

Starting with this month's Decisions, pages will be numbered to facilitate an indexing system which the Commission staff will develop. Decisions issued from March 9, 1978 through March 31, 1979 will be cited by date of issuance, and therefore should be kept in chronological order for easy reference.

On April 1, 1979 the Commission adopted a new docketing procedure for our cases. In the coming months you will notice different prefixes and suffixes in our numbering system. Following is an explanation of the system:

New System of Docketing Cases as of April 1, 1979

SUFFIX

YORK area -	Maine	CENT area -	North Dakota
	Vermont		South Dakota
	New Hampshire		Nebraska
	Massachusetts		Iowa
	Connecticut		Missouri
	Rhode Island		Kansas
	New York		Arkansas
	New Jersey		Oklahoma
	Delaware		Louisiana
	Maryland		Texas
			New Mexico
PENN area -	Pennsylvania	WEST area -	Montana
WEVA area -	West Virginia		Wyoming
			Colorado
			Arizona
			Utah
KENT area -	Kentucky		Idaho
			Washington
			Oregon
VA area -	Virginia		Nevada
			California
SE area -	North Carolina		Alaska
	South Carolina		Hawaii
	Tennessee		
	Georgia	LAKE area -	Minnesota
	Florida		Wisconsin
	Alabama		Illinois
	Mississippi		Indiana
	Puerto Rico		Ohio
			Michigan

PREFIX

Penalty - Coal	No Suffix
Penlaty - Metal	M after the number
Review - Coal	R after the number
Review - Metal	RM after the number
Discrimination	D after the number
Discrimination - Metal	DM after the number
Compansation	C after the number
Compensation - Metal	CM after the number

APRIL 1979

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

Magma Copper Company v. Secretary of Labor and United Steelworkers of America, DENV 78-533-M.

Secretary of Labor (on behalf of David Pasula, William Kaloz, Ralph Palmer, James Colbert, Bryan Plute, Lawrence Carden) v. Consolidation Coal Company, PITT 78-458, PITT 79-35, PITT 79-36.

Secretary of Labor (on behalf of David Pasula) v. Consolidation Coal Company, PITT 78-458.

Secretary of Labor v. Davis Coal Company, HOPE 627-P, HOPE 78-672-P, HOPE 78-673-P, HOPE 78-674-P, HOPE 78-675-P, HOPE 78-676-P, HOPE 78-687-P, HOPE 78-696-P, HOPE 79-112-P.

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

Burgess Mining and Construction Corporation v. Secretary of Labor BARB 78-541-573.

Secretary of Labor v. C F & I Steel Corporation, DENV 77-79-P.

Secretary of Labor v. Helvetia Coal Company, Keystone Coal Mining Corporation, PITT 79-12-P, PITT 79-5-P.

Secretary of Labor v. Clinchfield Coal Company, NORT 78-417-P.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 5, 1979

JOHN MATALA,	:	
	:	
Applicant	:	
v.	:	Docket No. MORG 76-53
	:	Appeal No. IBMA 76-96
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

This case arises under the Federal Coal Mine Health and Safety Act of 1969 ("the 1969 Act"). 1/ The issue is whether the Commission should review a discrimination claim brought by John Matala, a miner employed by Consolidation Coal Company.

Matala showed evidence of development of pneumoconiosis (black lung) and on March 1, 1975, he exercised his statutory right under the 1969 Act to voluntarily transfer from his continuous mining machine operator's position to that of a general laborer's position in an area of the mine with a lower coal dust level. 2/ Before his transfer, Matala had been earning \$55.00 per day, the standard daily wage rate for a continuous mining machine operator. After his transfer, the Company continued to pay Matala \$55.00 per day. On December 6, 1975, the National Bituminous Coal Wage Agreement of 1974 increased the standard daily wage rate for continuous mining machine operators to \$57.20. Matala continued to be paid \$55.00 per day, however.

Matala then filed an application for review of alleged discrimination with the Secretary of the Interior under section 110(b)(2) of the 1969 Act, claiming that the Company's failure to pay him the wages of a

1/ 30 U.S.C. §801 et seq. (1976)(amended 1977). This case presents no issue under the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. §801 et seq. (1978).

2/ Section 203(b)(2) and (3) of the 1969 Act provided, in part:

(2) [A]ny miner who ... shows evidence of the development of pneumoconiosis shall be afforded the option of transferring from his position to another position in any area of the mine, for such period or periods as may be necessary to prevent further development of such disease, where the concentration of respirable dust in the mine atmosphere is not more than 1.0 milligrams of dust per cubic meter of air....

(3) Any miner so transferred shall receive compensation for such work at not less than the regular rate of pay received by him immediately prior to his transfer.

continuous mining machine operator after December 6, 1975, violates section 203(b)(3) of the 1969 Act and results in discrimination against him in violation of section 110(b)(1)(B) of that Act. <sup>3/</sup> On May 5, 1976, Administrative Law Judge Malcolm Littlefield, assigned to hear Matala's case, dismissed the application for review. Matala appealed to the Secretary of Interior's Board of Mine Operations Appeals. <sup>4/</sup> For the reasons set forth below, we conclude that we should not review claims under section 110(b) of the 1969 Act of alleged violations of section 203(b)(3) of the Act, and therefore we affirm the dismissal.

The 1969 Act was amended in 1972 by the Black Lung Benefits Act, 30 U.S.C. §901 et seq. (1976). Section 428 of the Black Lung Benefits Act, 30 U.S.C. §938, provides, in part:

(a) No operator shall discharge or in any other way discriminate against any miner employed by him by reason of the fact that such miner is suffering from pneumoconiosis...

(b) Any miner who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section, or any representative of such miner may, within ninety days after such violation occurs, apply to the Secretary [of Labor] for a review of such alleged discharge or discrimination ....[Emphasis added.]

<sup>3/</sup> Section 110(b)(1) and (2) of the 1969 Act provided, in relevant part:

(1) No person shall discharge or in any other way discriminate against ... any miner ... by reason of the fact that such miner ... (b) has filed, instituted, or caused to be filed or instituted any proceeding under this Act...

(2) Any miner ... who believes that he has been discharged or otherwise discriminated against by any person in violation of paragraph (1) of this subsection may, within thirty days after such violation occurs, apply to the Secretary [of Interior] for a review of such alleged discharge or discrimination .... [Emphasis added.]

<sup>4/</sup> The appeal is before this Commission for disposition under section 301, Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C.A. § 961 (1978), under which the Secretary of Interior's adjudicative functions under the 1969 Act were transferred to the Commission.

The Administrative Law Judge held that section 428 of the Black Lung Benefits Act was exclusively applicable to Matala's claim and he therefore dismissed the application for review. He ruled that the claim should have been filed with the Secretary of Labor under section 428, rather than with the Secretary of Interior under section 110(b) of the 1969 Act. The judge relied primarily on the language of the Secretary of Interior's Board of Mine Operations Appeals decision in Higgins v. Old Ben Coal Corporation, 3 IBMA 237, 1973-1974 OSHD ¶18,228 (1974), appeal dismissed as untimely filed, No. 77-1363 (D.C. Cir. June 20, 1977), that:

[S]ince there is a specific statutory provision for review of discharge and/or discrimination of a miner based upon the fact that such miner suffers from pneumoconiosis, as here alleged, we need not speculate whether, in the absence of such provision, this Board could or should assume jurisdiction under some other provision of the Act, specifically section 110(b). We think it highly unlikely that Congress intended to confer jurisdiction upon both the Secretary of Labor and the Secretary of Interior pertaining to the same subject matter within the confines of the same Act.

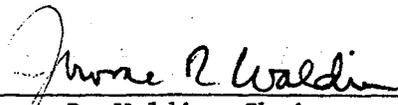
3 IBMA at 245.

On appeal, Matala argues that because he exercised his transfer right under section 203(b)(2) of the 1969 Act, he instituted a proceeding under the 1969 Act and thus a failure to pay him at the wage rate of his old job classification is discrimination in violation of section 110(b) of the 1969 Act.

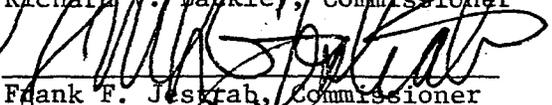
We conclude, however, that Matala's allegation of discrimination should be resolved under the extensive provisions of section 428(b) of the Black Lung Benefits Act, which are enforced by the Secretary of Labor, not the Commission. Despite Matala's attempt to characterize this dispute as a section 110(b) discrimination claim, his application raises issues of discrimination related exclusively to rights of miners afflicted with pneumoconiosis. Congress has provided a more specific remedy in the Black Lung Benefits Act for claims of discrimination based on pneumoconiosis and there is no need for this Commission to apply the more general provisions of section 110(b) of the 1969 Act in order to provide Matala with a remedy for any discriminatory practices which might be present in this case. 5/

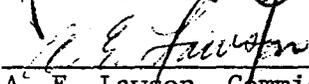
5/ We do not reach the question of whether discrimination actually existed in this case and we reserve judgment on whether we would reach a different result if claims like these were not entertained under section 428 of the Black Lung Benefits Act. See Higgins v. Old Ben Coal Company, No. 76-BLA-633 (Labor Dept. Office of ALJ's, March 21, 1977), aff'd, 584 F.2d 1035 (D.C. Cir. 1978), pet. for cert. filed, 47 U.S.L.W. 3587 (February 20, 1979) (No. 1288). We note in that regard that a claim based on these circumstances was in fact recently adjudicated by the Department of Labor under section 428 of the Black Lung Benefits Act. John Matala v. Consolidation Coal Company, No. 77-BLA-1415 (January 5, 1978), appeal pending. No. C780035W (N.D. W. Va.).

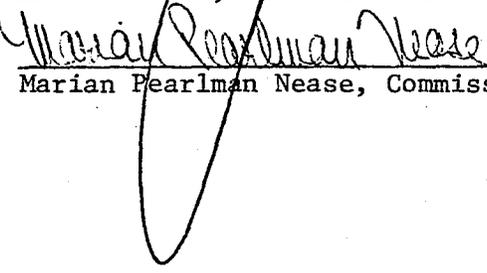
The judge's decision is affirmed.

  
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Jerome R. Waldie, Chairman

  
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Richard W. Backley, Commissioner

  
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Frank F. Jestrab, Commissioner

  
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A. E. Lawson, Commissioner

  
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Marian Pearlman Nease, Commissioner



Early in the Act's enforcement, the Interior Department's Board of Mine Operations Appeals held that, although an independent contractor and the coal company to whom the contractor provides services may both be "operators" under the Act, 3/ only the operator responsible for the violation and the safety and health of the endangered employees could be served with notices and orders and assessed penalties. Affinity Mining Co., 2 IBMA 57 (1973). The Board further stated, however, that an operator such as Affinity 4/ could be assessed a civil penalty where it "materially abetted" the independent contractor's violations or "actually committed" such violations.

In subsequent cases, the test stated in Affinity for determining a coal mine owner's responsibility for violations of the Act created by its contractors was modified by the Board. In Peggs Run Coal Co., Inc., 5 IBMA 175 (1975), the Board expanded the bases for holding a coal mine owner responsible to situations where the owner's employees were endangered by the violation and the owner could have prevented the violation "with a minimum of diligence." 5 IBMA at 183. The rationale of Peggs Run was followed by the Board in West Freedom Mining Corp., 5 IBMA 329 (1975), and Armco Steel Corp., 6 IBMA 64 (1976), in which notices issued to mine owners for violations arising from the work activities of their contractors were affirmed.

The Board's application of its "endangerment/preventability" test for determining a coal mine owner's responsibility for violations created by independent contractors was brought to an end, however, through a chain of events set in motion by the Board's decision in Affinity Mining Co., supra.

3/ In Laurel Shaft Construction Co., Inc., 1 IBMA 217 (1972), the Board held that an independent contractor can be an "operator" within the meaning of the 1969 Act. This conclusion was also reached by the Fourth Circuit in Bituminous Coal Operators' Association, Inc. v. Secretary of Interior, 547 F.2d 240 (1977), and the D.C. Circuit in Association of Bituminous Contractors, Inc. v. Andrus, 581 F.2d 853 (1978). The Commission has followed the holdings of the Board and the courts on this issue. Cowin and Co., Inc., Docket No. BARB 74-259, April 11, 1979. No argument is made in the present cases that the involved independent contractors were not "operators" within the meaning of the Act or that the violations did not occur in a "coal mine".

4/ The mine involved in Affinity was located on land leased by Affinity Mining Company from the Pocahontas Land Corporation. 2 IBMA at 63.

Following the decision in Affinity, the Association of Bituminous Contractors ("ABC") instituted a declaratory judgment proceeding seeking to establish that, contrary to the decision in Affinity, an independent contractor engaged by a coal mining company to perform construction work at a coal mine was not an "operator" within the meaning of the 1969 Act. ABC v. Morton, Secretary of Interior, No. 1058-74 (D.D.C., May 23, 1975). In its order granting the relief sought, the district court stated:

. . . [A] coal mine construction company is not an "operator" as defined in Section 3(d) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §802(d), where it is engaged in coal mine construction work on behalf of the owner, lessee or other person who operates, controls or supervises a coal mine;

Nothing in the foregoing declaration shall affect or prejudice the right of the Secretary of the Interior to contend in a subsequent proceeding that, if a coal mine construction company fails to observe the interim mandatory health and safety standards of the [1969 Act] and the regulations of the Secretary of the Interior promulgated thereunder, the Secretary may institute proceedings to seek compliance therewith and assess appropriate penalties against the owner, lessee or other person who operates, controls or supervises said coal mine.

On August 21, 1975, in response to the district court's order, then Acting Secretary of Interior Frizzell issued Secretarial Order No. 2977. This order directed the Interior Department's enforcement personnel to cite only coal mine operators for violations of the Act created by contractors performing work on behalf of the operators. The Board of Mine Operations Appeals held that Order 2977 was a department-wide policy directive, binding upon the Board and the administrative law judges as well as the enforcement personnel, and, therefore, that it was compelled to hold a coal mine owner responsible for its contractors' violations regardless of the particular circumstances surrounding the violations. E.g., Rushton Mining Co., 5 IBMA 367 (1975).

Based on this rationale, the Board affirmed the withdrawal order at issue in Docket No. MORG 76-21 ("Republic I"), 5 IBMA 306 (1975), and an administrative law judge assessed civil penalties for the violations in Docket No. MORG 76X95-P ("Republic II"). These decisions were then appealed to the Court of Appeals for the District of Columbia Circuit and to the Board, respectively. 5/

5/ The appeal before the Board in Republic II was stayed by the Board pending the decision of the D.C. Circuit in Republic I. That appeal is now before the Commission pursuant to section 301 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 961 (1978).

While the appeals in Republic I and Republic II were pending, the Court of Appeals for the Fourth Circuit issued its decision in Bituminous Coal Operators' Association, Inc. v. Secretary of Interior, 547 F.2d 240 (1977). The Bituminous Coal Operators' Association (BCOA) had filed suit in district court following the issuance of Secretarial Order 2977. The BCOA sought a declaratory judgment that coal mine operators are not responsible for violations created by independent contractors and an injunction restraining the Secretary from enforcing the policy announced in Order 2977. The district court held that construction contractors are not "operators" under the Act, but are "statutory agents" of the coal mining companies. The court further concluded, however, that the coal mining companies, as "operators", could be held responsible for violations created by their "agent" contractors. Accordingly, the court dismissed the complaints for declaratory and injunctive relief. BCOA v. Hathaway, 400 F.Supp. 371 (W.D. Va. 1975).

On appeal the Fourth Circuit affirmed the ultimate judgment of the district court although it did not embrace all of that court's conclusions of law. The court of appeals held, contrary to the district court, that construction contractors can be "operators" under the 1969 Act and, therefore, that the Secretary properly could enforce the provisions of the Act against such contractors. The court further held that a coal mine owner or lessee also could be held responsible for a construction contractor's violations. BCOA v. Secretary, supra, 547 F.2d at 246-47. This latter conclusion was premised on two bases. First, the court noted that the Act defined the term "operator" to include an owner or lessee and that the Act imposed responsibility for violations on the operator of a mine without exemption or exclusion. Therefore, the court concluded that the Act "impose[s] liability on the owner or lessee of a mine regardless of who violated the Act or created the danger requiring withdrawal." BCOA v. Secretary, 547 F.2d at 246. Second, the court agreed with the district court's conclusions that a construction contractor "may be considered the statutory agent of an owner or lessee of a coal mine", and that under the Act an owner or lessee may be held responsible for the violations of its agents. 547 F.2d at 247.

