conclude that the administrative law judges erred in approving the settlements. The judges' decisions are, accordingly, affirmed.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

Marian Pearlman Nease, Commissioner

Commissioner Lawson, dissenting:

I dissent. The evidence submitted in support of these 1977 Act settlements does not support the token penalties agreed to for the violations involved.

The Secretary concedes that the sole reason for the drastic reduction of the penalties initially proposed is this operator's "dire" financial condition.1/ A review of the facts--undisputed except for those bearing on this operator's financial condition--is instructive.

Davis Coal Company (Davis) admitted in these cases to 174 violations, 117 of which were either serious or very serious. Nor did this operator contest the fact that in the twenty-four months preceding the first of these violations, it had also accumulated some 156 other violations.

The Secretary's Office of Assessments proposed penalty assessments for the violations now before us in the total amount of $46,237.00. Despite this history, the Secretary agreed between March and October 1979, to settlement of these 174 violations for a total of $5,109.70, or a reduction of nearly 90 percent from the penalties originally proposed. The average amount paid by this operator was thereby reduced to $29.36 per violation. 2/ Moreover, neither the Secretary nor the Judges below required this operator to come forward with any current financial information to determine what, if any, effect payment of the initially proposed penalties would have had on Davis' ability to continue in business.3/

1/Davis did not contest the fact that it had violated the Act in each of these 174 instances, the gravity of the violations, or the negligence claimed in any instance. Neither did Davis dispute its history of past violations. This prior history was properly--perhaps even charitably--characterized as "large." (Secretary's Motion to Approve Settlement and Dismiss, HOPE 78-627-P et al (Davis I) served March 19, 1979.)

2/This compares to an average penalty per violation paid by all operators, for calendar year 1979, of $124.00. (Mine Safety and Health Administration Activity Report (1979)).

3/Section 110(i) of the Act provides: "The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation."

Scrutiny of Davis' business operations and supposedly "dire" financial condition therefore appears necessary in the context of review of these settlements. The financial data which was submitted by the operator, and accepted by the Secretary, revealed that Davis Coal Company--a corporation owned solely by the president thereof--had only two officers, Winford Davis, president, and Marie Davis, who for 1976 were paid salaries totalling $29,000.00. The corporation made a net profit of $190,008.00 in 1976.

For 1977, Davis claimed a net loss of $332,548.00. Nevertheless, the corporation's assets increased from January 1, 1976 to December 31, 1977, by more than $900,000.00, from $1,815,722.00 to $2,725,111.00. In 1977 this operator also increased the salaries paid to these same two officers from $29,000.00 to $71,578.00, despite the corporation's 1977 "loss."4/

Further, those 1977 and 1978 "losses"--substantially resulting from "natural disasters," as noted by the Secretary in its brief of June 15, 1979 (page 6), were more than compensated for by insurance. (Secretary's Motion to Approve Settlement, Exhibit B thereto (Statement Electing to Have Gain Not Recognized), HOPE 78-627-P et al filed March 19, 1979).

4/This operator also expended $10,500.00 for a new boat in 1975, $3,596.00 for a new golf cart in 1976, and $19,203.00 for a new Mercedes Benz in 1976, all purchased by and for the corporation, and one must assume necessary for Davis' mining endeavors. Their precise utility in these mining operations is not, however, explained in this record.

Mr. Winford Davis is also the sole owner of another coal company, Burning Springs Collieries Co., which has the same address as Davis Coal. Burning Springs showed a profit of $36,828.00 in 1976, and $22,800.00 in 1977. Certain real estate is also jointly owned by Davis Coal and Burning Springs, (Exhibit B, supra) and indeed is collateral for a loan obligation of Davis Coal. No investigation was had, nor information secured or requested, as to the financial interrelationship between these corporations.

This (Davis I) motion for settlement is unfortunately representative of the manner in which these violations were resolved. In that motion the Secretary noted Davis' 156 violations in the 24 months preceding the first violation in the instant dockets, during 83 inspection days, and "...that this represents a large history of previous violations."

In addition to the expenditures previously noted, and despite the fact that the violations settled in Davis I were agreed to on March 23, 1979, no 1978 or later tax returns were then--or ever--submitted--or apparently demanded by the Secretary or Judges to support this operator's plea of poverty. In fact, the only financial data submitted by Davis at that time was an unaudited financial statement for the first nine months of 1978 (dated September 30, 1978) accompanied by an explanation that the financial statements were "not audited" "are incomplete presentations"..."do not include all the disclosures required by generally accepted accounting principles" and "should not be used by anyone who is not a member of the company's management." (Secretary's Motion to Approve, Exhibit C thereto, HOPE 78-627-P et al filed March 19, 1979).

Davis is nowhere on record, in any exhibit, motion, brief, or pleading before any of the Judges below, or this Commission, with any audited financial statements, which might give at least colorable credibility to the proposed penalties' claimed "effect on the operator's ability to continue in business." (Section 110(i), supra). Indeed, in no instance did the parties submit or the Judge require current financial information to show whether or not Davis could, at the time it was requesting approval of a 90 percent penalty reduction, pay the full penalties proposed and remain in business.

The Secretary in Davis I also uncritically acquiesced in Davis' representation of its financial condition and accepted without question this operator's "unofficial corporate balance sheet," whatever that may be. (Emphasis added). (Exhibit C, supra). In addition, the settlement in those dockets--$2,407.00 versus proposed penalties of $23,935.00--was permitted to be paid in quarterly payments of approximately $600.00 per payment.5/ This settlement was deemed acceptable for an operator with gross receipts (for the first nine months of 1978) of $736,982.00, and then current assets of $1,114,734.00.

5/The Congress in writing the 1977 Act expressed strong disapproval of the delays which took place in penalty payments under the 1969 Act. "While low penalty assessments constitute one disturbing element of the current civil penalty system, the Committee is equally disturbed by the rather long period of time between citation of the initial violation and the final payment of the penalty associated with that violation." "...The Committee firmly believes that to effectively induce compliance, the penalty must be paid by the operator in reasonably close time proximity to the occurrence of the underlying violation." (S. Rep. at 15, 16; 1977 Legis. Hist. at 603, 604).

No mention was made in the motion to approve that settlement of any deterrent effect of the penalties agreed upon by the Secretary. Nor does the record evidence any consideration by either the Secretary or the Judge of deterrence, despite the legislative history of the Act. That history clearly states that the purpose of civil penalties is to "convinc[e] operators to comply with the Act's requirements." (S. Rep. at 45; 1977 Legis. Hist. at 633).

Nor did the penalty settlements arrived at in Dockets HOPE 79-195-P, 233-P, 234-P (Davis II); WEVA 79-25 (Davis III); or WEVA 79-130-133 (Davis IV) reflect more serious consideration of the place of deterrence in the fixing of penalties under the Act. In Davis II the Secretary does concede that financial difficulties do not "...automatically require major reduction in proposed penalties"; nevertheless, a 90 percent reduction in the proposed penalties, from $7,355.00 to $735.50, was found acceptable.

Davis III and IV also reflect very major reductions, from $3,263.00 to $326.30, and $11,684.00 to $1,640.00, respectively. The emphasis in those dockets is on assuring Davis' continuing its mining operations, despite (e.g.) in the most recently settled docket (Davis IV), a finding of sixty-nine violations, of which forty-seven were admittedly "serious."

Of more current and comparative interest, in the context of this Commission's review,is an (unreviewed) decision of January 10, 1980, in which Judge Joseph B. Kennedy approved a settlement of $2,325.00 by this operator for several dockets in which the penalties originally proposed totalled $3,582.00. That settlement, which Davis agreed to--despite a continuing contention by this operator of financial stringency--reflects a reduction of only 33 percent from the penalties originally proposed, Davis Coal Co., Dockets Nos. WEVA 79-358, 359. (Davis V).

While Section 110(i) of the Act requires the Commission, in assessing civil monetary penalties to "consider...the effect on the operator's ability to continue in business...6/" all of the settlements now before us, buttressed only by a scant record and slim fiscal documentation, including inter alia the expenditures by Davis for a boat, golf cart, and Mercedes Benz over a period of claimed extreme financial stress, fail to withstand even the most casual examination.

As a minimum, it would appear to be fundamental that the Secretary demand, before accepting pleas of poverty made by this--or any other--operator, direct representations by the operator to the Judge, as well as to the Secretary, detailing its plea of poverty, and sustained by complete and fully audited current financial statements. Second hand verbal assurances from the Secretary to the Judge, as exemplified by these cases, are not persuasive. The burden of proving that the penalties proposed will have an adverse effect on an operator's ability to continue in business is obviously that of the operator. It is anomalous indeed for the Secretary to gratuitously accept that burden--as here appears to be the case--and to me representative of a regressive return to the practice properly found wanting under the 1969 Act.

Even more disturbing is the Secretary's none too subtle suggestion in these cases--and the dockets before Judge Kennedy (supra)--that his agreement to a settlement is in

6/ None of the other criteria enumerated in Section 110(i) are in issue in the cases now before us. The parties do not contend that the criteria to be considered when the Secretary and the operator agree upon penalty settlements are in any way different from the criteria to be applied when penalties are imposed after a hearing and not as a result of agreement.

effect unreviewable and final, and that there is no objective standard to be applied for evaluating the appropriateness of the penalties agreed upon by him, other than Secretarial discretion.7/ To the contrary, the statute does not afford the Commission or its Judges--much less the Secretary--the luxury of merely rubber stamping the parties' agreement to mutually satisfactory penalties. Indeed, the legislative history of the 1977 Act has made clear the public interest involved in the imposition of penalties mandated by the Act.

In constructing the 1977 Act, Congress paid significant attention to penalties, noting its dissatisfaction with the low settlements of penalties under the 1969 Coal Act. Section 110(k)8/ was therefore made a part of the 1977 Act, in order that penalties, mandatory under the 1977 Act, would not be compromised, mitigated or settled except with the approval of the Commission.

As detailed in the Senate Report, the Congress stated:

"In short, the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards."

. . .

"To be successful in the objective of including (inducing) effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance."

. . .

"In overseeing the enforcement of the (1969) Coal Act the Committee has found that civil penalty assessments are generally too low, ...the effect of the current enforcement is to eliminate to a considerable extent the inducement to comply with the Act or the standards, which was the intention of the civil penalty system."

7/"In the judgment of the parties and the administrative law judge, as a result of the company's financial condition, a 10 percent penalty will deter Davis from future violations as much as a more substantial penalty would deter another company." (Secretary's Brief on review, served November 13, 1979). (Emphasis added).

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

. . .

"The Committee strongly feels that the purpose of civil penalties, convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.

"To remedy this situation, Section 111(1) provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission. ...By imposing these requirements the Committee intends to assure that the abuses involve in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided. It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any reduction in penalties." [S. Rep. at 41-45, 1977 Legis. Hist. at 629-633; emphasis added.]

The Act's penalty provisions are therefore best summarized as requiring penalties in such amounts as will induce compliance with the Act, by a process in which penalties are subject to the full scrutiny of all interested parties, to assure protection of the public's interest in the imposition of penalties sufficient to deter future violations. In order that this be accomplished, the Commission is required to approve the penalties imposed.

While neither the Act nor the legislative history is as specific as might be wished in guiding the Commission in fulfilling this statutory responsibility, it is impossible when, as here, the record is grossly inadequate. Nor are these dockets--unfortunately--unique in their deficiencies.9/

9/See for example, Bethlehem Steel Corp., PENN 79-100-M, and Itmann Coal Co., HOPE 79-188-P, in which the history of previous violations of the operator neither appear in the case records nor in the (respective) motions of the Secretary seeking settlement approvals. In King Coal Co., KENT 79-196, 197, the record is silent as to whether the nineteen citations therein are being settled for particular individual amounts, in full, at a fixed percentage, or without penalty.

If the record predicates necessary to our penalty approval role are absent from the record below, clearly neither we nor our Judges can meet our statutory responsibilities. It would not seem unduly difficult or burdensome for the Secretary to detail the factual bases on which approval for penalty settlements are founded.10/ Absent this information, meaningful review and evaluation of penalties cannot be had, nor their "appropriateness" determined as required by the Act.11/

The basic test is therefore whether the penalty will deter future violations, and is consequently "appropriate." In making that determination, the only statutory source providing criteria for review of approval of penalties is Section 110(i) of the Act and the six factors enumerated therein. It is to these that the Commission, and its Judges, must turn in considering penalty proceedings under the Act. To the extent that the Act is silent, or imprecise, resort must be had to the legislative history.

There is no doubt that the Congress has directed the Commission toward a more active role in overseeing the penalty settlement process than was the case under the 1969 Act. It was unwilling to entrust to the Secretary alone the protection of the public interest in penalty settlements. (Section 110(k), S. Rep. at 45; 1977 Legis. Hist. at 633, supra).

10/ Indeed, I strongly suspect some of our Judges are at least as troubled as I by the current dearth of data presented to them in penalty proceedings. Kaiser Aluminum & Chemical Corp., CENT 79-46-M, Republic Steel Corp., PITT 78-424-P, Blue Rock Industries, WILK 79-170-PM, and see Davis Coal, WEVA 79-358, 359.

11/ See also the Commission's permanent Rules of Procedure (effective July 30, 1979) (Rule 2700.30(c). "...Any order by the Judge approving a proposed settlement shall be fully supported by the record. In this regard, due consideration and discussion thereof, shall be given to the six statutory criteria set forth in Section 110(i) of the Act." (Emphasis added).

Indeed, where a tribunal before which a case is pending is required to approve a settlement to protect either the public interest or some special private interest, some active inquiry is usual. See 9 Wright and Miller, Federal Practice and Procedure: Civil §2363 at 153, 160 (discussing F.R. Civ.P. 41(a)(1)).

The Supreme Court in a bankruptcy reorganization settlement has also held that the statutory requirement that reorganization plans be "fair and equitable" applies to approvals of settlements of reorganization matters as well as to litigated reorganizations. To satisfy this requirement, the bankruptcy judge must apprise himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated, as well as the expense, complexity and duration of any litigation. "Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation", and, as emphasized by the Court:

> "[i]t is essential, however, that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law." [Protective Committee of Independent Shareholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424, 434 (1967).]

These decisions strongly suggest that the Judges and this Commission do not meet the mandate of our Act by merely pro forma acceptance of the parties verbal, unconsidered and thinly supported agreement to mutually acceptable amounts, arrived at without satisfying the six statutory criteria set forth in Section 110(i).

Whatever the Commission's role may be, it--and its Judges--must at least have before them for purposes of meaningful evaluation or appellate approval of penalties, factually supportive case history. The mandate of the Act is not met by general decisional declarations, otherwise unsupported, that "I find no reason to challenge MSHA's position." or, "There is no indication that either party was coerced or fraudently induced into the accord."12/

12/Rex Alton and Company, LAKE 79-28-M; Ranger Fuel Corp., HOPE 78-743-P.

A fortiori, similar conclusory generalizations not set forth in decisions but appearing only in motions made to the Judge below, are even less compelling or entitled to acceptance, particularly in view of the strong public interest in open and public penalty assessments, so forcefully endorsed by the Congress. (S. Rep. at 45; Legis. Hist. at 633, supra).

Lastly, when contentions made are unsupported by the record, particularly with reference to those Section 110(i) criteria most readily secured and accessible for documentation and inclusion in the decision of the Judge (e.g., the operator's history of previous violations; or financial data--as here--claimed as buttressing for the possible effect on the operator's ability to continue in business), no justification is apparent for the Secretary's failure to assemble the necessary facts for incorporation by the Judge in his decision fixing penalties.

In the instant cases, I would therefore find the absence of audited financial data to constitute a failure of proof, and insufficient under the Act to justify the settlements accepted by the Secretary. Whether further documentation might indeed verify that the settlements here agreed to are appropriate--because of "the effect on the operator's ability to continue in business"--on the record presented, I am unable to determine. Nor do I believe the Judges below were able to determine whether the penalties imposed would serve as deterrents to future violations. This operator's large history of prior violations, and erratic financial and operational record, provide no basis for confidence that the penalties agreed to will serve the statutory purpose of deterring future violations.

An even broader but no less compelling consideration should motivate all toward the procedures suggested. As these and other decisions make evident, penalty proceedings below are treated with widely varying touches. In many instances, the judges have been most assiduous and demanding when assessing or approving penalties, to make certain that the six statutory criteria are supported by the record and fully discussed. (FMSHRC Rules of Procedure (Rule 2700.30(c), supra). In other instances we have, in my judgment, fallen short.

In the belief that consistency and predictability in the application of the law, and our Act is both desirable--and necessary--and I am convinced, needed by those subject to its strictures, I believe that the Secretary, the Judges, and the Commission fail to meet their respective responsibilities if inconsistencies in the imposition of penalties are perpetuated. Mechanistic application of the law is not the goal, but certainty and predictability is crucial to any evenhanded application of the law. There must be no discrimination in favor of or against similarly situated litigants. Counsel's decisions, however well intentioned, should not be determinative in the fixing of penalties under this Act. The Congress, as I read the Act and its legislative history, has clearly expressed itself to the contrary.

The considerations involved were well expressed by Judge Kennedy in his Order to Furnish Information of December 14, 1979, and Decision and Order Approving Settlement of January 10, 1980, (Davis V, supra):

> "The Regional Solicitor claims that in reviewing a proposed settlement the advisability of a reduction in proposed penalties because of adverse business impact need not take into account or be balanced against the affirmative interest in perpetuating only safe mining operations.1/ The logical extension of this position seems to be that mine safety is a consideration secondary to mine productivity and that the enforcement policy in effect is "all the safety consistent with production" and not "all the production consistent with safety."
>
> 1/"While the Act requires that adverse business impact be "considered", it does not require that it be given controlling weight or that it cannot be outweighed by the countervailing interest in continuing only those mining operations that promote mine safety."
>
> . . .
>
> "...the question as I see it, is whether in view of the pattern of unwarrantable failure violations disclosed the Davis mine is not a disaster waiting to happen, and, if so, whether it is in the public interest to encourage its continued operation by even a token reduction in the amount of the penalties warranted by its past operations."

"While Congress, directed that the impact of penalties on an operator's ability to continue in business be considered, it obviously did not intend to encourage the continued production of coal in a mine in such dire financial straits that the operator cannot provide a minimal safe workplace environment. In other words, I believe there comes a time when the seriousness of violations cannot be minimized, trivialized or tacitly condoned in the interest of preserving stockholder equity or marginal productive capacity...."

"I am fully sympathetic to this relatively small operator's financial plight, but I am also charged with considering the socioeconomic impact of a disaster at this mine on the lives and well being of its miners and their families. I am also persuaded that the spectre of unemployment is more easily confronted than the awesome finality of the undertaker."

I too am deeply troubled by those matters which disturbed Judge Kennedy. The way to avoid penalties being imposed which are unfair or inequitable must be by requiring rigorous adherence to the statute by all concerned, with full public disclosure of the penalty imposition process, and a record which fully reflects the place of deterrence in the statutory scheme of the Act. I would therefore reverse and remand for the purpose of requiring that there be strict compliance with the criteria enumerated in Section 110(i) of the Act, before any settlement of these dockets is approved.

A. E. Lawson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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March 31, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket Nos. BARB 78-306 through 78-333
	:	BARB 78-609-P
	:	BARB 78-609-P(B)
v.	:	BARB 78-610-P
	:	
SCOTIA COAL MINING COMPANY	:	

DECISION

We granted interlocutory review to determine whether the administrative law judge abused his discretion when he denied the parties' motion for a stay of all proceedings until completion of a trial of criminal charges against Scotia Coal Mining Company in federal district court.

Scotia has sought Commission review of twenty-eight withdrawal orders, and the Secretary has sought the assessment of penalties for the alleged violations associated with the withdrawal orders. The violations are apparently alleged to have occurred in February and March of 1976. The withdrawal orders were issued under the Federal Coal Mine Health and Safety Act of 1969, 1/ in March of 1978 as a result of an investigation and inspection precipitated by two explosions at Scotia's Mine in Ovenfork, Kentucky, in March of 1976. In August of 1978, the Secretary of Labor initiated the penalty cases and they were consolidated with the withdrawal order cases the next month.

On September 8, 1978, the Secretary filed a motion with the administrative law judge to stay proceedings during the Justice Department's investigation of the mine accidents. The judge granted a stay until February 1, 1979. On January 31, 1979, the Secretary filed a motion to continue the stay because the U.S. Attorney had informed him that a grand jury would be convened to investigate the Scotia disaster. The stay was extended until June 1, 1979, and again until July 15, 1979. After the grand jury handed down an indictment, the judge granted another extension of the stay until October 15, 1979. The judge found that only five of the twenty-eight administrative cases are directly related to the allegations in the indictment, but was "reluctantly persuaded" that the stay of all proceedings should be continued. He noted the criminal trial was expected to begin between September 15 and October 15, 1979.

1/ 30 U.S.C. §801 et seq. (1976)(amended 1977)["the 1969 Act"].

On October 10, 1979, the Secretary again moved for an extension of the stay. Scotia joined this motion on October 24, 1979. On October 25, 1979, the judge issued an order staying eight of the cases, but returning twenty to the active trial docket. The judge first determined that only eight administrative cases are "factually related" to the criminal charges. He noted that the grand jury had completed its work and the administrative proceedings could not be used to assist the grand jury. He found that problems centering on the right to avoid self-incrimination under the Fifth Amendment will not arise in the criminal case since no natural persons had been indicted. The judge also stated that procedural devices such as particularized requests for a stay of discovery are available to the parties to protect their interests and ensure fairness of both the administrative and criminal proceedings. Finally, the administrative law judge noted that pretrial publicity, if it occurred, would not necessarily be prejudicial to the criminal defendants.

The parties then filed petitions for interlocutory review of the judge's ruling. We granted the petitions on November 30, 1979, and suspended all proceedings. 2/

The parties have presented several arguments that the judge abused his discretion. Both express concern that problems in the criminal proceedings could arise from pre-trial publicity. The parties fear that publicity stemming from the administrative cases may, if they are heard first, jeopardize Scotia's right to a fair criminal trial. The parties have overlooked that the federal district courts have the tools to mitigate any prejudicial effects of any publicity. See DeVita v. Sills, 422 F.2d 1172 (3rd Cir. 1970). In addition, the administrative law judge can take preventive measures short of a complete stay.

Both parties argue that the judge should have stayed the cases because differences in criminal discovery rules and Commission discovery rules will cause confusion, and possibly improper access to information by the prosecutor and defendants in the criminal case. The administrative law judge stated in his order:

> It is not apparent from the face of the charges or the parties' pleadings that the other 20 violations [those not stayed] present such an identity of issues and evidence with the criminal charges that any discovery problems may not, upon seasonable application by either party, be dealt with by the issuance of appropriate protective orders.

2/ The judge thereafter filed a "Supplement and Errata" to his order. We grant Scotia's motion to strike the supplemental material. We did not consider that material during our interlocutory review.

It is clear from the judge's order that he carefully considered the points presented by the parties. Neither party at this time has offered any evidence of actual harm to the criminal proceedings and the judge stands ready to meet those problems if they do become concrete.

Further, the parties have failed to consider the public interest in the expeditious resolution of penalty cases. This oversight on the Secretary's part is especially unfortunate, 3/ and prevents us from according his views the deference to which they might otherwise be entitled. 4/ Congress has forcefully expressed its desire for the expeditious adjudication of penalty cases, and its dissatisfaction with the length of time between the occurrence of violations and the payment of penalties under the 1969 Act. 5/ As the judge recognized, there is a substantial public interest in the expeditious determination of whether penalties are warranted.

Finally, we reject the parties' contentions that the administrative law judge acted arbitrarily and capriciously in refusing to continue to stay all proceedings in the absence of circumstances substantially different from when he issued his stay of all cases until October 15, 1979. The administrative law judge's order indicates he carefully reviewed the facts before him at the time of the motion and concluded that returning twenty cases to the active trial docket was appropriate and would not interfere with the criminal proceedings. 6/

3/ The Secretary in his brief states, "The Secretary, prosecutor of the administrative cases, desires that the twenty-eight alleged violation [sic] and civil penalty cases be stayed. Balanced with this is Scotia's like desire to stay those cases. There are no counter-vailing factors balanced on the other side." (Emphasis added.) Br. at 12.

4/ Old Ben Coal Company, 1 FMSHRC 1480, 1484-1485, 1 BNA MSHC 2177, 2179-2180, 1979 CCH OSHD ¶23,969 (1979); and Helen Mining Company, 1 FMSHRC 1796, 1798-1801, 1 BNA MSHC 2193, 2194-2196, 1979 CCH OSHD ¶24,045 (1979).

5/ See S. Rep. No. 95-181, 95th Cong., 1st Sess. at 15-16 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 603-604 (1978). The Senate Committee that drafted the bill from which the Federal Mine Safety and Health Act of 1977 was largely derived stated that "to effectively induce compliance, the penalty must be paid by the operator in reasonably close time proximity to the occurrence of the underlying violation." S. Rep. at 16, 1977 Legis. Hist. at 604.

6/ The Secretary raised an argument in his brief that was not raised in his petition for interlocutory review or before the judge. He claims that harm may come to the administrative penalty cases if all are not heard together. Br. at 19-26. Since he did not present this argument to the administrative law judge, we do not pass upon it. See Ora Mae Coal Co., 1 FMSHRC 1963, 1 BNA MSHC 2258, 1979 CCH OSHD ¶24,126 (1979), We also intimate no view whatsoever on the matter discussed in footnote 10 of the Secretary's brief.

The administrative law judge carefully weighed the parties interests and the public interest. We cannot say that he abused his discretion and we therefore leave his order undisturbed.

Accordingly, the case is remanded to the administrative law judge. Our order of November 30, 1979, suspending the proceedings, is vacated.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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Administrative Law Judge Decisions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

MAR 04 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 79-194-M
v.	)	ASSESSMENT CONTROL NO. 02-00852-05005-F
DUVAL CORPORATION,	)	MINE: SIERRITA MILL
Respondent.	)	

DECISION

APPEARANCES:

Mildred L. Wheeler, Esq., Office of Daniel W. Teehan, Regional Solicitor, Office of the Solicitor, U. S. Department of Labor, 11071 Federal Building, 450 Golden Gate Avenue, Box 36017, San Francisco, California 94102 for Petitioner

Walter D. Ellis, Esq., Houston, Texas, and Michael A. Lacagnina, Esq., Tucson, Arizona, for Respondent.

Before: Judge John J. Morris

STATEMENT OF THE CASE

Petitioner seeks to assess a penalty against a mine operator for the activities of a contractor. These proceedings arise under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq., (amended 1977).

ISSUE

The single issue here centers on whether a mine operator is liable under the Act for the activities of an independent contractor. 1/

1/ There is a paucity of evidence as to the exact relationship between the mine operator and the contractor.

FINDINGS OF FACT

From the uncontroverted evidence, I find the following facts.

1. Cimetta Engineering and Construction Company installed, under contract, a pipeline for Duval Corporation, a mine operator (Tr 9).

2. The installation did not involve Duval employees nor any mining activities (Tr 27).

3. Four Cimetta employees maneuvered pipe under three overhead power transmission lines (P1, R2).

4. While holding a steel choker, a Cimetta employee was electrocuted when contact was made with the power line by the Cimetta crane (BP-1).

CONTENTIONS

Duval argues that a finding of a violation of 30 CFR 55.12-71 [2/] imposes absolute liability without fault; that such a result violates the Act, Congressional intent, and basic fairness. Further, Duval asserts the dissenting opinion of Commissioner Backley in Old Ben Coal Company [3/] is more logical than the majority opinion and Duval argues the dissenting opinion should be followed.

2/ The cited regulation provides as follows:

> 55.12-71 Mandatory. When equipment must be moved or operated near energized high-voltage powerlines (other than trolley lines) and the clearance is less than 10 feet, the lines shall be deenergized or other precautionary measures shall be taken.

3/ Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Old Ben Coal Company VINC 79-119.

Finally, Duval contends Judges should achieve justice. In short, a Judge should not be bound by considerations of administrative convenience which Duval argues forms the basic rationale for the Commission decision in Old Ben Coal Company.

CONCLUSIONS OF LAW

The concept urged by Duval would result in the undersigned overturning a controlling Review Commission decision. I lack such authority. A failure to follow precedent could only result in adjudicatory chaos with as much different applicable law as there are individual Judges.

It is clear that an administrative law judge must follow the rules and precedent of the Commission, Secretary of Labor, Ray A. Jones vs. James Oliver et al NORT 78-415, March 1979.

On the authority of Old Ben Coal Company and other Commission cases, 4/ I affirm the citation.

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

ORDER

Citation 376894 and the proposed penalty of $5,000 are affirmed.

John J. Morris
Administrative Law Judge

4/ Republic Steel Corporation IBMA 76-28, April, 1979; Kaiser Steel Corporation DENV 77-13-P (May 1979); Monterey Coal Company HOPE 78-469 (November 1979).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 05 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. DENV 78-579-PM
	:	AC No. 02-01035-05001
v.	:	El Mirage Plant No. 6
UNION ROCK AND MATERIALS CORPORATION, Respondent	:	

DECISION

Appearances: Malcolm R. Trifon, Esq., Trial Attorney, Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Gary Houston, Esq., Phoenix, Arizona, for Respondent.