On February 22, 1978, the D.C. Circuit issued its decisions in ABC v. Andrus, 581 F.2d 853 (1978), and Republic Steel Corp. v. Interior Board of Mine Operations Appeals, 581 F.2d 868 (1978). ABC v. Andrus was the appeal of the district court's order in ABC v. Morton, supra, declaring the 1969 Act unenforceable against contractors. On appeal, the D.C. Circuit reversed the district court's order and held that independent contractors that otherwise fell within the Act's coverage were "operators" against whom the Act could be enforced. 581 F.2d at 862-63.

In Republic Steel, the D.C. Circuit reversed the Board's decision in Republic I. The court observed that the sole basis for the Board's decision was its belief that it was bound by Secretarial Order 2977 to hold coal mine owners such as Republic responsible for violations of the Act created by their contractors. Since the district court's order that resulted in the issuance of Secretarial Order 2977 had been reversed in ABC v. Andrus, the court concluded that the Board's decision in Republic I "no longer had a foundation" and that a remand was necessary. 581 F.2d at 820. 6/

Against this background we turn to a discussion of our holding.

We agree with the Fourth Circuit's conclusion in BCOA v. Secretary that as a matter of law under the 1969 Act an owner of a coal mine can be held responsible for any violations of the Act committed by its contractors. Our conclusion is derived from the text of the statute itself. The Act defines "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal mine." 7/ The Act provides for the issuance of orders and notices to the operator for imminent dangers and violations of mandatory standards; 8/ the assessment of civil penalties against the operator of a mine in which a violation occurs; 9/ and the compensation by the operator of miners idled by a withdrawal order. 10/ As the Fourth Circuit correctly observed, "[t]hese sections, when read with the definition of operator, impose liability on the owner . . . of a mine regardless of who violated the Act or created the danger requiring withdrawal." 547 F.2d at 246. 11/

Furthermore, we can find nothing in the Act or its legislative history that requires that an owner's responsibility for contractor violations be qualified by any consideration of the owner's ability to prevent the violations. Rather, Congress determined that the question of an operator's fault was not to enter into the determination of

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6/ The D.C. Circuit's decision remanded Republic I to the Board. The case is now before the Commission for disposition. See n. 5, supra.

7/ 30 U.S.C. § 802(d).

8/ 30 U.S.C. § 814.

9/ 30 U.S.C. § 819.

10/ 30 U.S.C. § 820.

11/ In Republic Steel Corp., supra, the D.C. Circuit also endorsed this conclusion. 581 F.2d at 870 n. 5.

whether a violation of the Act had occurred. 12/ Valley Camp Coal Co, 1 IBMA 196 (1972); Webster County Coal Corp., 7 IBMA 264 (1977). Thus, it is consistent with the Act's language and the intent of Congress to hold an owner responsible for its contractors' violations without regard to the owner's ability to prevent the violations. Insofar as the decisions of the Board held to the contrary, we decline to follow them.

12/ The House managers explained the conference report's provision requiring the assessment of a penalty on the operator of a coal mine in which a violation of the Act occurs as follows:

Section 109.

\* \* \* \* \*

2. The Senate bill provided that, in determining the amount of the civil penalty only, the Secretary should consider, among other things, whether the operator was at fault. The House amendment did not contain this provision. Since the conference agreement provides liability for violation of the standards against the operator without regard to fault, the conference substitute also provides that the Secretary shall apply the more appropriate negligence test, in determining the amount of the penalty, recognizing that the operator has a high degree of care to insure the health and safety of persons in the mine.

H. Conf. Rep. No. 91-761, 91st Cong., 1st Sess., at 71 (1969)(emphasis added), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part I, at 1515 (1975).

The 1969 Act's imposition of liability without regard to an operator's fault should be compared with the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq. In the OSHAct Congress declared that its purpose and policy was "to assure so far as possible" safe and healthful working conditions to America's workforce. 29 U.S.C. §651(b) (emphasis added). Some courts have interpreted the emphasized phrase as an indication of Congressional intent not to hold employers responsible for violations of the OSHAct that they could not have prevented. See, e.g., Horne Plumbing & Heating Co. v. OSHRC, 528 F.2d 564 (5th Cir. 1976); National Realty & Construction Co. v. OSHRC, 489 F.2d 1257 (D. C. Cir. 1973).

We also can find no support for the assertion that the Act permits an owner to avoid responsibility for a contractor's violations simply because the only miners endangered by the violative conditions at its mine are employees of the contractor. The Act seeks to protect the safety and health of all individuals working in a coal mine. 30 U.S.C. §§ 801(a) and 802(g). In order to achieve this goal, the Act places a duty on each operator to comply with its provisions. 30 U.S.C. § 803. The purpose of the Act is not served by interpreting these provisions to allow an operator to limit the benefit of the protection it affords to its own employees. Employer-employee is not the test. The duty of an operator, whether owner or contractor, extends to all miners. Again, to the extent the decisions of the Board held to the contrary, we decline to follow them.

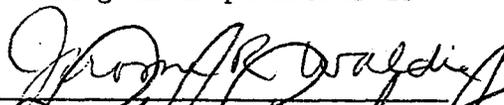
It bears emphasis that the miners of an independent contractor are invited upon the property of the mine owner to perform work promoting the interests of the owner. A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted.

We need not decide in this case the scope of Commission review, if any, over the Secretary's choice in proceeding against the owner, the independent contractor, or both, 13/ for a contractor's violation. At the time that the involved notices and orders were issued to Republic, the District Court's order in ABC v. Morton, supra, declaring independent contractors not liable under the Act, was still outstanding. Therefore, the Secretary had the choice of either proceeding against the owner or entirely abdicating enforcement of the Act for contractor violations. In view of this fact, no matter what test is applied, the Secretary's choice to proceed against Republic was entirely proper.

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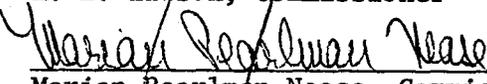
13/ We are not suggesting that the Act requires that an owner must be proceeded against whenever a contractor violates the Act. Nor are we suggesting that the fact that an owner may be proceeded against in any way lessens the duty of the contractor to comply with the Act's requirements. Even where an enforcement action is undertaken against an owner, the contractor may also be proceeded against in a separate or consolidated proceeding.

In view of Republic's concession that the violations alleged occurred at a mine that it owned, we conclude that Republic violated the Act. Accordingly, the decision of the administrative law judge vacating the withdrawal order in Republic I is reversed and the decision of the administrative law judge in Republic II assessing civil penalties is affirmed as to result.

  
Jerome R. Waldie, Chairman

  
Frank F. Jestrab, Commissioner

  
A. E. Lawson, Commissioner

  
Marian Pearlman Nease, Commissioner

Backley, Commissioner, dissenting:

The majority opinion combines two cases involving Republic Steel Corporation, Docket Nos. IBMA 76-28 and IBMA 77-39, referred to herein as "Republic I" and "Republic II," respectively. This, I believe, is unfortunate as it ignores the fact that Republic I is before us on remand from the United States Court of Appeals for the District of Columbia Circuit with the issue to be decided clearly stated. Republic II was stayed by our predecessor, the Interior Board of Mine Operations Appeals (Board), for review pending the outcome of Republic I.

By combining the two cases, the majority disregards the individual factual situations presented by these cases. Furthermore, the issue is stated in the majority opinion as if the sole issue to be decided is one of statutory construction, which is not accurate. As a result, the majority concludes that Republic, as owner of the mine where the alleged violations occurred, can be held liable for the violations "created by its independent contractors." This general proposition of statutory construction does in fact have support from two recent court decisions. 1/

The majority then concludes, without any discussion of the factual situation surrounding the occurrence of the violations or finding of fact relevant thereto, that Republic should be held liable for the violations of its independent contractor. Accordingly, it must follow that Republic, absent a finding of any causal connection between its actions and the violations, is being held liable under a strict liability theory. I cannot agree with this latter conclusion and, therefore, must dissent from today's decision.

1/ Association of Bituminous Contractors Inc., (ABC) v. Andrus, 581 F.2d 853 (D.C. Cir. 1978); Bituminous Coal Operators Association, Inc. (BCOA) v. Secretary, 547 F.2d 240 (4th Cir. 1977).

In order to put this matter in proper perspective, we must first look at the facts that gave rise to Republic I and under what circumstances that case is now before us.

As indicated above, Republic I was remanded from the Circuit Court which vacated the decision of the Board. 2/ The Board had, in turn, reversed the decision of the Administrative Law Judge (ALJ) who had held that the owner-operator (Republic) was not the proper party to cite in a withdrawal order for the acts of an independent contractor (Roberts and Schaefer Construction Company) who violates the health or safety provisions of the Federal Coal Mine Health and Safety Act of 1969. 3/

The Board did not, as the ALJ did, analyze the facts of the case, but held as a matter of departmental policy that the owner or lessee of a coal mine is the sole party to be held absolutely liable for violations of the mandatory standards caused by a coal mine construction contractor regardless of the circumstances. The Board stated that it was compelled to so hold as a result of Secretarial Order 2977, issued as a policy directive by the Acting Secretary of Interior on August 21, 1975, and made retroactively effective to May 24, 1975. The Secretarial Order stated that it was being issued to comply with the declaratory judgment order issued by the U.S. District Court for the District of Columbia on May 23, 1975, in Association of Bituminous Contractors, Inc. v. Morton, (C.A. No. 1058-74, unreported) (hereafter cited as ABC v. Morton). In that case the district court held that coal mine construction contractors were not "operators" within the meaning of 30 U.S.C. §802, and therefore were not liable for failure to abide by the mandatory health and safety standards. On February 22, 1978, that decision was reversed by the Court of Appeals on the basis of an erroneous statutory interpretation of the term "operator" by the district court. 4/ On the same day of its reversal of ABC v. Morton, the Court of Appeals remanded the instant case involving essentially the same issue. 5/

In remanding this case, the Court noted that the Board's decision "was not, in fact, based on an interpretation of law. It was based, pure and simple, on the Association of Bituminous Contractors decision." 581 F.2d at 870. The Court then vacated the decision and remanded, as

2/ Section 106(a) of the Act, 30 U.S.C. §816(a) (1970), provided that "Any order or decision" issued by the Secretary shall be subject to review in an appropriate court of appeals.

3/ 30 U.S.C. §801 et seq., hereafter "The Act".

4/ Association of Bituminous Contractors, Inc. v. Andrus, 581 F.2d 853 (1978).

5/ Republic Steel Corporation v. Interior Board of Mine Operations Appeals, 581 F.2d 868 (1978).

noted above, with the following language:

"The Board may then determine what enforcement action it will follow; whether to proceed, as in the past, only against construction contractors, and therefore dismiss the present action against Republic or to proceed against Republic on the basis of the Board's own interpretation of how best to effectuate the purposes of the Act." [Emphasis added.]

Thus, the Court of Appeals has left to us the determination as to which of the options available in determining liability will most effectively assure the health and safety of the miner. The policy considerations enunciated by the majority fail to convince me that by holding Republic strictly liable under the facts of this case, the purposes of the Act would be most efficiently promoted.

The undisputed circumstances of this case are as follows: Republic's Kitt No. 1 Mine was undergoing construction on August 4, 1975, when a federal inspector issued a notice of violation under section 104(b) 6/ of the Act. The notice cited Republic, as operator of the Kitt mine, the the following alleged violation of 30 C.F.R. §71.101: 7/

The Roberts and Schaefer Construction Company, doing construction work on the operator's property has not collected respirable dust samples on their employee [sic] as required.

The construction company was employed by Republic to construct a coal preparation plant at the Kitt Mine and its work activity did not involve any underground operation at the mine site. Abatement of the violation was required to be completed by August 11, 1975. On August 13, 1975, the inspector returned to the mine site and finding that "little or no effort was being made to abate the violation," issued an Order of Withdrawal to Republic pursuant to section 104(b) of the Act. The withdrawal order prohibited Republic from allowing Roberts and Schaefer to perform the work it had contracted to do. Following Republic's abatement of the violation on the same day, the withdrawal order was terminated.

6/ 30 U.S.C. 814(b) (1970).

7/ The pertinent part of section 71.101 reads:

"(a) Each operator of an underground coal mine and each operator of a surface coal mine shall take, as prescribed in this subpart, accurate samples of the amount of respirable dust in the atmosphere to which each miner employed in a surface installation or a surface worksite is exposed."

A timely application for review of the propriety of the withdrawal order was filed by Republic. 8/ Filed concurrently was a motion for summary decision with a supporting affidavit. In response, the government filed a motion and memorandum in opposition to the motion for summary decision together with a cross motion for summary disposition. The government's motion recited the allegations made by Republic and "agree(d) that there is no genuine issue of fact raised in this proceeding ..." The motion then cited Secretarial Order 2977, referred to above, as the basis for citing Republic.

Thus, based on the above documents, the record established the following:

- (1) Roberts and Schaefer was employed by Republic as an independent contractor to construct a coal preparation plant at its mine;
- (2) Roberts and Schaefer had exclusive control and responsibility over its employees engaged in that construction activity;
- (3) The alleged violation in question related solely to the failure to take samples of the respirable dust to which the employees of Roberts and Schaefer were exposed;
- (4) No employees of Republic were subject to any danger because of the alleged violations; and
- (5) The notice and order were issued to Republic instead of the independent contractor so as to comply with the departmental policy expressed in Secretarial Order 2977, which, in turn was based upon the district court's misinterpretation of the statute.

In concluding that Republic is absolutely liable for the violation charged, the majority relies in part upon the observation of the Fourth Circuit in BCOA v. Secretary 9/ that the provisions of the Act "impose liability on the owner ... of a mine regardless of who violated the Act or created the danger requiring withdrawal." However, when this quoted

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8/ Attached to the application were two memoranda from the Assistant Administrator, Coal Mine Health and Safety to all District Managers instructing inspectors to issue all notices and orders to owner-operators and not to construction companies or independent contractors, and to vacate those notices and orders issued to independent contractors prior to June 3, 1975, and reissue them to the owner-operator involved. Such action was taken to adhere to the District Court decision in ABC v. Morton.

9/ Supra, 547 F.2d at 246.

portion of the sentence is read within the context of the entire paragraph the court seemed to be holding that the referenced provisions of the Act authorized the Secretary to impose strict liability on the owner of the mine.

To realize the true impact of that holding it must be remembered that the court was referring to the Secretary of Interior and the departmental structure utilized for the enforcement of the Act at the time of the court's decision. The court had earlier noted at page 242 that "[w]ithdrawal orders may be reviewed by the Secretary through the Board of Mine Operations Appeals." 10/

The majority opinion further notes that the District of Columbia Circuit also endorsed this "same conclusion" of the Fourth Circuit in its remand of the instant case and cites footnote 5 of the Republic decision. That footnote, in its entirety, states as follows:

"Hence we do not disagree with the Fourth Circuit's logic in BCOA, that the Act leaves the agency free to assess either coal mine owners or contractors."

The majority apparently reads this footnote as support from the District of Columbia Circuit for the proposition that the statute mandates that the owner-operator be liable for any violations of the Act committed by its contractors on mine property should the enforcement body, not the reviewing authority, so determine. When the remand opinion is read as a whole, however, it is clear that the District of Columbia Circuit did not adopt this theory in Republic. If it had, it would have simply affirmed on the grounds that the Secretary was well within his statutory right to proceed against Republic.

On the contrary, however, the Court of Appeals remanded the present case with the options for the administrative reviewing authority clearly stated. Our determination regarding proper allocation of liability was to be based upon the policy considerations enunciated by the court. For the majority to now refer to the language quoted above from the opinions in ABC v. Andrus and BCOA v. Secretary for authority supporting a policy determination to impose strict liability on owner-operators indicates a significantly different reading of those cases than my own. 11/

Thus, I believe it would be helpful to summarize precisely my view as to what the Circuit Courts have held regarding the issues before us. The District of Columbia Circuit held in ABC v. Andrus that it was not contrary to the statutory language of the Act for the Board of Mine

10/ The Secretary had delegated his review authority under the Federal Coal Mine Health and Safety Act to the Interior Board of Mine Operations Appeals, 43 C.F.R. §4.500 (1976).

11/ The majority appears to place great emphasis on the fact that the statute does not "qualify" the owner-operators' liability by his inability to prevent a violation. Yet in ABC v. Andrus, the D.C. Circuit specifically referred to control and supervision in assessing liability. For further discussion of this principle see pages 13 and 14 infra.

Operations Appeals to hold independent construction companies liable as "operators" for failure to comply with the mandatory safety and health standards of the Act.

The Fourth Circuit held in BCOA v. Secretary that it was not contrary to the statutory language of the Act for the Board of Mine Operations Appeals to impose liability on a coal mine construction company that violates the Act. The Court in BCOA v. Secretary further held that it was not contrary to the statutory language of the Act for the Secretary (i.e., Board of Mine Operations Appeals) to impose liability on the owner for any violation committed by the construction company on mine property, regardless of the circumstances. However, the Court emphasized the narrowness of its holding by stating that the "opinion presents no occasion, however, for determining the proper allocation of liability in view of the myriad factual situations that may arise." Review by the Court pursuant to Section 106(a) of the Act as to the proper allocation of liability based on a specific factual situation was inappropriate because no administrative record had been developed. 12/

The Bituminous Coal Operator's Association (BCOA) and the Association of Bituminous Contractors (ABC) had both filed requests for declaratory relief in the respective district courts. Those courts had been requested to construe the Act as to the permissible limits of the term "operator." The decisions of the circuit courts do not purport to state which party should be held liable in a specific factual situation; rather, they provide guidance as to which party can be held liable as an "operator" consistent with the proper statutory construction. In line with these decisions, I therefore conclude that either the owner or the independent contractor may be held liable as operators under the Act.

In light of the above discussion, I now turn to my own determination of how best to allocate legal responsibility for violations and safety hazards as between the mine owner and the independent contractor working on mine property. I am convinced that the Act's purpose of assuring the health and safety of miners can best be accomplished by placing the responsibility for their health and safety on the person most able to prevent violations or hazards and to correct them quickly should they occur. In most situations that person would be the party who controls or supervises the work activity in that portion of the mine where the violation or hazard occurred.

In ABC v. Andrus, the appellate court noted, with approval, that decisions of the Board 13/ "stress the importance of placing direct liability on the independent construction company as the party most able to take precautionary measures." 14/ Noting that the Board had "forcefully rejected" the conclusion that mine owners should be absolutely

12/ The court's discussion of this point is found at 547 F.2d 243.

13/ Affinity Mining Company, 2 IBMA 57, 80 Interior Dec. at 229 (1973); Wilson v. Laurel Shaft Construction Co., 1 IBMA 217, 79 Interior Dec. 701 (1973).

14/ 581 F.2d at 862.

liable, the court went on to state:

"It is not a stretching of the statute to hold that companies who profess to be as independent of coal mine owners as these construction companies purport to be, do control and supervise the construction work they have contracted to perform over the area where they are working. If a coal mine owner contracts with an independent construction company for certain work within a certain area involved in the mining operation, the supervision that such a company exercises over that separate project clearly brings it within the statute. Otherwise, the owner would be constantly interfering in the work of the construction company in order to minimize his own liability for damages. The Act does not require such an inefficient method of insuring compliance with mandatory safety regulations." 581 F.2d at 862-63 (emphasis added in last two sentences).

Although the majority opinion suggests otherwise (page 7), there is no evidence that mine owners, either in this case or any other case, establish contractual relationships with independent construction contractors so as to "exonerate" themselves from the contractors' violations. Rather, in the normal situation an owner of a coal mine contracts with a construction company to perform services that are beyond his area of expertise. In this regard, the Fourth Circuit, in BCOA v. Secretary, was well aware of the role of the independent construction contractor when it stated:

Mining companies frequently employ independent, general contractors for both surface and sub-surface construction work. These construction companies build coal preparation plants, tipples, conveyor equipment, storage silos, bath houses, office building, power lines, roads, drag lines, and shovels. They also construct underground facilities, such as shafts, slopes, and tunnels. Their work may be done before or after the mine is in operation. The construction companies, however, do not process the coal that they remove. (547 F.2d 243)

Although it is true that the independent contractor is invited upon the property of the mine owner to perform work promoting the interests of the owner, as noted by the majority, this fact should not be the sole basis of liability as suggested. The test as to liability should be based on a party's ability to assure safety.

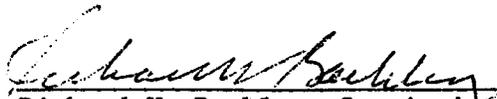
Under the majority decision, Republic's lack of control over the independent contractor's actions and resulting inability to prevent the latter's indiscretions has no bearing on liability. Failure to consider these elements I find more than somewhat prejudicial to Republic.

Accordingly, the question now arises as to whether the facts in this case can support a finding of liability on the part of Republic under the test I would adopt.

There is no dispute that the contractor was in complete control of its employees who were engaged in the construction activity. There is no evidence to even suggest that Republic had control. Roberts and Schaefer failed to take respirable dust samples of its employees, not Republic's. In fact, no Republic employee was in danger as a result of Roberts and Schaefer's failure to comply with the law. Upon consideration of the evidence of record, the only party that could have prevented the violation and thus effectuated the purposes of the Act was Roberts and Schaefer.

Given the factual situation presented in this case, I can not find Republic in violation of the Act and accordingly would affirm the Administrative Law Judge in Republic I.

In light of the above discussion, and the fact the Judge did not consider the factual situation in Republic II but relied on a misinterpretation of statute, I would remand for hearing on the merits.

  
Richard V. Backley, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 11, 1979

SECRETARY OF LABOR,	:	Docket No. BARB 74-259
MINE SAFETY AND HEALTH	:	IBMA 75-57
ADMINISTRATION (MSH,	:	
	:	
v.	:	
	:	
COWIN AND COMPANY, INC.,	:	

DECISION

This case is before the Commission on remand from the U.S. Court of Appeals for the District of Columbia Circuit. United Mine Workers of America v. Kleppe, No. 76-1980 (D.C. Cir., May 26, 1978). 1/ The issue before the Commission is whether Cowin and Company, Inc. (Cowin) properly was issued a withdrawal order pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977) [the "1969 Act"]. 2/ For the reasons that follow, we affirm the decision of the administrative law judge upholding the withdrawal order and dismissing Cowin's application for review.

Cowin, a construction contractor, contracted with U.S. Pipe and Foundry Company to construct new shafts at a coal mine owned by U.S. Pipe. On November 3, 1973, when Cowin was engaged in the concrete lining of one of the shafts, its worksite was inspected and a section 104(a) order was issued. The order stated that violations of the standards at 30 CFR §§ 77.1903(c), 77.1905(b), 77.1906(c), 77.1907(a) and (b), 77.1908(b), and 77.1908-1 existed, and described the violative conditions as follows:

1/ The court remanded this case to the Secretary of Interior. It is before the Commission for disposition pursuant to 30 U.S.C. § 961 (1978).

2/ Section 104(a) of the 1969 Act provides:

If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

The Ingersoll-Rand utility air hoist was being used to transport men and was not equipped with an accurate depth indicator. A qualified hoistman was not operating the hoist and a second person qualified to stop the hoist was not in attendance. No record was maintained to indicate that the hoist had been inspected prior to hoisting of men. The hoist rope was not equipped with an adequate number of rope clamps and the bucket was not provided with two bridle chains, a wooden pole was being used for a bucket guide and a crescent wrench was used to operate the air valves.

Cowin filed an application for review of the withdrawal order and a hearing was held. On April 3, 1975, the administrative law judge issued his decision affirming the withdrawal order, finding that an imminent danger existed at the time of the issuance of the order. On appeal, the Interior Department's Board of Mine Operations Appeals reversed the judge's decision and vacated the withdrawal order. Cowin and Co., Inc., 6 IBMA 351 (1976). The Board based its decision solely on its holding in Republic Steel Corp., 5 IBMA 306 (1975), rev'd, Republic Steel Corp. v. Interior Board of Mine Operations Appeals, 581 F.2d 868 (D.C. Cir. 1978), in which the Board held that, in accordance with Secretarial Order No. 2977, "the owner or lessee of a coal mine is the sole party to be held absolutely liable for violations committed by a coal mine construction contractor regardless of the circumstances." 5 IBMA at 310 (emphasis added). 3/

The United Mine Workers of America petitioned the Court of Appeals for the District of Columbia Circuit to review the Board's decision. On May 26, 1978, the court of appeals granted the UMWA's motion to summarily vacate the Board's decision and remanded for further proceedings not inconsistent with the court's decisions in Association of Bituminous Contractors, Inc. v. Andrus, 581 F.2d 853 (D.C. Cir. 1978), and Republic Steel Corp. v. IBMOA, supra.

We conclude that Cowin was an "operator" 4/ of a "coal mine" 5/ under the 1969 Act for the reasons stated in Association of Bituminous

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3/ For a discussion of the background and history of Secretarial Order 2977, see our decision in Republic Steel Corp., Nos. MORG 76-21 and MORG 76X90-P, issued this date.

4/ Section 3(d) of the 1969 Act provides:

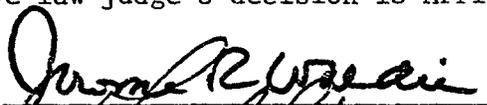
"[O]perator" means any owner, lessee, or other person who operates, controls, or supervises a coal mine.

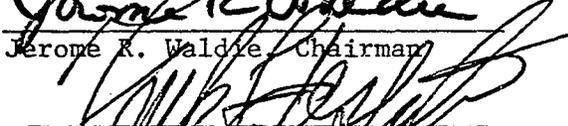
5/ Section 3(h) of the 1969 Act provides:

"[C]oal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or methods, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

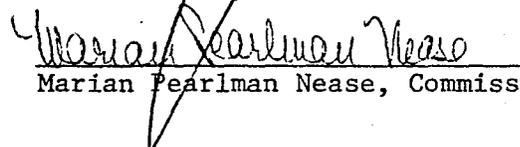
Contractors v. Andrus, supra, 581 F.2d at 861-862, and Bituminous Coal Operators' Association, Inc. v. Secretary of Interior, 547 F.2d 240, 244-246 (4th Cir. 1977). We further conclude that the withdrawal order at issue in this case was properly issued to Cowin. Cowin does not argue that its failure to comply with the cited standards did not constitute an imminent danger. Rather, Cowin argues that its failure to comply with the standards should be excused because an "emergency" condition existed. Even if it is assumed that an "emergency" warrants the vacation of an otherwise properly issued imminent danger withdrawal order, there is no support in the record for the assertion in Cowin's brief on appeal that an emergency existed. In fact, the only evidence relevant to this issue is testimony by the inspector that he was not aware of the existence of any emergency. 6/

Accordingly, the administrative law judge's decision is AFFIRMED. 7/

  
Jerome R. Waldte, Chairman

  
Frank F. Westrab, Commissioner

  
A. E. Lawson, Commissioner

  
Marian Pearlman Nease, Commissioner

6/ Cowin also argues in its brief on appeal that the Part 1977 standards cited in the withdrawal order are inapplicable. Cowin did not raise this argument before the judge. We do not address this argument raised for the first time on appeal. Clinchfield Coal Co., 6 IBMA 319 (1976). Cf. section 113(d)(2)(A)(iii) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978).

7/ Cowin has not raised any question on appeal concerning the assignment of the burden of proof in this proceeding. Therefore, we do not reach the judge's discussion of this issue. But see Old Ben Coal Corp. v. IBMOA, 523 F.2d 25, 39-40 (7th Cir. 1975) (on petition for rehearing).

[Concurring opinion attached]

Backley, Commissioner, concurring in result:

While concurring with the result reached in this case, I would hold Cowin liable as the proper party to be charged on somewhat different grounds.

This case was remanded for further proceedings not inconsistent with the court's decision in Association of Bituminous Contractors, Inc. v. Andrus, 581 F.2d 853 (D.C. Cir. 1978), hereafter referred to as ABC, and Republic Steel Corp. v. IBMOA, 581 F.2d 868 (D.C. Cir. 1978), (hereafter referred to as Republic). I fully agree with the conclusion that Cowin was an "operator" of a coal mine under the Federal Coal Mine Health and Safety Act of 1969. 1/ That conclusion is clearly consistent with the court's decision in ABC which construed the term "operator" to include independent construction companies. 2/ It is less clear to me how my colleagues arrive at the conclusion that Cowin, rather than the owner of the coal mine, is the proper party to whom the order of withdrawal should have been issued, particularly in light of the majority opinion in Republic Steel Corp., Nos. MORG 76-21 and MORG 76X90-P, issued this date.

The court's remand instructions in this case were that our decision was to be guided not only by the court's decision in ABC but also Republic. As noted in my dissenting opinion in Republic Steel Corp., I read the court's decision in Republic for the proposition that this Commission was asked by the court to make a policy determination as to which of the options available in allocating liability would most effectively assure the safety and health of the miner. I can find no discussion of this point in my colleagues' opinion in this case.

It is noted that, following remand, the parties were requested to state their positions regarding the action that should be taken by this Commission. The Secretary took the following position: In a situation involving a violation or hazard created by an independent contractor the Secretary "has the option to cite either the independent contractor or the coal mine operator [owner], and having made its election in this case, the decision of the Administrative Law Judge should stand." 3/

When the decisions issued today in Republic and Cowin are read together, one conclusion is inescapable: the majority has deferred in both cases to the discretion of the Secretary regarding the election of

1/ 30 U.S.C. §801 et seq., (1976) (hereafter "the Act" or the 1969 Act.")

2/ Although the 1969 Act did not explicitly include independent contractors as "operators", the Federal Mine Safety and Health Amendments Act of 1977 [Pub. L. 95-164] modified the definition of "operator" to include "any independent contractor performing services or construction at such mine." 30 U.S.C. §802(d) (1978).

3/ Conference before the Chief Administrative Law Judge Broderick, August 22, 1978, (TR. 8).

which party to proceed against, i.e., the owner or the independent contractor.

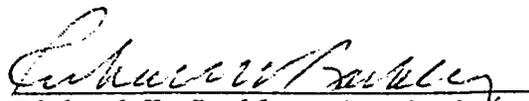
For me, the question of which party is the responsible operator is a factual determination to be made on a case-by-case basis. As noted in my dissent in Republic, supra, I am convinced that the responsibility for the health and safety of the miners should be placed on the party most able to prevent violations or hazards and to correct them quickly should they occur. This test is especially valuable in circumstances, such as present in this case, where the inspector at the mine site determines there is an imminent danger to the miners. I am in complete agreement with the following statement of the Board of Mine Operations Appeals when this case was before them:

The citing of an operator who may be far removed from the danger site may result in procedural and administrative delay never contemplated by the authors of the Act and permit a sufficient time lag for the feared disaster to become a reality.  
6 IBMA 351 at 365

In the facts of this case, Cowin was cited for the imminent danger complained of even though it had been hired by U. S. Pipe and Foundry Company to construct three shafts at a coal mine owned by U. S. Pipe. The situation is similar to that in Republic in many aspects. In both cases, an independent construction contractor, employed by the owner of a mine, was working on mine property. In both cases control and supervision of the work activity in that portion of the mine where the violation or hazard occurred rested with the independent contractor. The contractor in both cases was also in the best position to remedy the situation.

I find little difference in the two cases as far as the proper disposition of liability is concerned. Thus, I would conclude that Cowin is the proper operator to be charged in the subject order of withdrawal.

Accordingly, I would affirm the Administrative Law Judge's decision for the reasons stated.