Before: Judge Fauver

Findings of Fact

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. Only the Respondent has submitted proposed findings, conclusions and a brief.

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

1. At all pertinent times, Respondent, Union Rock and Materials Corporation, operated a sand and gravel plant, known as the El Mirage Plant No. 6, in Maricopa County, Arizona, which produced sand and gravel for sales in or affecting interstate commerce.

2. Respondent's sand and gravel plant processed material that would eventually be used as fill by its customers. The material would be removed from a riverbed, screened or sized, and stockpiled for pick up. The plant's equipment included about 15 conveyor belts that were arranged in various

alignments (plans) depending on processing requirements. The length of time a plant would use any one alignment plan varied with the particular job.

3. Some of the conveyors transported sand; others carried gravel. One of the conveyors at Respondent's wash plant was a sand reject conveyor that ran beneath the wash plant and caught sand as it was separated from the gravel passing above.

4. The sand reject conveyor would normally be energized by conductors housed in the motor junction box ("J-Box") that was located on top of the conveyor, about 10 feet off the ground. The J-Box protected splices in the power conductors from dust, water and other foreign objects. The wires inside the box were well taped to prevent a short. Deterioration of the insulation was unlikely.

5. Before a plant could become fully operational, a testing phase was required to test the belts' rotation and alignment. During normal production, the plant would run 180 to 200 tons per hour but much less material (about 1 ton) would be used to test a new alignment plan. Testing one belt would take from 15 minutes to 1 hour, however the testing phase for the whole plant varied with the number of conveyor belts. Testing would not begin until all the belts had been set up.

6. Except for purposes of testing, the conveyors would normally not be operated without guards around the tail pulleys and belt drives. When the belts were being aligned, the guards would normally be removed to allow adjustments to be made more easily.

7. On March 16, 1978, federal inspectors Daryl McPherson and Clarence Ellis, accompanied by the plant superintendent, Ralph Watson, inspected Respondent's wash plant. Inspector McPherson observed that the V-belt drive on the sand reject conveyor was unguarded, and issued a citation charging a violation of 30 C.F.R. § 56.14-6. The citation read in part: "A guard was not provided for the V-belt drive of the sand reject belt first stage. Sand wash plant." Only the V-belt drive on the sand reject conveyor was unguarded.

8. The cited condition was abated in 1-2 hours by installing a guard.

9. Six to 7 days before the inspection, the plant's component parts, including the conveyor belts, had been moved from another area in the plant and were still in the process of being set up at the new location at the time of the inspection. The sand reject conveyor was installed about 3 days prior to the inspection. When the inspectors arrived, most of the conveyor belts had been runing for about 1 hour to check their rotation and alignment. The inspector observed that material coming off the end of the belt was creating a small stockpile. Although this might have indicated the plant was in operation, he concluded that the belt was only run for test purposes. The plant became fully operational the following day.

10. Inspector McPherson also observed that the cover to the J-Box was missing, and issued a citation charging a violation of 30 C.F.R. § 56.12-32. The citation read in part: "The motor junction box on the first stage of the sand reject belt was not provided with a cover." The cited condition was abated in 1-2 days.

11. The condition in Finding 10 created the possibility that one of the power conductors could have loosened, touched the frame of the conveyor, energized the whole conveyor system, and endangered anyone coming into contact with the system.

12. The inspector also observed that the tail pulley of the sand belt was not guarded, and issued a citation charging a violation of 30 C.F.R. § 56.14-1. The citation read in part: "The tail of the first stage of the sand belt was not provided with a guard to prevent persons from coming in contact with the tail pulley. Tail pulley is app. 4-1/2 ft. above surface level." The condition was abated in 1-2 days.

13. The condition in Finding 12 created a hazard that a man might be caught in, or fall into, the tail pulley. This area was traveled frequently by clean-up men and maintenance personnel.

14. The inspector also charged Respondent with a violation of 30 C.F.R. § 56.12-8. The citation read in part: "The strain relief fitting for the power conductor feeding the screens was not being used properly. J-Box was mounted on the first belt feeding the dry plant." The inspector observed that the large insulation with strain relief clamps around it was about 5 feet long and hanging loosely, leaving three insulated wires hanging in the strain relief.

15. The inspector believed the relief cable had been slackened to allow the conveyor to match up with the wash plant. The inspector's statement read in part: "The plant was installed recently and the electrician pulled the wire out of the relief clamp. A proper check should have been made before energizing the equipment."

16. The inspector believed that vibrations in the plant could have caused the cable retention to loosen allowing one of the power conductors to become jarred loose in the junction box. This could have caused the splices on the power conductors to separate, resulting in energizing the conveyor system and endangering anyone coming into contact with it.

17. At the time of the inspection, the wire was not energized and served no function; instead of power going from the generator to the motor by way of the junction box, it came directly from the generator van switch box to the motor. This was considered a more efficient and practical way of providing power. The alternative was to string an extra wire, about 60 feet long, to the J-Box.

18. The electrician, Lee Graybill, abated the condition by placing the power conductor into the strain relief clamp.

19. The company's safety program had been in existence since 1962. That program consisted of having monthly supervisors' safety meetings; annual safety meetings; safety committee meetings twice a month; and safety talks at least once per week by the safety foreman. There was also two-way radio communication when radio safety bulletins were put on at least two or three times a day.

20. The last accident resulting in lost man-hours was in July, 1974. Prior to the citations, the company had gone 3 million hours straight without a mishap.

DISCUSSION

Citation Nos. 371141 and 371142

On March 16, 1978, Inspector McPherson charged Respondent with a violation of 30 C.F.R. § 56.14-6, which provides: "Mandatory. Except when testing the machinery, guards shall be securely in place while machinery is being operated." The inspector observed that a guard was not provided on the V-belt drive of the sand reject conveyor in Respondent's wash plant.

The inspector also charged Respondent with a violation of 30 C.F.R. § 56.12-32, which provides: "Mandatory. Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." He observed that the motor junction box cover on the first stage of the sand reject conveyor was missing.

The basic issue as to both of these citations is whether the testing exceptions to the mandatory requirements of each of the cited standards apply in this case.

The Respondent contends that at the time of the inspection, the plant was in a testing phase. Only 6 to 7 days earlier, the plant's 15 conveyor belts were moved from another location at the plant and were still in the process of being set up. Respondent states that when the inspectors arrived, most of the conveyor belts had been operating only about 1 hour just to test their rotation and alignment. No material had been processed during the testing phase, although some material had been run for purposes of testing.

Although the Secretary has not responded to these contentions, the inspector did state that he had reason to believe the plant was processing material. His conclusion is supported only by the small amount of material he saw stockpiled at the end of one of the belts and by his opinion that it would be uneconomical to test for more than 3 days.

I find that the plain meaning of the provision in section 56.14-5, "[e]xcept when testing machinery," refers to the testing or repairing of the equipment's mechanical parts due to a malfunction. Respondent asserts that the exception to the requirement for guards applies when a whole plant is in a testing phase designed to align the conveyor belts and to check their

rotation. I conlcude that "testing machinery" is not synonomous with a "testing phase," because the first situation involves curing a mechanical malfunction while the second involves assuring the smooth running of the complete operation. In the latter instance, which could last as long as 6 to 7 days, the moving parts of the conveyor would be in operation creating a hazard which the safety standard is designed to prevent. However, when a piece of equipment is malfunctioning, the guards would have to be removed only for short periods of time while making the repairs.

I reach the same conclusion as to the part of section 56.12-32 that reads "except during testing or repairs." "Testing or repairs" does not refer to the testing phase of setting up a plant, but to testing the electrical connections or to splicing the wires.

Citation No. 371143

During the same inspection, Inspector McPherson charged Respondent with a violation of 30 C.F.R. § 56.14-1, which provides: "Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts, sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded." The inspector observed that the tail pulley of the first stage of the sand belt conveyor was not provided with a guard.

Respondent asserts that since 30 C.F.R. § 56.14-1 contains an exception for "testing," and since both section 56.14-6 and section 56.14-1 fall under the same heading, "Use of Equipment," the exception also applies to the latter safety standard which is the subject citation. I conclude that the exception is neither expressly included nor implied in section 56.14-1.

Citation No. 371144

Inspector McPherson also charged Respondent with a violation of 30 C.F.R. § 56.12-8, which provides:

> Mandatory. Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

The inspector observed that the strain relief fitting for the power conductor feeding the screens was not being used properly.

Respondent contends that the loose power conductor observed by the inspector was neither energized nor intended to become energized; and that since the conveyors were relocated, the conductor served no function.

Respondent contends that the safety standards included under section 56.12 are only applicable when the cables are subject to being energized or are in fact energized.

I conclude that a reasonable interpretation of section 56.12-8 requires a finding that the power conductors be capable of conducting electricity before the standard can apply. Respondent demonstrated that an alternative method of energizing the screens was being used, making the loose wire observed by the inspector nonfunctional. Under these circumstancs, I find that Respondent did not violate section 56.12-8 as alleged in the citation.

CONCLUSIONS OF LAW

1. The undersigned judge has jurisdiction over the parties and the subject matter of the above proceeding.

2. Respondent violated 30 C.F.R. § 56.14-6 by failing to provide guards on the V-belt as alleged in Citation No. 371141. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of $28 for this violation.

3. Respondent violated 30 C.F.R. § 56.12-32 by failing to provide a cover on the motor junction box as alleged in Citation No. 371142. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of $30 for this violation.

4. Respondent violated 30 C.F.R. § 56.14-1 by failing to provide a guard around the tail pulley as alleged in Citation No. 371143. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of $90 for this violation.

5. Petitioner did not meet its burden of proving a violation as alleged in Citation No. 371144.

ORDER

WHEREFORE IT IS ORDERED that (1) the charge based on Citation No. 371144 is DISMISSED, and (2) Union Rock and Materials Corporation shall pay the Secretary of Labor the above-assessed civil penalties, in the total amount of $148 within 30 days from the date of this decision.

William Fauver

WILLIAM FAUVER, JUDGE

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 0 5 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. KENT 79-52
	:	Assessment Control No. 15-04053-03004 V
v.	:	
	:	Mine No. LA-6
RITA COAL COMPANY, Respondent	:	

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Lee F. Feinberg, Esq., Spilman, Thomas, Battle & Klostermeyer, Charleston, West Virginia, and
William T. Watson, Esq., Pikeville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to notice of hearing issued September 7, 1979, as amended, October 22, 1979, a hearing in the above-entitled proceeding was held on November 8, 1979, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Upon completion of the evidence presented by the parties, I rendered the bench decision which is reproduced below (Tr. 218-228):

> This proceeding involves a petition for an assessment of penalty filed on June 15, 1979, by the Secretary of Labor, alleging a violation of 30 CFR 75.200 by Rita Coal Company.
>
> The issues, of course, in any civil penalty case are whether a violation occurred, and if so, what civil penalty should be assessed under the six criteria set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977.
>
> The first point that has to be determined is whether a violation of Section 75.200 occurred. The violation that was alleged was set forth in Order of Withdrawal No. 72701 dated October 31, 1978, alleging that the roof control plan was not being followed, and that safety posts had not been installed in the working face of the number 8 pillar block before roof bolting had started.

I find that a violation of Section 75.200 occurred, because respondent's roof control plan provides in Sketch A of the roof control plan, which is Exhibit 2 in this proceeding, that safety posts shall be set as shown on that sketch before roof bolting is started.

Based on certain credibility determinations that I shall hereinafter explain, I find that the safety posts were not installed, and, therefore, that there was a violation of Section 75.200.

Perhaps before explaining the basis for my finding, I should indicate that I am denying the Motion to Dismiss made by respondent on the ground that I believe the inspector heard enough and saw enough to support his finding that violation of Section 75.200 had occurred.

We have testimony in the case by the inspector that he heard the sound of a roof bolting machine installing bolts as he came into the mine, and we have his testimony that when he was close to the working face, he observed the section foreman make a movement toward the men who were working in the face area, and by moving his cap light back and forth, give a signal that they should stop working. At that signal, the inspector states that the roof bolting machine was turned off, and when the inspector got to the face area, he found that no safety posts had been set as required by the roof control plan.

Respondent's section foreman testified that it was his practice always to signal the men on his section to stop working when an inspector appeared, so that the inspector, at his option, could watch whatever activities he wished to see performed. The section foreman also stated that the men satisfactorily explained to him, that is the roof bolter and his helper, their reasons for not having safety posts erected at the time the inspector came upon the scene.

The section foreman's explanation was that the roof bolter had observed some loose draw rock on the left side of the entry, and that he was in the process of barring that down when the inspector arrived, and although he had set safety posts before he started roof bolting, he took them down in order that he might get the loose rock down before finishing the installation of the roof bolts.

The roof bolter himself testified that he had installed two roof bolts on the left side, which

on the sketch in the exhibit 2, sketch A, would be roof bolts 1 and 2.

The roof bolter stated that he had then decided to bar down the loose roof which was on the left side, between those two roof bolts, and the working face. Before he did that, he took down the temporary supports which he had already put up.

After listening to the testimony of the roof bolter and the section foreman, I conclude that there are a number of discrepancies in their testimony, which causes me to give their testimony less credibility than I do that of the inspector.

Among other things that disturbed me about the [in-] consistency of their testimony, was the fact that the section foreman, for example, said that the temporary supports were lying beside the roof bolting machine, whereas the roof bolter, who was there and who was doing the work, stated that two of the temporary supports were on the machine, and that the third one was being put on the machine when the inspector got there. The inspector had testified that the temporary supports were on the roof bolting machine. I find that the section -- that the roof bolter is consistent with the inspector's testimony, in that respect.

The other aspect of the roof bolter's testimony, which is inconsistent with that of his section foreman, is that the section foreman said that there was a lot of material on the left side of the entry, it was too thick for the roof bolting machine to go up over it and bolt, whereas the inspector said that there was very little material on the floor, on the left side, and the roof bolter agreed with the inspector on that.

Additionally, the roof bolter stated that he had decided to knock out three temporary supports in order to bar down some loose material which was located solely on the left side of the entry, and inby the two roof bolts which he had already installed.

Now, the roof bolter had indicated it was always his practice to follow the roof control plan precisely, and that he always installed the roof bolts from left to right. Now, that being the case, there was no reason for him to be worrying about loose roof inby the first and second roof bolts which he had already installed, until he had already installed roof bolts three and four, because he didn't indicate that there was any

loose roof at all over at the place where roof bolts three and four would have been installed.

Therefore, there is no reason for him to have taken down those temporary supports until after he had put in roof bolts 3 and 4. Then at that point he would have been moving forward and could have been worried about taking down loose roof, if there had been any in advance of the roof bolts that he would have put in Nos. 5, 6, 7, and 8.

The roof bolter stated that it was his practice to sound the roof when he was still under supported roof in order to determine whether to bar down any loose roof.

Consequently, it is my conclusion that the roof bolter never had put up any temporary supports, and had put in two bolts without any temporary supports, and that when the inspector came on the scene, he endeavored to justify the fact that he had not put up any temporary supports.

Consequently, those are the primary reasons for my belief that the inspector's testimony is entitled to a greater amount of weight than the section foreman's or the roof bolter's.

Having found that a violation occurred, it is necessary now to consider the six criteria. It has been my consistent practice to consider from the standpoint of history of previous violations, whether an operator has violated a given section of a regulation a number of times, or any time prior to the violation alleged in the case before me.

In this instance, the parties stipulated before the hearing began that the respondent had not previously violated Section 75.200 except for a couple of violations which were observed by the inspector during the same inspection which was here involved.

In light of the fact that those violations were practically simultaneous with the one that is here before me, and, therefore, would have given the operator no opportunity to perhaps prevent additional violations before the one before me was observed, I find that there is no history of previous violations which should be taken into consideration.

Consequently, the penalty will neither be increased nor decreased under that criterion. The question of the

operator's size is also the subject of some stipulations by the parties. First of all in 1978, the No. 3 or LA-6 Mine here involved, produced about 25,000 tons of coal, which if divided by 250 days of production would only be about 100 tons a day. According to the testimony of Mr. Childress, the Rita Coal Company is owned by Russell Fork Company, and that entire group of companies, in 1978 produced 256,000 tons of coal, which would amount to about 1,024 tons per day.

The evidence also indicates that the mine which is before me today, or in this proceeding, is not now in operation because of the simple economic fact that the present market is not sufficient to justify the costs which the company has recently experienced for producing coal. The fact that Russell Fork is in turn owned by A.T. Massey enables the Rita group of mines to hold onto their reserves at about a loss of $100,000 a month, in hopes that the market will someday be profitable enough that it can resume coal operations.

Since the situation as it now exists is that A.T. Massey is having to pick up the tab for all of the holding operations, that is holding onto the reserves and keeping the mines in such a fashion that they could be operated again, it is quite obvious that we have an uneconomic enterprise before us. While I agree with Mr. Taylor and Mr. Feinberg also, as indicated, that A.T. Massey would really pay any penalty that might be assessed, I still think that under the criterion of whether the payment of penalties would cause the operator to discontinue in business, that some weight should be given to the fact that we are confronted here with an uneconomic situation, and also, I should give some consideration to the fact that even in 1978 when the instant violation occurred, Rita Coal Company experienced a loss of between $400,000 and $700,000.

So, although I find that this is a moderate size business, and while I do not think that any one penalty would cause A.T. Massey to cease holding onto its mines in the hope that it might, within a reasonable period, have a profitable operation, again, I still am giving some weight to the fact that at this point in time it is not a -- certainly a remunerative operation.

It was stipulated, I believe, and if it were not, it is certainly shown by the short time that it took the operator to comply with the section here involved, after it was noted by the inspector, the evidence indicates that there was at least a normal good faith effort to

achieve compliance, so that factor should also be considered in assessing a penalty.

The two remaining criteria which are to be considered are first as to how serious the violation was, and on that, the inspector considers the failure to install temporary supports to be a serious violation; on the other hand, the inspector did not see any loose roof on the right side where the bolts were still to be installed, and, consequently, I believe that the violation was not of an extreme gravity, and in other words, it is not of such a hazardous nature that I feel that a really large penalty would be required.

From the standpoint of negligence, I have constantly run into situations where I have every reason to believe and find that much to my amazement that the very men who are doing the installation of roof bolts are failing to put in the temporary supports. I have even had cases involving fatalities in which the very men who were supposed to be putting up temporary supports, didn't do it. And they were killed, simply because they didn't put up supports.

This to me, is always astounding, but it seems to continue, so I find that it is gross negligence for men to work in a coal mine and fail to take care of themselves properly, and that is what section foremen are supposed to do, and yet this section foreman was out worrying about the the fact that there was some moisture on the section, and wasn't even around to take a methane check before this roof bolting machine began to operate. So, he didn't know what his men were doing, and I think that was gross negligence on his part.

If it were not for the fact that I have found that this is an uneconomic enterprise at the moment, I would be inclined to assess a very large penalty, but taking that factor into consideration, I believe that a penalty of $1,000 is reasonable in the circumstances.

Ultimate Findings and Conclusions

(1) Respondent should be assessed a civil penalty of $1,000.00 for the violation of section 75.200 cited in Order of Withdrawal No. 72701 dated October 31, 1978.

(2) Respondent, as the operator of record of the LA-6 Mine, is subject to the Act and to the regulations promulgated thereunder.

WHEREFORE, it is ordered:

Respondent, within 30 days from the date of this decision, shall pay a civil penalty of $1,000.00 for the violation described in paragraph (1) 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
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FALLS CHURCH, VIRGINIA 22041

MAR 7 1980

PEABODY COAL COMPANY,	:	Contest of Order of Withdrawal
Contestant	:	
v.	:	Docket No. CENT 79-335-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Order No. 793364
ADMINISTRATION (MSHA),	:	July 23, 1979
Respondent	:	
	:	Tebo Surface Mine
UNITED MINE WORKERS OF AMERICA	:	
(UMWA),	:	
Respondent	:	

DECISION

Appearances: Thomas R. Gallagher, Esq., St. Louis, Missouri, for Contestant;
Inga Watkins, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent MSHA;
Mary Lu Jordan, Esq., Washington, D.C., for Respondent UMWA.

Before: Judge Melick

This case is before me under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 801 et seq., upon the application of Peabody Coal Company (Peabody) to contest an order of withdrawal issued by the Mine Safety and Health Administration (MSHA) under section 104(d)(1) of the Act. 1/ A hearing was held on November 7 and 8, 1979, in Kansas City, Missouri.

1/ Section 104(d)(1) of the 1977 Act provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of the 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

The substantive issue is whether there is sufficient evidence to support the validity of Order of Withdrawal No. 793364 issued to Peabody on August 2, 1979. Peabody alleges that the order was invalid because there was insufficient evidence of the violation charged in the order (mandatory standard 30 C.F.R. § 77.404(a)) and that in any event there was insufficient evidence of unwarrantable failure on the part of Peabody to comply with that standard. The parties stipulated in this case as to the existence of a valid underlying section 104(d)(1) citation; a condition precedent to the issuance of a withdrawal order under section 104(d)(1).

The order in this case was triggered by an alleged violation of mandatory standard 30 C.F.R. § 77.404(a) in that "the transmission [in the No. 10 D-9 bulldozer] would not go into gear at times and when it would it would lurch forward or backward, particularly when pushing down an incline at the reclamation site." The cited standard requires that "[m]obile 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."

MSHA's case is based primarily on the testimony of its inspector, James Jury. I find his testimony to be completely credible and the significant portions of his testimony to be uncontradicted. Jury arrived at Peabody's Tebo Surface Mine for a routine inspection on the morning of August 2, 1979. He was approached by bulldozer operator Eldon Prettyman who reported that the No. 10 D-9 bulldozer had transmission problems. It would not shift properly, would take a long time to go into gear, and when it went into gear, would lurch. Jury then received what is commonly known as a "103(g)(2)" complaint 2/ regarding alleged safety defects in the No. 10 bulldozer including, inter alia, a complaint that the transmission was not working properly. Inspecting the subject bulldozer in the presence of Peabody representatives Mike Cain, Owen Suhr, and Darrel Montgomery, and union representatives Jack Sheppard and Elmer Robertson, Jury found no safety violations. Norman

---

fn. 1 (continued)
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."

2/ Section 103(g)(2) of the 1977 Act provides in relevant part as follows:

"Prior to or during any inspection of a coal or other mine, any representative of miners or a miner in the case of a coal or other mine where there is no such representative, may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act or of any imminent danger which he has reason to believe exists in such mine * * *."

Engelhart, the No. 10 bulldozer operator at that time, then complained to Jury that "it would not go into gear and it would lurch; and when you are on an incline changing from one gear to another, it would take a long time for it to go into gear [and] in the meantime, the machine would keep moving." Suhr then operated the machine in a brief demonstration on level ground but no problems were evident. Jury observed, however, that the complaints had been primarily directed to operations on steep inclines.

There is some disagreement over the exact sequence of events that followed, however, I do not consider them to be material. Jury recalled that he next went to the maintenance shop to check the log books and maintenance records for the suspect bulldozer. Jury found log entries indicating that the bulldozer had been in the shop on at least two different occasions for transmission work and that it had been returned to service. Maintenance logs for the subject bulldozer were introduced in evidence and show that complaints had in fact been made during the months of May, June, and July 1979, about transmission shifting difficulties. These entries were not crossed out or stricken in accordance with company procedure for completion of work, thus indicating that the repairs had not been performed. Suhr, being in charge of the shop and these shop procedures, should therefore have known of the complaints and that the repairs had not been performed. I therefore give no credence to his testimony that he thought the problems had been corrected. After examining the maintenance records, Jury consulted briefly with his supervisor by telephone and thereupon issued the order at bar.

Jury explained at the hearing some of the safety hazards involved in operating a bulldozer in the condition in which the No. 10 was reported to him:

> When you are pushing down an incline, pushing dirt into a pit or anywhere where you are on an incline, pushing into a hole, when you get a blade full of dirt, you have a matter of seconds to change directions or go into the pit. If your transmission is faulty, the bulldozer is still moving while you are trying to change gears.
>
> Also, when a bulldozer is being used to push a scraper or whatever you have, to one approaching the equipment you are going to push, you have to go up to this slowly rather than hitting them hard; and if the transmission is lurching you go off slowly and it won't go into gear and it lurches forward, you are going to be hitting the scraper or truck harder than you should. Plus, if there is anyone in front of you, there's a possibility of running into someone or damaging other equipment or machines.

Six bulldozer operators from the Tebo Surface Mine also testified at the hearing about their experience in operating the No. 10 bulldozer with its defective transmission. They all described various problems generally described as difficulty changing gears, hesitation after the gears had

become engaged, and unexpected movement. Their testimony, in significant respects, is uncontradicted and is fully corroborative of the inspector's testimony.

Norman Engelhart, who was operating the suspect bulldozer when Jury made his inspection, testified that it was unpredictable--"[o]ne time it might go into gear and the next time possibly not, and if it did go into gear, there was a chance it would lunge foward." The problem was described as hesitation after shifting gears and not knowing when the gears would engage. He recalled that on August 1st or 2nd he was pulling a pump with the bulldozer and was afraid that the cable might snap because of the unexpected movement. Engelhart reported these problems to company foreman Darrel Montgomery in May and again when he was pulling the pump. He explained that the transmission defects affected the ability to rapidly engage reverse gear so that it was also likely that you would go over the highwall with the dirt. He explained that the brakes alone would not pull the machine to safety in such a situation.

Joseph Marme was pushing scrapers and loading dirt with the suspect bulldozer on July 31, 1979. He too had difficulties because of the hesitation. The bulldozer would not properly disengage from the scraper it was pushing. It could have broken the "gooseneck" of the scraper and pushed the load on top of the scraper operator.

Danny Haggart had operated the suspect bulldozer for 4 or 5 days before the order was issued in this case (Tr. 113). He explained that "[w]henever you go to change gears, there would be a hesitation in it and I would have to work it back and forth, from forward to reverse sometimes to get it into gear" (Tr. 113). Haggart recalled a situation in which he was pushing dirt into water and could not shift into reverse. The mud was beginning to give away when finally the gears engaged and he was able to pull out. The brakes did not prevent him from sinking since the dirt beneath the tracks was also sliding into the water (Tr. 117). He reported the defective operation to his immediate supervisor, Raymond Roks, "quite a few times," but the problem had never been corrected.

J. C. Young operated the suspect bulldozer for 4 hours on July 12, 1979, moving topsoil into a pond. He had difficulty engaging reverse gear and when it did engage, it jumped or hesitated. He told company official Terry Rassler of the problem. Eldon Prettyman also had shifting problems with the suspect bulldozer 2 or 3 weeks before the order was issued while pushing off a highwall down into a pit of water. He reported this to company official Hoppy Gibson and the reclamation foreman.

The uncontested testimony of John Ferguson, a shop mechanic, is also significant in that it suggests that in spite of the known transmission problems, management returned the bulldozer to service without appropriate repairs. He was working on another problem with the No. 10 bulldozer in the latter part of July and was unable to shift it into gear. He was told to put the bulldozer back "on the line" after getting the track buckled up. It went out the next morning.

The cause of the transmission problems became evident after it was withdrawn from service. Robert Tallenger, senior mechanic at the mine, examined the suspect bulldozer on August 3 and could not get it into gear. He found that the gears in the hydraulic pump were gaulded and prevented the pump from producing any pressure. After the pump was changed the transmission worked properly. Donald C. Potts, an experienced mechanic and service manager for the Fabick Tractor Company, conceded that inadequate oil pressure in the transmission could cause a delay or hesitation in the movement of the bulldozer until sufficient pressure was built up. This certainly could account for the difficulties encountered.

In light of the foregoing evidence, I can give but little weight to the testimony of Michael Cain, Peabody's health and safety supervisor, denying that he had received any complaints about the transmission prior to August 2nd. I also accord little weight to the testimony of truck and tractor manager Gail Gustafson who reportedly checked out the withdrawn bulldozer on the morning of August 3rd. The fact that the bulldozer may have operated without difficulty during this 45-minute demonstration does not detract from the described hazards. The hazards were in fact, in my opinion, even greater because of the unpredictability of the problem.

Within this framework of evidence, I have no difficulty in finding that Peabody was operating its No. 10 bulldozer in violation of mandatory standard 30 C.F.R. § 77.404(a). Moreover, in light of the overwhelming evidence that various bulldozer operators had reported the faulty transmission problems to management, that the maintenance logs on the No. 10 bulldozer reflected that similar complaints had been made to the maintenance shop under the direct supervision of management and had been returned to service without repair, and the admissions of foremen Montgomery and Suhr that they had known of the transmission difficulties before the order was issued; I find that the violation was caused by an unwarrantable failure of the operator to comply with the standard. The order of withdrawal at bar therefore was, and is, valid.

Peabody has during the course of this case also raised several procedural questions which I shall now dispose of. I held in this case that MSHA had the burden of going forward to establish a prima facie case and that Peabody bore the ultimate burden of proof. Peabody disagreed and contended that the burden of proof should lie with MSHA. The Commission's Rules of Procedure (29 C.F.R. § 2700.1 et seq.) do not directly address this issue. My determination in this regard is, however, consistent with my authority to regulate the course of the hearing under Commission Rule 29 C.F.R. § 2700.54(a)(5), 3/ and is in accord with Section 7(d) of the Administrative Procedure Act, 5 U.S.C. § 556(d). 4/ Cf. Zeigler Coal Company, 4 IBMA 88

3/ 29 C.F.R. § 2700.54(a) provides that:

"Subject to these rules, a Judge is empowered to * * * (5) Regulate the course of the hearing; * * *."

4/ Section 7(d) of the Administrative Procedure Act states, in pertinent part, as follows:

(1975), interpreting the former burden of proof rule of the Interior Board of Mine Operations Appeals in light of Section 7(d) of the Administrative Procedure Act. Moreover, in light of the overwhelming evidence supporting MSHA's case, the assignment of the burden of proof herein becomes immaterial. It is only when the evidence is in a state of equipoise that the burden becomes significant.

Peabody has also suggested that in determining the validity of a withdrawal order issued pursuant to section 104(d)(1) of the Act, such as the one at bar, I may consider at the hearing only that evidence within the knowledge of the MSHA inspector at the time the order was issued and not evidence subsequently discovered or obtained. There is no authority for this proposition and I reject it. The issues before me are whether the violation charged in the order occurred and whether a special "unwarrantable failure" finding can be made. In order to make a full and fair determination of these issues, I must consider all admissible evidence produced at hearing. I observe, however, that the inspector in this case had ample credible information at the time he issued the withdrawal order on which to base that order.

Peabody further argues that an MSHA inspector should not rely solely on "hearsay and third party statements" in issuing a 104(d)(1) order and cites the dictum of Judge Koutras in Secretary of Labor (MSHA) v. Pennsylvania Glass & Sand Corporation, BARB 79-108-PM (presumably at pages 19-30) as authority. That dictum is, in any event, inapposite to this case. Among other things, it dealt with a section 104(a) citation and not a section 104(d)(1) order. Moreover, Judge Koutras found an exception to his evidentiary requirements where the MSHA investigation follows a section 103(g) complaint, as occurred herein. Inspector Jury based his decision to issue the order in this case on unquestionably reliable evidence, including the company maintenance logs, admissions by company officials and statements by bulldozer operators, one of which was made in the presence of, and not denied by, company officials. Moreover, at hearing in this case, in contrast to Pennsylvania Glass & Sand, MSHA produced substantial admissible evidence of the violation and of "unwarrantable failure."

Gary Melick
Administrative Law Judge

fn. 4 (continued)

"Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence."

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MAR 7 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. PENN 79-137
	:	A.O. No. 36-00809-03022V
v.	:	Newfield Mine
REPUBLIC STEEL CORPORATION, Respondent	:	Docket No. PENN 79-138
	:	A.O. No. 36-00973-03019V
	:	Docket No. PENN 79-139
	:	A.O. No. 36-00973-03022V
	:	Docket No. PENN 79-140
	:	A.O. No. 36-00973-03024V
	:	Docket No. PENN 80-34
	:	A.O. No. 36-00973-03026V
	:	Banning Mine

DECISION AND ORDER

The parties move for approval of a settlement of the captioned matters in the amount of $9,350.00 or 81% of the $11,500.00 initially assessed for the eight unwarrantable failure violations charged.

For the reasons set forth in the parties' motions and based on an independent evaluation and de novo review of the circumstances, I find the settlement proposed for citation/order numbers 618528, 391918, 618446, 618427, and 618467 are in accord with the purposes and policy of the Act.

On the other hand, I find the reductions proposed for citation/order numbers 618460 and 618436, are for the reasons set forth below unjustified. I further find that not only the reduction but the amount initially assessed for closure order number 618607 failed to take into account the fact that three separate and distinct violations of the standard cited occurred.

More specifically, an evaluation of the escapeway violation cited in unwarrantable failure citation 618460 shows the amount initially assessed was proper and that no reduction is warranted. The mitigating circumstances offered, namely that an able bodied miner could squeeze through the 42 by 31 inch passage is insufficient to justify a reduction in view of the requirement that all escapeways be maintained so as to insure the passage at all times of disabled miners. The panic that would ensue and the hazard to life and limb that would be created in attempting to carry a disabled miner through this small opening in the event of a fire or explosion that created noxious gases necessitating the use of self-rescuers would present all the ingredients of a mine disaster. Furthermore, this condition was known and allowed to exist for almost a month before the inspector discovered it. The fact that the other return airway could be used would be of little use to miners trapped and trying to find their way out with a disabled buddy in the smoke and confusion of an emergency. For these reasons, I conclude the amount initially assessed for this violation, $1,000.00, is warranted.

An evaluation of the roof control violation cited in order number 618436 shows that contrary to the parties representations the mechanic responsible for knocking out the temporary roof supports with a continuous miner was grossly negligent. Despite this, there is no claim he was disciplined or otherwise made aware of the seriousness of his actions or that the operator did not by its silence and acquiescence condone his flagrant disregard for safe mining practices. Unless and until compliance is extracted on a voluntary basis from the mine superintendent to the common laborer, the negligence of each or any of them must be imputed to the operator. In addition, the operator was independently negligent in failing to train the mechanic in the proper procedure for moving a continuous miner without knocking out temporary supports or dangering off the area after he did knock them out. On the basis of the record considered as a whole, I conclude the amount initially assessed for this violation, $1,500.00, is fully warranted.

Finally, a review of the circumstances relating to closure order 618607 shows that for a distance of 200 feet accumulations of loose coal, coal dust and float coal dust having the explosive potential of black gun powder was discovered on the floor and ribs of the 1, 2, and 4 entries and crosscuts of the 007 section of the Banning Mine. The 2 and 4 entries were shuttle car haulageways which presented the potential for an ignition source due to the presence of trailing cables. While spot rock dust samples were taken, no 75.403 violation was charged. Nevertheless, it is clear that three separate and distinct violations of 75.400 were observed in three separate and distinct physical locations. Further, they were unwarrantable failure violations that with the exercise of due diligence the operator could have prevented. I conclude the amount of the penalty warranted for the three violations cited is $500.00 each for a total of $1,500.00.

Accordingly, it is ORDERED that to the extent indicated the parties' motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay in full settlement of these violations a penalty of $11,100.00 on or before Friday, March 28, 1980 and that subject to payment the captioned petitions be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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MAR 7 1980

PRINCESS SUSAN COAL COMPANY, Applicant	:	Notice of Contest
v.	:	Docket No. WEVA 79-423-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 0641203
	:	Campbell's Creek Surface Mine

Appearances: C. Lynch Christian, III, Esq., Charleston, West Virginia, for Applicant
Thomas P. Piliero, Esq., Office of the Solicitor, U. S. Department of Labor, for Respondent

Before: Judge Melick

DECISION

On September 4, 1979, Applicant was issued Citation No. 0641203 which charged a violation of Section 103(f) of the Federal Mine Safety and Health Act of 1977 (the Act). 1/ That section has been interpreted by the Federal Mine Safety and Health Review Commission to provide that miners may accompany Federal inspectors on regular mine inspections pursuant to Section 103(a) of the Act, and suffer no loss of pay. 2/

1/ Section 103(f) states in part:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection [103](a). . .[O]ne such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. 30 U.S.C. 813(f).

2/ In Kentland-Elkhorn Coal Corp., PIKE 78-399, 1 FMSHRC Decisions 1833 (November 30, 1979) appeal pending No. 79-2536 (D.C. Cir., December 21, 1979), the Federal Mine Safety and Health Review Commission interpreted the Section 103(f) walkaround pay provision to apply to Section 103(a) "regular" inspections only. In reaching its decision, the Commission in Kentland-Elkhorn relied on its reasoning in Helen Mining Co., PITT 79-11-P, 1 FMSHRC Decisions 1796 (November 21, 1979) appeal pending No. 79-2537 (D.C. Cir., December 21, 1979). In Helen Mining Co., the Commission held that a miner was not entitled under Section 103(f) to walkaround pay for spot inspections pursuant to Section 103(i) of the Act and noted that compensation was due only for a miner's accompaniment of a Federal inspector during a Section 103(a) "regular" inspection. In Helen Mining Co., the Commission referred to "regular" inspections as those described in the third sentence of Section 103(a) of the Act, i.e., the four required annual inspections of underground mines and the two required annual inspections of surface mines.

On September 19, 1979, Applicant filed an Application for Review contending therein that it had not violated Section 103(f) and thereafter moved for summary decision.

Pursuant to the Commission's Rules of Procedure, summary decision can be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows that there is no issue as to any material fact and 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 alleged by Applicant are not disputed. On August 7, 9, 10, 13, 14, 15, and 16, 1979, a Federal mine inspector conducted a "free silica technical investigation" at Campbell's Creek Surface Mine. The inspector was accompanied by Mr. Thomas Morris, a representative of the miners. Morris was not compensated for the time he spent accompanying the inspector. Applicant asserts that Morris was not entitled to compensation since the "free silica technical investigation" was not a regular inspection.

I accept Applicant's unchallenged representations, and considering the undisputed assertion of fact regarding the nature of the inspection, I conclude that the "free silica technical investigation" at issue was not a regular inspection, and that therefore, as a matter of law, Applicant did not violate Section 103(f) of the Act.

Accordingly, the Motion for Summary Decision is GRANTED, and the citation is VACATED.

Gary Melick
Administrative Law Judge

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MAR 10 1980

WINDSOR POWER HOUSE COAL COMPANY, Contestant	:	Contest of Citation and Order
v.	:	Docket No. WEVA 79-193-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 811576 May 11, 1979 Beach Bottom Mine
UNITED MINE WORKERS OF AMERICA, Respondent	:	

DECISION

Appearances: David M. Cohen, Esq., American Electric Power Service Corporation, Lancaster, Ohio, for Contestant; Michael Bolden, Assistant Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, Arlington, Virginia, for MSHA.

Before: Judge Melick

This case is before me upon the application by the Windsor Power House Coal Company (Windsor) under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., hereinafter the "Act") to contest a citation and subsequent order of withdrawal issued by the Mine Safety and Health Administration (MSHA) under sections 104(a) and (b) of the Act, respectively. An evidentiary hearing was held on December 12, 1979, in Wheeling, West Virginia.

Section 104(a) of the Act provides for the issuance of citations by MSHA for violations by mine operators. Section 104(b) of the Act provides that an order of withdrawal may be issued when the operator fails to timely abate a violation described in a citation issued under section 104(a). The citation at bar was issued by MSHA inspector Charles B. Coffield on May 11, 1979, at 3:45 p.m., charging a violation under 30 C.F.R. § 75.316, for inadequate ventilation. The order of withdrawal, under section 104(b) of the Act, was issued by inspector Coffield at 5:40 p.m. on the same date for Windsor's alleged failure to abate the violation. Windsor takes issue in this case only with the underlying violation and concedes that if the violation existed, the order of withdrawal was properly issued.

While 30 C.F.R. § 75.316 provides essentially only for the approval by the Secretary and for the adoption by the mine operator of a ventilation system and methane and dust-control plan, violations of this regulation have been found where an operator has failed to adhere to its approved ventilation plan. Zeigler Coal Company, 4 IBMA 30, January 28, 1975, aff'd, 536 F.2d 398 (D.C. Cir. 1976). Windsor's ventilation plan required an air quantity of not less than 3,600 cubic feet per minute and a mean air velocity of not less than 35 feet per minute at the working faces. Windsor concedes that the air readings taken by Inspector Coffield and reported in his citation and order were less than specified but argues that the readings were not taken at "working faces" because Windsor was not then actually engaged in "work of extracting coal."

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

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

. The air readings cited herein were taken in the Nos. 1, 4, 5, and 6 entries of the 6 West section of the mine by Inspector Coffield beginning around 3:45 p.m., on May 11, 1979. At that time there was no active cutting or loading of coal in any of the face areas although mining equipment was being moved about. The operator concedes that the full sequence of conventional mining operations continued in the cited entries until 2:45 p.m. It appears that at that time the feeder had broken down and, as a result of that and an anticipated shift change at 3:45 p.m., the various operations were being phased out. Even after 2:45 p.m., however, the evidence shows that further work was performed with the admitted purpose of setting up the entries for production to resume as soon as the feeder was repaired. The uncontradicted evidence shows that various equipment used in the mining cycle was energized at least until 3:45 p.m., that a roof-bolting machine continued to spot roof bolts (the process of replacing bolts) at the inby corner of the No. 1 entry until at least 3:15 or 3:20 p.m., that the cutting machine which

had completed cutting the No. 5 entry at around 2:45 p.m., was on its way to cut the No. 4 entry and that the loading machine was waiting to operate in the No. 6 entry.

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

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 10 1980

RANGER FUEL CORPORATION, Contestant	:	Contest of Order of Withdrawal
v.	:	Docket No. WEVA 79-378-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 645907 June 14, 1979 Beckley No. 1 Mine

DECISION

Appearances: Gary W. Callahan, Esq., The Pittston Company Coal Group, Lebanon, Virginia, for Contestant;
Stephen P. Kramer, Esq., Office of the Solicitor, Mine Safety and Health Administration, U.S. Department of Labor for Respondent.

Before: Judge Melick

This case is before me under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 801 et seq., upon the application of Ranger Fuel Corporation (Ranger) to contest an order of withdrawal issued by the Mine Safety and Health Administration (MSHA) under section 104(d)(2) of the Act. 1/ An evidentiary hearing was held in Beckley, West Virginia, on January 29, 1980, at which the parties appeared and presented evidence.

The issue is whether there is sufficient evidence to support the validity of Order of Withdrawal No. 645907 issued to Ranger on June 14, 1979. The parties stipulated in this case as to the existence of a valid

1/ Section 104(d)(2) provides as follows:
"If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine."

section 104(d)(1) order which is the condition precedent to the issuance of a withdrawal order under section 104(d)(2). The order at bar charged a violation of mandatory standard 30 C.F.R. § 75.1710-1(a)(4) and alleged that:

> The 1 left section continuous mining machine was being operated in the No. 2 working place with the machine operator beside the miner and the remote control unit sitting [sic] on the machine. Any machine with a remote control system must be provided with a cab or canopy when the controls are placed on the machine.

The cited regulation provides, as relevant herein, that:

> All self-propelled electric face equipment, including shuttle cars, which is employed in the active workings of each underground coal mine shall * * * be equipped with substantially constructed canopies or cabs, located and installed in such a manner that when the operator is at the operating controls of such equipment he shall be protected from falls of roof, face, or rib, or from rib and face rolls.

Ranger does not deny that its continuous mining machine was being operated as stated in the order, but contends that the cited standard does not apply to mining machines with remote controls, and that in any event, the alleged violation was not the result of an "unwarrantable failure."

The essential facts are not in dispute. MSHA inspector Charles Meadows was conducting a regular inspection of the Beckley No. 1 Mine on July 30, 1979, and while in the 1 Left Section observed a continuous-mining machine operating without a cab or canopy. The miner operator, Gregory Stover, was standing beside the machine with the remote control console on top of the machine. Stover admitted at hearing that he was operating the machine in this manner. Under the circumstances, the fact of the violation is proven as charged. There is no exception provided in the cited regulation for remote-controlled face equipment. The fact that MSHA may have permitted the use of such equipment in certain other circumstances is immaterial.

Meadows had previously issued citations on April 9, 1979, and July 25, 1979, for similar violations. After each citation, he told the miner operator and the section foremen how to properly use the remote control console. He explained that if the controls were placed on the mining machine, the machine would have to be provided with a cab or canopy, and if it were to be used as a remote unit, it would have to be operated from beyond the boom of the miner. Meadows explained the hazards in operating the miner with the remote control panel on a machine not provided with a cab or canopy could come from a roof fall, from the machine pinning the operator against a rib, by the operator getting a foot caught under it, or from a shuttle car bumping the machine into the operator.

Mine foreman William Ray Tillie testified on behalf of the operator that after the earlier violations issued by Meadows he told his workers not to place the remote controls on the miner while they were running or tramming it and warned that if they were caught violating the rule "some kind of action would have to be taken." Even after these warnings, however, Tillie caught his men violating the order and took no disciplinary action. Shelby Tolliver, mine superintendent, concurred that no disciplinary action had ever been taken against any violators of this rule. Tillie conceded that he had told the operators that he agreed with their view that it was sometimes safer to operate the equipment while standing next to it. Thus, at the same time he was reprimanding them for operating in violation of the regulation and company policy, he agreed with them that it was in fact safer to do just that.

Gregory Stover, the operator caught by Meadows violating the canopy standard on June 14, 1979, admitted that he had been warned by management not to operate the machine in the manner cited, but nevertheless continued on a daily basis to operate that way. No disciplinary action was ever taken against him.

Under the circumstances, I have no difficulty finding that Ranger knew or should have known that the miner operators were continuing to follow the cited practice in spite of the so-called warnings. The alleged warnings were given in such a way that the operators were given license to disobey them. No disciplinary action had ever been taken for repeated violations of the warnings in spite of the fact that these violations were admittedly known to management. The evidence shows that the violations continued unabated on a daily basis. For these reasons, I find that the violation was caused by the "unwarrantable failure" of the operator.

Ranger argues that it is sometimes safer to operate the remote miner in the manner cited as a violation, i.e., with the control console upon or near the machine. Based on the evidence presented in this case, I cannot agree with this contention. In any event, if the operator believed that such was the case, it should have filed a petition for modification under section 101(c) of the Act. By its failure to pursue this course of action, I can only believe that the operator is as unconvinced by its argument as I am. Under all the circumstances, Order of Withdrawal No. 645907 was, and is, valid.

Gary Melick
Administrative Law Judge

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MAR 11 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. PENN 79-145 A.O. No. 36-00962-03030V
v.	:	Vesta No. 5
JONES & LAUGHLIN STEEL CORP., Respondent	:	

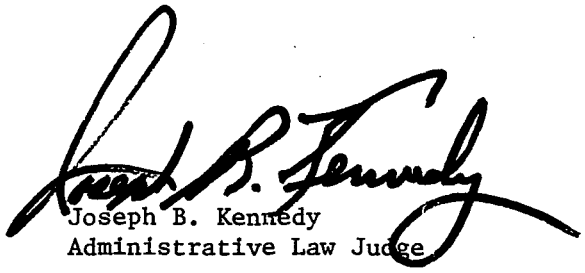
DECISION AND ORDER

As a result of the failure to train properly the miner assigned to the duty of fan watcher as required by the operator's fan stoppage plan the operator failed to detect a fan stoppage on the Hastings Fan at the Vesta No. 5 Mine that occurred around midnight on April 9, 1979. Because the miner responsible for turning off the other fans, deenergizing the power, and signalling the men to leave the mine misread the fan signals a serious violation of 30 CFR 75.321 occurred. Since the inspector determined the violation involved a condition which the operator knew or should have known about a section 104(d)(1) citation issued and a penalty was originally proposed in the amount of $2000.00. After conference the penalty was reduced to $1250.00.

The parties now move to reduce the penalty to $850.00 on the ground that a violation attributable to a rank-and-file miner is not within the operator's control, and must therefore be treated as an unwarrantable no-fault violation. This I find is a contradiction in terms. On the one hand, counsel for the Secretary has refused to vacate the unwarrantable failure charge because "the Operator should have known of the condition." On the other hand she suggests the $1150.00 reduction is justified because "this violation was not within control of the Operator and negligence was minimal." Because I conclude that the knowledge and actions or inactions of the miner responsible for fan watching are fully imputable to the operator, I find the proposed reduction is unjustified and the amount assessed after conference was proper.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, DENIED. It is FURTHER ORDERED that the operator pay

a penalty of $1250.00 as settlement in full of this violation on or before Friday, March 28, 1980 and that subject to payment the captioned petition be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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MAR 12 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		Civil Penalty Proceeding
	Petitioner	Docket No. KENT 79-146
v.		A.O. No. 15-11400-03004 W
		Preparation Plant
FAULKNER COAL & LEASING,	Respondent	

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; David O. Smith, Esq., Corbin, Kentucky, for Respondent.

Before: Judge Edwin S. Bernstein

On June 29, 1978, Petitioner served Respondent with Citation No. 149652, for an alleged violation of the mandatory safety standard at 30 C.F.R. § 77.1713. The standard requires facilities such as Respondent's to be inspected by a "certified person" at least once during each working shift and written reports of such inspections to be entered in a book maintained at the facility. On September 26, 1978, Petitioner issued to Respondent an order of withdrawal pursuant to Section 104(b) of the Federal Mine Safety and Health Act of 1977 (the Act) for allegedly failing to abate the June 29, 1978 citation. On that day, Respondent also was served with Citation No. 149666, alleging that Respondent continued to produce coal in defiance of the withdrawal order. On June 12, 1979, a petition was filed for the assessment of a civil penalty of $3,000 for violation of the September 26, 1978 citation. Respondent filed a timely answer to the petition.

A hearing was held in Knoxville, Tennessee, on January 24, 1980. In order to dispose of all the issues in one hearing, Petitioner proposed a penalty of $75 for the alleged June 29, 1978 violation of 30 C.F.R. § 77.1713, and Respondent contested that proposed assessment. Respondent also contested the September 26, 1978 withdrawal order and Petitioner waived an objection to the contest of that order. Therefore, the issues to be decided are:

1. Whether Respondent violated the mandatory safety standard at 30 C.F.R. § 77.1713 on June 29, 1978;

2. If so, what penalty should be assessed, taking into consideration the six criteria set forth in Section 110(i) of the Act;

3. Whether the September 26, 1978 withdrawal order was proper;

4. Whether the issuance of Citation No. 149666 on September 26, 1978 was proper; and

5. If Citation No. 149666 was properly issued, what penalty should be assessed for this violation, again taking into consideration the criteria in Section 110(i) of the Act.

At the hearing, the parties waived submission of posthearing briefs. 1/ Based upon the evidence and my evaluation of the credibility of the witnesses and exhibits, I make the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

The parties stipulated, and I find:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over the subject matter of this case.

2. The Faulkner Coal & Leasing Preparation Plant is subject to the provisions of the Act.

3. The Faulkner Coal & Leasing Preparation Plant is a "mine" within the definition of that term contained in Section 3(h)(1) of the Act.

4. The products of the Faulkner Coal & Leasing Preparation Plant enter into and affect commerce.

5. The Faulkner Coal & Leasing Preparation Plant operates one production shift with an average of three employees.

6. Citation No. 149652 was issued on June 29, 1978.

7. The order of withdrawal was issued on September 26, 1978.

8. Respondent is a small operator which mined less than 50,000 tons of coal per year at the time of the alleged violations.

9. Respondent had 13 alleged violations for the three-year period prior to June 30, 1978. All of these violations were discovered during the inspection of Respondent's facility on June 29, 1978. There were no violations by Respondent during the three-year period prior to June 29, 1978.

1/ Counsel for both parties presented excellent closing arguments to conclude an extremely well-tried case.

10. At all times relevant to this proceeding, Marion McKee was qualified as a "certified person" within the meaning of 30 C.F.R. § 77.1713.

11. As of December 29, 1978, Arlis Faulkner also has been a "certified person" within the meaning of that term in 30 C.F.R. § 77.1713.

At the hearing, H. M. Callihan, Jr., Ronnie Brock, and Ken Howard testified for Petitioner. Arlis Faulkner and Marion McKee testified for Respondent.

Mr. Callihan stated that on June 29, 1978, he inspected Respondent's preparation plant and found 13 violations of mandatory safety standards. He testified that on that day, he asked Mr. Faulkner if he had a certified person making and recording daily examinations. When Mr. Faulkner indicated that he had no one, Mr. Callihan issued Citation No. 149652. Mr. Callihan told Mr. Faulkner that he or one of his employees should contact the Kentucky Department of Mines and Minerals and take the test to become a "certified person."

On July 28, 1978, Mr. Callihan revisited the Faulkner facility to determine whether the 13 violations had been corrected. Mr. Faulkner indicated that he still had no one to make the inspections, but that he had made arrangements for himself or someone else to take the test. Mr. Callihan extended the time to abate the violation.

On September 26, 1978, Mr. Callihan accompanied Ken Howard, an MSHA inspection supervisor, and Ben Bunch, another inspector, on an inspection trip to check on a reported illegal mine in the area. En route, Mr. Callihan decided to visit the Faulkner facility to determine whether the violation of 30 C.F.R. § 77.1713 had been abated. Mr. Faulkner again stated that he had no one to make the inspections and that he himself had not had time to take the test. Mr. Faulkner stated that he had contacted Marion McKee, who was qualified, but that he "couldn't keep up with him." Upon learning that the violation had not been abated after almost three months, Mr. Callihan issued a withdrawal order pursuant to Section 104(b) of the Act. Mr. Faulkner told Mr. Callihan that despite the order, he would be unable to stop loading coal that day and continued to load coal. As a result, Mr. Callihan issued Citation No. 149666.

Mr. Callihan further stated that during his three visits to the facility on June 29, July 28, and September 26, 1978, Mr. Faulkner never showed him nor offered to show him a record book; that the first time he saw such a record book was the night before the hearing; that during these three visits he never saw Mr. McKee at the Faulkner facility; and that if Mr. Faulkner had shown him a record book, he would not have issued the withdrawal order, but would have abated or terminated the citation. Mr. Callihan also testified that he never told Mr. Faulkner that the certified inspector must be a full-time employee; however, he did tell Mr. Faulkner that the individual must be "someone who would be on the property," and someone who "must be there more than just in or out."

Mr. Callihan further testified that on November 17, 1978, he revisited the Faulkner facility to see if it was still processing coal. He inspected the preparation plant and talked to Mr. Faulkner. As Mr. Callihan was making his inspection, Mr. McKee drove up and there was some banter about an old shotgun which Mr. McKee jokingly waved about. Mr. Callihan did not see any written records at that time. Mr. Faulkner did not offer to show him any written records, and did not indicate that there was a record book.

Ronnie Brock, another MSHA inspector, testified that he made a follow-up inspection of the Faulkner plant on July 7, 1978 to determine whether the citations issued on June 29, 1978 had been abated. Mr. Callihan was on National Guard duty and thus unavailable to conduct the follow-up inspection. Mr. Faulkner told Mr. Brock that he needed more time to take the test. Mr. Faulkner did not indicate that Mr. McKee was making inspections and did not indicate that he had an inspection book. Mr. Brock extended the abatement time to July 14, 1978. Mr. Brock did not tell Mr. Faulkner that the inspector had to be a full-time employee. It was his understanding that no MSHA policy required this.

Ken Howard, an MSHA supervisor, testified that he visited the Faulkner facility with Mr. Callihan and Mr. Bunch on September 26, 1978. Mr. Faulkner then stated that he had not had time to arrange for the test to obtain his certification, and had no one on the site to make examinations. Mr. Faulkner did not indicate that he had any records of examinations, but said that he had attempted to hire Mr. McKee, and "couldn't keep up with him." It was Mr. Howard's understanding that nobody was making examinations.

Mr. Callihan issued the Section 104(b) order, but Mr. Faulkner said that he would not close down his facility since he could not afford to shut down. Mr. Howard did not remember any conversation regarding the necessity of having a full-time employee make the inspections. He stated that MSHA's policy is that whoever makes the examinations should be on site about 50 to 60 percent of the time. Mr. Howard did not recall any conversation regarding MSHA policy at the time, and Mr. Faulkner did not ask about policy.

Mr. Howard testified that MSHA believes that this inspection procedure is an effective tool of hazard prevention, and a very important requirement. He stated that at the September 26, 1978 meeting, when Mr. Faulkner said that he would not comply with the Section 104(b) order, Mr. Howard explained the ramifications of such conduct, specifically the possibility that Mr. Faulkner might be subject to further penalties and even criminal prosecution. Mr. Faulkner told the MSHA inspectors that he intended to comply with the requirement, but that if he did not load the Louisville and Nashville railroad cars which he had obtained, he would lose his contract for such cars and be out of business. He said he would leave the premises and did not want any trouble.

Marion McKee testified that between July 1 and July 5, 1978, he began to help Mr. Faulkner temporarily as a bulldozer operator and tipple inspector. He stated that although he made his first tipple inspection at the Faulkner plant in early July 1978, he did not record his inspections in a

book until August 22, 1978. He also testified that in July 1978, he saw Mr. Callihan at the Faulkner facility and they joked about an old shotgun. According to Mr. McKee, all of his inspections were made at 7 a.m., except for the November 17, 1978 inspection which was made at 7:30 a.m. He testified that from early July 1978 until Mr. Faulkner became qualified in December 1978, he inspected every day that coal was loaded. Mr. McKee stated that he inspected the preparation plant on September 26, 1978, but was not present when the inspectors were there.

Arlis Faulkner testified that he held a Bachelor of Science degree from the University of Kentucky, attended graduate school in pharmacy for three years, and has been the sole proprietor and owner of Faulkner Coal & Leasing since he built the coal preparation plant in 1973. He also owns three concrete plants, some bluejean stores, and some rental income property.

Mr. Faulkner testified that on June 29, 1978, Mr. Callihan told him that the inspector should be a full-time employee. Accordingly, he hired Mr. McKee in July 1978. Mr. McKee would begin work, either at Respondent's plant or elsewhere, at 7:30 a.m., and would stop by Respondent's plant before work and inspect at about 7 a.m. on days when the tipple was in operation. In July 1978, the tipple was inspected, but the inspections were not recorded in a book. Mr. Faulkner stated that on July 7, 1978, when Mr. Brock made his follow-up inspection of the plant, he did not tell Mr. Brock about Mr. McKee's employment even though Mr. McKee was inspecting for him at the time. Mr. Faulkner told Mr. Brock that he needed more time to study for the certification examination.