  
Richard V. Backley, Commissioner



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 23, 1979

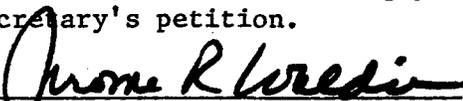
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
 :  
v. : Docket Nos:  
 :  
HELVETIA COAL COMPANY, : PITT 79-12-P  
 :  
KEYSTONE COAL MINING CORPORATION. : PITT 79-5-P

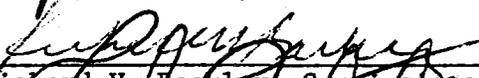
ORDER

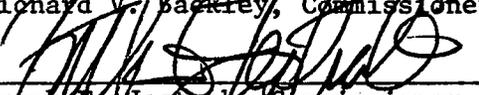
On April 19, 1979, Helvetia Coal Company and Keystone Coal Company jointly filed a motion to strike certain materials and references to them from the Secretary of Labor's petition for discretionary review. Helvetia and Keystone moved that the Commission strike an affidavit of Donald K. Walker, Chief of the Health and Safety Analysis Center of the Mine Safety and Health Administration, and a letter from Robert B. Lagather, Assistant Secretary for Mine Safety and Health, to the President of the Bituminous Coal Operators' Association, Inc. These evidentiary materials were submitted as part of the Secretary's petition, but were not a part of the record before the administrative law judge. Helvetia and Keystone assert that consideration of this extra-record evidentiary material would contravene section 113(d)(2)(C) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §823(d)(2)(C). That section states in part:

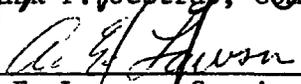
For the purpose of review by the Commission under paragraph (A) or (B) of this subsection, the record shall include: (i) all matters constituting the record upon which the decision of the administrative law judge was based; (ii) the rulings upon proposed findings and conclusions; (iii) the decision of the administrative law judge; (iv) the petition or petitions for discretionary review, responses thereto, and the Commission's order for review; and (v) briefs filed on review. No other material shall be considered by the Commission upon review. [Emphasis added.]

We agree that the evidentiary material attached to the petition may not be considered by the Commission, and we accordingly strike it and references to it from the Secretary's petition.

  
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Jerome R. Waldie, Chairman

  
\_\_\_\_\_  
Richard V. Backley, Commissioner

  
\_\_\_\_\_  
Frank F. Jestrak, Commissioner

  
\_\_\_\_\_  
A. E. Lawson, Commissioner

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 3, 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. BARB 78-653-P  
Petitioner : A.O. No. 15-05046-02031V  
v. :  
PEABODY COAL COMPANY, : Alston No. 3 Mine  
Respondent :

DECISION

Appearances: John H. O'Donnell, Trial Attorney, Office of the  
Solicitor, U.S. Department of Labor, Arlington,  
Virginia, for the petitioner;  
Thomas F. Linn, Esquire, St. Louis, Missouri, for  
the respondent.

Before: Judge Koutras

Statement of the Proceeding

This is a civil penalty proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, initiated by the petitioner against the respondent on August 24, 1978, through the filing of a petition for assessment of civil penalty, seeking a civil penalty assessment for three alleged violations of the provisions of mandatory safety standards 30 CFR 75.400, 75.316, and 75.402, set forth in three orders issued by Federal coal mine inspectors in April and May, 1977. Respondent filed an answer and notice of contest on September 7, 1978, denying the allegations and requesting a hearing. A hearing was held in Evansville, Indiana, on December 12 and 13, 1978, and the parties submitted posthearing proposed findings, conclusions, and briefs, and the arguments set forth therein have been considered by me in the course of this decision.

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 petition for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil

penalty that should be assessed against the respondent for the alleged 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 Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., now the Federal Mine Safety and Health Act of 1977.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Interim Commission Rules, 29 CFR 2700.1 et seq., 43 Fed. Reg. 10320-10327, March 10, 1978.

#### Stipulations

The parties stipulated to the following:

1. The jurisdiction of the petitioner and the presiding Judge (Tr. 10).
2. Any civil penalty assessed by me in this matter will not adversely affect the respondent's ability to remain in business (Tr. 10).
3. Respondent is a large coal mine operator, and the mine in question, in April 1977, was a large mine producing 5,800 tons of marketable coal daily, employing 422 persons underground and 28 persons on the surface while operating 9 conventional units (Tr. 10, 14).
4. MSHA coal mine inspector Arthur L. Ridley was a duly authorized representative of the Secretary when he inspected the mine on April 4, 1977, and is a qualified coal mine inspector (Tr. 11).

#### Discussion

The petition for assessment of civil penalties in this docket seeks assessment for three alleged violations, namely:

104(c)(2) Order No. 7-0145, 1 ALR, April 4, 1977, 30 CFR 75.400.

104(c)(2) Order No. 7-0215, 1 DLW, May 24, 1977, 30 CFR 75.316.

104(c)(2) Order No. 7-0233, 1 TML, May 20, 1977, 30 CFR 75.402.

On motion by the petitioner, filed October 11, 1978, and granted by me on October 13, 1978, Violation No. 7-0233, May 20, 1977, 30 CFR 75.402, was withdrawn. On motion by the petitioner, Violation No. 7-0215, May 24, 1977, 30 CFR 75.316, was settled by the parties, and pursuant to Commission Rule 29 CFR 2700.27(d), the settlement was approved by me after affording the parties an opportunity to present arguments on the record in support of the settlement, and a discussion in this regard follows at the conclusion of this decision.

Section 104(c)(2) Order No. 7-0145, 1 ALR, issued on April 4, 1977, by Federal coal mine inspector Arthur L. Ridley, charging a violation of 30 CFR 75.400, states as follows:

Loose coal and coal dust ranging in depths from 4 inches to 30 inches in depth had been permitted to accumulate in the headings and throughout the last open cross-cut of 7 rooms along the return air side of the 5th east panel entries off the 1st north main entries beginning at a point approximately 1225 feet inby the #6 entry of the last main north parallel entries and in an inby direction for approximately 350 feet. There was an estimated 20 tons of loose coal and coal dust. Dust samples 1, 2 & 3 were taken. Responsibility of Steve McCloskey and Richard Berry section foremen.

Section 30 CFR 75.400 provides as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

#### Testimony and Evidence Adduced by the Petitioner

MSHA inspector Arthur L. Ridley testified that he was familiar with the subject mine which is located in Ohio County, Kentucky, near Centertown. It is a relatively large mine and employs 422 people underground and 28 on the surface, and at the time the violation issued, it was operating with nine conventional units. On April 8, 1977, the daily production was 5,800 tons. A conventional mining system is used in mining coal, and he gave a description of the mining procedure followed at the mine. He confirmed that he issued section 104(c)(2) Order of Withdrawal No. 1 ALR, citing 30 CFR 75.400 (Exh. P-1) and served it on Mr. Charles Short, the assistant mine foreman (Tr. 9-17).

Inspector Ridley testified he was at the mine to make a spot inspection, and while walking through the return area on the unit in question, he was looking about and saw a considerable darkness which caused him to investigate further. Upon further investigation, he found considerable accumulations of loose coal and coal dust that had been left in the headings of the rooms. He saw coal ranging from 4 to 30 inches deep. He also saw spotty sections of coal in the second open crosscut along about room Nos. 2, 3 and 4, and which was subsequently cleaned up. The areas involved were active workings. With regard to the width of the accumulations, there were places where it was rib to rib and there were places where it was not. He stayed from 4:30 a.m. (the time that he verbally issued the order of withdrawal) to 9 p.m. to make a determination as to how much coal was accumulated, and he estimated that he wrote the order on the surface no later than 5 p.m. The accumulation consisted of loose coal and coal dust, and he took samples with a sieve, a brush, and a scoop across the floor and in a depth of approximately 1 inch deep and sifted them (Tr. 18-27). Inspector Ridley identified Exhibit P-3 as the laboratory analysis of the samples he took to support his order, and he described the places where he took the samples and the method used in sampling, and he indicated that the samples were taken from the accumulations described by him in the order (Tr. 28-40).

Inspector Ridley testified that it was his opinion, based on advancement of the working faces, that the coal which had accumulated beyond the last room that had been worked out and the amount of time that it would have taken to produce the advancement, the accumulations came from normal production and had been in the mine in this condition for approximately 16 production shifts, i.e., 8 working days. He indicated that he had previously worked as an industrial engineer and explained how he computed the duration of the accumulations. He stated that he spoke with Mr. Short about the accumulations and Mr. Short stated that they had only existed for 1 or 2 days (Tr. 40-53).

Inspector Ridley believed that the accumulations could have been cleaned up in about 4-1/2 hours using the equipment available, namely, scoops and shovels. The accumulations were dry and he identified the mine cleanup program (Exh. P-11). He indicated that he believed the operator violated paragraph (A) of the cleanup plan which requires cleanup of the face of working places. At the time coal was being produced, the area was, in fact, the face of a working place. Failure to clean up was a violation of the cleanup plan which requires that the ribs and bottom be cleaned as the face advances. In his opinion, the cleanup program was not followed at the mine, and he found coal as much as 30 feet deep in different locations across the 350 feet. It was obvious that there had been no serious attempt by the loader to clean the rib floor (Tr. 53-60).

The nearest ignition point would have been on the working section. The area had previously been bolted, and unless there is evidence of

an adverse roof condition, it is possible to go back after an area has been roof-bolted. Weekly checks are conducted in return room entries (in the return side of the mine where the air is returning from the unit), in order to test for hazardous conditions. Checks are conducted of methane, velocities of air, and volume of air, in order to determine that the air is traveling with the proper push and velocity and any other condition that might exist in the mine. Although he has previously detected methane in the mine, none has been detected in the panel of the working faces in question. The working face was approximately 400 to 450 feet from the area nearest to where the accumulation began. Assuming the coal accumulations were the result of normal mining, there would be a time when the coal would be nearer the working face, since that was exactly where mining was being done and equipment was being operated. Certain men are required to travel in this area at least weekly, namely, a certified mine foreman examiner, and other employees may be in the area for brief periods of time, picking up materials (Tr. 60-63).

Inspector Ridley considered the condition which he observed on April 4, 1977, to be serious, since in the event an ignition should occur in the panel, with the accumulation of dust and so forth, it would propagate an explosion and would increase the hazard involved, depending on where it occurred. He believes that explosives are commonly kept at the mine in the return entries, and that traveling at its normal course of velocity, return air will not reach the face where the men are presently working. Permanent stoppings separate it from the fresh air and it goes into the return. In his opinion, the operator should have known of the condition since it is the general policy to maintain ventilation across the last faces, and an attempt had been made to open up the crosscut for ventilation and the section foreman should have been aware of the conditions (Tr. 63-66).

Mr. Ridley observed no rock dust in the area of the accumulations, and Foreman McCloskey offered no explanation as to the accumulations (Tr. 67). He abated the citation on April 4, and he believed the operator made every reasonable effort to remove the accumulations as soon as possible. He observed part of the abatement, and three men were used to clean up. The accumulations were removed from the mine and the area was rock-dusted (Tr. 68-73).

On cross-examination, Mr. Ridley testified that he took samples to within 30 to 50 feet of the face. He described the sampling process, and indicated that he did not take a band or parameter sample, but rather, took floor samples. The areas he cited had previously been rock-dusted to within 40 feet of the face. However, production had ceased in those areas for some 8 days and the areas where he found the accumulations were about 450 to 500 feet from the active faces. He described where he traveled on the day of the citation, indicated that he saw no equipment, no men, no power set-ups or

equipment running, and stated that he believed men would pass through the area on a weekly basis rather than daily. The area was not being preshifted daily, and while it had been worked out, he did not consider it to be abandoned (Tr. 73-84).

Mr. Ridley stated that although it is common to have some sloughing of ribs and top coal, in this instance, only a minor amount of the accumulations resulted from such an occurrence. A working section consists of that area in by the tailpiece of the belt to the working face. The subject worked-out rooms were not located within that area, that is, they were not between the loading place and the active face and therefore, this was not a working section. He did examine the weekly examination book for hazardous conditions, but it did not indicate the existence of accumulations (Tr. 84-88).

On the day that he issued the order, the miners who wanted to reach the active working faces, did not have to go through the area cited in the order. Due to the fact that the battery-operated scoop had to pick up a load and then travel about 500 feet in order to dump it, the long traveling distance was part of the reason that it took 4-1/2 hours to clean up the area. Since there was no one in the area of the worked-out rooms at the time he inspected it, and he had seen no evidence of people being in that area, there was no one to withdraw from that immediate area. The nearest ignition point, which was the explosive storage area, was approximately 250 to 300 feet away or approximately 175 feet back from the working face in the room neck of No. 6 entry, which is a return entry. The ultimate ignition point, therefore, would be approximately 325 feet away from the accumulations. There would be occasions when it would be unwise to go into an abandoned area or an unworked area. It is a reasonable assumption that the longer a particular area remains worked out and is not maintained for travel, the more the chance increases that there would be a danger there (Tr. 90-95). Although there may have been rock dust in the area, it was insufficient for him to detect it with his naked eye (Tr. 97).

On redirect examination, Mr. Ridley testified that under the definition which appears in 30 CFR 75.2(h), the area where he saw the accumulations would not meet the definition of an abandoned area because the particular area is required to be examined at least once weekly, is regularly traveled, and is required to be ventilated (Tr. 97-99).

On recross-examination, he testified that the area in which the alleged accumulations were found was ventilated, but he did not take an anemometer reading or a smoke tube reading, nor did he pick up any dust and drop it to watch the air move the dust. Despite the fact that he did not perform such tests, he still maintained that the air

was moving through the area and that there were no obstructions to prevent ventilation. No report of the accumulations had been made. If the area had been examined, then the accumulations should have been noted in the books. However, he has no reason to believe that someone may have intentionally disregarded the accumulations (Tr. 101).

In response to bench questions, he indicated that he believed the area had been ventilated because on the day that the violation issued, he had with him his flame safety lamp, which indicated that there was a sufficient amount of oxygen and/or ventilation and that the area was therefore safe to travel or work in. It is his opinion, if an area is traveled at least once a week, then it is an area regularly traveled for purposes of the standard (Tr. 103-105). However, he conceded that a flame safety lamp does not show air movement, and he did not know for a fact whether or not the last open crosscut in the worked-out rooms was walked or inspected (Tr. 106).

#### Respondent's Testimony and Evidence

Steve McCloskey, respondent's shift manager, testified that he was aware of the order issued by Inspector Ridley on April 4, 1977, and he indicated that on that day, he was approached by Charles Short, assistant mine foreman, and was told that a withdrawal order had been issued due to an accumulation of coal on the bottom and around the ribs of the No. 5 unit and that he should withdraw his equipment from the faces of his regular unit and take every available man that he had and go to the area and commence procedures for correcting the problem. He then went to this area with his men, who totaled approximately 11, including the mechanic. From the last open crosscut to where the coal had been found, was approximately 500 to 600 feet. Prior to the issuance of the order, no work had been done in that area on that day, and when he arrived on the unit, he saw no evidence of any recent activity in the area. It took approximately 1-1/2 hour's running time with the scoop to move the coal out, and the scoop was used rather than the loader, due to the fact of the distance from the area (Tr. 110-114).

Mr. McCloskey identified Exhibit R-2 as copies of the preshift reports covering the period March 17 to April 4, 1977, and he indicated that the area in question was not preshifted at anytime during this period of time, and as an explanation he stated that there were no men working in that area and to the best of his knowledge, no one would have any reason to go in the area and work or perform any duties of any kind. There is no law that he is aware of that requires an inspection of that particular area be conducted on a daily basis (Tr. 115-123). He also stated that the preshift reports do not show the presence of any accumulations, although it is normal and customary for preshift mine examiners to note the accumulations of hazardous materials on their preshift reports. In his estimation, 5 to 7 tons

of coal had to be loaded out of the area. The area had been cleaned, prior to his arrival, and he believed that some of the loose coal or loose material could have been the result of undercutting by a cutter operator or could have resulted from weakened coal falling off the ribs onto the floor. It is also possible that some top coal could have broken loose and consequently fallen to the bottom, and there also could have been places where the coal ribs had taken weight and some of them had popped off to the mine floor (Tr. 124).