Mr. Faulkner testified that the shotgun incident occurred on July 28, 1978. He added that at that time, Mr. McKee told Mr. Callihan that he was making the inspections. Mr. Callihan did not then ask for the inspection records. Mr. Faulkner stated that Mr. McKee was inspecting as of July 28, 1978, but that Mr. Faulkner did not know if a part-time inspector was sufficient to comply with the standard. Mr. McKee also ran a bulldozer for Mr. Faulkner. Mr. Faulkner admitted saying that he could not "keep up with" Mr. McKee. Mr. Faulkner testified that one day Mr. McKee would come in; another day he would not. Mr. McKee was never a full-time employee. He would come by to inspect the tipple and would go to work. Mr. Faulkner stated that he did not always know where Mr. McKee could be located.

On September 26, 1978, the facility was loading coal. There had been a shortage of railway cars, and Mr. Faulkner had waited three weeks before getting the cars which he was loading that day. Unless he loaded those cars, he would lose his railroad contract and would be unable to obtain any more cars. He told the inspectors he was doing everything he could to comply with the standards, but that he had not had time to take the certification examination. He testified that the inspectors did not ask for the inspection book on September 26.

Mr. Faulkner conceded that the proposed $3,000 penalty would not put him out of business. His 1979 production at the facility was approximately

15,000 to 20,000 tons, and his 1978 net profit from the facility was between $25,000 and $35,000.

Mr. Faulkner had stated that there was an inspection every time that coal was loaded. On cross-examination, he was asked why there was an inspection report for September 19, 1978, even though he had also testified that coal was not loaded for three weeks prior to September 26. Mr. Faulkner qualified his earlier testimony by adding that inspections were made when the tipple was used to move or stockpile crushed coal, as well as when coal was being loaded.

In response to my questions, Mr. Faulkner stated that he did not examine the provisions of 30 C.F.R. § 77.1713. He also stated that Mr. McKee was an erratic worker, and that "[i]f he took a notion to go somewhere, fishing or somewhere, he went. If he took a notion to get him a bottle and go, he did it." When I asked Mr. Faulkner why he did not tell the inspectors on September 26, 1978 that he had a record book, he gave various answers which included: (1) "they didn't ask for it"; (2) "I didn't really think about it"; and (3) he thought a full-time employee was required.

The record book which was introduced into evidence was a spiral notebook. Petitioner's counsel noted that the book began with entries for the month of November 1978, and that entries for the previous August appeared on subsequent pages. He also noted that while the November entries were all in one color ink, the August entries were in another color ink, and that all of the entries indicated that Mr. McKee made his inspections at 7 a.m., with the exception of the November 17, 1978 entry, which was made at 7:30 a.m. Petitioner's counsel challenged the authenticity of the book on the grounds of the differing colors of the ink and the fact that the entries for various months were out of sequence.

CONCLUSIONS OF LAW

It is undisputed that on June 29, 1978, Respondent violated 30 C.F.R. § 77.1713. Respondent's business is small in size, and had no history of prior violations. The proposed penalty would not affect the operator's ability to continue in business. The gravity of the violation was small since the probability of an accident was slight, 2/ and Respondent's negligence was

2/ In Robert G. Lawson Coal Company, 1 IBMA 115, 120 (1972), the Interior Board of Mine Operations Appeals made the following comments concerning the "gravity" criterion:

"Each violation should be analyzed in terms of the potential hazard to the safety of the miners and the probability of such hazard occurring. The potential adverse effects of any violation must be determined within the context of the conditions or practices existing in the particular mine at the time the violation is detected."

slight. There were, however, no good faith efforts to abate the violation. I assess a penalty of $75, the full amount of the Assessment Office's proposal.

The withdrawal order of September 29, 1978, was proper. The violation had not been abated when the inspectors revisited the facility, although almost three months had elapsed since the issuance of the citation. The inspectors had extended the abatement period several times. When the order was finally issued, the inspectors were presented with no evidence indicating that the regulation was being complied with. Even if, as contended by Respondent, the required inspections were being made and records being kept, Respondent's failure to communicate this to the inspectors justified the conclusion that the violation had not been abated in good faith.

The second citation was proper in that Respondent knowingly and willfully defied a properly issued withdrawal order. This constituted a violation of Section 110(a) of the Act. 3/

In connection with the assessment of a penalty for the second citation, several of the factors previously stated apply, including the small size of Respondent's business and its insignificant history of prior violations. Mr. Faulkner stated that the proposed penalty of $3,000 would not put him out of business, but that he would have to obtain the funds from his other businesses.

In order to determine whether the operator acted in good faith in this matter, it is necessary to evaluate apparently conflicting testimony. Mr. Faulkner and Mr. McKee testified that Mr. McKee began making inspections in early July, shortly after the June 29, 1978, citation was issued, and that from August 22, 1978, onward, Mr. McKee recorded his examinations in the inspection book which was submitted into evidence. Mr. Faulkner stated that he was under the impression that a full-time employee was required to inspect. He stated that this impression was based upon his discussions with the inspectors, although he never read the regulation itself. Mr. Faulkner and Mr. McKee stated that in July 1978, they told the inspectors that Mr. McKee was making inspections, although they never told the inspectors that a record book was kept after August 22, 1978.

Petitioner disputes the contention that Mr. McKee was making inspections and maintaining an inspection book before September 26, 1978. Counsel stressed that as late as the November 1978 follow-up inspection, MSHA personnel were not informed about the book.

3/ Section 110(a) reads:

"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. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense."

There is also a discrepancy between Petitioner's witnesses and Respondent's witnesses regarding when the inspectors first observed Mr. McKee on Respondent's premises. The inspectors contend that this took place on November 17, 1978, while Mr. Faulkner and Mr. McKee testified that it took place in July 1978. Mr. McKee and Mr. Faulkner also testified that in July they told the inspectors that Mr. McKee was making inspections.

I find that the inspectors' version of the facts is more believable. The three inspectors' testimony remained consistent throughout direct and cross-examination. Upon observing their demeanor, I found them to be truthful witnesses. On the other hand, Mr. McKee's and Mr. Faulkner's testimony contained a number of factual inconsistencies. The notebook and various aspects of their testimony challenge simple logic.

The alleged record book contains several discrepancies on its face which lead me to believe that it probably was prepared after the fact, rather than during the alleged inspection period. As previously noted, the book begins with dates in November. After a page or two of November entries, the August entries appear. This lends credence to the explanation that the entries were begun in November, and that the earlier dates were added as an afterthought. Additionally, there is a regularity with respect to the entries which gives the impression that they all were prepared at the same time. Initially, Mr. McKee and Mr. Faulkner testified that entries and inspections were made when coal was loaded. This also raised some questions of credibility. Although Mr. Faulkner later qualified his testimony, it calls into question entries made during the three-week period immediately prior to September 26, 1978 when, according to the testimony, no coal was loaded onto railroad cars.

Another matter which raises questions regarding the notebook's authenticity and credibility relates to Mr. Faulkner's description and my observation of Mr. McKee. Mr. McKee is a very casual man who does not appear to be totally reliable. Mr. Faulkner testified that Mr. McKee would sometimes disappear, would often be difficult to locate, was very erratic in his movements, and was the type of man who would disappear anytime he "took a notion to get him a bottle and go." Despite this, every entry in the book indicated that Mr. McKee performed his inspections at precisely 7 a.m., with the lone exception of the September 26, 1978, entry, which indicated that the inspection was made at 7:30 a.m. The apparent regularity of the inspection times is inconsistent with my observation of Mr. McKee and with the picture of Mr. McKee etched by Mr. Faulkner. Mr. Faulkner's admission to the inspectors on September 26, 1978, that he "couldn't keep up with" Mr. McKee substantiates that view and is inconsistent with the notebook which indicated that Mr. McKee was a diligent man who made regular inspections at exactly the same time each day.

Finally, and most persuasively, when Mr. Faulkner was faced with a total shutdown of his facility on September 26, 1978, a shutdown which was so economically threatening to him that he defied the withdrawal order and subjected himself to possible criminal penalties, he still did not inform

the inspectors that Mr. McKee had been making and recording regular inspections and produce the record book. Mr. Faulkner impressed me as being an extremely bright, well-educated, and resourceful individual who apparently has done well in a number of business ventures. It is completely inconsistent with this characterization for him not to have produced or revealed the existence of the notebook at that time.

The inspectors' testimony is far more credible. I believe the inspectors when they indicated that on two visits in July 1978, and one on September 26, 1978, they were not told that Mr. McKee was performing the inspections. I do not believe that the inspectors misled Mr. Faulkner into thinking that the certified person referred to in the regulation had to be a full-time employee. According to Mr. Faulkner's own testimony, the inspectors encouraged him to take the examination knowing that he only spent part of his time at this facility. I also do not believe that the alleged shotgun incident took place in July as Mr. Faulkner and Mr. McKee alleged. I credit the inspectors' testimony that this meeting took place in November. I further accept the inspectors' testimony that the conditions were not abated until sometime after November 17, 1978, probably in December 1978.

I also do not find Mr. Faulkner's testimony that he did not know that the inspections were required to be recorded to be believable. The initial citation issued to Respondent indicated that "[n]o certified person was available to make and record inspections." [Emphasis added.]

In summary, the evidence of record convinces me that as of September 26, 1978, there were no regular inspections being performed and there was no record book of any such inspections at Respondent's facility. Further, Mr. Faulkner was extremely slow in abating both citations. It was not until November or December 1978 that he finally corrected the condition.

The violation of the withdrawal order was thus willful. 4/ The gravity was small; 5/ I do not believe that as a result of the defiance of the withdrawal order any lives were endangered. There was a complete lack of good faith in complying with the second citation.

In consideration of all of these factors, I find that a penalty of $2,000 is appropriate to achieve the purposes of the Act.

4/ The willfulness of the violation is somewhat ameliorated by the fact that at the time of the withdrawal order, Mr. Faulkner was faced with a desperate economic situation in that he had been waiting for several weeks to obtain railroad cars, and felt that he would suffer dire economic losses if he complied with the withdrawal order and failed to load the cars. I think this situation should be considered as a mitigating factor in assessing an appropriate penalty.

5/ See footnote 2, supra.

ORDER

The order of withdrawal is AFFIRMED. Respondent is ORDERED to pay $2,075 in penalties within 30 days of the date of this order.

Edwin S. Bernstein
Administrative Law Judge

Distribution:

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

David O. Smith, Esq., Attorney for Faulkner Coal & Leasing, 100 West Center Street, P.O. Box 699, Corbin, KY 40701 (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

MAR 12 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceedings Docket No. HOPE 79-6-P A.C. No. 46-03467-03001
v.		
		Meadow River No. 1 Mine
SEWELL COAL COMPANY,	Respondent	Docket No. HOPE 79-227-P A.C. No. 46-03859-03005
		Sewell No. 1-A Mine

DECISION AND ORDER ASSESSING PENALTIES

This matter came on for hearing on February 5, 1980, in Charleston, West Virginia. Respondent did not appear at the hearing although it was set at the site requested by Respondent 1/ and although Respondent received approximately 32 days notice of the hearing. 2/

Respondent was found to have waived its right to present its defense and a summary order was entered assessing MSHA's proposed penalties as final and directing Respondent to pay such penalties.

My oral decision containing findings, conclusions and rationale appears below as it appears in the record aside from minor changes in grammar and punctuation:

> The record will reflect that the Respondent, Sewell Coal Company, is not present. On Thursday, January 31, 1980, I

1/ By letter dated January 4, 1980, Respondent's counsel, Gary W. Callahan, requested a continuance of these two proceedings for the reason that he had another mine safety hearing to attend in Arlington, Virginia, on the same day. By Order dated January 15, 1980, Respondent's motion was denied. On January 31, 1980, Mr. Callahan advised me that he was not going to attend the hearing in Charleston, West Virginia. Mr. Callahan was again advised that the hearing would not be cancelled.

2/ A form letter dated November 1, 1979, from Respondent's counsel to administrative law judges in the Commission's Arlington office is attached as Exhibit "A." Among other things, it indicates various mining companies that counsel represents.

did receive a call from Respondent's counsel, Mr. Gary Callahan, who advised me he would not be in attendance at the hearing today. He said that he was going to be in Arlington, Virginia, in a hearing before my colleague, Judge William Fauver, in a mine safety matter. I did advise Mr. Callahan at that time that I had previously ruled upon his motion to continue this case, and that I had denied his motion to continue this case.

The sequential facts with respect to my denial of this motion for continuance are as follows:

First, this hearing was noticed by me on January 2, 1980. Mr. Callahan received that Notice of Hearing on or before January 4, 1980, since on that date he sent me a letter and in writing requested that the hearing be continued because of his hearing before Judge Fauver. So the record reflects clearly that the Respondent did have more than thirty days' notice of the hearing in writing.

The pertinent rule with respect to Notice is that contained in 29 CFR 2700.53, which requires that written notice of the hearing shall be given to all parties at least twenty days before the date set for a hearing.

After receiving Mr. Callahan's letter dated January 4, 1980, I issued a written order denying his motion for continuance on January 15, 1980, pointing out that our exceedingly heavy docket makes it impossible to delay or adjust hearing dates based on the availability of one attorney.

In our conversation five days ago when Mr. Callahan called and actually said he would not attend the hearing today, and after I pointed out to him that his client has a great deal of business before this Commission and has insufficient attorneys to represent it, I advised him we could not set our schedule to that of an individual's availability when the client's attorney had more business than he could handle.

Mr. Callahan indicated in this conversation that this was a field of expertise and it was difficult for him to find another attorney. He did not say that he had called other attorneys in an attempt to obtain someone to attend this hearing and represent the Respondent.

I advised him I was going to hold the hearing and that I would be in Charleston to hold the hearing on the date scheduled -- that is today, February 5. I asked him to advise the Government attorney. Mr. Callahan indicated he had already spoken to the Government attorney and that the Government attorney said he was going to attend the hearing.

It is my judgment that if the principle were established that hearing schedules were to be established on the basis of the convenience of counsel or on the availability of one counsel, it would soon be impossible to schedule these Mine Safety hearings.

I know of one situation several years ago where a large company had only one attorney, and its whole policy was to delay the processing of these hearings because that attorney was never available.

I note Mr. Callahan has before me in the past sought a delay in hearings I have had with him on this same basis, and I also point out he has done the same with other Administrative Law Judges in our office saying he is the only one who can try these cases for his client. Sewell Coal Company has many, many hearings before this Commission. I question whether any rule which would be established delaying these cases would actually be in the best interest of mine safety.

Where is a proper line to be drawn? If a party says it has two hearings going on simultaneously, can it hide behind an attorney's unavailability and not be required to hire other counsel?

A second question arises: Can an attorney delay the normal processing and hearing of cases because of his unavailability? Can a mine operator charged with violations of the mine safety laws delay these cases by refusing to hire sufficient counsel?

In the very proceedings before us in the two dockets with which we are concerned today, this Respondent, apparently through its counsel, has already engaged in considerable delay. I note that the petition for the assessment of civil penalty was filed by the government on October 3, 1978. Several months went by without an answer being filed by Respondent.

On April 26, 1979, an Order to Show Cause was issued by Chief Administrative Law Judge James A. Broderick requiring the Respondent to show cause why it should not have been deemed to have waived its right to a hearing and to contest the proposed penalty. On May 11, 1979, Judge Broderick granted the Respondent until June 1, 1979, to respond to the Order to Show Cause. On May 17, 1979, the Respondent did file its answer to the petition for assessment. Perhaps an error was made at this point by not finding the Respondent in default at that point. It never did show good cause why

it had delayed filing its answer for several months; however, at that time the commission was in a state of change. We were operating under different procedural rules and new rules were soon to be issued, and they were issued on June 29, 1979.

So the Respondent in this case started the proceeding with a considerable delay. It was very well-accommodated, it was given additional time to answer the Order to Show Cause and was not found in default -- a considerable accommodation which I do question now the propriety of. I am beginning to think that perhaps the default should have been entered at that time. In any event, the default was waived by the Government and Respondent's answer was received and these matters were then starting to be processed.

In its answer to the petition for penalty assessment, the Respondent specifically requested that the hearing in these two cases be held in Charleston, West Virginia. That is where these two cases were noticed for hearing, and the Respondent, through its counsel, was given thirty days' notice.

I find it improper for an attorney to call up a judge five days before a hearing and tell a judge he is not going to appear [in] a case when he has had notice and where the hearing is being set at a site convenient to that particular party, particularly where there is a history by this same counsel of engaging in the same type of delay, and where the apparent belief of counsel is that he, the attorney, is the focal point of Mine Safety and Health proceedings.

Mr. Callahan is a counsel for one party. We have many attorneys in this country. These hearings in Mine Safety matters are held in fifty states. Administrative Law Judges travel to every state in the union to hold these hearings. We are not able to accommodate the scheduling of these hearings based upon the fact that one attorney representing a party cannot himself make it. One of the points that Mr. Callahan made in his conversation with me was that this is an area of expertise, and apparently he's the only one who can try these cases. I reject that out of hand. Any attorney worth his salt can try a Mine Safety and Health proceeding. Attorneys have customarily had no difficulty in trying these cases. It would not have been impossible to begin having a sufficient number of attorneys to try these cases available, and there are such attorneys available, and there is quite a large Mine Safety and Health bar.

I also note for a period of years another large coal company, Eastern Associated, had law students representing it in these cases. Although I did not approve of that practice, the fact remains that that did occur.

So, if Mr. Callahan's argument were accepted that he or another attorney or three more attorneys are the only ones who can represent a client, if that were accepted, then ultimately you would have difficulty bringing many of these cases to hearing.

The question now is what to do in this case. The current rules of procedure differ from the past rules of procedure in such a matter. The only current rule which even winks at this situation is that contained in 29 CFR 2700.63. It has two paragraphs: Subparagraph (a) provides generally, "When a party fails to comply with an order of a judge or these rules, an Order to Show Cause shall be directed to the party before the entry of any Order of Default or Dismissal." Subparagraph (b) provides, "Penalty Proceedings. When the judge finds the Respondent in default in a civil penalty proceeding, the judge shall also enter a summary order assessing the proposed penalties as final and directing that such penalties be paid."

In analyzing this rule, I first note the first paragraph generally applies to all proceedings before the Commission. The second paragraph [refers[specifically to penalty proceedings.

The first paragraph requires an Order to Show Cause shall be directed to a party before the entry of any default; however, it applies only where a party, "-- fails to comply with an order of a judge or these rules."

In this case, there is no failure of Respondent to comply with an order or any rule. The Respondent in this case has had a reasonable opportunity for hearing at a site he requested -- or it requested -- and has failed to take advantage of that right.

I therefore conclude that it is not necessary to issue an Order to Show Cause in these proceedings. In so finding, I note there is no specific rule in the current procedural rules covering the situation where a party does not appear at a hearing.

In the interim procedural rules which preceded the current rules, Regulation 2700.26 provided specifically, where the Respondent fails to appear at the hearing, the

judge shall have the authority to conclude that the Respondent has waived its right to a hearing and contest of the proposed penalties and may find the Respondent in default. Where the judge determines to hold Respondent in default, the judge shall enter a summary order imposing the proposed penalties as final, directing that such penalties be paid.

We have no such rule in the current rules. The situation is left uncovered by the current rules. In this situation, I believe the answer is contained in rule -- or let me rephrase that -- that the answer is [found] by reference to two of the current rules, of that contained in 29 CFR 2700.60 and that contained in 2700.63.

2700.60 provides, Any party does have a right to present his case or defense by oral or documentary evidence and to submit rebuttal evidence and the like.' That is a right that a party has.

2700.63(b) then provides that if I find a party in default I shall enter a summary order assessing the proposed penalties as final.

I believe in this case that the Respondent has waived its right to a hearing and I so find. The Respondent has unnecessarily delayed this proceeding once before; and while it was not found to be in default, I am not inclined to permit it be continued to delay the processing of such proceedings on the basis that it just has this one attorney or two attorneys who are unable to handle the great amount of business the Respondent has before the Commission.

In conclusion, I am adopting the rule which I gather will go before the Commission and which will either be approved or rejected but in the process of which we hope we should get some clarification as a result of this case. I am going to adopt the rule that where Respondent is given reasonable notice of a hearing and fails to appear or declines to appear at such hearing, it has waived its right -- and I underline the word right -- to present its case at a hearing on the record as provided in 29 CFR 2700.60(b); and that in such circumstances it is proper for the Administrative Law Judge to find the Respondent in default and pursuant to 29 CFR 2700.63(b) to enter a summary order assessing MSHA's proposed penalties as final.

* * * * * * *

Before closing, I am going to indicate one other item that I believe is pertinent in these proceedings to aid the

Commission and perhaps any court subsequently down the line that may be reviewing this matter, and that is the nature of the Commission's hearing process and the problems which are involved in setting these hearings.

In the past two years and since the passage of the 1977 Safety Act, the docket, I believe, of many of the Commission judges -- there are something like fourteen in Arlington and four now in Denver -- the dockets, that is, the number of cases they are carrying has increased dramatically. I am now carrying approximately twice as many cases as I was two years ago. I do not sit, for example, as a United States District Court Judge does, in a single site or two sites. The hearings which I hear are, as I previously indicated, spread out all over the country. I have, for example, a hearing trip set up in March, next month, which requires me on Tuesday to have a hearing in Wheeling for two days and then starting two days later I'll be in Pomeroy, Ohio, beginning on a Thursday morning; the following Monday morning, I'll be in Prestonsburg, Kentucky, and the following Wednesday, I'll be back here in Charleston. If attorneys in any of those cases began calling me up after I had set up such a schedule saying, "Look, I've got to go somewhere else, I've got another hearing elsewhere," it would be impossible to start to process any of these cases.

These are Mine Safety and Health cases and the Congress has given these cases quite a bit of priority. I have had many times in the past lawyers call me up saying, "Look, I've got a traffic court case the same day, I can't make that Mine Safety case." It has been a rare situation where it has been possible to grant these types of continuance with that type of situation existing; that is, a very heavy docket with the hearing sites literally strung out all over the country and with numerous lawyers involved.

I can recognize that an attorney's livelihood and the practice of his profession is important to him. Mr. Callahan has sent a letter around to various of the administrative law judges in the past indicating a long list of fairly large companies he represents in these proceedings, and he has many cases; and it is certainly a credit to him that he undertakes to represent these clients. On the other hand, our moving this large number of cases cannot be dependent on his availability or any one or two or three attorneys in a given case. I hope that this proceeding will result in a good look on the part of the Commission as to the necessity of moving the large number of Mine Safety cases we presently have.

The commission in total has no more judges -- actually, it has less working judges under the 1977 Act then it had

under the '69 Act, even though the case load has increased by a great amount and the hearings are held now practically everywhere in the United States.

I would note the hearings are by and large much more difficult to process, there are more procedural battles going on, there are more prehearing matters to be disposed of; so some sense of reality has to now be adopted so these cases can be handled and be disposed of.

The commission has previously held that the hearings have to be held in the area where the mines are located. That takes time -- that takes travel time and the like. I hope the rule that I have indicated on the record, which I believe is a reasonable one, will be adopted by the Commission in this case. That simply is that where the Respondent has been given a reasonable notice of hearing and it fails to appear, it has waived its right to present its case on the record as provided in 29 CFR 2700.60. And that in such event, it is proper for the Administrative Law Judge to find the Respondent in default and to enter a summary order assessing MSHA's proposed penalties as final. That procedure had been in the interim procedural regulations, and under the current regulations a gap appears. So if a reasonable rule is not filled in here, I would estimate that every Administrative Law Judge at the commission will soon have stacks of cancelled hearings in their office; and we will just simply create a complete backlog of these hearings, human nature being such as it is and lawyers being the way they are, they will put off, if they can, these cases. If the judges are going to conscientiously try to whack away at the large number of cases, we have to have some sort of reasonable procedures we can work with.

I do find the Respondent in default on the basis that I have previously indicated, and I assess the Respondent in Docket Number HOPE 79-6-P a penalty of six hundred ninety dollars ($690) for the violation of 30 CFR 75.200 described in Order of Withdrawal Number 045973, which issued on March 27, 1978. I also assess a penalty against Respondent in Docket Number HOPE 227-P of five hundred thirty dollars ($530) for the violation of 30 CFR 75.503 contained in Citation Number 044189 dated June 14, 1978; and direct that these penalties be paid to the Secretary of Labor on or before thirty days after the receipt of my written order which will issue in the near future.

Michael A. Lasher, Jr.

Michael A. Lasher, Jr., Judge

Distribution:

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

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

THE PITTSTON COMPANY
COAL GROUP
LEBANON, VIRGINIA 24266

November 1, 1979

he Honorable
dministrative Law Judge
ederal Mine Safety and Health
Review Commission
015 Wilson Boulevard
rlington, Virginia 22203

ear Judge

On occasion I receive from your office a notice that trial r hearing has been scheduled for a case of one of the divisions f The Pittston Company, and often I already have a hearing or ther matter previously scheduled. Since I handle all MSHA and SM matters for the companies listed below, my schedule of open ates is somewhat limited. I would appreciate, then, if you ould call or otherwise advise me of a prospective date prior to he time a case is set for hearing.

Amigo Smokeless Coal Company
Badger Coal Company
Buffalo Mining Company
Clinchfield Coal Company
Eastern Coal Corporation
Elkay Mining Company
Evergreen Industries, Inc.
Excel Development, Inc.
Jewell Ridge Coal Corporation
Kentland-Elkhorn Coal Corporation
Rail-River Terminal Company
Ranger Fuel Corporation
Sewell Coal Company
The Maple Company, Inc.
The Sycamore Company, Inc.

Sincerely,

Gary W. Callahan
Attorney

WC/ksg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 13, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ex rel.	:	Complaint of Discharge, Discrimination, or Interference
	:	Docket No. VA 79-141-D
THOMAS ROBINETTE, Applicant	:	United Castle Mine No. 1
v.	:	
UNITED CASTLE 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; Michael L. Lowry, Esq., Ford, Harrison, Sullivan, Lowry and Sykes, Atlanta, Georgia, for Respondent.

Before: Chief Administrative Law Judge Broderick

Statement of the Case

On September 20, 1979, Applicant filed an Application for Temporary Reinstatement of Thomas Robinette together with a finding by the Secretary of Labor that the complaint of discriminatory discharge had not been frivolously brought. Based on the application and finding, and pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), an order was issued September 24, 1979, requiring Respondent to temporarily reinstate Thomas D. Robinette in the position from which he was terminated or in a comparable position at the same rate of pay and with the same or equivalent work duties as were assigned him immediately prior to his termination. The complaint was filed on October 11, 1979, alleging that Robinette was discharged on or about June 4, 1979, because he filed a discrimination complaint with MSHA, and because he complained about working on the belt feeder without an operative cap light.

Pursuant to notice, the case was heard on the merits in Norton, Virginia, on November 28, 1979. Thomas Robinette, Teddie Joe Fields

and Isaac W. Fields testified on behalf of Applicant. Fuller B. Helbert, Denver Cook and Percy Sturgill testified on behalf of Respondent. Both parties have filed posthearing briefs. To the extent that the contentions of the parties are not accepted in this decision, they are rejected.

STATUTORY PROVISION

Section 105(c) 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 such 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 this paragraph.

* * * * * * *

Issue

Whether Thomas Robinette was discharged because of activity protected under section 105 of the Federal Mine Safety and Health Act?

FINDINGS OF FACT

1. In May and June 1979, and prior thereto, Respondent United Castle Coal Company was the operator of an underground coal mine in Wise County, Virginia, known as the United Castle Mine No. 1.

2. In May and June 1979, and prior thereto, Applicant Thomas D. Robinette was employed by Respondent in its United Castle Mine No. 1 as a miner.

Complaint to MSHA May 30, 1979

3. When Robinette reported for work on May 30, 1979, he was informed by the section foreman, Percy Sturgill, that another miner, Ike Fields, had been assigned Robinnette's former job as miner helper and that Robinette was to work on the belt feeder as the feeder man, a lower paying job.

4. The reason given for the transfer was the fact that Fields had filed a complaint with MSHA alleging that he was removed from the position of miner helper in January 1979, when he refused to operate the miner "because there was no air."

5. When Fields was put back on the miner helper job in May 1979, he and the Respondent signed an agreement wherein Fields withdrew his complaint and Respondent agreed not to interfere with miners in the exercise of their rights under the Act.

6. After finishing work on May 30, 1979, Robinette went to the MSHA office in Norton, Virginia, and executed a complaint alleging discrimination on the part of Respondent in changing his work status.

7. There is no evidence as to the nature of the discrimination alleged in the MSHA complaint. Specifically, there is no indication that Robinette charged that he was given a new job because of safety-related activities.

8. On May 31, 1979, when Robinette reported for work, Sturgill told him that he would be assigned to driving a shuttle car and would receive the same rate of pay as a miner helper. This job was to begin the following Monday. On May 31, Robinette worked about 2 hours on the miner and the remainder of the shift on the belt feeder.

9. On May 31, 1979, Robinette told Sturgill that he had filed a discrimination complaint with MSHA.

10. Sturgill replied that if Robinette wanted "to play it that way," he could play it that way too. He also told Robinette that in the future he must bring a doctor's slip anytime he is off work. Previous company policy required a doctor's slip for 2 or more days absence.

Discussion

I have accepted Robinette's version of this conversation which is different from Sturgill's version largely because Robinette's testimony is indirectly corroborated by the testimony of Isaac Fields (Tr. 47-48). Sturgill was clearly upset because in trying to resolve one MSHA complaint (that of Fields), he apparently precipitated another (that of Robinette).

11. The nature of the complaint made to MSHA by Robinette is not clear. Robinette testified that the complaint was filed "because of my job being changed and my pay rate being cut." There is no evidence that it was related to any health or safety matter.

12. On May 31, 1979, Robinette worked for a time operating a shuttle car, and on relief as a miner helper. He ran over a cable

with the shuttle car and destroyed some line curtain with the miner. Sturgill reprimanded him for these incidents. He was also reprimanded by Tiltson for failure to properly grease the feeder tail shaft.

THE INCIDENT OF THE CAP LAMP CORD

13. On June 1, 1979, while Robinette was working on the belt feeder, it went out of line. In attempting to realign it, Robinette's head lamp cord was caught in the roller and severed. He called to the shuttle car operator to inform Sturgill that he had no light and would have to shut down the feeder. There was no other illumination in the area.

Discussion

It is Respondent's position that the cutting of the Robinette's lamp cord was not accidental but deliberate; and that it was caused not by being caught in the roller, but by being cut with a knife or other sharp instrument. Respondent attempted to demonstrate in the courtroom and by testimony the impossibility of a cord being severed in the way Robinette's was by being caught in a roller. I find that Respondent failed to establish these contentions, and there is no adequate reason to reject Robinette's testimony.

14. Robinette shut down the feeder because he believed that it was not safe to work in an unlighted area.

15. The belt feeder operator is required to remove or break up rocks moving on the belt to permit the coal to pass. It is necessary on occasion to shut down the feeder to remove larger rocks. To permit the belt to continue running when the operator has inadequate illumination would create a hazardous situation for the operator and other miners.

16. After some delay, Sturgill came to the area of the belt feeder, and, as he approached, saw Robinette disconnect the mine phone.

Discussion

Robinette denied that he disconnected the mine phone. I accept the testimony of Sturgill that he did so. His motive apparently was frustration over his cap light being out and Sturgill's delay in responding to his request for assistance.

17. Sturgill repaired Robinette's lamp and the mine phone. The two men exchanged harsh words as to the shutting down of the belt feeder, as to how the lamp cord had been broken, and the disconnection of the telephone. Sturgill told Robinette to come to the mine office at the end of the shift.

18. Robinette went to the office and was scheduled to meet with Jack Tiltson, Vice President of Respondent company, Denver Cook, the Mine Administrator and Sturgill. Tiltson, however, was not available at the time so Robinette went home.

19. After Robinette departed, Sturgill discussed the incidents involving Robinette with Tiltson and Cook. Thereafter, Tiltson and Cook went over Robinette's file which contained a number of warnings for unsatisfactory work.

20. On Monday, June 4, 1979, when Robinette reported for work, Tiltson told him he was discharged.

21. Prior to the actual discharge, an "Employee Warning Record" was completed by Denver Cook and entered in Robinette's file. It states "Employee became disobedient with section foreman. Was not maintaining the belt feeder in a clean and safe condition, the job requires the feeder to be greased and shoveled at all times. Disconnected the mine phone interrupting communication." This was based on information furnished by Sturgill at the meeting on Friday, June 1.

22. When Tiltson discharged Robinette, he told him that "it was for what had happened that Friday, and what had happened in the past" (Tr. 19). He stated that Robinette had no reason to shut down production because his cap lamp did not work. When Denver Cook raised a question about operating the equipment without a light, Tiltson replied that "Robinette could have got out of the way and that the tailpiece would have took care of itself" (Tr. 41).

23. The effective cause for Applicant's discharge was his refusal to continue operating the feeder after his lamp cord was cut. This was a bona fide refusal to work under what he considered to be, and what objectively were, unsafe conditions. The other reasons given for the discharge--insubordination and inferior work--were not the primary motives for the discharge.

CONCLUSIONS OF LAW

1. At all times relevant to this proceeding, 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. On June 4, 1979, Applicant Thomas Robinette was discharged from his position with Respondent because of his refusal to work under unsafe conditions. This refusal is activity protected under the Act.

4. Applicant Thomas Robinette was discharged and discriminated against in violation of section 105 of the Act.

Discussion

Respondent established that Applicant's work was less than satisfactory. Applicant was obviously belligerent and uncooperative with his foreman Sturgill as a result of his change in job classification. The evidence clearly establishes, however, that the effective cause for his discharge was his refusal to continue operating the belt feeder after his cap lamp cord was cut. Applicant concluded, and I agree with him, that to continue operating the belt feeder would be hazardous. Refusal to continue working under hazardous conditions is protected activity under the Act. See Phillips v. Interior Board, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1974).

ORDER

Respondent, United Castle Coal Company is ORDERED:

1. To reinstate Applicant Thomas Robinette to the position from which he was discharged on June 4, 1979, or to a comparable position at the same rate of pay and with the same or equivalent work duties. The reinstatement shall take effect as of June 4, 1979.

2. Respondent is further ORDERED to pay for the time lost by Applicant prior to the Order of Temporary Reinstatement issued herein, with interest thereon at the rate of 9 percent per annum.

3. Respondent shall remove all references to the discharge of Applicant from his personnel file.

4. Respondent shall post a copy of this decision on the bulletin board at the mine office for a period of 30 days.

5. The Secretary of Labor is directed to file with the Commission a proposal for a penalty for the violation of the Act found herein to have occurred. Because the Act and the Commission Rules of Procedure provide specific steps to be taken in connection with penalty assessments, I declined to entertain evidence during this proceeding involving a claim of discrimination, and I decline to assess a penalty for the violation found herein. I conclude that a separate proceeding is required.

James A. Broderick

James A. Broderick
Chief Administrative Law Judge

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Mr. Thomas D. Robinette, General Delivery, Exeter, VA 24249

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

MAR 17 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. DENV 79-245-PM
Petitioner	:	A.O. No. 04-02511-05001
v.	:	
	:	Eagle Mountain Mine & Mill
KAISER STEEL CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Judith G. Vogel, Attorney, Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for the petitioner;
Daniel B. Reeves, Esquire, Oakland, California, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal 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), on January 26, 1979, charging the respondent with six alleged violations of certain mandatory safety standards found in Part 55, Title 30, Code of Federal Regulations.

Respondent filed a timely answer contesting the civil penalty proposals and requested a hearing in Indio, California. A hearing was convened on November 6, 1979, and the parties appeared and participated fully therein. The parties waived the filing of written proposed findings and conclusions but were afforded an opportunity to present oral arguments in support of their respective positions.

Issues

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed

in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

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

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 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.

Stipulations

The parties stipulated to the following (Tr. 1-2):

1. Respondent has no prior history of violations for the period June 16 to 29, 1978, the dates of the inspection in question, and the effective date of the Act, March 9, 1978.

2. The civil penalties assessed for the violations in question will not impair respondent's ability to remain in business.

3. The mine in question produces 4 million tons of iron ore per year.

Dismissal of Citation

Petitioner's motion to dismiss Citation No. 375455, June 27, 1979, 30 CFR 55.14-6, on the ground that petitioner cannot sustain its burden of proof as to the fact of violation was granted (Tr. 2) and the citation is vacated.

Petitioner's Testimony and Evidence

Citation No. 375204, June 28, 1978, citing 30 CFR 55.20-3, states: "The take-up pulley balcony was not clean and prevented safe access for 2 maintenance employees who were changing a counterweight bearing."

MSHA inspector James W. Shroyer confirmed that he issued the citation in question after inspecting the balcony area at the take-up pulley on the H-4 conveyor belt. He observed an accumulation and buildup of encrusted materials that covered the entire balcony, and it had built up to a height of some 18 to 20 inches from the edges of the center of the platform. The encrusted materials fell off of the conveyor belt as it came around the counterweight sloping outward and even with the toeboard. Employees have access to the balcony by an open door which provides maintenance and lubrication for the pulley and moving parts. The unclean balcony with the buildup of materials, and the presence of tools, presented slipping and tripping hazards to employees on the balcony as well as the area below the balcony where tools could fall off and injure employees. Lubrication grease was also present on the balcony and this presented a slipping hazard in that employees could slip through the handrailings and fall to the area below injuring themselves against metal structures. Employees may receive a range of injuries from broken bones to fatal injuries, and the respondent should have known about the material buildup on the balcony. The hazardous conditions were abated within the time specified after respondent pulled employees off of one job and assigned them to clean up the balcony, and he was present shortly after the hazardous conditions were corrected (Tr. 4-12).

On cross-examination, Inspector Shroyer testified that the function of the conveyor belt is to transfer ore waste from one plant area to another, and he believed that the hardened materials came from the conveyor belt. The materials consisted of ore waste one-quarter to three-eighths inches thick located outside the plant building. The materials had hardened because they had not been disturbed by employees doing repair work, and the presence of the materials on the iron balcony surface made it more of a tripping and slipping hazard to employees because it was not packed in some areas, and this could cause an employee to loose his footing. As the material was dumped, part of it would stick to the conveyor belt, and after it dried, the materials dropped off on to the balcony area. In order to prevent accidents, a 42-inch guardrail enclosed the balcony and 3-inch toeboards were also there to prevent employees and materials from being knocked off the balcony into the area below. Toeboards are required in platform areas which are elevated and when men and equipment are in the area below.

Inspector Shroyer stated that employees are on the balcony in question only when they are performing maintenance and repair work, and employees usually travel in the area directly below the balcony. If an employee were to fall, the toeboard may prevent him from slipping over the edge, but based on the type and slope of material, an employee might have a difficult time holding onto anything to prevent his fall if he had been working with lubrication grease. There was no grease on the floor and it is not probable that an employee would fall off the 20-foot balcony. The balcony is not a normal work area and in a normal production shift employees would be there only to perform maintenance. He observed no one working on the balcony, but a supervisor told him that two men had been working there, and he observed tools and equipment present which indicated to him that men had been working there shortly before he arrived on the scene (Tr. 12-21).

Inspector Shroyer stated that the presence of the material on the iron balcony presented slipping and tripping hazards, and when an employee walks out the door going towards the take-up pulley, the material buildup presents a tripping hazard. The material buildup area was 18 to 20 inches up around the conveyor belt sloping downward to 3 inches to the right of the toeboard on the outside, and the balcony itself is 4 feet wide and 7 feet long (Tr. 22). In view of the buildup of materials, he did not believe the toeboards were serving the purpose of keeping materials or tools from falling off the balcony (Tr. 23-26).

In response to bench questions, the inspector testified that he believed the violation was more of a housekeeping problem, and had the balcony been cleaned he would not have issued a citation. He did not believe there was a violation of any "safe access" standard, and he observed no other violations of safety standards in the balcony area (Tr. 27-28).

Respondent's Testimony

Plant superintendent M. A. Gaines testified that the material found on the iron balcony came from two 6-inch openings of the metal housing which built up on the grating of the platform, and the buildup resulted from the scraper belt wash system on the conveyor being down. The bottom of the trough had corroded away, and the belt wash system could not be repaired while it was in operation during production. The belt wash system could be repaired on two regularly scheduled days per week, and material spillage from the conveyor belt is cleaned up on a routine basis depending on the area and how frequently the equipment is required to be greased. If the scraper belt system was working, laborers would not be required to clean up the material spillage. Laborers apparently neglected to clean the area because it is not a normal work area but is only used while mechanics are changing and lubricating bearings. After the inspection, the material buildup was knocked down to a flat surface to 2-1/2 feet wide between the take-up pulley and the handrail. The two mechanics in question were standing on the built up material while changing the bearings. If there is a material buildup on the platform, the normal procedure is to contact the maintenance employees to clean the area first before they go in (Tr. 29-33).

On cross-examination, Mr. Gaines described the belt conveyor wash system and indicated that the material accumulations buildup was caused by the fact that the belt wash system was down, but that it could also have been caused by a pump located at the discharge end of the conveyor. On the day in question, both conveyor belts were down for maintenance and the walkway beneath the conveyor is used twice a year by maintenance employees while replacing belt idlers and performing clean-up duties. After the spillage was leveled out, it was 6 inches high and 4 inches at the outside and even with the 4-inch toeboards (Tr. 34-37).

William E. Eastgate, respondent's industrial safety manager, testified that he accompanied the inspector during the inspection and observed the conditions on the balcony in question. He did not believe a tripping hazard

existed because the materials were very fine and did not contain any rocks or significant mass which would cause one to trip. He conceded there was a buildup and one could leave footprints in it while walking over the area. He did not believe there was a slipping hazard present even though the surface material was damp, and he indicated that one would use due caution when walking over the footing conditions (Tr. 38-39).

On cross-examination, Mr. Eastgate estimated the height of the materials to be approximately 10 to 12 inches at the take-up pulley frame, and that it was not level throughout the balcony aea. He did not believe someone could trip or slip because "when you walk in an operation like this, you are always observant of footing conditions" and "there is no such thing as an idyllic situation" (Tr. 40).

In response to bench questions, Mr. Eastgate stated that maintenance was being performed on the equipment and that two mechanics were present (Tr. 41).

On redirect examination, Inspector Shroyer testified that he could not recall that two mechanics were present when he arrived at the scene and since there were so many people in the inspection party, he may have assumed they were part of that party. The amount of buildup of materials present increased the possibility of tools falling off the balcony to the area below (Tr. 42-43).

Citation No. 375450, June 27, 1978, citing 30 CFR 55.20-3(a), states:

> The walkways on the C-1 conveyor were not kept clean of loose materials that restricted the passage on the walkways. Material spills and sections of used metals were blocking access on the walkways in the tunnel section and on the outside sections of the walkways on the conveyor.

Petitioner's Testimony and Evidence

MSHA inspector Arthur S. Carisoza confirmed that he issued the citation in question after observing material spills and sections of used metal material blocking the access on the walkways inside the conveyor tunnel and the inclined elevated area outside the tunnel. The C-1 conveyor has a walkway on both sides which is encircled by a headboard, and the walkway is 24 inches wide with toeboards, handrails, headrails, and a graded metal floor. The conveyor is elevated in excess of 20 feet starting from ground level, and the spillage he observed on the walkway on the outside section of the C-1 conveyor consisted of precrushed iron ore and sections of the iron frame structure used to support the braced end. The spillage was scattered beyond the width of the walkway running one-third down from the headpoint of the conveyor, and the edge of the toeboards ranging from 2 to 8 inches. The spillage inside the tunnel consisted of iron ore near the chutes and jagged and straight-edge metal lying on the tunnel walkways. The tunnel is 8 feet high with a walkway on one side running down into the tunnel 150 feet, and employees used this walkway to service the conveyor and check for spillage.

Inspector Carisoza testified that while he did not see any employees near the conveyor, there were footprints in the tunnel, and it appeared that employees went inside the tunnel to clean up the spillage and to repair the conveyor roller (Tr. 45-50). The spillage on the inclined elevated section outside the walkway created a slipping, falling, and stumbling hazard to employees walking down the walkway. The spillage inside the tunnel created several hazards to employees, including restricted head clearance, tripping, falling, and stumbling. In order to walk through the tunnel, employees would have to climb over the material piles, and there was not enough room to walk cleanly around the material piles. An employee could slip on the loose material on either section of the tunnel and receive a sprain, fractures, lacerations, and a concussion if he struck his head. The water on the floor, the wet conditions between the piles, loose dust, and the practice of employees wearing dark sun glasses are conditions that increased the likelihood of accidental injury inside the tunnel. He believed the respondent should have known that loose materials, including the iron and metal pieces, were located on the conveyor walkways, and employees should be instructed to inspect the area for spillages at least once per shift, and materials should be removed as soon as the repair work is completed. Respondent began to clean the materials off of the walkways on the day of the inspection, and the citation was abated within the time specified (Tr. 50-53).

Citation No. 375451, June 27, 1978, citing 30 CFR 55.20-3, states:

> Material spills in the C-2A tunnel were restricting the passage on the walkway. Material spills were causing workers to expose themselves to tripping hazards and limiting head clearances while traveling through the tunnel.

Inspector Carisoza confirmed that he issued a second citation after observing material spills in the C-2A tunnel area, and this material consisted of a fine type of iron ore that rose from 3 feet from the draw chutes to the top of the conveyor. Although he did not see any employees inside the C-2A tunnel, there were footprints present. Employees are in the tunnel to repair the conveyor and unplug the draw chutes. The loose material and spillages in the C-2A tunnel posed the same type of hazards to employees as the C-1 tunnel, including lack of head clearance, injuries, and falls. Water on the walkway, bad illumination from burned-out bulbs, and a dusty atmosphere were conditions that increased the likelihood of accidental injury and the conditions were subsequently abated by the respondent within the time specified (Tr. 53-56).

On cross-examination, Inspector Carisoza agreed that belt spillage will occur during mining operations, but that methods should be utilized to insure a cleanup to minimize the problem. He did not believe that the presence of cleanup crews in the tunnel while the belt was operating presents a hazard, but a better practice would be to clean up while the belt is down. He described the walkways in the C-1 conveyor tunnel and the spillage which he observed. The loose spillage on the elevated east walkway ranged from 2 to 9 inches. The walkways were guarded by guardrails and toeboards and it was

not probable that anyone would fall off the elevated walkway. He clarified the statement made on his inspector's statement at the time the citation was issued by stating that the probability of one slipping and falling was present and he slipped while on the conveyor belt walkway. If one did not walk with extreme caution it would be more likely than not that he would slip. He saw no one on the walkway and an employee should be able to observe the obstructions.

Inspector Carisoza stated that he found more than three areas on the C-1 conveyor feed point chutes which had accumulated materials present, and the accumulations at those points were as high as the conveyor belt itself, in excess of 2-1/2 feet sloping at an angle. A person could slip if he tried to walk over those obstructions. Persons in the inspection party had to walk over the obstructions, but none of them slipped or fell, and this was because they exercised extreme caution in climbing over the areas. The tunnel is 8 feet high and employees are required to wear hard hats. The accumulated materials consisted of iron ore and dirt and it was not flammable or explosive, and the metal materials consisted of used materials, including a belt idler. He observed no work being performed in the tunnel while he was there, but believed that work had been performed there before he arrived (Tr. 57-64). With regard to the C-2A tunnel, the accumulated materials consisted of a spill in excess of 2-1/2 feet and several obstructions (Tr. 64).

Mr. Carisoza indicated that the extraneous materials cited were found in the C-1 tunnel and not the C-2 tunnel. The materials were blocking the access and presented a tripping hazard. One employee is usually in the tunnel walkways to check the flow of materials, but they are not regular walkways or travelways used by all employees. The citations were abated in good faith (Tr. 64-67). The citations were personally served on respondent at the conclusion of the post-inspection conference each day (Tr. 82). While he recalled more than one piece of loose material on the C-1 walkway, he could not specifically remember what they were but indicated they consisted of used metal parts which he believed constituted tripping hazards which obstructed an employee's travel access through the area (Tr. 82-84).

Respondent's Testimony

Superintendent Gaines explained the functions of the conveyors in question and he testified that no one is allowed in the C-1 tunnel while the conveyor is running. Employees are issued clear glasses and sun glasses for use in the tunnel, and cleanup crews are sent in to clean up the walkways while the conveyors are down before maintenance personnel go in. In the C-2 tunnel, designated personnel are present while the conveyor is running, and except for the tail pulley locations, cleanup is normally done while the conveyor is down. Due to the restrictions in the amount of room in the tunnel, cleanup is not performed while the conveyors are running. Although there are two walkways in the C-1 tunnel, under normal circumstances only the east one is used and this would be infrequently while maintenance is being performed (Tr. 67-71).

Mr. Gaines confirmed that an idler frame and roller was in the C-1 tunnel on the west walkway. It was left there after an idler was changed and had not been removed, but it was subsequently immediately removed. The inspector complained about dust and small pebble materials on the inclined walkway, and if one is not careful he could slip on it. Mr. Gaines also confirmed the presence of an obstruction at one location in the C-1 tunnel, and he described it as "14 inches across the face and six inches deep." It was halfway down the tunnel and pushed under the conveyor belt. He could not recall any 2-1/2-foot obstructions in the feed chute. Cleanup is performed once a week in the C-1 tunnel and as required in the C-2 tunnel. He also confirmed the presence of the obstructions in the C-2 tunnel which were caused by material buildup at the bottom of the skirtboard, and he indicated that an employee would have to maneuver his way around the pile of spillage, but he could do so safely (Tr. 71-73).

On cross-examination, Mr. Gaines testified that there is no occasion for employees to be in the C-1 tunnel while the conveyor is operating. A chain barricade is in place while the conveyor is running, and following the inspector's suggestion, a sign was also put up at the tunnel entrance. The material buildup was not on the tunnel walkway but under the conveyor belt, but the used idler and roller were on the walkway. There was a 2-1/2-foot buildup of material at the bottom of the skirtboard near the south feeder in the C-2 tunnel, and he and the inspector had to walk over it (Tr. 73-77).

In response to bench questions, Mr. Gaines stated that other than the idler frame and roller, he saw no other used metal materials in the C-1 tunnel. However, at the tail end of the C-2 tunnel, pan liners were leaning against the wall and they were left there from the previous day when maintenance was performed. The C-2 tunnel had been cleaned the day of the inspection, but he could not recall when the C-1 tunnel was last cleaned, but both are cleaned at least once a week on the down days. He did not consider 2-1/2 feet of spillage to be normal (Tr. 78-79, 80).

Citation No. 375452, June 27, 1978, citing 30 CFR 55.17-1, states:

> Sufficient illumination to provide safe working conditions and travel through the C-2A tunnel conveyor were not maintained due to broken and burned out bulbs in the tunnel section of the conveyor. Several areas in the tunnel were not illuminated sufficiently and limited a person's visibility while in the tunnel.

Citation No. 375453, June 27, 1978, citing 30 CFR 55.17-1, states:

> Sufficient illumination to provide safe working conditions and travel through the C-2B tunnel conveyor were not maintained in the tunnel section of the conveyor. Several bulbs were broken and the area at the tail section was not illuminated to provide safe visibility in that section.

Petitioner's Testimony

Inspector Carisoza confirmed that he issued two citations for illumination violations on June 27, 1979. With regard to the C-2A tunnel, he stated that he did not count the number of broken and burned-out light bulbs, but there were at least three which were broken. He walked the entire length of the tunnel and his visibility was impaired due to the broken and burned-out bulbs. He did not have clear floor vision in the dark areas and he had to take extra precautions when walking from area to area so that his eyes could focus. He had no additional lighting source with him because he was not aware of the conditions present when he entered the tunnel. In his opinion "sufficient illumination" is that illumination which provides enough illumination for a person to walk safely and travel where his visibility is not impaired and this was not provided in the C-2A tunnel because one could not see the travelway, walkway, or structures in certain areas without straining the eyes. The hazards presented included tripping and falling over spillage, obstructions, and wet areas, and water was on the flooring. Although he saw no employees in the tunnel, he observed footprints which indicated that employees had been there. He believed the respondent should have known about the conditions cited because the tunnel illumination should be checked at the beginning of the shift and burned-out bulbs should be reported. The conditions were abated within the time specified by replacing the defective light bulbs (Tr. 85-88).

With regard to the C-2B tunnel, Inspector Carisoza stated he could not recall the number of broken bulbs, but there was an excess of three. Due to the restricted visibility, he could not tell whether there was any light in the tunnel tail section which measured some 15 to 20 feet. He walked to the tail section and since the lighting was bad, he exited the tunnel and advised mine management to "fix the lighting before we go in there." He observed two employees coming out of the tunnel, and in his view, the illumination was insufficient to provide safe working conditions. The sufficiency of the lighting is determined by the mine operator, and once installed, it must be maintained in operable condition to provide sufficient illumination. Had all the light bulbs been operating, the illumination would have been adequate. Employees are in the tunnel to check rollers or perform maintenance and the hazards of lack of sufficient illumination consist of tripping, stumbling, or striking solid objects and the head clearance is restricted. The respondent should have known about the conditions cited because routine inspections would have disclosed the conditions. The defective bulbs were timely replaced (Tr. 88-93).

On cross-examination, Inspector Carisoza testified that some bulbs in both tunnels were on, but he did not know the bulb wattage. He did not determine the light fixture intervals, and he indicated that had twice the amount of light been provided there would still be a violation if every other light is out. He determines a violation on the basis of the effect of the illumination on visibility. As an exmple, if 20 lights are installed and one is burned out, if visibility is affected in the area of the burned-out light, that is a problem. A tunnel is approximately 150 feet long and

while he did not know how many light bulbs were on in the tunnels in question, there were more than three in each one. He saw no one working in the C-2A tunnel, but if someone were there to perform work and took in a portable light to provide sufficient illumination, that would comply with section 55.17-1. He did not have a light meter and could not estimate the foot-candles of illumination in the tunnels (Tr. 93-97).

Inspector Carisoza testified that the hazards in the C-2A tunnel were higher than those in the C-2B because of excessive spillage and the lighting at the location of the spills at two chutes was insufficient. While the locations where there were defective bulbs were not pitch black, one had to be there awhile in order to see, and even then visibility was marginal (Tr. 97-100).

In response to bench questions, Inspector Carisoza confirmed that he cited the violations because respondent failed to maintain the illumination as installed. Once an operator determines his lighting needs and installs light fixtures, they are required to be maintained. He determined the lack of sufficient illumination on the basis of the fact that light bulbs were burned out and in those locations he could not see. At the time the citations were issued, the requirement that work places be routinely inspected was not a mandatory standard (Tr. 102-105).

Respondent's Testimony

Superintendent Gaines confirmed that he was with the inspector when the conditions cited were observed. He described the tunnel areas in question and indicated that the light fixtures are spaced approximately 20 to 22 feet apart and that each light bulb generates 200 watts. He observed burned-out bulbs but did not recall any two in a row being out. The work activity performed in both tunnels is the same and the normal work activity in the tunnels is very low. In his view, the hazards requiring visual detection are slight, and while the heater areas would be the only problem areas, the company is very conscious of the lighting in those areas. Bulbs are kept in stock and replaced on a regular basis, and portable lights are stocked and used as necessary. With the exception of the broken light fixture at the tail pulley of the C-2B tunnel, he did not believe the burned-out bulbs presented a visibility hazard. No one was working at the tail pulley and portable lights were available if work had to be performed at that location. Due to the great deal of vibration in the tunnels, lights can go out at any time. Allowing for eye adjustments from the outside natural light and the tunnel artificial light, he believed there was sufficient lighting to detect any obstructions along the walkway, and employees carry their flashlights into both tunnels (Tr. 106-110).

On cross-examination, Mr. Gaines testified that no portable lighting was provided when he accompanied the inspector, and while he usually carries a flashlight, he could not recall whether he had one with him. Employees may or may not carry flashlights and this depends on their judgment as to

the need for one at any given time. He confirmed that there was no lighting in the tail section of the C-2B tunnel due to a broken fixture, but the walkway stopped at that location. The broken fixture was in a room which encloses the tail pulley, and the only person who would have a need to be there is a lubrication man (Tr. 115-117).

Findings and Conclusions

Fact of Violation

Citation No. 375204, June 29, 1978, and Citations 375450 and 375451, June 27, 1978, charge the respondent with violations of the provisions of 30 C.F.R. §§ 55.20-3 and 55.20-3(a), and the cited safety standards state as follows:

> At all mining operations: (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly. (b) The floor of every workplace shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable. (c) Every floor, working place and passageway shall be kept free from protruding nails, splinters, holes, or loose boards, as practicable.

Citation No. 375204 concerns alleged accumulations of materials in a balcony area of the H-4 take-up pulley conveyor belt, and Citation Nos. 375450 and 375451 concern accumulations of materials on the walkways in the C-1 and C-2A conveyor belt tunnels. In each instance the inspector found that the materials impeded safe access for the employees and constituted dangerous slipping and falling hazards. With regard to Citation No. 375204, the inspector indicated that it was more or less a "housekeeping" violation, did not believe it was a "safe access" violation, and he observed no other conditions constituting violations on the balcony area in question. The other two citations resulted from used metal parts which were apparently not removed from one tunnel area after maintenance, and relatively small amounts of spillage which apparently resulted from a faulty conveyor belt.

With regard to the existence of the conditions as cited in each of the three citations, I conclude and find that MSHA's evidence and testimony supports each of the citations and that the conditions cited constitute violations of the cited standards. The testimony of the witnesses produced by the respondent does not rebut the crucial testimony of the inspector as to the existence of the materials accumulations in question, but rather, goes to the question of the seriousness of the conditions presented. Under the circumstances, I find that MSHA has established the fact of violation as to each of the three cited citations. The cited standard requires that all working places and passageways be kept clean and orderly, and based on the testimony and evidence that work is in fact done at each of the locations

cited, the areas in question were "working places" within the meaning of that term as found in 30 C.F.R. § 55.2(d). Under the circumstances, all three citations are AFFIRMED.