Mr. McClaskey testified that abandoned workings need not be inspected, and he identified Exhibit R-3 as weekly examination reports of hazardous conditions of methane for the weeks of March 19, 26, 31, and April 2, all of which indicated no hazardous conditions for the areas in question. He indicated that an active working is one where men are required to work or travel daily (Tr. 125-127).

On cross-examination, Mr. McClaskey testified that the area cited by Mr. Ridley had not as yet been sealed, but that the No. 6 panel is presently sealed. He identified the ventilation plan provision (Exhibit P-6) which provides for the prompt sealing of all abandoned areas. He believed an "abandoned area" was one where regular work, such as extracting coal, is being performed. The area where the accumulations were found is not his responsibility, and Mr. Short is responsible for that area. He indicated that he was called into the area by Mr. Short to correct the problem of loose coal and coal dust. He managed the removal of the material. It is possible that a small amount of the accumulation could have resulted from normal mining operations. He has seen some rashing or sloughing (i.e., material that weathers and coal falls off in large lumps from the ribs) in the unit that he was working on, up in the headings as well as in the return rooms. The lumps of coal that he observed on April 4, 1977, ranged in size from fist-size to about half the size of a basketball (Tr. 127-147).

On redirect examination, Mr. McClaskey stated that he did not believe the law required abandoned areas to be examined, and he described the cleanup process. He stated that he did not observe the area before the order was issued or before Mr. Ridley arrived on the scene, but once there, he did not see any accumulations as deep as 30 inches as testified to by Mr. Ridley. In his view, an area was an "active working" only if someone was required to go there and perform regular duties on a daily basis (Tr. 148-157).

Inspector Ridley was called in rebuttal, and testified that he had the mine ventilation plan with him when he cited the violation, and he discussed the areas where he found the accumulations. He testified that while he noticed the beginnings of float coal accumulations, they had not yet developed into a violation, but he asked Mr. Short to include that condition in the rock dusting which was done to abate the citation (Tr. 184-187).

In response to further questions by respondent's counsel, Mr. Ridley stated that he saw no activity in the area, and he observed no evidence that weekly examinations had been conducted, that is, he saw no times, dates, or examiner's initials posted in the area at that time, but knows that they were being made thereafter in accordance with section 75.305 (Tr. 187-191).

### Findings and Conclusions

#### Fact of Violation--30 CFR 75.400

Section 30 CFR 75.400 provides that: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

The term "active workings" is defined by 30 CFR 75.2(g)(4) as: "[A]ny place in a coal mine where miners are normally required to work or travel."

Aside from the question of the presence of the cited accumulations, a threshold question to be decided is whether the area cited by the inspector can be considered to be an "active working" within the meaning of the cited safety standard.

#### Respondent's Arguments

In its posthearing brief, respondent argues that the mine area cited in the order in question was not an "active working" within the meaning of section 75.400, or as that term is defined in 30 CFR 75.2(g)(4) ("any place in a coal mine where miners are normally required to work or travel"). In support of this argument, respondent cites the testimony of Inspector Ridley on cross-examination indicating that the area was not an active working, thus contradicting his prior statement that he believed it was based on the fact that the area was required to be preshifted once every 8 hours. Respondent points out that the area had not been examined pursuant to section 75.303 since March 17, 1977, the last time a preshift examination was made in the cited area, and asserts that on April 4, 1977, the area cited was inactive or abandoned in the sense that all work had been completed in the area and there were no plans to return there to continue further work. In support of this conclusion, respondent cites the testimony of the inspector that he saw no one in the area, observed no power setups or equipment, that the area had been "worked out," that respondent was not required to inspect the area during preshift examination, and that he did not consider the area to be a working section. Finally, respondent argues that the area cited was in a set of rooms about 250 feet from the return air course which was parallel to the last open crosscut in which the alleged accumulations were located, that from the return air course inby to the active

workings was at least an additional 200 feet, and the weekly examination for hazardous conditions made at the time the order was cited did not include the area in question. In view of the foregoing, respondent concludes that the area cited was not one in which men were normally required to travel at the time the order was issued.

#### Petitioner's Arguments

Petitioner argues that respondent's interpretation of the term "active workings" as an area where miners are required to work or travel daily is erroneous, that the word "normally" as used in section 75.2(g)(4) is not ambiguous, and that the test must be whether any miner must normally anytime work or travel in the area and, if so, the area is an active working.

Regarding respondent's attempt to categorize the area in question as an abandoned area, petitioner points out that the area had not been sealed in accordance with the existing ventilation plan requiring all abandoned areas to be sealed promptly. Since the area was unsealed at the time of the inspection, petitioner argues that it could not be deemed, under the ventilation plan, to be an abandoned area, and respondent's definition of an abandoned area as one where no regular duties such as extracting coal are any longer performed, is not a valid definition. Further, petitioner cites the legislative history of the 1969 Act where Congress expressed a concern for abandoned mine areas.

Petitioner agrees with the inspector's conclusion that the area cited was not a working section as defined by section 75.2(g)(3), but points out that Old Ben Coal Company, 4 IBMA 198, 215 (1975), requires loose coal to be kept free of active workings and did not rewrite section 304(a) of the 1969 Act (75.400), so far as to allow accumulations in all parts of a mine but the working section. Further, while it is true that the area in question did not require preshift or onshift examinations, it was required to be examined weekly under section 75.305. Consequently, petitioner asserts that the inspector was correct in finding that the area was an active working.

After full and careful consideration of the arguments presented, I conclude that petitioner's arguments in support of its position that the cited area in question was, in fact, an "active working" within the scope of the meaning of section 75.400 is correct, and its arguments are adopted as my findings and conclusions on this issue, and respondent's arguments to the contrary are rejected. The fact that the area cited had not been preshifted pursuant to section 75.303, that work had been completed there, and respondent did not plan to return to the area to continue further work, is not particularly relevant. Further, the fact that the inspector may have contradicted himself when characterizing the area is of no particular significance since the question of whether the area was, in fact, an

active working must necessarily be based on all of the evidence and facts adduced. Here, it is clear that the area had not been sealed and abandoned pursuant to respondent's own ventilation plan. Further, the area cited required weekly examinations pursuant to section 75.305. Consequently, it was an area where miners would normally be expected to work or travel when conducting such examinations. Further, as pointed out by petitioner, the legislative history cited reflects that Congress expressed a special interest in insuring that abandoned areas are maintained free of hazardous conditions. While it is true that the facts presented here do not support a finding that the area cited was, in fact, abandoned, it cannot be said that Congress ever envisioned a lesser concern for a mine area which is clearly an active working. Congress expressed that concern by enacting section 304(a), the statutory provision requiring that active workings be kept free of accumulations of combustible materials.

In Kaiser Steel Corporation, 3 IBMA 489 (1974), MSHA established that since an operator was required to inspect an air return twice a day, that return was, in fact, an "active working" subject to the requirements of section 75.400. The former Board of Mine Operations Appeals reversed the judge's finding that MSHA had not proven the return air course was an "active working" within the definition of 30 CFR 72.2(g)(4). Likewise, in Mid-Continent Coal and Coke Company, 1 IBMA 250 (1972), the Board found that an entry was an "active working" and therefore subject to the requirements of section 75.400, since miners were required to go into the entry for the purpose of inspecting a high-voltage cable, and as to the miner that conducted this inspection, the Board held that the accumulations of coal dust in that entry presented a potential hazard to him and that the entry in that case was a place of normal work and travel.

In Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par. 22,087 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977), it was held that the presence of a deposit or accumulation of coal dust or other combustible materials in active workings of a mine is not, by itself, a violation.

In that case, the Board held that MSHA must be able to 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.

As to the issue of "reasonable time," the Board stated:

As mentioned in our discussion of the responsibilities imposed upon the coal mine operators, what constitutes a "reasonable time" must be determined on a case-by-case evaluation of the urgency in terms of likelihood of the accumulation to contribute to a mine fire or to propagate an explosion. This evaluation may well depend upon such factors as the mass, extent, combustibility, and volatility of the accumulation as well as its proximity to an ignition source.

8 IBMA at 115.

The Board further stated:

With respect to the small, but inevitable aggregations of combustible materials that accompany the ordinary, routine or normal mining operation, it is our view that the maintenance of a regular cleanup program, which would incorporate from one cleanup after two or three production shifts to several cleanups per production shifts, depending upon the volume of production involved, might well satisfy the requirements of the standard. On the other hand, where an operator encounters roof falls, or other out-of-the-ordinary spills, we believe the operator is obliged to clean up the combustibles promptly upon discovery. Prompt cleanup response to the unusual occurrences of excessive accumulations of combustibles in a coal mine may well be one of the most crucial of all the obligations imposed by the Act upon a coal mine operator to protect the safety of the miners.

Based on the preponderance of the credible evidence adduced in this proceeding, I conclude and find that petitioner has established a violation of section 75.400 as charged by the inspector in his order, and that its evidence in support of the violation more than adequately meets the tests set down in the Old Ben case. Aside from a dispute as to the actual weight of the total accumulations eventually cleaned up and removed from the mine once the order issued, I cannot conclude that the respondent has rebutted the inspector's findings concerning the presence of the cited accumulations. The inspector's order describes the extent and location of the accumulations, and I find his testimony in support of his order

to be credible. The inspector testified that the loose coal came from prior normal operations, and from the distance which the mining cycle and face area had been advanced, he estimated that it had existed for approximately 8 working days, or 16 working shifts. Although one of respondent's witnesses suggested that the accumulations may have resulted from weakened ribs falling to the floor after the area had been worked out, he candidly admitted that it was just as likely that some of the accumulations could have resulted from normal mining operations. Further, mine management advised the inspector that the accumulations had existed for 1 or 2 days, and the shift manager was informed that the accumulations were present and should be cleaned up on the very day of the inspection. In the circumstances, I conclude and find that petitioner has established that loose coal and coal dust existed as described in the order and that respondent failed to clean them up within a reasonable time after they should have been discovered.

During the course of the hearing, respondent's counsel took issue with the laboratory analyses report concerning the incombustible content of the samples collected by the inspector to support his order. The report was received over counsel's objections, and that ruling is hereby reaffirmed. The testimony of the inspector reflects that he followed the proper procedure in taking his samples, and respondent has failed to rebut that testimony or the information resulting from the laboratory analyses. I find that the action taken by the inspector regarding the sampling supports the conditions cited. See Co-op Mining Company, 3 IBMA 533 (1974); Coal Processing Corporation, 2 IBMA 336 (1973); Consolidation Coal Corporation, 4 IBMA 255 (1975).

#### Size of Business and Effect of Penalty Assessment on the Respondent's Ability to Remain in Business

The parties have stipulated that the respondent is a large coal mine operator and that any civil penalty assessed by me in this matter will not adversely affect its ability to remain in business, and I adopt these stipulations as my findings in this regard.

#### Negligence

I find that the evidence adduced supports a finding that the respondent failed to exercise reasonable care to prevent the accumulations of coal and coal dust in the areas cited by the inspector, and that this failure on respondent's part constitutes ordinary negligence. The inspector's testimony regarding the duration of the existence of the accumulations is credible, respondent's own witness admitted that they existed for at least 2 days, and it is clear to me that they should have been discovered and cleaned up earlier.

## Gravity

The evidence adduced reflects that the accumulations in question were approximately 400 feet from the working face where mining was taking place, and the belts were 350 feet away. The nearest ignition source was a storage area for explosives located in the room neck of the No. 6 entry some 200 to 250 feet away. The cited area was being ventilated, and since the inspector saw no tracks there, I have to assume that no equipment was operated in the area. Although petitioner's brief, at pages 5 and 6, make reference to the presence of "float coal dust," the citation as issued makes no such reference, the inspector did not believe the presence of "float coal dust" was a violation, and he indicated that he used a 20-mesh screen to take his samples. Since float coal dust, as defined by section 75.400-1(b), is dust that can pass through a 200-mesh screen, I cannot conclude that the evidence supports any finding that float coal was present.

The inspector found the accumulations some 200 feet from the return air course in which he was walking. However, he indicated that he saw no one in the area, there were no power setups or equipment present, and he considered the area to have been "worked out" and not a "working section." Thus, it would appear that the area, by definition of "working section" as found in section 75.2(g)(3), was outby the loading point and working faces where normal mining activities took place, and there is no evidence that any mining activity was taking place in the cited area.

Based on the foregoing facts and circumstances which prevailed at the time the citation issued, I cannot conclude that the conditions cited were grave or posed a serious threat to the safety of miners, notwithstanding the inspector's belief that the violation was serious because the accumulation could propagate an ignition or explosion. I find that the evidence presented simply cannot support that conclusion. Any potential ignition sources were far removed from the accumulations, and petitioner obviously concurs in this evaluation of the totality of the situation since at page 14 it argues that the actual hazard and concern was the explosives stored some 200 to 250 feet away. Lacking any ready ignition sources, I fail to understand how the explosives, standing alone, posed any real threat. Further, there is no evidence that the storage of the explosives was not in compliance with any other standards or procedures, nor is there any evidence that the explosives were subjected to any hazardous conditions. In the circumstances, the inspector's finding that the violation was serious is rejected, and I conclude that it was not.

## History of Prior Violations

Petitioner introduced a computer printout of the prior history of violations pertaining to the Alston No. 2 Mine (Exh. P-10). That

history reflects a total of 712 paid violations for that mine during the period January 1, 1970, to April 4, 1977. During that same period of time, the printout reflects 71 violations of the provisions of section 75.400. No evidence was produced with respect to respondent's overall prior history of violations, and my findings on this issue are therefore limited to the prior history of the mine in question as reflected in the printout. Based on the overall history of the mine encompassing a 7-year period for which an average of some 100 citations yearly were assessed and paid, and taking into account the size of the mine, I cannot conclude that the history of prior violations is significantly large. However, with respect to respondent's prior track record concerning citations for section 75.400, I find that it is not good, and that it appears that coal and coal dust accumulation violations at the mine have been consistently occurring. It seems clear that in enacting the civil penalty provisions of section 109 of the 1969 Act, now section 110(i) of the 1977 Act, Congress intended that a penalty assessed pursuant to section 109 of the Act should be calculated to deter similar future violations and to induce compliance. Robert G. Lawson Coal Company, 1 IBMA 115, 117, 79 I.D. 657, 1971-1973 OSHD par. 15,374 (1972). Further, it has also been held that repeated violations justify a higher penalty than theretofore assessed as a method of deterring future violations of the same standard. Old Ben Coal Company, 4 IBMA 198, 82 I.D. 264, 1974-1975 OSHD par. 19,723 (1975). Accordingly, I have taken this into account in the civil penalty assessment made by me in this matter.

With regard to the matter concerning the corporate changes which took place concerning Kennecott Copper's sale of stock to the Peabody Holding Company, and the effect of that transaction on the respondent's prior history of violations, petitioner points out that the arguments advanced by respondent in this regard are inappropriate in this proceeding because the violation took place on April 4, 1977, prior to the stock transfer of July 1, 1977. In this regard, I take note of the fact that this issue was raised by the respondent in a recent proceeding, MSHA v. Peabody Coal Company, BARB 78-606-P, decided by me on March 26, 1979. In that case, I rejected the defense advanced by the respondent, and to the extent that it is reasserted in this proceeding, it is likewise rejected, and my findings and conclusions previously made on that issue are herein incorporated by reference.

#### Penalty Assessment

Petitioner asserts that a civil penalty in the amount of \$5,000 is reasonable for the violation. Taking into account the prior history of section 75.400 violations at the mine, the size of the respondent, and the fact that the cited accumulations existed over a long period of time without being cleaned up, petitioner's recommendation does not appear to be totally excessive. However, considering my gravity findings, and the fact that the conditions were cleaned

up promptly once the order issued, I believe that a civil penalty of \$4,000 is warranted, and that this should prompt mine management to give more attention to the requirements of section 75.400.

#### Proposed Settlement

With regard to section 104(c)(2) Order of Withdrawal No. 1 DLW (7-215), May 24, 1977, citing 30 CFR 75.316, the parties proposed a settlement in the amount of \$2,500. Petitioner's Assessment Office recommended a civil penalty of \$5,000 for this violation. Arguments in support of the proposed assessment were presented on the record and petitioner argued that while the violation was serious, the Assessment Office's finding that "a shift of the roof or ribs could occur and cause a roof fall which in the return air would not be separated from the belt entry in such a manner as to seriously jeopardize the health and safety of the workmen in the section" is "nonsense" since the ventilation plan permits the brattice curtain to be hung on a very light wood frame and if the roof fell on such a frame, it would smash the frame just as much as if the frame were hung on the unauthorized two boards which were, in fact, used by the operator when the inspector observed it. After consulting with the inspector who issued the order, and who was present in the hearing room and agreed that the Assessment Office was mistaken as to the facts when it proposed its assessment, petitioner's counsel asserted that the ventilation was not affected by the improperly hung curtain. Under the circumstances, this fact, coupled with the mistaken evaluation of the gravity presented by the conditions cited, and the fact that the condition was abated the same day the order issued, counsel asserted that petitioner considers \$2,500 to be an appropriate civil penalty for the violation and respondent stipulated that payment in that amount would be made (Tr. 4-8).

In view of the foregoing, I find and conclude that the proposed settlement should be approved, and pursuant to Commission rule 29 CFR 2700.27(d), it is ordered that the settlement reached by the parties be approved.

#### ORDER

In view of the aforesaid findings and conclusions made in this proceeding, including the approval of the proposed settlement proposed by the parties, IT IS ORDERED:

1. Respondent shall pay a civil penalty in the amount of \$4,000 for a violation of section 75.400, as set forth in Citation No. 7-0145, April 4, 1977, payment to be made within thirty (30) days of the date of this decision.

2. Respondent shall pay a civil penalty in the amount of \$2,500 for a violation of section 75.316, as set forth in Citation No. 7-0125, May 24, 1977, within thirty (30) days of the date of this decision.

  
George A. Koutras  
Administrative Law Judge

Distribution:

John H. O'Donnell, Trial Attorney, Mine Safety and Health Administration, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

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Standard Distribution

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 3, 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. HOPE 78-722-P  
Petitioner : A.O. No. 46-01398-02020F  
v. :  
ALLIED CHEMICAL CORP., : Shannon Branch UG Mine  
Respondent :

DECISION

Appearances: William Moran, Trial Attorney, U.S. Department of Labor, Arlington, Virginia, for the petitioner; Lee F. Feinberg and William T. Brotherton III, Esquires, Charleston, West Virginia, for the respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a petition for assessment of civil penalty filed by the petitioner against the respondent on August 28, 1978, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with one alleged mine safety violation issued pursuant to the 1969 Federal Coal Mine Health and Safety Act. Respondent filed a timely answer in the proceeding, asserted several factual and legal defenses, and a hearing was held in Charleston, West Virginia, on January 17, 1979. The parties filed proposed findings and conclusions, and the arguments contained therein have been considered by me in the course of this decision.

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

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

#### Applicable Statutory and Regulatory Provisions

1. The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., now the Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978.

2. Sections 109(a)(1) and (a)(3) of the 1969 Act, 30 U.S.C. §§ 819(a)(1) and (a)(3), now section 110(i) of the 1977 Act.

#### Discussion

During the evening shift of September 8, 1977, Thomas M. Williams, motorman on the No. 20 locomotive, and Larry Gibson, the brakeman, were operating the locomotive while hauling 28 trips of loaded mine cars underground in the mine in question. During the course of their travel, the locomotive trolley harp assembly which supplies power to the locomotive became disengaged and as a result of that loss of power, Mr. Williams was unable to stop or otherwise control the locomotive and it subsequently derailed. Mr. Gibson jumped from the moving locomotive before it was derailed and was killed when he apparently struck one of the ribs at the point where he jumped. Mr. Williams stayed with the locomotive for approximately 1,000 feet further from the point where Mr. Gibson had jumped, and after being unable to stop the locomotive, he too jumped into a wide entry prior to the derailment and sustained injuries.

The alleged violation and applicable mandatory safety standard in issue in this proceeding are as follows:

Section 104(a) Order Nos. 1 HS and 1 GLS, dated September 9, 1977, cites a violation of 30 CFR 75.1404, and states as follows:

The pneumatic braking system on the No. 20 locomotive being used for coal haulage purposes was not sufficient to control a trip of 28 loaded mine cars which were involved in a run-a-way trip. The brake shoes were not properly aligned with the trucks and could not apply uniform frictional pressure on the braking surface. The linkage for the manual brake was disconnected completely. 75.1404.

The orders were terminated on September 16, 1977, after abatement of the conditions cited, and the notice of termination states: "The required conditions to be corrected on No. 20 locomotive were corrected."

Testimony and Evidence Adduced by Petitioner

MSHA inspector James E. Kaylor testified that he has had experience in visually inspecting track haulage equipment, including locomotives, as part of his duties, and that he has an understanding as to how the locomotive braking systems operate. He can tell when a braking system is functioning properly and when it is not, can identify the parts of a braking system, and can determine whether a braking system is properly aligned and adjusted. He went to the mine on September 8, 1977, upon instructions from his supervisor to conduct a fatal accident investigation. He described what took place during the course of his investigation, including what he found at the scene of the locomotive derailment and the point where the accident victim, Brakeman Gibson, jumped from the locomotive and was killed (Tr. 4-16).

Mr. Kaylor testified that at the time of the accident, the locomotive was pulling 27 mine cars, each of which weighs 4 tons, with a load having a capacity of 15 tons each. Company policy at the time limited the trips to 25 mine cars. The locomotive derailed onto a derail track, but did not overturn. It simply left the rails and slid on the rails and sustained no visible damage. The day after the accident, the respondent was allowed to remove the locomotive and cars from the mine, but while it was still underground, he had an opportunity to visually examine the locomotive braking system and his visual examination revealed that the brake shoes were out of line with the wheel trucks and the flange on the brake shoe was wearing on the wheel flange. MSHA inspectors Gerald Smith and Junior Sizemore also observed the locomotive, conducted a more extensive examination, and they concurred in his evaluation that the brake shoes were not properly aligned. In his opinion, the derailment of the locomotive did not cause the braking system to become misaligned and unadjusted. The flange was worn practically off one end of some of the brake shoes. He saw no visual evidence of any brake skidding at the scene of the accident, and this indicated that the brakes or wheels were not frozen or applied. Three wheel skids used as an additional braking device to slow the locomotive down were found at the scene and they were apparently dislodged from their normal position under the wheels in the process of derailment (Tr. 16-25).

Mr. Kaylor identified Exhibit P-10 as a locomotive inspection report dated June 18, 1977, concerning the No. 20 locomotive, and he indicated that it was obtained by MSHA Electrical Inspector Sizemore during his review of company records which are required to be maintained, and that Mr. Sizemore advised him that he could find no other reports or files covering the period June 18, 1977, to the date of

the accident. Mr. Kaylor did not know whether the No. 20 locomotive was inspected during this period of time. Section 75.512 of the mandatory safety standards requires that reports be maintained of weekly inspections of electrical equipment (Tr. 25-37, 44).

Mr. Kaylor testified that during his investigation, he examined the trolley wire, could see no lubrication applied, and he also discovered the trolley pole harp assembly near the top of 18 Hill going down the hill at the 2 Right parallel where the track enters a side track. The trolley harp connects with the trolley wire and serves as a means of supplying power to the locomotive. The dislocation of the harp assembly from the trolley pole results in a loss of power, and this in turn results in a loss of the braking systems because the air compressor shuts off and the only air remaining is that left in the air tanks (Tr. 12-13, 38-39).

Upon observation of the locomotive controls at the scene of the accident, Inspector Kaylor observed the power tram controller in the wide-open position, the sand lever open, and the pneumatic brake lever open, and with these controls open, air pressure will be lost, but the sander would provide additional traction and increased braking ability. In addition, the brake lever was engaged (Tr. 39-43).

On cross-examination, Mr. Kaylor testified as to his training and experience in conducting mine inspections and accident investigations, and while he has had no formal training regarding the actual working of brake shoes, he has observed numerous brake shoes on locomotives and has gained his knowledge through experience. He explained and detailed his understanding of how a locomotive brake operates. He also described a brake shoe flange, and indicated that the flange on the brake shoe in question was practically completely worn off the shoes which he observed. He observed all eight brake shoes on the locomotive underground and six of them had worn flanges and two appeared to be in good shape. The worn flanges resulted in the braking surface of the shoe not being applied to the full surface of the wheel. When he looked down inside the locomotive, the brake shoes were backed off the wheel due to the loss of air pressure and he could observe where the flanges were worn, but he could not tell how much of the brake shoe surface was on the wheels when the brakes were applied. Some part of the flanges on each of the six shoes was worn away, but he conducted no tests to determine how much of these brake shoe surfaces would touch the wheel and his examination was visual. However, he believed that if only part of the brake shoe is touching the wheel, then that brake shoe, which was designed for the locomotive, would not be doing the job that it was designed to do (Tr. 45-59).

Mr. Kaylor stated that the distances and grades described in his accident report were obtained by scaling from a mine map, but he could not recall whether he did the scaling. The locomotive was still upright after it derailed, had no external damage, and he concluded

that Mr. Gibson possibly could have suffered a bruise or two had he ridden the locomotive and not jumped. He also indicated that as a general rule, it is far safer to ride the motor rather than to jump. His investigation revealed that the trolley pole harp probably caught in a junction point where two wires came together. The harp was in good condition, and he did not issue a violation for it not being lubricated. He was not sure whether any other inspector did, and indicated that if it is not in his report, then no violation was issued. The 4,000-foot distance mentioned in the report was derived from the mine map and the overall 5-percent grade for that distance was supplied by the respondent. He also testified as to the position of the controls as he found them, and described the dynamic and pneumatic braking systems in terms of efficiency and how they are applied and used. He agreed that section 75.512 does not require that a locomotive be inspected during a vacation period or a strike and it is not a violation to leave it uninspected during that time (Tr. 60-78).

On redirect, Mr. Kaylor testified that a misaligned brake shoe is not as efficient as an aligned one, that the manufacturer has certain requirements as to how to install brake shoes, and that alignment is important to braking efficiency. Based on his experience, he believed that with the brake shoes misaligned as they were, the braking effect is not what it would be if they were properly aligned. The brake shoe flange is designed to hold the wheel or shoe in line and is not designed for braking or stopping the locomotive. The size of any trip is not governed by any regulation, but is fixed by company policy with safety in mind and after considering the size of the trams, motors, and the graders involved. Although only three skids were found, it is just as likely that four were used. He was not sure whether trolley wire lubrication is required by regulation and believed that such lubrication with a graphite base tends to keep the trolley harp in contact with the trolley wire (Tr. 80-a - 80-e).

In response to bench questions, Mr. Kaylor stated that being out of line, the brake shoes were not wearing the way they were designed to wear. Normally, the flange of the shoe is supposed to ride over the wheel flange, but in this case, it was riding on top of it. The condition was not a normal wear and tear situation (Tr. 80-85). He did not know how much surface of the worn brake shoes touched the wheels, and the flanges were worn in parts and the entire flanges were not worn (Tr. 80-84).

MSHA electrical inspector Gerald F. Smith testified as to his mining experience and training, and he assisted in the accident investigation conducted at the mine on September 9, 1977. He is familiar with braking systems and how they operate, he can identify a properly working system from one which is not properly working, and he knows how to test such systems to determine whether they are properly working. Upon visual observation of the locomotive at the scene of the accident underground, with the guards removed, he determined that the

brake shoes were not aligned with the trucks of the locomotive. He is familiar with the No. 20 locomotive braking system and indicated that it has a dynamic or electric brake which acts as a speed reducer similar to down-shifting an automobile. The locomotive had a dual braking system, namely, the dynamic brake and the pneumatic, or air brakes. He described the pneumatic braking operation, and also indicated that the locomotive also had a manual or mechanical brake, but it was disconnected and it is used as a parking brake (Tr. 84-89).

Mr. Smith identified Exhibit P-11 as a sketch representing a properly and improperly aligned brake shoe, but the sketch is not intended to depict what the actual brake shoes which he observed looked like. From his observations concerning the wear on the flange, he assumed that it was making contact with the wheel surface, but no pictures or actual sketches were made and the wheels were not dismantled. The basis for his determination that the brakes were improperly aligned was the fact that there was excessive wear on the flange and this led him to conclude that the brakes were misaligned (Tr. 90-95).

Mr. Smith stated that the manual brake installed on the locomotive was required to be maintained as a matter of MSHA policy and guidelines, and once installed, it had to be maintained operative. The locomotive had a dual braking system which complied with section 75.1404 (Tr. 98-99). After the locomotive was removed to the surface and brought to the main shop, it was tested again. He observed the locomotive again from a pit which allowed him to view it from the bottom. He observed that two straps which serve to tie or hold the brake ring in position, were broken, two were bent, and two were missing. Power was put on the locomotive and the pneumatic braking system was inoperative in that the brake shoes did not set. When this occurred, company officials immediately began to find out why the system was not working (Tr. 103-105).

Mr. Smith stated that in issuing the section 104(a) order, he did not consider the number of car trips involved, or the grade of travel when he made the judgment that the brakes were inadequate or that the faulty brake system would not stop the locomotives. He simply considered the condition of the equipment and assuming he walked into a mine and found the same locomotive with the same brake condition, he would again conclude that they would not stop the locomotive. If the brake shoes did not apply uniformly to the locomotive wheels when pressure was applied, then he would conclude that it did not have adequate brakes. He assumed the flanges of the brake shoes were coming in contact with the wheels due to the wearing of the flanges and the flanges are not designed to be used as braking surfaces (Tr. 109-113).

Mr. Smith stated that no tests were conducted on any of the locomotive wheels to determine how much of the braking surface was present or whether the flange presented a problem (Tr. 114). He

issued the 104(a) order because he believed the locomotive braking system was inadequate to control the locomotive. It is adequate only if properly maintained as designed (Tr. 118). Mr. Smith stated that when the locomotive was tested outside the mine, the pneumatic brakes were set, power was put on the locomotive, the locomotive was put in forward motion, but when the brakes were applied, they did not stop the locomotive (Tr. 119-121).

On cross-examination, Mr. Smith stated that mine management made no response when the brakes failed to hold during the test and he could not recall Mr. Halsey telling him that the brake shoes would not touch the wheels because the locomotive had been dragged through mud, and he knew nothing about how it was brought to the surface. Mr. Halsey asked to put the power on so that he could show that the brakes would hold. Mr. Halsey also set the brake and then put the locomotive in motion again and the brakes failed to hold again. The tests were conducted on a Saturday, September 10, and when he returned on Monday, the brake shoes were taken off the locomotive (Tr. 121-125).

Mr. Smith testified that he did not physically attempt to determine whether the misaligned brake shoes were touching on the locomotive wheels and he made his determination by visual observation. No one ever engaged the brakes in order to observe whether the shoes were contacting the wheels. On two of the six brake shoes, the flanges were severely worn, and the remaining four were out of adjustment to the point where the flanges were making contact instead of the surface of the shoe. The mechanical parking brake has nothing to do with the dual braking system, and he had no quarrel with the dynamic brakes. The violation centers on the fact that the pneumatic brake shoes at some times apparently would not have contacted the wheels. He did not know whether the bent and missing straps came off in the wreck. Based on the flange conditions, he believed that the brake shoes did not touch the wheels on six of the eight wheels (Tr. 129-140).

On redirect, Mr. Smith reiterated that there were eight locomotive wheels, and eight brake shoes, six of which were not properly aligned and showed wear. Two of the eight shoes appeared to have been properly aligned. He did not watch the shoes actually being applied to the wheels and he confirmed his opinion that the shoes were not capable of stopping the locomotive and were not properly aligned by the two tests conducted on the surface by Mr. Halsey (Tr. 142-144).

Inspector Kaylor was recalled by MSHA and testified as to the orders he issued in this case, and he identified the report of investigation he compiled. He believed the violation was serious, and that the respondent should have been aware of the brake conditions through the weekly examinations and reports. The brakes can be readily inspected visually to determine whether they are misaligned. The condition cited was abated in good faith (Tr. 154-162).

Mr. Smith stated that the fact that no additional inspection reports were found does not indicate that the brakes were not inspected for alignment (Tr. 166).