Negligence

With regard to Citation No. 375204, respondent's witness Gaines attributed the buildup of accumulations on the balcony area to a malfunctioning scraper belt washer and a corroded trough. Although he indicated that repairs could not be made while production was going on, I cannot conclude that the accumulations were something that occurred over a short period of time or that respondent was totally unaware of them. To the contrary, I find that the conditions cited should have been corrected earlier without the need for a citation and that respondent failed to exercise reasonable care to prevent the violation which it knew or should have known existed, and that its failure to do so constitutes ordinary negligence.

With regard to Citation Nos. 375450 and 375451 concerning the failure to keep the cited tunnel walkways clean of material spills and extraneous materials, I conclude that the testimony and evidence adduced in these proceedings supports findings that the respondent was aware of the conditions and that it failed to exercise reasonable care in correcting the conditions. Superintendent Gains conceded that certain excess conveyor parts such as rollers, an idler frame, and pan liners were left in the tunnels after prior maintenance had been performed, and while he alluded to certain cleanup procedures, I am not convinced that cleanup in the tunnels was performed in any regular or routine way. Under the circumstnaces, I find that the citations resulted from ordinary negligence.

Gravity

The citation issued by the inspector concerning the balcony (375204) states that failure to clean the balcony area "prevented safe access." However, this conclusion is contradicted by the inspector's testimony which indicates that this was not the case. Further, the inspector testified that it was not probable that one would fall off the balcony, that he observed no one there when he cited the violation, that employees are not normally in the area while production is going on, and he characterized the citation as a "housekeeping" infraction. Under the circumstances, I cannot conclude that the conditions cited were serious, and I find they were not.

With regard to Citation Nos. 375450 and 375451, I find that the testimony and evidence adduced supports a finding that these were serious violations. Respondent's own witness (Gaines) conceded that persons could slip on the inclined tunnel walkways if they were not careful and that one would have to maneuver his way around some of the spillage which was present. The fact that he could do it safely is beside the point. The presence of accumulations which requires one to climb over or around them presents additional hazards which would not be present if the accumulations had been cleaned up.

Although Mr. Gaines indicated that employees are not permitted in the C-1 tunnel while the conveyor is running, certain designated employees are present while the conveyor is running in the C-2 tunnel, and to this extent, the presence of employees in a tunnel walkway area which is obstructed increases the hazards presented. Coupled with the limited clearance in both tunnels, and the inspector's testimony concerning the overall tunnel conditions he observed on the day in question, I can only conclude that the citations were serious and respondent's testimony and evidence has not convinced me otherwise.

Fact of Violations

Citation Nos. 375452 and 375453, both issued on June 27, 1978, allege violations of 30 C.F.R. § 55.17-1, in that the inspector believed that sufficient illumination was not maintained in the C-2A and C-2B tunnels due to broken and burned out ligh bulbs. Section 55.17-1 provides as follows: "Mandatory. Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas."

In addition to the arguments advanced at the hearing with respect to these citations, the parties were afforded an opportunity to submit additional arguments in support of their respective positions, but they declined to do so. Accordingly, I have considered the arguments made at the hearing by the parties.

In support of its position, respondent argues that the mine in question also comes under the illumination standards established by California OSHA (Exh. R-2). That standard only requires as a minimum a very low level of illumination, or half-a-foot candle power. Since the cited MSHA standard only requires that "sufficient illumination shall be provided," respondent argues that this standard is too vague to provide any meaningful guidelines for compliance and that the OSHA standard is sufficient for compliance (Tr. 111). Respondent maintains that the intent of the cited standard deals with the number of light fixtures which are required to maintain sufficient lighting and not with the question of whether light bulbs are burnt out. The essence of respondent's defense is that MSHA must first establish a standard as to the amount of illumination required, i.e., a fixed number of light fixtures spaced at appropriate intervals to provide sufficient lighting, and if it can show that the required amount of illumination is not maintained, then it can support a violation.

Respondent maintains that the fact that a light bulb may be burned out is insufficient to establish a violation, unless MSHA can establish that the illumination which remains from the other fixtures is not sufficient to provide adequate candle power to insure sufficient lighting for the workplace in question. The question of whether a violation has occurred is dependent on the amount of lighting provided in an area where work is being performed, taking into account any hazards presented by the lack of adequate lighting. Since the inspector failed to establish the required illumination standard

in the first instance, and since he failed to make any tests with a light meter or other device to establish his conclusion that the lighting was not adequate, respondent maintains that MSHA has failed to carry its burden of proof.

MSHA takes the position that it is incumbent on an operator to establish his own illumination standards, and that once light fixtures are installed and maintained through the use of workable fixtures and bulbs which are burning, he has met the requirements of section 55.17-1. However, if a fixture is inoperative or a bulb is burned out, MSHA seemingly maintains that the standard is violated per se because sufficient illumination has not been maintained.

The inspector testified that he had difficulty in seeing where he was going in the tunnel because his vision was impaired by the burned out light bulbs and he did not have clear vision. Although some of the bulbs were burning, the inspector made no effort to ascertain the remaining wattage, nor did he utilize a light meter to determine the actual lighting and he made no estimate of the existing candle power of illumination in the tunnels in question. He simply concluded that the lighting was insufficient and the sole basis for this conclusion was the fact that bulbs were burned out at several locations and he had some difficulty seeing. Although he guessed that three bulbs were burned out, he did not count the number of bulbs which were in fact burned out and had no idea as to the total illumination which was in fact present in the tunnels on the day the citations issued. When asked whether he believed there was sufficient lighting for one to detect any obstructions along the walkway, the inspector replied "Once an individual will allow their eyes to adjust from the bright light outside to the artificial light inside the tunnel, I would say yes. Now, there is a transition period there" (Tr. 109-110). He also indicated that employees do carry flashlights with them while in the tunnels (Tr. 110).

Respondent's witness Gaines testified that while some bulbs were burned out, he could not recall any two in a row being burned out. Allowing for a period of time for the eyes to adjust from the outside natural light, he believed there was sufficient lighting to alert anyone as to any stumbling hazards or obstructions along the tunnel walkways. He conceded the fact that the light fixture at the tail section of the C-2B tunnel was broken and inoperative, but indicated that the walkway ended at that location. Further, he indicated that the fixture was located in a room which encloses the conveyor tail pulley and that the only person who had any need to be there would be a lubrication man.

After careful review of the evidence adduced and the arguments advanced by the parties with respect to their respective positions, I conclude that respondent's arguments are well taken. I agree with respondent's assertion that section 55.17-1, is very broad and somewhat vague in that the question of sufficient illumination leaves much to the imagination. I fail to understand how an inspector can determine that the existing lighting is insufficient when he not only fails to take a light meter test, but also has not determined the amount of existing lighting. On the facts here presented, it

would appear that the lighting was sufficient enough to permit the inspector to walk through the tunnels to make his inspection. The inspector conceded that he had no problem with the visibility once his eyes adjusted to the tunnel conditions and that bulbs were in fact burning at least in every other light fixture which he observed, and respondent's evidence indicates that the existing light was sufficient enough to permit detection of any obstacles which may have been on the walkways. Under the circumstances, with respect to Citation No. 375452, I find that MSHA has failed to establish a violation by any credible evidence which establishes the inspector's assertion that the lighting along the C-2A tunnel walkway was insufficient, and that citation is VACATED.

With respect to Citation No. 375453, although I cannot conclude that MSHA has established that there was insufficient lighting along the walkway of the C-2B tunnel, it has established that there was no lighting at all in the room which housed the conveyor tail section due to the fact that the light fixture itself was completely broken. Although the walkway may have ended at that location, the broken light fixture provided no light at all and respondent has conceded this fact, as well as the fact that a lubrication man would be exposed to a hazard at that location due to the absence of any light. In these circumstances, I find that the failure to provide any lighting at all in the room in question constituted a violation of section 55.17-1, and to this extent the citation is AFFIRMED.

Negligence

With regard to Citation No. 375453, I find that the respondent should have been aware of the fact that the light fixture in the C-2B tunnel conveyor tail pulley room area was inoperative and provided no lighting at all. I find that the condition cited resulted from respondent's failure to exercise reasonable care to correct a condition which it knew or should have known existed and that this failure on its part constitutes ordinary negligence.

Gravity

I find that Citation No. 375453 is a serious violation. Respondent's witness Gaines conceded that the failure to provide any lighting in the conveyor tail room area presented a visibility hazard, and while it was true that no one was in the area on the day the citation issued, the fact is that a lubrication man is normally in the room performing work and the absence of any lighting increased the hazard presented and exposed him to potential injuries.

History of Prior Violations

The parties stipulated that the mine in question has no prior history of violations and I conclude that on the basis of the record in this proceeding any increased assessments on the basis of any asserted prior history is not warranted.

Size of Business and Effect of Civil Penalties on Respondent's Ability to Remain in Business

On the basis of the stipulated annual mine production of four million tons of iron ore, I conclude that respondent's mining operation at its Eagle Mountain Mine and Mill was a large mining operation, and the parties have stipulated that any civil penalty assessments levied in this matter will not adversely affect respondent's ability to continue in business.

Good Faith Compliance

The evidence and testimony adduced in these proceedings support a finding that as to all proven violations, the respondent timely abated the conditions, and I conclude that they were timely abated in good faith.

Penalty Assessments

On the basis of the foregoing findings and conclusions made in these proceedings, civil penalties are assessed for each citation which has been affirmed as follows:

Citation No.	Date	30 C.F.R. Section	Assessment
375204	06/28/78	55.20-3	$ 35
375450	06/27/78	55.20-3(a)	$125
375451	06/27/78	55.20-3	$200
375453	06/27/78	55.17-1	$ 90

On the basis of the foregoing findings and conclusions made in these proceedings, Citation No. 375452, June 27, 1978, alleging a violation of 30 C.F.R. § 55.17-1, is VACATED.

On motion by the petitioner during the hearing, Citation No. 375455, June 27, 1979, alleging a violation of 30 C.F.R. § 55.14-6, is VACATED.

ORDER

The respondent IS ORDERED to pay the civil penalties assessed by me in these proceedings in the amounts shown above, totaling $450 within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge

Distribution:

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 19 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings Docket No. WEVA 79-354 A.O. No. 46-01431-03026V
v.	:	Four States No. 20 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. WEVA 79-355 A.O. No. 46-01433-03044V
	:	Loveridge No. 22 Mine

DECISION AND ORDER

Based on an independent evaluation and de novo review of the information furnished at the settlement conference of February 12, 1980 and in the conference call of March 13, 1980, I conclude the proposal to settle these two unwarrantable failure 75.400 violations should be approved even though MSHA's policy of charging multiple violations as a single violation is clearly contrary to section 110(a) of the Act.

The record shows that in Order 814147 the inspector charged the operator with failing to clean up combustibles in four separate and distinct areas on the numbers 1 and 2 conveyor belts and its contiguous crosscuts for a distance of 2,500 feet or approximately one-half mile. The inspector also charged the operator with failing to report the hazardous conditions in its preshift reports.

Despite this, it is the position of the Solicitor and MSHA that only one violation occurred because the inspector apparently has absolute and uncontrolled discretion to treat multiple violations relating to the "same area of the mine" as a single violation. See Memoranda to District Managers from Cook and Shepich dated October 29, 1976 and October 3, 1979, copies attached.

This policy of soft enforcement is, I submit, contrary to the best interests of the miners as well as the declared purposes and policy of the Act. Section 110(a) and its predecessor section 109(a) have always provided that "each occurrence of a violation" is to be treated as a separate offense, regardless of the area, and certainly violations of separate standards wherever found should be treated as separate offenses.

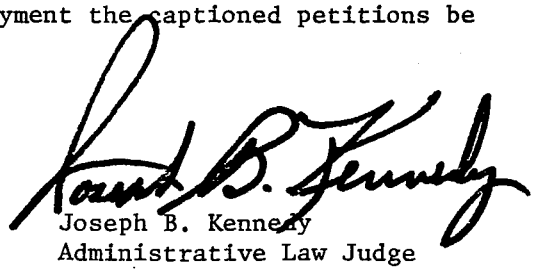
Here four separate and distinct violations of 75.400 have been joined with a violation of 75.1802 in one order. And while I have no difficulty in reading the order as charging five separate and distinct violations, MSHA and the Solicitor claim that because the five occurrences are recorded on one piece of paper and on one order they must, regardless of the law and logic, be treated as one violation for the purpose of (1) assessing a penalty and (2) for recording the violations on the operator's history.

This may be good "policy" and even better "special interest" politics but I firmly believe it is weak enforcement. Small wonder that the operators consider the penalty assessment program little more than a "cheap nuisance".

The situation is even more aggravated with respect to Order 813910. There the inspector wrote one unwarrantable failure order to cover eight separate and distinct violations of 75.400 on a longwall conveyor belt, its auxiliary transport belt, and in adjacent return airways. As the mine maps submitted for both these orders show, it strains credulity to accept the view that "the same area of the mine" was involved in these thirteen violations. The flaw in this argument, however, is that this is not the relevant criterion. How Messrs. Cook and Shepich were ever advised that the law condones "multiple violations" of the same or different standards if they occur in "the same area of the mine" is difficult to understand. I can find nothing in the Act or its legislative history which indicates Congress intended violations to be cheaper by the dozen. I think the Labor Department's position is bad law and worse policy.

For these reasons, I refused to accept the parties original settlement proposal which was to reduce the total penalty as assessed from $4,000 to $1,750. The final agreement is to pay $4,500.

Accordingly, it is ORDERED that the motion to approve settlement, as amended, be, and hereby is GRANTED. It is FURTHER ORDERED that the operator pay the settlement agreed upon, $4,500, on or before Friday, April 4, 1980 and that subject to payment the captioned petitions be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

Attachments (2)

Distribution:

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

Samuel P. Skeen, Esq., Consolidation Coal Company, Consol Plaza, Pittsburgh, PA 15241 (Certified Mail)

Memorandum

To: District Managers, Coal Mine Health and Safety

From: Acting Assistant Administrator--Coal Mine Health and Safety

Subject: Notices and/or Orders Citing Multiple Violations

During the past several months attorneys in the Associate Solicitor's Office, Mine Health and Safety, and Chief, Office of Assessments have expressed concern respecting the practice of citing multiple violations of mandatory health or safety standards in a single notice of violation (or a Section 104(c) Order) issued pursuant to Section 104 of the Act. Apparently such practices cause some problems in effectively implementing the Act. It makes it difficult for the Assessments Office, and in turn, the trial attorneys in the Associate Solicitor's Office, to identify and charge the operator with each violation observed and listed in the notice (or (c) order). In many instances where a single notice described or listed several violations there was only one inspector's statement and only one "reasonable time" for abatement. This practice has resulted in some violations not being recognized, assessed, or counted in the operator's history of violations.

Effective upon receipt of this memorandum, in order to more effectively administer the Act and its purposes, each violation observed by an inspector and cited pursuant to Sections 104(b), 104(c) or 104(i) shall be cited in a separate Notice of Violation or Order of Withdrawal.

The basic rule to be followed is that violations of separate standards on one piece of equipment or identical violations on separate pieces of equipment or identical violations in distinct areas of the mine be cited on separate notices. For example, if two shuttle cars each had the same violation it would be two separate violations charged. If two distinct areas of the mine were inadequately rock dusted there likewise would be two violations.

Code 6033

However, this does not change our policy concerning situations where there are multiple violations of the same standard all of which are observed in the course of an inspection and all related to the same piece of equipment or to the same area of the mine. For example, "Twelve rail joints of the main line track along No. 4 north main entry were not welded or bonded beginning inby No. 2 southwest track switch and extending inby for approximately 800 feet (Sec. 75.514)", or, "Four permissibility defects, which included two openings in excess of 0.005 inch in the plane flange joint of the main contractor compartment, a loose headlight lens on the right (operator's) side headlight, and an unsecured inspection (handhold) cover for the conveyor motor, were detected in the 12 J.M. continuous mining machine in operation in No. 3 entry south mains section (Sec. 75.503)." In each of the above instances, where the occurrences are multiple violations of the same standard which are contiguous or related they may be treated as one violation.

Joseph O. Cook

Acting Assistant Administrator--
Coal Mine Health and Safety

U.S. DEPARTMENT OF LABOR
MINE SAFETY AND HEALTH ADMINISTRATION
4015 Wilson Boulevard
Arlington, Virginia 22203

OCT 3 1979

MEMORANDUM FOR: DISTRICT MANAGERS

FROM: THOMAS J. SHEPICH
Administrator for Metal and
Nonmetal Mine Safety and Health

SUBJECT: Citations and Orders Citing
Multiple Violations

Effective upon receipt of this memorandum, in order more effectively to administer the Act and carry out its purposes, each separate violation observed by an inspector and cited pursuant to section 104 of the Act shall, except as noted below, be cited in a separate citation or order of withdrawal.

The basic rule to be followed is that violations of separate standards on one piece of equipment, or violations of separate standards in a distinct area of a mine, or identical violations on separate pieces of equipment, or identical violations in distinct areas of a mine, shall be cited on separate citations. For example, if two haul trucks each had the same violation, there would be two separate violations charged. Likewise, if two distinct areas of a mine had loose rock in the back, there would be two separate violations charged.

However, where there are multiple violations of the same standard which are observed in the course of an inspection and which are all related to the same piece of equipment or to the same area of the mine, such multiple violations should be treated as one violation and one citation should be issued. For example, "Loose ground was observed in four places of the haulageway between 3 switch and No. 4 x-cut" (57.3-22); or, "At the crusher power control panel insulated bushings were not provided where insulated wires entered five of the metal switch boxes" (55,56, 57.12-8).

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MAR 19 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 79-338
	:	A.O. No. 46-01382-03013V
v.	:	Guyan No. 4 Mine
ISLAND CREEK COAL COMPANY, Respondent	:	

DECISION AND ORDER APPROVING SETTLEMENT

The Solicitor filed a motion to approve a settlement in this matter for $375. The amount originally proposed was $750.

The violation was due to Respondent's failure to comply with its roof control plan. Specifically, the motion stated that "wide places had been driven in five entries at the inspected mine in violation of the roof control plan." The motion continued that there is a serious dispute as to what the roof control plan required.

The motion stated that a West Virginia state inspector accompanied the MSHA inspector on the day in question, and issued a citation for the same condition.

The state inspector re-inspected on the next day and terminated his citation. When the MSHA inspector re-inspected a day later, he determined that the violation was not sufficiently abated and issued a withdrawal order. The motion stated that since the state inspector agreed with the operator that the condition was promptly abated, there is a dispute as to the operator's negligence which justifies a reduction in the proposed penalty. Additionally, the motion indicated that the mine had been closed since September 1979.

Upon consideration of the motion and the six criteria set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977, I find that the proposed settlement is sufficiently substantial to effectuate the purposes and policies of the Act and I approve the settlement.

ORDER

Respondent is ORDERED to pay $375 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge

Distribution:

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MAR 19 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. PENN 79-160 A.O. No. 36-05123-03010
v.	:	Solar No. 7 Mine
LUNAR MINING COMPANY, Respondent	:	

DECISION AND ORDER APPROVING SETTLEMENT

The Solicitor filed a motion to approve a settlement in this matter for $478. The amount proposed by the MSHA Assessment Office for these eight citations was $736. The motion indicated that the six criteria set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977 were considered during settlement negotiations.

Citations 09903940 and 09904033 were issued because Respondent failed to submit timely respirable dust samples as required by 30 C.F.R. § 70.250. The Assessment Office recommended that penalties of $84 be assessed for each of these citations. The motion stated that penalties of $38 for each citation would be more appropriate. According to the motion, Respondent is experiencing financial difficulty, and to save money has asked an affiliated mine to take dust samples for Respondent's miners. It is thus asserted that Respondent was not negligent in failing to submit timely samples. I have serious reservations about this explanation. I do not believe that Respondent can avoid having the negligence of the "affiliated mine" imputed to it, especially when the affiliated mine was apparently retained specifically for this purpose. However, in view of recent challenges to the respirable dust program which make the outcome of this case far from certain, I believe the recommended settlement is appropriate and I approve it.

Citation 0617653 was issued because a line brattice used to provide ventilation to the working face was installed more than 10 feet from "the area of deepest penetration to which any portion of the face has been advanced," in violation of 30 C.F.R. § 75.302-1(a) and the mine's ventilation plan. The motion stated that while Respondent's negligence was low, this was a serious violation because trace amounts of methane had been detected shortly before this area of the mine was inspected. Accordingly, the need for adequate ventilation was especially great. I agree with the Solicitor that the full $72 proposed penalty is an appropriate assessment.

A $122 penalty was proposed for Citation 0617655, involving a violation of 30 C.F.R. § 75.503. A lock washer was missing from under a bolt in the bottom of the main contactor compartment of a shuttle car which rendered

the car impermissible. The motion stated that Respondent's degree of negligence was low because it was difficult to detect the defect. The motion urges that because of the low degree of negligence, a $56 assessment is appropriate. I agree.

Citation 0617657 was issued when it was discovered that inadequate ventilation was reaching a working face of Respondent's mine because of a loose line brattice. This constituted a violation of Respondent's ventilation plan. See 30 C.F.R. § 75.316. The motion stated that an assessment of $84 is more appropriate for this violation than the $160 proposed by the Assessment Office. This is purportedly because of Respondent's low degree of negligence since the brattice had been properly installed, and was secure against the roof during earlier inspections. I approve that recommended settlement.

For Citations 0617658 and 0617659, the motion stated that the original proposals of $48 and $44 respectively are appropriate assessments. Citation 0617658 involved another violation of 30 C.F.R. § 75.316, while Citation 0617659 involved an ommission on the mine's electrical map. See 30 C.F.R. § 75.508. I agree.

The final violation, Citation 0617660, was issued for not complying with 30 C.F.R. § 75.313, which requires an operative methane monitor on all electric face cutting equipment. Respondent was cited for having an inoperative monitor on a continuous mining machine. The Assessment Office proposed a $122 penalty. The motion stated that this should be reduced to $93 since (a) the miner operator carried a methane testing lamp at all times, and (b) the Solar No. 7 Mine had never previously liberated methane, nor has any methane been detected since the issuance of the citation. However, trace amounts of methane had been detected in the section in which the violation was cited. I approve the recommended settlement for this citation.

ORDER

Respondent is ORDERED to pay $478 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge

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Ron Corl, Lunar Mining, Incorporated, 900 - Mine 42, Windber, PA 15963 (Certified Mail)

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MAR 19 1980

SECRETARY OF LABOR, on behalf of William F. Hamrick & John L. Meadows, Applicants	:	Complaints of Discharge, Discrimination, or Interference
	:	Docket No. WEVA 80-48-D
v.	:	
	:	CD 79-183
ISLAND CREEK COAL COMPANY, Respondent	:	Birch No. 2-A Mine

ORDER OF DISMISSAL

The Secretary's October 12, 1979 Complaint alleged that in failing to pay Respondent's employees, William F. Hamrick and John L. Meadows, for one day that each spent accompanying MSHA inspectors during respirable dust inspections, Respondent discriminated against these employees in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (the Act). Respondent's Answer, filed on December 20, 1979, denied these allegations.

In my January 15, 1980 Order to Show Cause, I indicated my understanding that the Commission's decision in Secretary of Labor, Mine Safety and Health Administration v. The Helen Mining Company, Docket No. PITT 79-11-P, mandates dismissal of this case. Accordingly, I directed Applicants to show cause why this case should not be dismissed.

Applicants' January 21, 1980 Response opposed dismissal. Applicants argued that the decision in Helen Mining was incorrect, was appealed to the United States Court of Appeals for the District of Columbia Circuit, and that "these proceedings should be stayed or held in abeyance because failure to stay these proceedings will result in (1) irreparable harm to the Applicants, (2) irreparable harm to the public interest, (3) no harm to Respondent and because there is a strong likelihood of success on the part of the Secretary of Labor."

Applicants have failed to disuade me of the view that this matter should be dismissed without prejudice. This matter comes fully within the scope of the Commission's decision in Helen Mining which, along with all other Commission decisions, is binding on me. I am not persuaded that a dismissal of this case will result in irreparable harm either to Applicants or to the "public interest." This case involves a relatively small monetary claim based upon one day's pay for each of two miners. Irreparable harm presupposes the absence of an available remedy either administrative or judicial. Sink v. Morton, 529 F.2d 601, 604 (4th Cir. 1975). The Random House College Dictionary (1973 ed.) defines irreparable as "incapable of being rectified, remedied or made good."

In addition, it is not within my province to "handicap" the prospects of successful appeals of Commission decisions. It is true that two highly respected Commission members dissented in Helen Mining; however, three other highly respected Commission members, including the Chairman, formed a majority.

Finally, even successful appeals are time-consuming. In general, I am opposed to retaining cases in an inactive status on this office's dockets while a higher authority decides similar cases. A preferable solution is to dismiss the case without prejudice to reinstitution at such time as may be appropriate.

ORDER

This case is DISMISSED WITHOUT PREJUDICE.

Edwin S. Bernstein
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 19 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. VA 80-31 A.O. No. 44-00294-03018
v.	:	Mine: Virginia No. 1
EASTOVER MINING COMPANY, Respondent	:	

ORDER OF DISMISSAL

Petitioner filed the following Motion to Hold in Abeyance:

"The Secretary of Labor, by his attorneys, hereby requests an Order holding in abeyance Respondent's Motion to Dismiss in the above matter. As grounds therefor, the Secretary submits:

"1. The Citations alleged violations of § 103(f) of the Federal Mine Safety and Health Act of 1977 resulting when three employees of Respondent suffered a loss of pay when accompanying an authorized representative of the Secretary on other-than-regular inspection of the mine.

"2. This issue is now pending an appeal from the Review Commission's decisions in Helen Mining Company, 75-2518, 79-2537 (D.C. Cir.), and Kentland-Elkhorn 79-2503, 79-2536 (D.C. Cir.).

"WHEREFORE, the Secretary requests that Respondent's aforesaid Motion be held in abeyance until a decision is rendered in the above-mentioned cases."

Respondent did not oppose the motion.

In Secretary of Labor, Mine Safety and Health Administration (MSHA) v. The Helen Mining Co., Docket No. PITT 79-11-P, 1 FMSHRC Decs. 1796 (1979), appeal docketed, No. 79-2537 (D.C. Cir. Dec. 21, 1979) and Kentland-Elkhorn Coal Corporation v. Secretary of Labor, Mine Safety and Health Administration (MSHA), Docket No. PIKE 78-399, 1 FMSHRC Decs. 1833 (1979), appeal docketed, No. 79-2536 (D.C. Cir. Dec. 21, 1979), the Commission decided that miners were not entitled to "walkaround compensation" under Section 103(f) of the Federal Mine Safety and Health Act of 1977 for time spent accompanying MSHA inspectors on spot and special mine inspections.

Those decisions, which are dispositive of the case at hand, have been appealed to the United States Court of Appeals for the District of Columbia Circuit. Even successful appeals take many months and often even years to prosecute. Generally, I am opposed to retaining cases in an inactive status on this office's dockets pending appeals of similar cases. I feel that a preferable solution is to dismiss the cases pending before me without prejudice to reinstitution at such time as may be appropriate.

ORDER

This case is DISMISSED WITHOUT PREJUDICE.

Edwin S. Bernstein
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 19 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. PENN 80-19
	:	A.O. No. 36-00807-03030
v.	:	Renton Mine
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. PENN 80-21
	:	A.O. No. 36-03298-03013V
	:	Docket No. PENN 80-22
	:	A.O. No. 36-03298-03014
	:	Laurel Mine

DECISION AND ORDER

Based on an independent evaluation and de novo review of the circumstances, I conclude the $95.00 reduction in the penalties initially assessed for citations 622623 and 622624 is justified and in accord with the purposes and policy of the Act.

With respect to the unwarrantable failure violation cited in citation 617909, I conclude the reduction proposed, $200, is unjustified in view of the gravity and negligence involved. The reason advanced, namely that operation of the jeep in low gear reduced the probability that its collision with a miner would be fatal or disabling is unpersuasive. Next to roof falls haulage accidents are the largest cause of fatalities in the mines. The knowing operation of a jeep for 10 days without a braking system that could be rapidly activated is inexcusable. I conclude, therefore, that the initial assessment of $2,000 was fully warranted.

The citation charging a violation of 75.403 is invalid as a matter of fact and law. The standard requires that the incombustible content of a working area on an intake split be "maintained" at 65%. Here only one out of 14 of the band samples showed a deficiency in incombustible content. This is not probative of the allegation that the 2 West Section was not being "maintained" in a properly rock dusted condition at the time the violation was charged.

Accordingly, it is ORDERED that the motion as to citations 622623 and 622624 be, and hereby is, GRANTED. It is FURTHER ORDERED that citation 802789 be, and hereby is, VACATED. Finally, it is ORDERED that the operator pay a penalty of $2,325.00 in full settlement of these matters on or before Friday, April 4, 1980 and that subject to payment the captioned petitions be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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MAR 19 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. VINC 79-213-PM
	:	A.O. No. 33-00523-05001
v.	:	
	:	Summitville Pit and Plant
SUMMITVILLE TILES, INC., Respondent	:	

DECISION

Appearances: Linda Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner;
James D. Primm, Jr., Esq., Lisbon, Ohio, for Respondent.