Testimony and Evidence Adduced by Respondent

Buddy E. Raines, general superintendent of the Shannon Branch Mine, testified that he was aware of the accident in question and he described the route taken by the locomotive in question on the day of the accident, the loads of coal it was pulling, and Locomotive Operator Williams' activities that day based on the accident investigation report. He also described the general terrain and the track grades over the area traveled by the locomotive, and described the area from a mine map (Exh. R-1). He testified that from the 2 North parallel area, where the locomotive harp was lost, to the point of the derailment, the average travel grade is 1 percent descending downhill, but the area also has uphill grades and steeper grades (Tr. 203-216).

Mr. Raines testified that mine policy, established in 1972, fixed the limit that a locomotive could transport to 25 mine cars of coal. Prior to that time, there was competition among the motormen who often pulled more than 25, and as many as 30, and 25 was fixed as the limit after consultation with the union committeemen and motormen who decided that 25 was a "comfortable limit," and the rotary dump track can only handle 19 cars, with room enough to store the remaining six cars on a side track entry. He has observed locomotives traveling underground and normal speed traveling downhill would be about 10 miles per hour and any speed over 10 would be fast. The speed in the 21 left area would average 5 to 7 miles per hour (Tr. 216-220).

Mr. Raines testified that the company was concerned about whether the 25-car load limit had been exceeded on the day in question. He participated in the company accident investigation and did not know what happened to the brake shoes in question. The map previously referred to, was prepared for the purpose of conducting some tests related to the accident. According to his calculations, the distance from where the harp came off to the point of the derailment where the locomotive came to a stop, is 4,230 feet, and the distance from the top of 18 left hill to where the locomotive stopped, is 7,030 feet (Tr. 220-228).

Safety was one of the factors considered in limiting the loads to 25 mine cars. There is no company policy concerning proper locomotive speed, speed limits are not posted in the mine, and a locomotive does not have a speedometer. Locomotive destinations and movements are controlled by the dispatcher, and he does not control speed, but does control various locomotive checkpoints (Tr. 228-230).

On cross-examination, Mr. Raines testified that state law requires that a locomotive travel no faster than track conditions permit and actual speed is left to the judgment and experience of the motormen. The locomotive was pulling 27 mine cars at the time of the accident (Tr. 232).

On redirect, Mr. Raines stated that the statement attributed to Mr. Waters to the effect that Locomotive Operator Williams could handle 27 trips is found in MSHA's accident report, but did not mention that Mr. Waters told everyone that he believed that his order to limit it to 25 trips was obeyed. The speed of a locomotive depends on a number of factors, including the number of trips, sand, brakes, slope, skids, and the weight of the motor, and the number of cars pulled is not the sole factor in determining stopping distance or speed. Locomotive speed limits are not regulated by statute or safety regulations and he knows of no mines which post such speed limits (Tr. 234-235).

In response to bench questions, Mr. Raines stated that no one calculated the speed of the locomotive at the time of the accident (Tr. 236).

William E. Funsch is employed by the General Electric Company, the manufacturer of Locomotive No. 20, the locomotive involved in the accident. He is a graduate of the University of Oklahoma, has 28 years' experience in pneumatics, and has designed and tested industrial and mining locomotive braking systems. He is familiar with the No. 20 locomotive braking system and it has four independent braking systems, namely, a dynamic brake, a straight service air brake, a truck (wheel) emergency brake, and a parking brake. The parking brake is also referred to as a mechanical brake. The auxiliary braking system is a completely independent system installed as an additional feature to cover a weak link in the system, namely, an air hose that goes between the main locomotive frame and the trucks which swivel. The hose is subject to abrasions, and should it break or become severed, the emergency system is designed to automatically supply air to the four brake cylinders (Tr. 240-242).

Mr. Funsch testified that the No. 20 locomotive has eight wheels, each with a brake shoe, and four braking systems. He calculated the stopping distance of the locomotive, and based on (1) a 1-degree slope, (2) speed of 15 miles per hour, which he considers excessively fast, (3) the weight of the locomotive, (4) the weight of 27 loaded mine cars, and (5) a factor of sliding friction caused by the use of wheel skids, he calculated that it would take 57.7 seconds, or roughly 1 minute, for the train to stop over a distance of 589.3 feet. Assuming sufficient air pressure is in the braking systems, Mr. Funsch testified that the No. 20 locomotive, with 27 loaded cars, could have stopped within the 4,230 feet, which is the distance from where the harp came off to the point of derailment, without any difficulty, and that distance was seven or eight times the distance required to bring the train to a stop (Tr. 244-246).

Mr. Funsch stated that the pneumatic brake system operates by supplying air from two main reservoirs, through a brake valve, to four brake cylinders which exert force on the brake shoe, pushing it against the wheel, thereby generating friction, which retards the rotation of the wheel, thus slowing the train down (Tr. 247).

On cross-examination, Mr. Funsch testified that he sells locomotives to various coal mine operators, including the respondent. He has never seen the No. 20 locomotive, did not examine it after the accident, and has not seen the brake shoes or examined the braking system in question. His testimony is based on the plans and construction of the locomotive, including his underground mine experience, but he did not know whether the brake shoes in question were misaligned. The auxiliary truck emergency braking system was designed as an integral part of the locomotive as a standard feature (Tr. 248-250).

Mr. Funsch stated that operating instructions come with the sale of a locomotive, including the operation of the braking system, and he explained the use of the emergency system. Assuming the brake shoes were improperly aligned or adjusted, this would affect the motion. However, a loose brake shoe hanger will wobble, but will seek the flange on the wheel and will center on the wheel and gross misalignment does not occur. The purpose of the wheel flange is to keep the shoe in line and to create more brake shoe area on the wheel. Using only the flange for the braking of the wheel creates a dangerous situation (Tr. 250-256).

Mr. Funsch stated that wetness, mud, or oil would have a great effect on the friction factor as applied to the brake surfaces and that an increase in the grade of travel would increase the distance required to stop the train. This stopping distance calculation did not take into account human error or panic in the operation of the locomotive. He was not paid to appear as a witness and his testimony is voluntary. However, he testified that his company has not sold a locomotive to the respondent since 1957, and he is not in the marketing of his company's business (Tr. 258-262).

On redirect, Mr. Funsch stated that the emergency truck brake is not used in the normal stopping of the pneumatic air brake system. The locomotive in question has a dual braking system within the meaning of section 75.1404, namely, the dynamic brake and the pneumatic brake. Referring to Exhibit P-11, Mr. Funsch stated that the small line on the diagram in the center of the wheel indicates that the brake shoe flange is riding on the wheel flange and is an unstable condition and will eventually wear down the brake shoe flange (Tr. 263-268).

Thomas M. Williams has been employed by respondent for 13 years and has 37 years' underground experience in the mining industry. He

was employed as a motorman on September 8, 1977, and had been employed in that capacity for 20 years. He was the operator of the No. 20 locomotive on the day of the accident, and Mr. Larry Gibson was assigned as the brakeman. Mr. Williams described his movements during the shift when the accident occurred. He performed a routine inspection of the locomotive, including checking the skids, trip light, fire extinguishers, and all the safety devices. After speaking with the dispatcher, he moved the locomotive and checked his sand supply and the brakes and they were in satisfactory condition (Tr. 272-277).

Mr. Williams testified that his job entails pulling loaded mine cars and picking up empties and he goes where the dispatcher tells him to. He described his route of travel on the day of the accident, and indicated that earlier in the shift, he had traveled to the area below 2 North parallel with 22 empty mine cars and had no difficulty stopping on Hill 18 and his electric brake and air brake were working satisfactorily. He picked up 11 loaded mine cars at 6 North and proceeded to 27 where he picked up 16 loads after dropping off the 11 car loads and his brakes were operating. He stopped the cars by means of sand and his air brake. He then recoupled the 11 car loads to the 16 which he had picked up and then proceeded to the 21 left junction where he stopped his load by means of sand or air brakes with no difficulty. While awaiting further instructions from the dispatcher, Mr. Gibson was setting four skids. Mr. Williams saw him set two next to the motor car and left with the other two. He assumed he set the other two, but could not see him due to the length of the cars. Upon receiving clearance from the dispatcher, he moved from the 21 left junction and proceeded on his trip. He passed the 18 Hill with no difficulty, using both electric and air brakes. As he started over the 18 Hill, he lost his trolley pole but put it back on the trolley wire and the trip was under control, and he used electric and air brakes and sand to control the trip down the 11-percent 100-foot grade past the 18 Hill (Tr. 277-288).

Mr. Williams lost his trolley pole again in the 2 North parallel section. The pole knocked his mine cap off his head. He then discovered that the pole harp was missing and he began using every available device to keep the motor under control, including sand and the dynamic and air brake, but could not control the trip. Due to the loss of the harp, he lost his air pressure and no additional pressure was building up. The only available air pressure was that which remained when the harp was lost and his pressure gauge indicated zero. Mr. Gibson jumped from the locomotive and he (Williams) jumped after locating a wide area in an entry (Tr. 288-293).

Mr. Williams testified that he had on previous occasions transported 27 or more car loads down the No. 18 Hill, and has hauled as many as 29 or 30 car loads with engines smaller than the No. 20 locomotive, and he had no trouble controlling those trips, and the accident in question is the first one he has experienced in his 37 years

of mining. The No. 20 locomotive is inspected every Thursday on the third shift, and he had authority to take it to the motor barn if he detected anything wrong while operating it (Tr. 293-295).

Mr. Williams testified that he took 27 trips on the day in question because he felt he could handle that many car loads. When he discovered the loss of air pressure, he did everything possible to slow down, but prior to the loss of air pressure, he was controlling the trip satisfactorily by using sand, and his electric and air brakes, and his trip was under control at all times prior to the losing of his harp and air pressure (Tr. 295-298).

On cross-examination, Mr. Williams testified that he considered himself to be a well-experienced motorman. He checked the brakes of the No. 20 locomotive and visually observed that the brakes were touching the wheels. He could not check the flanges because that requires the locomotive to be parked over a pit. It is possible for the brakes to malfunction sometime during a shift, even though a visual inspection indicates they are in working order. He has had no previous accidents involving the operation of locomotives prior to the accident in question. He had traveled to the motor barn in a westerly direction earlier in the evening, but could not recall whether he had any mine cars. He went to the barn to obtain a slide and normally would not take along a loaded trip of cars. He could not recall his speed at that time, but had the trip under control by using his air brakes (Tr. 299-307).

Mr. Williams believed that some 7 minutes transpired from the time he left 21 Left to the point where he jumped from the locomotive, and at least 5 minutes transpired from the point where he lost his trolley harp to the point where he jumped. Prior to his losing the harp, there was adequate air pressure when the trolley wire was in contact with the overhead wire (Tr. 308-311). He had 60 pounds of air pressure when he lost the harp (Tr. 313).

In response to questions from the bench, Mr. Williams testified that most of the grade starting at 2 North is downhill with some rise and fall. If a car were dropped at one end of the horizontal travelway from 4 South in a westerly direction toward 2 North, it would travel the entire distance to the other end by force of gravity. When his trip derailed, he was told 18 mine cars left the tracks. He never went back to view the scene and has not operated a locomotive since the accident. While he was not disciplined by the respondent, he was taken off the job as a motorman, but is still employed in another capacity (Tr. 313-318).

On redirect, Mr. Williams indicated that 50 pounds of air pressure is required to operate the locomotive. The motorman who operated the No. 20 locomotive prior to his shift did not indicate that he was experiencing any difficulties or that he was having trouble with the brake shoes (Tr. 318-320).

Steve Halsey, employed as an underground maintenance supervisor, was employed in that capacity at the time of the accident, and his job entailed servicing and inspecting locomotives, including work on locomotive brake systems. He knows how brake systems work and has worked on the No. 20 locomotive (Tr. 332-333). He stated that the emergency or auxiliary brake is a different braking system from the air brake system, and the parking or mechanical brake is the fourth. The dual braking system is the pneumatic and dynamic brakes which are designed to stop the locomotive under normal conditions. He has ridden the locomotive underground and the normal speed is 8 to 10 miles per hour while carrying loads. The load limit is presently 15 cars, but at the time of the accident, it was 25. He has ridden the No. 20 locomotive when it pulled as many as 33 car loads and he experienced no trouble in controlling it. He identified the locomotive inspection report (Exh. P-10) and indicated there were additional "time sheets," but he could find no other reports covering the period June 18 to the day of the accident. He stated that during this period, the mine worked approximately 15 days due to a strike and vacation period. During this time, the No. 20 locomotive was in the motor barn for maintenance on several occasions. A new harp was put on 2 days prior to the accident (Tr. 333-343).

Mr. Halsey described the procedure used to remove the locomotive for testing from the mine to the shop area after the accident. No power was put on the locomotive and it was either pushed, pulled, or dragged to the shop. The locomotive was inspected by several people, including MSHA inspectors, and upon instructions, he took the brake shoes off and laid them beside each wheel truck. He looked at the brake shoes and did not believe they were "that far out of adjustment," and he was convinced they would work. After applying the power to the locomotive, the brakes did not hold. A second test was made and the brakes still would not hold. After Inspectors Smith and Sizemore left the shop, he went to the pit to check the wheels and brake shoes again. After power was applied, he noticed a gap caused by compressed mud between the wheels and brake shoes on all eight wheels. The shoes would have contacted the wheels, had it not been for the mud. The mud evidently came from the shop area while the locomotive was being transported. The normal gap between shoe and wheel is one-half to five-eighths of an inch and the shoe will move an inch or an inch and a half. Two of the brake shoes in question were in perfect condition, two had problems with the flanges, one had a portion of the flange broken off and it was decided that this was an old break which did not result from the accident. The other shoes had no problems with the flanges and exhibited only normal wear. One of the two shoes which concerned MSHA had a groove cut into the tread area causing it to rock on the wheel and ride out of alignment, and the other one had a portion of the flange missing. Mr. Halsey conceded that these two brake shoes were misaligned (Tr. 343-359).

Mr. Halsey testified he inspected all of the brake shoes in question, and in his opinion, the two misaligned shoes were making contact with the wheels, as were the other four (Tr. 359-362).

On cross-examination, Mr. Halsey testified as to his education and training courses concerning braking systems. He has mine foreman's papers and believed he is well-qualified to speak on locomotives and locomotive braking systems. The auxiliary braking system will activate if there is a break in the main line or hose, if the system bleeds off over a period of time, or if the brake lever is pushed all the way over. The locomotive would adequately stop a trip of 25 or 30 and he remembered this from riding it 3 or 4 years ago. At that time, however, he did not check the brakes and could not say whether that braking system was the same as the one involved in the accident. The locomotive was taken out of the mine on the tracks and he was not present when it was taken out and did not know what the conditions were. He initiated the two tests in the shop because he was confident the brakes would work, but was surprised when they did not. He did not protest to the MSHA inspectors after the tests failed because they were leaving the shop and did not do so later, although he did tell them that "something was wrong." He estimated the 1-1/2-inch shoe distance from the wheel through visual observations. In his view, the brake shoes and flanges were not excessively worn. He replaced all of the brake shoes (Tr. 365-376).

On redirect, Mr. Halsey testified the brakes were working on the night of the accident. After the locomotive was brought out of the mine, it was pushed and dragged over the timber yard area which was muddy (Tr. 382).

In response to bench questions, Mr. Halsey stated that when he discovered the mud on the wheels, he did not inform the inspectors of that fact, and after cleaning out the mud, he made no attempt to test the locomotive again (Tr. 383).

Tom Akers, employed as an electrical engineer by the respondent, testified that after the accident, he was assigned the task of attempting to determine the speeds at which locomotives travel in the mine under particular conditions and that MSHA recommended that this be done. A 15-load limit was decided on as a temporary limit until his study could be made. His study determined that a speed of 8 to 9 miles an hour down the No. 18 Hill was considered by the locomotive operators to be a normal rate, and 15 miles per hour was considered excessive. Mr. Akers described the procedures used to conduct his tests, and they included tests to determine stopping and braking distances, and loaded mine cars were used after weighing them on scales. His tests were conducted before Mr. Funsch made his calculations, but the results of both were close.

On cross-examination, Mr. Akers testified that he was not sure whether the No. 20 locomotive was used in the tests and that the braking systems were working adequately (Tr. 387-394).