Before: Administrative Law Judge Melick

Statement of the Case

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., hereinafter referred to as the "Act"). Petitioner filed a proposal for assessment of civil penalty on March 13, 1979, alleging four violations on June 8, 1978, of mandatory safety standards. An evidentiary hearing was held on December 11, 1979, in Wheeling, West Virginia.

Respondent (Summitville) admits the violations but contends that the citations were vitiated by the MSHA inspector's unlawful entry onto its premises. Summitville argues that it consented to the inspection only because the inspector misled it into believing that it would not be subject to penalties for any violations found on such inspection and claims that it had a right under the Fourth Amendment to the United States Constitution to deny entry to the inspector absent a valid search warrant. MSHA concedes that it had no search warrant but argues that none was required. It contends that whether or not Summitville knowingly consented to the search is immaterial.

The issues in this case are (1) whether the inspection herein was lawfully conducted and, if so, (2) what are the appropriate civil penalties for each of the admitted violations.

I. The Legality of the Inspection

Summitville concedes that its clay pit and processing plant is a "mine" as defined in the Act. Section 103(a) of the Act 1/ mandates "frequent inspections" of mines by authorized representatives. It also directs that no advance notice of inspections be provided, and that any authorized representative "shall have a right-of-entry to, upon, or through" any mine. Thus, section 103(a) requires frequent nonconsensual inspections of all mines by authorized representatives. See Secretary of Labor, v. Readymix Sand and Gravel Company, Inc., WEST 79-66-M, December 5, 1979; Secretary of Labor, v. Waukesha Lime and Stone Company, Inc., VINC 79-66-PM, June 5, 1979.

Summitville nevertheless contends that a search warrant is required to make a nonconsensual inspection of its mine under the Act. The established law is to the contrary. In Marshall v. Nolichuckey Sand Company, Inc., 606 F.2d 693, 696 (6th Cir. 1979), a warrantless inspection of a sand and gravel "mine" under the Act was upheld. The court held that the enforcement needs of the mining industry made provisions for warrantless searches reasonable. Similarly, in Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589, 593 (3rd Cir. 1979), cert. den., ___ U.S. ___, (January 7, 1980), a warrantless inspection of the company's sand and gravel preparation plant was found to have satisfied the reasonableness standard set forth by the U.S. Supreme Court in Marshall v. Barlow's, Inc., 436 U.S. 307, 321 (1978). Within this framework of law it is clear that not only does the Act mandate warrantless nonconsensual inspections of "mines" such as the one at bar but that such inspections do not constitute unreasonable searches prohibited by the Fourth Amendment to the United States Constitution. Respondent thus has no right to refuse entry to an MSHA inspector attempting to conduct an inspection directed by the 1977 Act. See also Marshall v. Sink, No. 77-2614, U.S. Circuit Court for the 4th Circuit (January 24, 1980); Readymix Sand and Gravel Company, supra; and Waukesha Lime and Stone Company, supra.

Since a warrantless nonconsensual MSHA inspection of Summitville was legally permissible, it was not necessary to obtain the operator's knowing consent prior to such inspection. It is therefore immaterial whether or not

1/ Section 103(a) of the Act provides in part:

"Authorized representatives of the Secretary * * * 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 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. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided * * *."

such consent was given before the inspection in this case. The inspection was in any event lawfully conducted. Moreover, I find from the credible testimony of Inspector Beauchchamp, corroborated by the operator's agent, plant superintendent Currie, that Beauchamp did not misrepresent the possible consequences of the inspection, and that the operator in fact gave its consent to be inspected. I find that at most, the Summitville Board Chairman Fred Johnson, misunderstood the accurate representations of the inspector.

II. Appropriate Penalties

Respondent has agreed that the violations occurred as charged. In considering the amount of the penalty, I have determined that the operator is small in size (having only six employees), that it had no history of violations and that the penalties would have no affect on its ability to remain in business. Each of the cited violations was promptly abated.

Citation No. 359057 charges one violation of 30 C.F.R § 55.12-34 (relating to the guarding of lights which present a shock or burn hazard by their location). There were at least two unguarded light bulbs located over the bin area and presenting a hazard to the one employee who would occassionally work there. There was only about a 4-foot clearance at that location so an employee could easily hit the exposed bulbs with his head or arms. The resulting shock could have caused serious injury. I find some negligence as the condition should have been observed. A penalty of $32 is appropriate.

Citation Nos. 359058 and 359059 each charge one violation of 30 C.F.R. § 55.9-7 (requiring that unguarded conveyors with walkways be equipped with emergency stop devices along their full length). I find that the likelihood of injury here was probable in that an employee could easily slip or fall against the conveyor and be caught in the rollers. Resulting injuries could be serious, involving potential disability. Negligence existed in that the operator should readily have seen the unguarded conveyor. A penalty of $36 for each violation is appropriate.

Citation No. 359131 charges one violation of 30 C.F.R. § 55.11-1 (relating to safe access to working places). Access to the adjustment plow above the extrusion bin was gained by an 18-inch wide platform with no guardrail. The walkway was used only occasionally to readjust the plow. Injury or fatality from falling into the bin would also have been unlikely since the material would have to be of a certain height and consistency to cause the anticipated hazard of suffocation. I find the operator to have been only slightly negligent with regard to this violation because of the improbability and unforeseeability of an accident. A penalty of $20 is appropriate.

ORDER

WHEREFORE, it is ORDERED that Respondent pay the penalty of $124 within 30 days of the date of this decision.

Gary Mellick
Administrative Law Judge

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MAR 26 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. DENV 79-452-PM
	:	A/O No. 02-00842-05004
v.	:	
	:	Docket No. DENV 79-453-PM
	:	A/O No. 02-00842-05006
	:	
	:	San Manuel Mine
MAGMA COPPER CO., Respondent	:	

DECISION

ORDER TO PAY

Appearances: Marshall Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner, MSHA;
N. Douglas Grimwood, Esq., Twitty, Siegwright and Mills, Phoenix, Arizona, for Respondent, Magma Copper Company.

Before: Judge Merlin

The above-captioned proceedings are two petitions for the assessment of civil penalties for 19 alleged violations of the Act.

At the hearing on February 20, 1980, the docket numbers were consolidated for hearing and decision pursuant to agreement of counsel.

Citations 376617, 376618, 376620 and 376702

These citations deal with inadequate guarding for rod mills. 30 CFR 57.14-1. At the hearing, the Solicitor moved to modify Citation No. 376617 to include the conditions set forth in the other citations and to vacate the other citations. The Solicitor further moved to impose a penalty of $178 for Citation No. 376617, the amount originally assessed for the citations. This was the first inspection of this mine. From the bench, I granted the Solicitor's motions, assessed a penalty of $178 for Citation No. 376617, and vacated the remaining citations.

Citations 376713, 376714, 376715, 376716, 376717, 376718, 376719, 377140, 376711, 377141, and 377142

These citations deal with inadequate guarding for ball mills. 30 CFR 57.14-1. At the hearing, the Solicitor moved to modify Citation

No. 376713 to include the conditions set forth in the other citations and to vacate these other citations. The Solicitor further moved to impose a penalty of $508 for Citation No. 376713, the amount originally assessed for these citations. This was the first inspection of this mine. From the bench, I granted the Solicitor's motions, assessed a penalty of $508 for Citation No. 376713, and vacated the remaining citations.

Citations 377137, 377138 and 377139

These citations deal with inadequate guarding for regrind mills. 30 CFR 57.14-1. At the hearing, the Solicitor moved to modify Citation No. 377137 to include the conditions set forth in the other citations and to vacate the other citations. The Solicitor further moved to impose a penalty of $152 for Citation No. 377137, the amount originally assessed for these citations. This was the first inspection of this mine. From the bench, I granted the Solicitor's motions, assessed a penalty of $152 for Citation No. 377137, and vacated the remaining citations.

Citation 376850

The Solicitor moved to assess a civil penalty of $98 (the originally assessed amount) for Citation No. 376850, which was issued for a violation of 30 CFR 57.17-1. From the bench, I granted the Solicitor's motion and assessed a penalty of $98 for this citation, since I concluded it was consistent with the statutory criteria.

ORDER

The rulings and decisions issued from the bench are hereby AFFIRMED.

The operator is ORDERED to pay $936 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

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MAR 27 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 80-106
	:	A.O. No. 46-04628-03009V
v.	:	Coal Fork No. 1 Mine
CEDAR COAL COMPANY, Respondent	:	

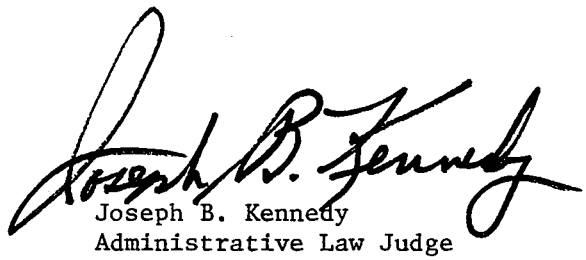
DECISION AND ORDER

The parties move for approval of a settlement of a charge that the operator knowingly premitted an excessive accumulation of loose coal, coal dust and float coal dust to exist for an extended period of time (almost a month) along the numbers 2, 3 and 4 belt conveyors of the 3 Left Section of the Coal Fork No. 1 Mine. The accumulation was very dry and extended for a distance of 1,700 feet at depths of 1 to 5 inches. The inspector's gravity sheet showed the potential for a fatal ignition was high due to the presence of 20 stuck idler rollers and two idler rollers with bad bearings on the number 2 belt. After a conference, the assessment office adhered to its original assessment of $2,000.00 based on a finding that the violation created a serious hazard of a fire or explosion and resulted from the operator's negligence.

Based on an independent evaluation and de novo review of the circumstances, I find the amount of the settlement proposed, $2,000.00, is not in accord with the purposes and policy of the Act. MSHA's conclusion that only one violation occurred is erroneous as a matter of fact and law. See, Consolidation Coal Company, Docket No. WEVA 79-354, (March 3, 1980). The record shows that at least three separate and distinct safety hazards occurred as a result of the operator's unwarrantable failure to institute or adhere to a reasonable cleanup program. It also shows that the violation on the number 2 belt was extremely serious due to the existence of the stuck idler rollers. In addition, the fact that these conditions were reported as hazards in the preshift reports for a period of almost 30 days demonstrates a reckless disregard for safety by top mine management that requires a finding of gross negligence.

For these reasons, I find the amount of the penalty warranted and that best calculated to deter future violations and ensure voluntary compliance is $3,000.00.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, DENIED. It is FURTHER ORDERED the operator pay a penalty of $3,000.00 in full settlement of the violations charged on or before Friday, April 18, 1980, and that subject to payment the captioned petition be DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

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28 MAR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. VINC 78-395-P
Petitioner	:	A/O No. 11-00599-02026 V
v.	:	
	:	Orient No. 6 Mine
FREEMAN UNITED COAL MINING COMPANY,	:	
Respondent	:	

DECISION ON REMAND

Appearances: Leo J. McGinn, Esq., and Sidney Salkin, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Harry M. Coven, Esq., Gould & Ratner, Chicago, Illinois, for Respondent.

Before: Judge Cook

I. Procedural Background

On August 30, 1979, a decision was issued in the above-captioned case which, among other things, dismissed the petition as relates to an alleged violation of 30 C.F.R. § 75.400. This decision was based upon a rule of law established by the predecessor of the Federal Mine Safety and Health Review Commission, the Board of Mine Operations Appeals (Board), of the Department of Interior. In Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978, OSHD par. 22,088 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977), the Board held that the presence of a deposit or accumulation of coal dust or other combustible materials in the active workings of a coal mine is not, by itself, a violation of that regulation. The Board held that other facts had to be proved to establish a violation.

In the Commission's decision in Old Ben Coal Company, 1 FMSHRC 1954, 1979 OSHD par. 24,084 (1979), it held that a violation of 30 C.F.R. § 75.400 occurs when an accumulation of combustible materials exists without the additional requirements set forth by the Board.

On the same date of its decision in Old Ben Coal Company, the Commission also issued a decision in the instant case reversing the decision herein insofar as it dismissed the Secretary of Labor's petition for assessment of a penalty for an alleged violation of 30 C.F.R. § 75.400 and remanded the case for further proceedings consistent with the Commission's opinion in Old Ben Coal Company.

Subsequent to the remand, the parties were accorded the opportunity to submit additional briefs in light of the change in the law occasioned by the Commission's decision in Old Ben Coal Company. The Mine Safety and Health Administration (MSHA) filed a brief on January 30, 1980. Freeman United Coal Mining Company (Freeman) did not file a brief subsequent to the remand. 1/

The two basic issues presented are set forth in Part IV of the August 30, 1979, decision.

II. Violation Charged

Order No.	Date	30 C.F.R. Standard
1 LDC	January 12, 1977	75.400

III. Opinion and Findings of Fact

A. Occurrence of Violation

MSHA inspector Lonnie Conner conducted a regular health and safety inspection at Freeman's Orient No. 6 Mine on January 12, 1977 (Tr. 7). He walked the Main West North conveyor belt, arriving in the area at approximately 9:30 a.m. (Tr. 7). He issued the subject order of withdrawal at 11 a.m. (Tr. 6, Exh. M-1), citing Freeman for violating mandatory safety standard 30 C.F.R. § 75.400 in that accumulations of combustible materials were observed along the Main West North conveyor belt (Tr. 8, Exh. M-1).

Two airlocks were located across the belt travel entry approximately five or six crosscuts from the point where the subject belt dumped onto the Main North belt (Tr. 8). The two airlocks were approximately 70 to 80 feet apart (Tr. 8). Along that 70- to 80-foot distance, the inspector observed float coal dust, coal dust and loose coal (Tr. 8). Immediately inby the first airlock, he observed large accumulations of coal dust and float coal dust (Tr. 8). The coal dust was 5 to 6 inches in depth where the air going through the airlock was blowing it off the belt (Tr. 9). The float coal dust was not only in the belt entry, but also in the intersecting crosscuts and in the entry immediately north of the belt line (Tr. 8). The inspector testified that the instability of float coal dust renders it difficult to measure (Tr. 10).

The inspector proceeded from the inby airlock, traveling west on the south side of the belt (Tr. 10). He observed accumulations of coal and coal dust 2 to 6 inches deep all along the south side of the belt and underneath the belt up to a point 70 feet outby the tailpiece, a distance of approximately 2,300 feet (Exh. M-1, Tr. 10). The 2,300 feet was determined by taking a measurement off the mine map (Tr. 11).

1/ Freeman filed a posthearing brief on March 21, 1979.

Float coal dust was observed on rock-dusted surfaces along the belt entry and intersecting crosscuts from the inby airlock to the 1,150-foot mark (Tr. 12, Exh. M-1).

All depths were measured with a steel tape (Tr. 10, 11). All areas cited were dry, including the float coal dust (Tr. 12). The inspector testified that the belt was in operation and that the conditions were observed during a production shift (Tr. 7), but he did not recall whether coal was being loaded (Tr. 7).

The witnesses disagreed as to the extent of the combustible accumulations. The inspector described them as deep and continuous (Tr. 250), while the testimony of Mr. Peter Helmer, the mine superintendent, portrays a different picture. Mr. Helmer inspected the area cited in the subject order of withdrawal immediately after its issuance (Tr. 267). He testified that he observed intermittent piles containing loose coal, rock and coal dust along the south side of the belt. According to Mr. Helmer, it was not a continuous spillage (Tr. 267). He indicated that a problem existed in that area of the mine with rock falling from the roof and ribs, a condition that makes any accumulation appear more extensive than if it consists only of coal (Tr. 267). However, he did not mention specifically either the presence or the absence of float coal dust in the subject area, while the inspector indicated that the float coal dust was present for a length of 1,150 feet (Tr. 10, 12).

In Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par. 22,088 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977), the Board held that the presence of a deposit or accumulation of coal dust or other combustible materials in the active workings of a coal mine is not, by itself, a violation of 30 C.F.R. § 75.400. The Board held that MSHA must prove:

> (1) that an accumulation of combustible material existed in the active workings, or on electrical equipment in active workings of a coal mine;
>
> (2) that the coal mine operator was aware, or, by the exercise of due diligence and concern for the safety of the miners, should have been aware of the existence of such accumulation; and
>
> (3) that the operator failed to clean up such accumulation, or failed to undertake to clean it up, within a reasonable time after discovery, or, within a reasonable time after discovery should have been made.

8 IBMA at 114-115.

A petition for review of the Board's decision was subsequently filed with the United States Court of Appeals for the District of Columbia Circuit.

On January 16, 1979, the Court, without deciding the merits, remanded the case to the Commission for further proceedings.

In its December 12, 1979, decision, cited supra, the Commission disagreed with the Board's interpretation of the standard and held that a violation of 30 C.F.R. § 75.400 occurs when an accumulation of combustible materials exists in active workings. 2/

Freeman, in its March 21, 1979, posthearing brief, argues that MSHA has failed to prove that an accumulation of combustible materials existed in the mine's active workings as described in the order of withdrawal (Exh. M-1) (Respondent's Posthearing Brief, p. 52). In support of its position, Freeman points to the testimony of Mr. Helmer, which indicates that some rock was intermixed with the accumulations, and argues that samples were not taken and analyzed to determine the combustibility of the accumulation. I disagree with Freeman's theory for two reasons: First, visual observations are sufficient to prove a violation of 30 C.F.R. § 75.400. Coal Processing Corporation, 2 IBMA 336, 345-46, 80 I.D. 748, 1973-1974 OSHD par. 16,978 (1973). Second, the rebutting evidence adduced by Freeman is insufficient to establish that rock was present in sufficient quantities to render the accumulations inert. Accordingly, it is found that accumulations of combustible materials were present in the mine's active workings as described in the order of withdrawal (Exh. M-1). A violation of 30 C.F.R. § 75.400 has been established by a preponderance of the evidence.

B. Negligence of the Operator

The inspector testified that he checked the preshift books, and that the belt had been recorded "dirty" for two shifts prior to his inspection (Tr. 13). Acceptance of the inspector's opinion would establish gross negligence on Freeman's part.

The only notations that the inspector took from the books were the approximate footage marks for the recorded accumulations (Tr. 13). According to the inspector, the belt was recorded dirty from the 790-foot mark to the 818-foot mark and, to the best of his recollection, from the 800-foot mark to the 880-foot mark (Tr. 13), which totaled approximately 107 feet (Tr. 14).

The inspector testified that, in his opinion, the coal and coal dust accumulated "over a period of time" (Tr. 13). Although he never expressed a firm opinion as to the approximate duration of the accumulations' existence, he did state on direct examination that the preshift books indicated that the condition had existed on two previous shifts (Tr. 14). He

2/ When the decision was written in the instant case, the undersigned Administrative Law Judge was required to follow the Board's decision in Old Ben Coal Company in accordance with section 301(c)(2) of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 961(c)(2) (1978).

interpreted this as meaning in excess of 16 hours (Tr. 14). On redirect examination, the inspector testified as follows:

> Q. Mr. Conner, did visual observations which you had before you have any bearing on your determination on how long the accumulations had been there?
>
> A. Yes, sir, they did.
>
> Q. Could you explain how?
>
> A. The accumulations were deep and continuous. In one particular spot, there was more than three ton of coal in one particular spot along the belt that had got there from some kind of dumping. So, I assume, going along with the pre-shift examiners' books, it is my opinion that the accumulations had been there for some time.

(Tr. 249-250).

The inferences drawn from the above-quoted passage, coupled with the inspector's recollection as to the time periods covered in the relevant preshift reports, lead to the conclusion that the depth and extent of the accumulations were interpreted in conjunction with the preshift reports in reaching the conclusion that the coal and coal dust had been present for "some time." These factors evidently led to the conclusion that the accumulations had been present for two shifts, i.e., more than 16 hours.

However, the preshift reports do not support the inspector's time estimate. The report for the preshift examination conducted between 4 a.m. and 8 a.m. on January 12, 1977 (Exh. O-6) recorded a spillage problem on the subject belt between "800" and "850," a distance of 50 feet (Tr. 259). The reports for the preshift examinations conducted between 8 p.m. and 12 midnight on January 11, 1977 (Exh. O-7) and between 12 noon and 4 p.m. on January 11, 1977 (Exh. O-8) reveal no accumulations problems along the subject belt (Tr. 260-261). Thus, a key factor in the inspector's equation has been proven in error, and no credible basis exists in the record to support a finding of gross negligence.

Three workmen and a foreman were assigned to clean the area at the beginning of the shift and were performing their assigned task when the inspector walked the belt (Tr. 37, 266).

In accordance with the ruling of the Commission in the Old Ben Coal Company case, action to eliminate the conditions should have taken place before the 8 a.m. shift began.

In view of the entries contained in Exhibit O-6, the knowledge of the preshift examiner, and the presence of the foreman in the area, it is found that Freeman knew or should have known of the condition. Ordinary negligence has been established by a preponderance of the evidence.

C. Gravity of the Violation

The extensive amount of accumulation is set forth earlier in the decision. The accumulations provided a potential fuel source for a fire. Friction from belt rollers and electricity from a belt drive were identified as possible ignition sources (Tr. 16).

The belt was composed of fire-resistant material (Tr. 274). The belt line was equipped with fire suppression devices and fire sensors (Tr. 273-274).

An explosion could have suspended the float coal dust in the air and thus could have intensified the explosion (Tr. 18, 24). An explosion would most likely occur in the face areas (Tr. 22), and the nearest face areas ranged from approximately 1,000 to 1,500 feet from the various accumulations (Tr. 284-286).

Any person working in the belt entry would have been exposed to physical danger if an ignition had occurred in the entry (Tr. 17-18).

In view of the foregoing, it is found that the violation was very serious.

D. Good Faith in Attempting Rapid Abatement

Additional men were immediately assigned to clean the cited area (Tr. 279). The order was terminated 24 hours after issuance (Exhs. M-1, M-2). Accordingly, it is found that Freeman demonstrated good faith in attempting rapid abatement.

E. History of Previous Violations

The history of previous violations at the Orient No. 6 Mine for which Freeman had paid assessments between January 13, 1975, and October 28, 1976, is set forth as follows: 3/

30 C.F.R. Standard	Year 1 (12 months) 1/13/75 - 1/12/76	Year 2 (9.5 months) 1/13/76 - 10/28/76	Totals
All Sections	182	138	320
75.400	26	26	52

(Note: All figures are approximations.)

3/ See Exhibit 3 filed in Docket No. VINC 78-49-P.

F. Appropriateness of Penalty to Operator's Size

The parties stipulated that Freeman United Coal Mining Company produces approximately 6,221,752 tons of coal per year and that the Orient No. 6 Mine produces approximately 1,159,797 tons of coal per year.

G. Effect on Operator's Ability to Continue in Business

Counsel for Freeman conceded in his March 21, 1979, posthearing brief that assessment of the maximum penalty will have no effect on the operator's ability to continue in business (Respondent's Posthearing Brief, p. 56).

IV. Conclusions of Law

1. Freeman United Coal Mining Company and its Orient No. 6 Mine have been subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969 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 the parties to this proceeding.

3. MSHA inspector Lonnie D. Conner was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the order of withdrawal which is the subject matter of this proceeding.

4. The violation charged in Order No. 1 LDC, January 12, 1977, 30 C.F.R. § 75.400, is found to have occurred as alleged.

5. All of the conclusions of law set forth in Part III, supra, are reaffirmed and incorporated herein.

V. Proposed Findings of Fact and Conclusions of Law

Freeman submitted a posthearing brief prior to the issuance of the August 30, 1979, decision. MSHA submitted a brief following the remand. 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.

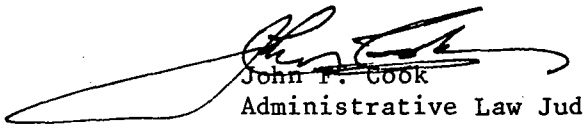
VI. Penalty Assessed

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:

Order No.	Date	30 C.F.R. Standard	Penalty
1 LDC	1/12/77	75.400	$2,750

ORDER

Respondent is ORDERED to pay the civil penalty in the amount of $2,750 assessed in this proceeding 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

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

28 MAR 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 79-111
Petitioner	:	A/O No. 46-01483-03021
v.	:	
	:	Docket No. HOPE 79-318-P
THE VALLEY CAMP COAL COMPANY,	:	A/O No. 46-01483-03017
Respondent	:	
	:	Valley Camp No. 1 Underground

DECISION

ORDER TO PAY

Appearances: Eddie Jenkins, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner, MSHA; Ronald Johnson, Esq., Schrader, Stamp and Recht, Wheeling, West Virginia, for Respondent, The Valley Camp Coal Company.

Before: Judge Merlin

These cases are two petitions for the assessment of civil penalties filed under section 110 of the Act by the Secretary of Labor, petitioner, against The Valley Camp Coal Company, respondent. They were duly noticed for hearing and were heard as scheduled on March 11, 1980. At the hearing, pursuant to agreement of the parties and in accordance with the regulations, the subject docket numbers were consolidated for hearing and decision (Tr. 3).

At the hearing, the parties agreed to the following stipulations (Tr. 6-7):

(1) The operator is the owner and operator of the mine.

(2) The operator and the mine are subject to the jurisdiction of the 1977 Act.

(3) I have jurisdiction of these cases.

(4) The inspector who issued the subject citations was a duly authorized representative of the Secretary.

(5) True and correct copies of the subject citations were properly served on the operator.

(6) Copies of the subject citations attached to the petition are accurate and may serve in lieu of ordinary documentary exhibits.

(7) Imposition of any penalties herein will not affect the operator's ability to continue in business.

(8) All of the alleged violations were abated in good faith.

(9) The operator has a moderate history of prior violations as evidenced by the printout attached to the stipulations which I received on February 7, 1980.

(10) The operator is large in size.

(11) Ordinary negligence was present in all the alleged violations.

(12) All the alleged violations were of ordinary gravity.

(13) The witnesses of both parties are accepted as experts in the field of mine health and safety.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 7-187). 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. 188). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violations (Tr. 193-199).

Bench Decision

The bench decision is as follows:

These cases are two petitions for the assessment of civil penalties. Docket No. HOPE 79-318-P contains three violations, and Docket No. WEVA 79-111 contains two violations.

Both cases and all the violations contained therein present only one issue in dispute between the parties. This issue is whether the Souttell Run Tunnel of the Valley Camp No. 1 mine is covered by Part 75 or by Part 77 of the mandatory standards.

The violations in these cases were issued under Part 75. Accordingly, if Part 75 applies, the violations were issued under the proper sections of the regulations; whereas, if Part 77 applies, they were not. In paragraphs 16 and 17 of the detailed stipulations submitted by the parties prior to the hearing, it was agreed that if I should hold that Part 75 applies, the operator does not contest the fact of violation and agrees to the originally assessed penalties; whereas, if I should hold that Part 77 applies, the parties agree that violations do not exist.

The stipulations as well as the testimony which I have heard today describe the tunnel in very great detail. The tunnel is 9,200 feet long, five to five and a half feet high, and 14 feet wide. No coal is exposed in the entire length of the tunnel. Approximately 4,500 feet of the tunnel is covered by an overburden averaging 100 feet in height, another 4,500 feet of the tunnel is covered by an overburden averaging 120 feet, and approximately 200 feet of the tunnel is covered by an overburden averaging 290 feet in height. Twelve inches to 16 inches of the immediate overburden remaining over the tunnel is coal.

The tunnel contains a conveyor belt 42 inches wide which moves beside a track composed of 40 pound steel rails. A barrier coal pillar of at least 250 feet separates the tunnel from all other areas of the Valley Camp mine. The coal that moves along the belt conveyor in the tunnel has been extracted from the mine and processed through a cleaning plant which admittedly is a surface installation. The coal is then brought by conveyor belt to the tunnel and conveyed through the tunnel to a loading dock along the Ohio River.

The testimony this morning with respect to the structure and functions of the tunnel as compared with the operations which are carried on in the rest of the mine expands upon the stipulations previously submitted.

In my view, the issue presented is a relatively simple one. Section 75.1 states that Part 75 "sets forth safety standards compliance with which is mandatory in each underground coal mine subject to the Federal Mine Safety and Health Act of 1977". Section 77.1 states that Part 77 "sets forth mandatory standards for * * * surface work areas of underground coal mines".

These words mean exactly what they say and what they say is crystal clear. The Souttell Run Tunnel is not a surface work area because it is underground.

The stipulations of the parties and the testimony this morning demonstrates that the entire tunnel is under the ground. If "underground" means anything, it means under the ground. Moreover, it is agreed that this tunnel was driven through coal and that 12 inches of the immediate overburden now on top of the tunnel consists of coal. Also, the tunnel is adjacent to a large area of unmined virgin coal which is part of the subject mine.

This is dispositive. The Souttell Run Tunnel is both underground and part of a coal mine. The words are too clear to admit of any other meaning and I cannot and will not distort them. Part 75 applies and the citations were therefore, issued properly.

Moreover, there is no basis upon which to apply Part 77. Clearly, the tunnel is not a surface work area and to hold that neither Part 75 nor Part 77 applies would be a result at variance with the intent and spirit of the Act. Indeed, even the operator does not contend the tunnel should be left unregulated.

If the operator is not satisfied with the result reached herein, recourse can be had to rulemaking so as to amend the scope of Parts 75 and 77. I would state, as I have stated in other contexts on other occasions, that the administrative law judge is not a substitute for rulemaking.

I decide this case on the foregoing basis. However, a further word appears appropriate. I recognize the testimony from the operator's witnesses that the tunnel is well constructed. I recognize too that the tunnel is used solely to transport coal. Nevertheless, I am persuaded by MSHA's evidence that there are hazards from methane, roof falls, and other circumstances that are peculiar to underground coal mines. And I am persuaded that these hazards apply to this tunnel as well as to other parts of the mine. Certainly, every hazard does not have to apply or be present to the same degree in the tunnel as in the rest of the mine for Part 75 to apply to the tunnel. The fact that methane never has been detected in the tunnel also is not determinative. It is well known that methane can be liberated spontaneously and unpredictably. Finally, I am convinced that the Souttell Run Tunnel is an integral part of the extraction and production process. Admittedly, coal is transported through the tunnel in a somewhat different manner than in areas closer to the actual face. But everything is part of the same process. It makes little practical or legal sense to draw artificial distinctions in what is in fact one continuous activity.

Nor have I overlooked the fact that before the coal enters the tunnel it spends some time above the surface in the preparation plant. This interruption in the coal's presence underground is not, in my view, determinative.

Finally, the Act is to be liberally construed. As already pointed out a conclusion that neither Part 75 nor Part 77 applies is one to be avoided. And as between Part 75 and Part 77 a liberal construction is furthered by the application of Part 75 where, as the evidence I have heard today makes clear, the standards for pre-shift examiners are more stringent under Part 75 than those in Part 77. In addition, Part 75, unlike Part 77, contains specific standards with respect to many items involved, such as fire sensors, water lines, and sanding devices.

Therefore, as an additional but wholly separate reason, I note the foregoing practical and policy considerations which in my view further support the result which is in any event compelled by the precise language of the mandatory standards.

In light of the foregoing, I conclude that Part 75 applies and that, therefore, as the parties have agreed, the citations were properly issued. I have reviewed each of the citations in accordance with the six statutory criteria and based upon this review, I conclude that the originally assessed amounts are appropriate and consistent with the provisions of the law.

Accordingly, the operator is order to pay $372 within 30 days for the violations contained in the subject docket numbers.

ORDER

The foregoing bench decision is hereby AFFIRMED.

The operator is ORDERED to pay $372 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

31 MAR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 80-64
	:	A/O No. 46-05121-03022
v.	:	Wayne Mine
MONTEREY COAL COMPANY, Respondent	:	

ORDER APPROVING WITHDRAWAL

On March 5, 1980, Petitioner filed a motion for approval of the withdrawal of the above-captioned civil penalty proceeding and for the vacation of the citation at issue herein. As grounds for this motion, Counsel for Petitioner asserted the following:

> Citation No. 677462 was issued for a violation of 30 CFR 77.1710(g) for failure to use safety belts and lines while climbing a 40 feet high steel column to a power station.
>
> Futher investigation revealed that the persons who were working without proper safety equipment were employees of the Appalachian Power Company. The respondent, Monterey Coal Company, was in the process of putting in a mine near the location of the transfer station. Appalachian Power Company was to provide the power necessary for that mine. At the time the citation was issued, employees of the Appalachian Power Company were working on the column to the power station in preparation for their own use of this station in supplying power. The respondent exercised no control over the Power Company's work. Nor did the respondent monitor the progress of the Power Company's work in any way. Therefore, the Appalachian Power Company was not acting as an independent contractor of the respondent at the time the citation was issued.
>
> Furthermore, the respondent had granted an easement and an absolute right of way to the Appalachian Power Company in the metering station located at this transformer station. Thus, the power company was not working on respondent's property at the time the citation was issued. The power station exists near the mine, but not on the mine site. In addition, non of respondent's employees are allowed in the power station.

Respondent had relinquished all ownership rights in the property and respondent's employees were never present on the property. Consequently, respondent should not be found liable for a violation.

For these reasons, it has been determined that the citation was issued in error. The inspector who issued the citation has been consulted and he agrees that, under these circumstances, the citation should be vacated and the petitioner withdrawn.

In view of the above, Petitioner's motion is GRANTED.

ORDER

Petitioner's withdrawal of the above-captioned civil penalty proceeding is approved and Citation No. 677462 is vacated. The proceeding is DISMISSED.

Forrest E. Stewart
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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31 MAR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
Petitioner	:	Docket No. BARB 79-209-PM
v.	:	A.C. No. 22-00101-05001
	:	
	:	Docket No. BARB 79-210-PM
AMERICAN SAND & GRAVEL COMPANY,	:	A.C. No. 22-00101-05002
Respondent	:	
	:	Glendale Operations Mine

DECISION

Appearances: Murray Battles, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
R. W. Heidelberg, Esq., Heidelberg, Sutherland & McKenzie, Hattiesburg, Mississippi, for Respondent.

Before: Judge Charles C. Moore, Jr.

The two cases captioned above involve 26 alleged violations of the Federal Mine Safety and Health Act of 1977. Fourteen of those alleged violations involve a charge that Respondent failed to provide adequate guards as required by 30 C.F.R. § 56.14-1 in its three sand and gravel plants. Nine of the alleged violations are concerned with 30 C.F.R. § 56.11-1 which requires safe access to working areas and three involve isolated items such as lack of a handrail, lack of a cover over an open hole, and failure to provide an adequate means of locking out an electrical switchbox. The latter three allege violations of 30 C.F.R. §§ 56.9-7, 56.11-12, and 56.12-16.

Inasmuch as I will find that some of the violations occurred as alleged, I make the following findings regarding the six statutory criteria that must be considered in assessing a civil penalty: Respondent is of moderate size and no penalty that I assess will affect its ability to continue in business. All violations were abated promptly and in good faith and, as a matter of fact, inasmuch as Respondent closed down its mines when the inspector came and did not reopen them until all violations had been abated, I do not see how any better faith could have been shown in abating the violations. Respondent has no prior history of violations and has received three certificates of achievement in safety from the Federal Government. Matters of negligence and gravity will be taken up with respect to each violation that is found to have occurred.

As to the guarding violations, which will be taken up first, it is my conviction that the standard was designed to prevent accidental injuries but was not intended to protect someone who deliberately reaches into a hazardous area. As to the allegations of a failure to provide safe access, it is my view that the standard requires that a respondent provide safe access to a working area but that the standard cannot be used as a catchall to cover actions prohibited by other standards. I do not therefore consider a failure to provide guards as required by 30 C.F.R. § 56.14-1 to be, in addition, a failure to provide safe access.

GUARDING VIOLATIONS AT PLANT A

30 C.F.R. § 56.14-1

Citation No. 081703, alleges that the main V-belt drive pulley on the 1-A dredge was not adequately guarded. The testimony established that the V-belt drive in question was guarded on all sides except underneath the pulley. In order to get caught in the bottom part of the pulley, a person would have to reach under the guard and up, but it was the inspector's opinion, that because certain materials were stored under the pulley someone trying to get material from that area could become caught in an unguarded pinch point. It was in reality not an area which should be guarded but an area where materials should not be stored. I find that the Secretary of Labor has failed to carry his burden of proof with respect to this violation and accordingly the citation is vacated.

Citation No. 081704 alleges that the plant A shaker V-belt drive was not adequately guarded. The V-belt drive was 3 feet above the catwalk and the top part of the pulley was guarded but the bottom was not. It is difficult to ascertain the exact factual situation from the testimony but there was testimony that in order to reach the pinch point, an employee would have to reach around a motor and an electrical box. The pulley itself was 6 inches in diameter, but there was no testimony as to whether the pinch point was at the top of the pulley or the bottom of the pulley. The danger of a pulley 3 feet above the walkway not guarded at the bottom is that in slipping or falling a worker's hand or clothing might engage the pinch point. From the description given, I think it highly unlikely that a miner would accidentally contact the pinch point of the pulley. The citation is vacated.

Citation No. 081705 alleges that the plant A shaker balance wheel was not guarded. This particular balance wheel had spokes and was 5 feet above the work platform. At first there was testimony that it was not guarded, but this was later amended to state that it was guarded, but not adequately. A short set of steps made the wheel, which was 1 foot in diameter, accessible. A 5-foot high unguarded spoked wheel would be covered by the standard regardless of the ladder if it were such that someone walking along the catwalk could accidentally become injured by the moving wheel. I am discounting the ladder because the only purpose of the ladder is to service the balance wheel and the balance wheel is only serviced when it is not working. In

my opinion the standard is intended to cover dangerous areas where a miner might be, but not up on a ladder or a set of steps where there would be no reason to climb were the wheel in motion. I am not convinced that this pulley was unguarded. The inspector changed his testimony because the pulley in front of the balance wheel was guarded. A miner would have to reach around that guarded pulley approximately 2 feet before coming in contact with the balance wheel. I cannot find that the condition was such that someone would accidentally come in contact with the wheel. A picture or diagram might have convinced me to the contrary, but the oral evidence was not sufficient to sustain the Secretary's burden of proof. The citation is vacated.

Citation No. 081710 alleges that the sand pump V-belt drive pulley was not adequately guarded. There was a guard on the V-belt drive pulley that was supplied by the manufacturer but it was the type that was designed to fit down over the drive shafts so there was a portion of the lower part of the guard that contained an opening through which a miner could reach the drive pulley. The notch in the lower part of the guard was approximately 8 by 12 inches and it was the testimony of the inspector that a miner might accidentally fall or reach into this area while shoveling. From the description, I find it was possible for a miner to accidentally engage the V-belt and be injured. I do not find the likelihood of such injury to be high nor do I find the negligence to be of a high order. The violation occurred, however, and a penalty of $30 is assessed.

Citation No. 081711 alleges that the desand conveyor tail pulley was not adequately guarded. The pulley in question is bolted to the outer wall of the plant and normally it is about 10 feet above ground level. Gravel and sand, however, accumulate in the area under the pulley. At the time of the inspection, the accumulation had reached the point where the pulley was only 4 feet above the sand and gravel. The pulley, which was 16 inches in diameter, was covered by a guard which extended approximately 1 foot to the right of the pinch point and approximately 6 inches to the left of it. Court Exhibit No. 1 is a rough drawing of the pulley and guard and, as can be seen, the pinch point is at the bottom of the pulley and somewhat to the left of the center where the moving belt first makes contact with the pulley. The danger point is not the pulley itself, but the point where the belt and pulley meet to create a "wringer" effect which could draw a hand or a miner's clothing into the belt and pulley. As the drawing shows, the guard extended farther to the right than it did to the left, even though the pinch point was on the left side. While I do not think it very likely, I think it is possible for a miner to accidentally become enmeshed in this pinch point. Gravity and negligence are minimal, however. A penalty of $30 is assessed.

GUARDING VIOLATIONS AT PLANT B

Citation No. 081713 alleges that the desand conveyor head pulley was not guarded. The head pulley in question was 3 to 3-1/2 feet above the catwalk next to the conveyor, was 24 inches in diameter, and was unguarded. The inspector saw a man walking near the head pulley and was told that the man had to check the system while it was running. The inspector did not observe

a chain guard that would prohibit someone from approaching the pulley. It was a clear violation, it was hazardous, and Respondent was negligent in allowing the condition to exist. A penalty of $60 is assessed.

Citation No. 081715 alleges that the reclaim conveyor head pulley was not guarded. The head pulley in question was 26 inches in diameter, was located 3 feet above the catwalk and was attached to an I-beam framework which was between the catwalk and the pinch point of the pulley. The pinch point was only 7 inches inside the outer edge of the I-beam and in my opinion, a tripping or slipping miner trying to catch himself might well contact the pinch point. A hazard existed and the violation was established, but negligence was of a low degree because of the channel iron framework around the pulley. A penalty of $30 is assessed.

Citation No. 081716 alleges that the desand pump V-belt drive was not adequately guarded. The unguarded V-belt drive mechanism is located in a framework supporting a tank. This cubicle area below the tank measured 4 feet wide on each of four sides and 6 feet tall. Three of the four sides were guarded with screen mesh. The fourth side was open but was partially blocked by a pump and its supports. It was testified that, while the screened area was not entered while the machinery was working, it would be possible to squeeze into the area beside the pump housing and contact the drive mechanism. (The unguarded drive can be seen at the center of the photograph labeled Respondent's Exhibit No. 1.) While someone could deliberately enter this screened area and become injured, it is not, in my opinion, probable that someone would accidentally fall into or otherwise enter this area. I therefore rule that no violation has been proved with respect to this citation and the citation is accordingly vacated.

Citation Nos. 081717 and 081718 charged respectively that the head pulleys on the long and short conveyors were not guarded. These citations are treated together as the testimony indicates almost identical conditions. Court Exhibit 2 is a drawing of the areas that were guarded. The inspector testified that the pulleys were not guarded, and it is true that there was not a separate guard on each pulley. But in each case there was a V-belt drive driving the head pulley and the V-belt drive was guarded. The pinch point for the head pulley was at the top of the pulley and directly behind the guard for the V-belt drive. Considering the drawing (Court Exh. 2) together with the testimony, I find it highly unlikely that any miner could accidentally be injured by the pinch point of the drive pulley which is some 16 inches behind the guard. The two citations are accordingly vacated.

GUARDING VIOLATIONS AT PLANT F

Citation Nos. 081720 and 81723 both allege that the tail pulley and feed trough areas were not adequately guarded on the concrete conveyor and sand conveyor respectively. The alleged violations are sufficiently similar to be treated together. In both cases (see Respondent's Exh. 6), there is an unguarded pinch point on the troughing idlers which is created by the metal

feed trough. The citations also allege that the tail pulleys themselves were not adequately guarded by the factory-mounted guard. The testimony regarding the pulley itself is not sufficiently clear to determine that a violation existed, but the pinch points in the troughing area were unguarded. As to whether or not the standard requires such guards, I hold that it does and I am attaching hereto my decision in Dravo Limestone Corporation v. MSHA, Docket No. IBMA 77-M-1, (October 28, 1977) which explains why I consider the standard to apply. The violations were serious, but I consider the negligence to be low as it is unlikely that a mine operator would realize that this standard covered idling pulleys in a trough area. A penalty of $30 is assessed for each citation.

Citation No. 081726 alleges that the desand pump V-belt pulley was not adequately guarded. This pulley contained a factory-made guard with a notch measuring 8 by 12 inches, cut so that the guard could be slipped down over a drive shaft. Except for location, the factual situation is the same as that involved in Citation No. 081710 and my findings with respect to this citation are the same. A penalty of $30 is assessed.

Citation No. 081729 alleges that the gravel shaker conveyor tail pulley and an extended shaft were not adequately guarded. The inspector testified that the factual situation, except for location, was the same as that involved in Citation No. 081711. My decision is the same and a penalty of $30 is assessed.

SAFE ACCESS CITATIONS AT PLANT A

30 C.F.R. § 56.11-1

Citation No. 081706 alleges that a safe means of access was not provided for the pea gravel conveyor. The head pulley at the end of the catwalk was unguarded and there was no railing in the area where maintenance was performed on the pulley. There was, however, a chain guard approximately 4 feet from the end of the catwalk where the pulley was located. In order to do maintenance work on the head pulley, it was necessary to cross the chain barrier, but at such times the pulley and belt were not in operation. I think the chain guard is adequate to keep out miners having no work to do in the area, but of course it was not sufficient to keep out out maintenance men who needed access to the pulley to perform their jobs. Since the machinery did not operate while maintenance work was being done, these miners were not endangered by the pulley, but by a falling hazard. It is that falling hazard which, in my opinion, establishes the violation here. The negligence was very low, however, and MSHA has not convinced me that the falling hazard was great. A penalty of $20 is assessed.

Citation No. 081707 alleges that a safe means of access was not provided at the oversize conveyor head pulley. This is the same factual situation as in Citation No. 081706, except for the location. I make the same findings and a penalty of $20 is assessed.

Citation No. 081708 alleges a safe means of access in the load-out conveyor head pulley area was not provided. This is the same situation as in the two previous citations, except for the location and I make the same findings. A penalty of $20 is assessed.

Citation No. 081712 alleges a safe means of access was not provided in the desand conveyor head pulley area. Again, the factual situation, except for location, is the same as in Citation No. 081706 and the two alleged violations considered after that. My findings are the same and a penalty of $20 is assessed.

SAFE ACCESS CITATIONS AT PLANT F

Citation No. 081721 alleges a safe means to perform maintenance was not provided at the concrete sand conveyor head pulley drive. This conveyor had no catwalks or handrailings and the inspector was told "we walk the belt" (Tr. 128) to maintain the conveyor. No safety belts were used and the conveyor is 15 feet above ground. The defense witness indicated that maintenance was performed from the bucket of a front-end loader and that other inspectors had not objected, but I think the defense witness was confused as to which citation he was being questioned about. I find that the violation occurred, that Respondent was negligent, and that a falling hazard existed. A penalty of $40 is assessed.

Citation No. 081722 alleges a safe means of access was not provided to perform maintenance on the mason sand conveyor head pulley drive. The factual situation, except for location is the same with respect to this violation as in Citation No. 081721. I make the same findings and a penalty of $40 is assessed.

Citation No. 081724 alleges that a safe means of access to perform maintenance to the track cross-conveyor was not provided. Maintenance was performed on the track cross-conveyor by having employees work from a front-end loader bucket that is raised to the level of the conveyor. The inspector testified that maintaining machinery from loader buckets is a common cause of accidents throughout the industry. I think this is the citation that the defense witness was talking about when he stated that other inspectors had known of the practice and not disapproved. Be that as it may, the bucket could fall with the men in it or it could be moved unintentionally and I am convinced it is a hazardous situation. I find the violation occurred, that Respondent was negligent, and that a hazard existed. A penalty of $40 is assessed.

Citation No. 081727 alleges a safe means of access was not provided to the desand conveyor head pulley drive. This is the same type of factual situation presented in previous citations where a chain barrier is located approximately 4 feet from an unguarded pulley drive, and there is no end railing at the pulley drive end of the elevated catwalk. I make the same findings as I did with respect to Citation No. 081706 and others. A penalty of $20 is assessed.

Citation No. 081730 alleges a safe means to perform maintenance was not provided at the gravel shaker conveyor head pulley drive. In order to grease the head pulley, miners were required to stand on the conveyor belt and no safety belts were provided. A fall of 10 feet could result. While the factual situation was not described in sufficient detail for me to make a finding of extreme hazard, I do find there was sufficient hazard to constitute a violation and that Respondent was negligent. A penalty of $40 is assessed.

CITATIONS NOT INVOLVING GUARDING OR SAFE ACCESS

Citation No. 081709 alleges a violation of 30 C.F.R. § 56.9-7 in that there was a missing piece of handrailing in the guard for the load-out conveyor. The piece of handrailing missing was 42 inches in length. The railing itself totaled about 400 feet. The standard cited does not require a guard rail, but it requires that an unguarded conveyor be equipped with a stop cord. It may seem unreasonable that a stop cord should be provided on this conveyor because of the 42-inch gap in the railing, but that, nevertheless, is what the regulations require. I find the hazard of falling onto the belt through this 42-inch gap of a low order and I also find the negligence of a low order. But a violation did exist. A penalty of $30 is assessed.

Citation No. 081725 alleges a violation of 30 C.F.R. § 56.11-12 in that a cover was not provided over an open hole, at the top gravel-loading platform. The platform in question was 20 feet above ground level and the two planks that had been removed left an opening measuring 6 feet by 20 inches. The danger was to "stick pickers" who might fall through the hole. The defense was that this platform was not a work area, had been used four times in 6-1/2 years and that before any stick pickers performed this rare chore, all holes in the platform were covered. Under the circumstances, I find that this was not the type of area contemplated by the standard cited, and the citation is accordingly vacated.

Citation No. 081728 involves an alleged violation of 30 C.F.R. § 56.12-16 in that an adequate means of locking out an electrical switchbox was not provided. After the inspector's testimony, the attorney for the Secretary realized that the evidence did not establish a violation of the safety standard and withdrew the citation from his petition. The citation is accordingly vacated.

ORDER

It is therefore ORDERED that Respondent pay to MSHA, a civil penalty in the total amount of $560 within 30 days of the entry of this order.

Charles C. Moore, Jr.
Administrative Law Judge

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
HEARINGS DIVISION
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

October 28, 1977

DRAVO LIME COMPANY, Petitioner	:	Application for Review
v.	:	Docket No. IBMA 77-M-1
MINING ENFORCEMENT AND SAFETY ADMINISTRATION (MESA), Respondent	:	Order No. 7; November 2, 1976
	:	Federal Metal and Nonmetallic Mine Safety Act
	:	Cabin Creek Mine

DECISION

Appearances: Louise Q. Symons, Dravo Corp., Pittsburgh, Pennsylvania, for Petitioner;
Robert Cohen, Esq., Office of the Solicitor, Department of the Interior, for Respondent.

Before: Administrative Law Judge Moore

This case involves review of an order of withdrawal issued under the Federal Metal and Nonmetallic Mine Safety Act. The order is similar to a 104(b) order under the Federal Coal Mine Health and Safety Act of 1969, in that it was issued because of applicant's failure to abate Notice of Violation No. 105 which was issued on June 9, 1976. Unlike the procedures under the Coal Mine Health and Safety Act however, the belt in question was not closed even though it was the subject of a withdrawal order. While the parties did not explain this anomaly in detail, they are in apparent agreement that the appropriate way to obtain review of an order of withdrawal is to fail to comply with it.

The facts themselves are not in dispute. Applicant operates a conveyor belt which is skirted in a certain area and it has not placed guards in that area. The question is whether the standard requires guards in a skirted area of a conveyor belt.

Applicant's Exhibits 2, a scale drawing, 1/ and 3, a photograph, clearly depict the area which MESA contends should be guarded. The

1/ A portion of the drawing is attached to this decision.

area in question is where the belt designated LS-1 bringing limestone out of the mine dumps on to the belt designated LS-2 which transports the limestone to a stock pile for future milling. For dust control purposes the entire dumping area is shielded with plate metal with rubber belting attached to the sides of the shielding. This rubber belting attached to the plate metal rubs against the belt itself forming a dust shield. MESA does not contend that all idler rollers should be shielded, because if a miner caught his hand between the roller and the belt in an unskirted area, the belt could give way and his hand could be withdrawn. In the skirted area however, there is only five-eighths of an inch 2/ between the side of the metal skirt and the belt so that if a miner's hand got caught between the roller and the belt, the belt could only raise up five-eighths of an inch before being stopped by the metal skirt. It is MESA's contention that this constitutes a "pinch point" which in turn gives rise to the requirement of guards to prevent any part of a miner's body from being caught in such a "pinch point." In this instance, a pinch point is something like a clothes wringer.

The mandatory standard allegedly violated, 30 CFR 57.14-1 states: "Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; fly wheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons and which may cause injury to persons shall be guarded." It has been conceded that if the above-quoted standard does not require guards at the "pinch points" previously described, that there is no other regulation that would require such guards.

It is conceded by MESA that the idler rollers involved in the instant case are not among the items listed in the standard, such as drive, head, tail, and takeup pulleys or gears, sprockets, chains, couplings, shafts, sawblades or fan inlets. It is argued however, that the existence of the "pinch point" together with the ladder and catwalk beside the conveyor belt causes the idler rollers to become "similar exposed moving machine parts which may be contacted by persons, and which may cause injury * * *." Most of the pieces of equipment specifically referred to in the standard are rotating items with nonsmooth surfaces - gears, sprockets, chains, sawblades, fan inlets. Fly wheels may be either solid or spoked, couplings and shafts could be rough or smooth, and head, drive, tail and takeup pulleys are generally smooth. Obviously the idler pulleys involved in the instant case are not similar to sawblades or gear sprockets, so if they are similar to anything mentioned in the standard, it is the drive, head, tail, or takeup pulleys.

Drive pulleys, head pulleys, tail pulleys and takeup pulleys all contain "pinch points" (Tr. 55-56, MESA Exhibit R-6, pages 2 and 3) that was undoubtedly the reasons why these particular pulleys

2/ This is the distance shown on Applicant's Exhibit 2, but the testimony indicates that it varies.

were specifically included in the standard. Idler pulleys however, do not contain "pinch points" as a rule, because the belt has leeway to move away from the idler pulley in the absence of a skirted area such as the one involved in the instant case. It is the "wringer effect" which can cause a serious injury. It is my opinion, that the combination of the skirted belt with the catwalk and ladder next to it causes the idler pulleys to become "similar exposed moving machine parts which may be contacted by persons, and which may cause injury * * *."

The existence of a stop cord beside the belt which will stop the drive and result in the belt stopping after a movement of approximately 22 feet may diminish the extent of a potential injury but would not prevent the injury unless pulled five seconds before contact with the "pinch point" (See MESA Exhibit R-5, page 3 and Tr. 52). I certainly disagree with the implication on page 11 of petitioner's brief that MESA is attempting "to guard against the ultimate in stupidity." I consider the likelihood of a miner stumbling on the ladder or catwalk and having his hand or some other part of his body or clothing caught in the "pinch point" sufficiently high to require MESA to interpret the regulation as it did. I interpret it the same way and hereby AFFIRM the order of withdrawal.

All proposed findings not included above are rejected.

Charles C. Moore, Jr.
Administrative Law Judge

Date Entered: October 28, 1977

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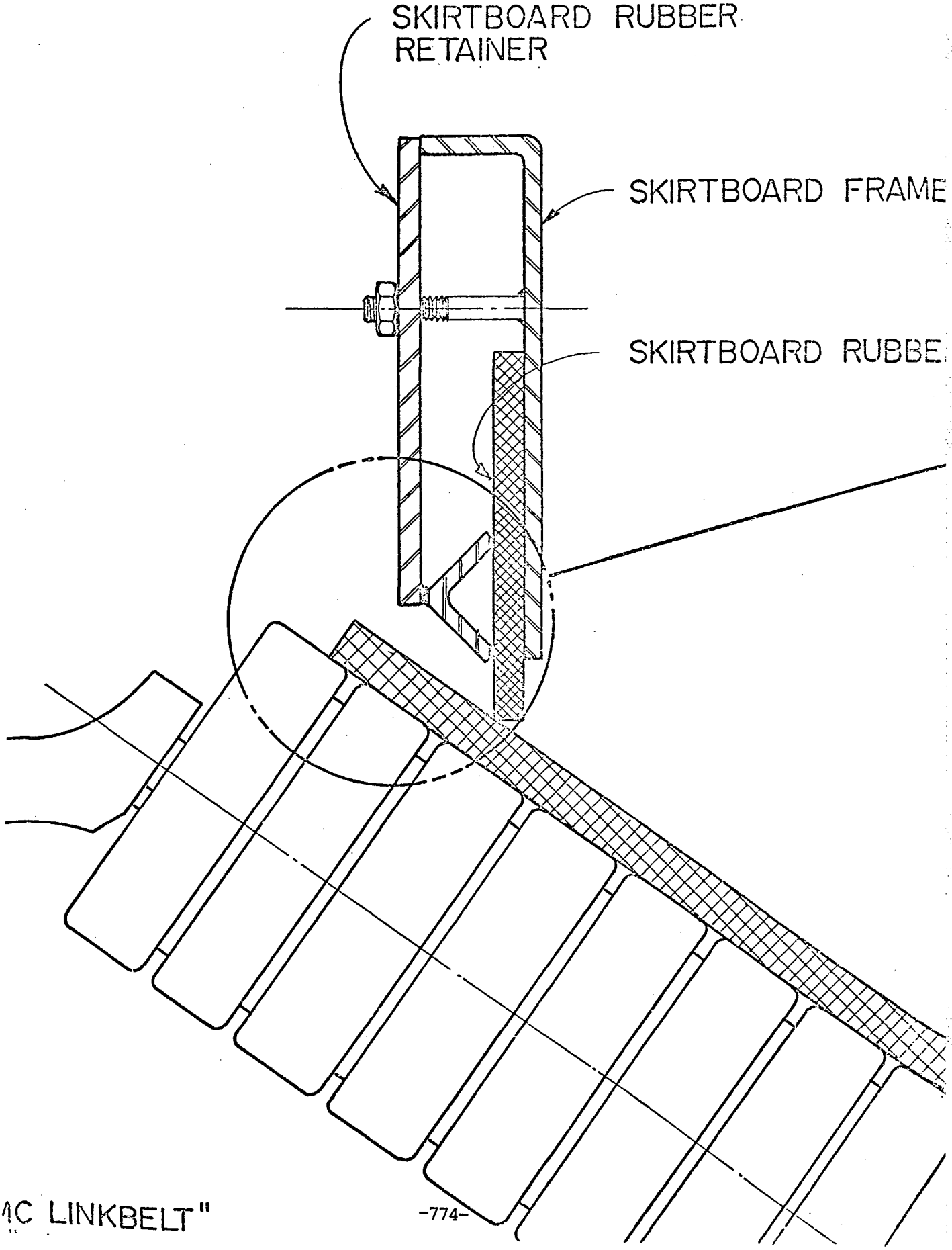

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