Mr. Kaylor was recalled by the court and testified that the conclusion reached in his report of investigation that the locomotive in question was traveling at an excessive speed was based on interviews and statements made by several motormen listed in the report who indicated that normally, a locomotive, with four skids and a comparable number of loaded cars, would level off at stop if it were cut loose with the power off after it reached Hill 18 at the point where the grade levels off and dips. The persons giving the statements assumed that the locomotive was traveling at an excessive speed in order for the motor to travel by itself after it lost its air brakes. During his investigation at the accident scene, three skids were found, but the other one could have been inside the rail under the wrecked cars where it could not be seen. He also indicated that Mr. Williams could have left the throttle in the wide-open position, while moving it back and forth in his attempts to bring the locomotive under control, and that Mr. Williams' explanations as to the positions of the controls possibly explain why they were found in those positions as explained in his report (Tr. 394-400).

#### Findings and Conclusions

Respondent is charged with a violation of 30 CFR 75.1404, a statutory standard found in section 314(e) of the Act, and which reads as follows:

Each locomotive and haulage car used in an underground coal mine shall be equipped with automatic brakes, where space permits. Where space does not permit automatic brakes, locomotives and haulage cars shall be subject to speed reduction gear, or other similar devices approved by the Secretary, which are designed to stop the locomotives and haulage cars with the proper margin of safety.

30 CFR 75.1404-1 braking system, provides:

A locomotive equipped with a dual braking system will be deemed to satisfy the requirements of 75.1404 for a train comprised of such locomotive and haulage cars, provided the locomotive is operated within the limits of its design capabilities and at speeds consistent with the condition of the haulage road. A trailing locomotive or equivalent devices should be used on trains that are operated on ascending grades.

The condition cited as a violation by the inspector, and which he believed constituted a violation of section 75.1404, reads as follows:

The pneumatic braking system on the No. 20 locomotive being used for coal haulage purpose was not sufficient to control a trip of 28 loaded mine cars which were involved in a run-a-way trip. The brake shoes were not properly aligned with the trucks and could not apply uniform frictional pressure on the braking surface. The linkage for the manual brake was disconnected completed 75.1404.

#### Petitioner's Arguments

Petitioner takes the position that the provisions of 75.1404-1 pertaining to "design capabilities and speeds consistent with the condition of the haulage road" are not at issue here, and that the key issue in this case, in terms of construction of the standard, is the meaning of the phrase which appears in the first part of 75.1404-1. In support of this proposition, petitioner asserts that the requirement that "a locomotive equipped with a dual braking system will be deemed to satisfy the requirements of section 75.1404," necessarily requires that the dual braking system be working, operative, and in good order and repair, and suggests that respondent's position that the dual braking system need only be in existence on the locomotive and that its ability to function as a braking system is irrelevant and should be rejected. Citing what it believes to be the applicable case law in support of the proposition that remedial legislation such as the Act in question here should be construed liberally, petitioner argues that a construction of section 75.1404 to the effect that a locomotive equipped with a dual braking system need not work, operate, or be capable of stopping the locomotive, runs contrary to the remedial nature of the statute and the general rules of statutory and regulatory construction.

Petitioner cites the case of Sewell Coal Company, HOPE 78-529-P, decided by Judge Merlin on November 15, 1978, and states that Judge Merlin found a violation of section 75.1404 based upon that portion of the standard relating to design capabilities and haulage road conditions, and that the braking system, per se, was not the focus of his decision. However, petitioner maintains that one can infer that an operative, working brake system was considered by Judge Merlin to be a necessary requirement since he found "that the air brake system did work." Further, since Judge Merlin found that the language of section 75.1404-1, dealing with design capabilities and haulage road is a separate requirement of the regulation, petitioner maintains that it need not show that a locomotive's operation was outside of its design capabilities or that the condition of the haulage road was inconsistent with speeds of the locomotive because those are not the only grounds for demonstrating a violation of section 75.1404.

Petitioner maintains that the lack of a dual braking system as well as the lack of a braking system which is working, operative, and in good repair constitute other grounds for a violation of this regulation. With respect to the use of the term "equipped," petitioner asserts that the term should be construed to mean not only outfitted, but also maintained in a working, effective and operative condition, and cited a decision by Judge Michels in Pittsburgh Coal Company, PITT 76-123-P, decided October 7, 1976, concerning the standard for automatic couplers.

Turning to the facts and evidence adduced in this proceeding, petitioner argues that visual examination of the locomotive brake shoes underground at the point of the derailment indicated that the brake shoes were out of alignment with the wheels (or trucks) of the locomotive and that the flanges were worn. In the opinion of Inspector Kaylor, the derailment did not cause the misalignment of the brake shoes, and out of the eight shoes, six were not in good shape and had worn flanges. No evidence of brake skidding was found at the scene of the accident, and when the locomotive was removed to the surface and tested on two separate occasions, the locomotive brakes failed to work when the motor was put in motion. Conceding that the loss of electricity upon which the dual braking system depends, was a factor in the accident, petitioner nonetheless maintains that this fact does not support an inference that the pneumatic braking system would not have failed at some point in time, irrespective of electrical power, and that at some point in time the extent of wear or misalignment will result in brake system failure. This problem has been recognized by section 75.512 requiring a weekly recorded examination of electrical equipment, including a locomotive, and petitioner asserts that no evidence was offered to dispute the fact that no examination report was made between June 18, 1977, and the fatality date of September 8, 1977. In summary, petitioner takes the position that the locomotive did not have a braking system that would do the job at the time the fatality occurred.

#### Respondent's Arguments

Respondent contends that the condition cited in the order, namely misaligned brakes shoes, is not a violation of section 75.1404, since that section is confined to violations relating to a failure to equip a locomotive with a dual braking system. Respondent maintains that section 75.1404, and its subpart, 75.1404-1, is a design-oriented safety standard rather than a maintenance requirement standard. Citing the plain meaning of the statutory language and the legislative history of the standard in question, respondent argues that they require that the locomotive must have automatic brakes or, alternatively, must have a dual braking system designed to stop the locomotive with the proper margin of safety; they do not mandate maintenance thereof.

In support of its arguments, respondent points to the fact that petitioner's own witnesses admitted that the locomotive had a dual braking system and that respondent's expert witness Funsch testified that such dual braking system was more than sufficient to stop the locomotive, with 27 loads being pulled, on 18 Left Hill under the conditions existing on September 8, 1977, and at a speed far in excess of that which Motorman Williams testified was his speed prior to losing the harp assembly. Witness Funsch testified that the locomotive and its braking system were so capably designed and operated that, had the pneumatic braking system not accidentally been depleted of all of its air supply, the locomotive could have been stopped in approximately one-eighth of the distance between the site where the harp assembly was lost and the derail location at 2 South.

With regard to the Sewell Coal decision, respondent asserts that its position is consistent with Judge Merlin's holding in that case even if it requires that a locomotive must be operated within the limits of its design capabilities and operated at speeds consistent with the condition of the haulage road. In Sewell, respondent points out that the undisputed facts revealed that a decedent/motorman was operating a tandem locomotive pushing a loaded rock duster weighing 5 tons up a steep grade, and when the locomotive failed to make the grade, it slid back down the hill at which time the decedent was thrown out of the locomotive and killed. It was admitted that automatic brakes were not present, so Judge Merlin turned to the alternative section, 75.1404-1, requiring that the locomotive have a dual braking system and he interpreted such alternative to also require that the locomotive be operated within the limits of its design capabilities and at speeds consistent with the condition of the haulage road. Judge Merlin ruled that the locomotive did not have a dual braking system, that the locomotive could not handle the 5-ton load placed upon it (the locomotive was not being operated within the limits of its design capabilities) and that the locomotive did not have enough power to achieve sufficient speed to travel along the grades it was sent on (the locomotive was not operated at speeds consistent with the condition of the haulage road).

Turning to the facts presented in the instant case, respondent argues that as in Sewell, automatic brakes were not present on the No. 20 locomotive, and one must look to section 75.1404-1 to determine whether the locomotive satisfied the alternative of a dual braking system. As pointed out earlier, respondent maintains that the locomotive did, in fact, have a dual braking system, that its expert witness unequivocally testified that the locomotive was being operated within the limits of its design capabilities on the day in question, and that the only person with knowledge of the speed being traveled down 18 Hill, motorman Tom Williams, testified that his trip was "under control," traveling down 18 Hill, by utilizing sand, dynamic and pneumatic braking, until such time as the trolley pole bounced along the roof, accidentally losing the harp assembly and, simultaneously, electric power which would have activated the compressor

which supplied air to the pneumatic and dynamic braking system. Although Mr. Williams continued to use air to pneumatically and dynamically brake and to release sand onto the tracks, when the air cylinders were completely depleted all "control" was lost and the derail became inevitable. Therefore, according to the only witness who knows, speed was not a factor in the accident. In addition, Inspector Kaylor testified that his investigation revealed that the trip was under control until the harp assembly was pulled off the trolley pole.

Respondent submits that it has satisfactorily rebutted petitioner's assertion that the dual braking systems were not maintained operable, and that petitioner presented no evidence as to whether the locomotive in question was operated within the limits of its design capabilities. Regarding the disconnection of the linkage for the manual brake as a condition supporting the alleged violation of 75.1404, respondent asserts that this fact has no relevance to the alleged violation since it is established that a dual braking system existed on the locomotive and the manual brake is not part of that system. Respondent views the inspectors' testimony regarding their inspection of the misaligned shoes as suspect because the inspection was a visual inspection by inspectors who were not trained in the operation of braking systems and who themselves conceded that the visual examination was not conducted with the brake shoes applied to the wheel surface to determine if the brake shoes were indeed failing to make contact.

Regarding the surface tests relied on by the petitioner in support of its argument that the pneumatic brakes were incapable of performing adequately, respondent argues that this resulted from the fact that compressed mud had accumulated on the brake shoe surfaces as a result of the locomotive being dragged to the surface, and the mud prevented the shoes from making contact with the wheels. Further, aside from the surface tests, respondent cites the testimony of the locomotive operator that on the day of the accident he stopped the locomotive with the same 27 loads using only sand and the pneumatic brake, and that he experienced no difficulties during his shift in braking the locomotive or controlling the trip until after he lost power and his air pressure was depleted. Respondent also cites the testimony of its expert that were it not for the loss of power the locomotive would have been stopped, and that the locomotive and its braking system were capably designed and operated within their design limits.

In summary, petitioner's position is that the respondent failed to properly maintain the pneumatic braking system of the No. 20 locomotive because it allowed certain brake shoes to become misaligned with the locomotive wheels (trucks), thereby rendering the dual braking system inoperative. Respondent's position is that petitioner failed to establish by a preponderance of the evidence that the

misaligned brake shoes had an effect on the braking capacity of the locomotive in question, and assuming that it did, no violation on section 75.1404 ensued because that standard is not directed to the maintenance of a braking system but only to its proper design. With respect to petitioner's further argument that the pneumatic braking system was inoperative because the emergency truck brake was deficient, respondent asserts that such argument is irrelevant because the emergency truck brake is not part of the dual braking system required by section 75.1404.

Petitioner seems to take the position that even if the locomotive had not lost its power, the brakes would not have worked anyway since they were misaligned and had worn flanges. However, based on the testimony and evidence produced by the petitioner, I cannot make that conclusion. I believe it is clear from the weight of the evidence adduced in this proceeding that the failure of the locomotive brakes to function was due to the unexpected loss of power caused by the loss of the trolley harp assembly, which in fact resulted in the unanticipated loss of braking air pressure due to the loss of electrical power. I am also impressed with the fact that the locomotive operator did all that was humanly possibly to bring the locomotive under control, that he stayed with the locomotive for a distance of some 1,000 feet after the brakeman jumped and was killed in his futile attempts to slow it down, and that he finally jumped from the locomotive after failing to stop or slow it down and after finding a safe place in a wide entry in which to jump.

Although the investigative report prepared by Inspector Kaylor mentions the fact that the trip limit policy was disregarded, the report makes no reference as to whether the locomotive in question was being operated within the limits of its design capabilities. As a matter of fact, MSHA produced absolutely no evidence concerning the design or specifications for the braking systems on the locomotive in question, and the inspectors conducted no tests to determine whether the worn brake shoes in question were making contact with the wheel surfaces, or whether the worn brake shoe flanges were, in fact, being used to brake the wheels. Although the brake shoes were removed from the locomotive wheels after it was removed from the mine, the shoes were not further tested and were apparently discarded. Further, once the locomotive was placed back on the tracks underground to facilitate its removal from the mine, no physical tests were conducted at the scene to determine whether the braking systems were operative. The inspectors simply visually observed the brake shoes, noted that six out of the eight were worn and appeared to be misaligned, and came to the conclusion that the brakes were inadequate. As a matter of fact, Inspector Smith stated that at the time he issued his section 104(a) order, he did not consider the number of trips being pulled or the grade of travel, and he simply considered the condition of the brakes as he observed them in coming to the conclusion that they would not

stop the locomotive. However, in support of this conclusion, he relied on the fact that brake shoes which are not applied uniformly to a locomotive wheel surface are inadequate. Yet, no one bothered to test the brake shoes to determine how much braking surface was present and no one visually observed the shoes coming in contact with the wheels during any of the surface tests. Although Inspector Smith asserted that he relied on the two tests suggested by the respondent in the surface shop to support his conclusion that the brakes were inadequate, those tests are somewhat suspect since they were conducted after the locomotive had been removed from the mine and subjected to possible dragging through mud, thereby subjecting the locomotive wheels and brake shoes to conditions which were not present at the time of the accident. Significantly, those surface after-the-fact tests are not even mentioned in the accident investigation report compiled by Mr. Kaylor.

It is clear from the evidence presented that once the harp assembly was disconnected from the trolley wire, the brake systems would not function because of the loss of air pressure and electric power. MSHA's accident report concluded that the primary factor causing the accident was the disengagement of the locomotive trolley pole from the trolley wire and the subsequent loss of the trolley harp assembly which led to the premature loss of the pneumatic and dynamic braking systems. Further, MSHA inspector Kaylor conceded that if the locomotive harp assembly had not been lost, it is very possible that the accident would not have occurred. As for the other factors "possibly contributing to the accident" as stated in Mr. Kaylor's accident report, I believe it is clear they are not so critical. The lack of an operative mechanical brake is irrelevant since it has been established that the locomotive had a dual braking system installed and the mechanical brake is simply an emergency parking brake that is not normally used to stop the locomotive under operating conditions. Mr. Kaylor's assertion of excessive speed is totally unsupported by any credible evidence, and the fact that the 25-car limit was exceeded is irrelevant since respondent's evidence supports a finding that the locomotive was capable of handling loads in excess of that limit and petitioner has not proved otherwise.

In the final analysis of the evidence presented by the petitioner in support of the alleged violation, it seems clear that the thrust of its case is bottomed on the surface "tests" conducted in the shop once the locomotive was removed from the mine several days after the accident. In my opinion, those so-called tests are far from conclusive. In the first place, it is clear to me that the locomotive was not in the same condition that it was underground at the time of the accident. It had been placed back on the tracks underground, pulled from the mine, and then pushed or dragged for some distance over the surface and into the mine shop. Thus, it had been subjected to some abuse, and from the evidence presented by the respondent, it had been dragged through mud and the brake shoe surfaces had been covered with

mud at the time the locomotive had been tested. Respondent's expert testified that such mud and foreign matter on the shoes would cause the brakes not to hold when power was applied and petitioner has not rebutted this fact. Further, the locomotive operator testified that when he tested the brakes underground while the locomotive was in motion, he experienced no difficulties in stopping the locomotive, and, as a matter of fact, his unrebutted testimony is that he experienced no difficulties in stopping the locomotive with the trips he was hauling during the shift in which the accident occurred. His difficulties began when he lost his power, thereby incapacitating all of the locomotive brake systems.

The condition cited by the inspector on the face of the citation alleges that due to the misalignment, the brake shoes were unable to apply uniform frictional pressure on the braking surfaces. In my view, the inspector simply cannot support that statement. He indicated he had no formal training in the operation of brake shoes, and testified that when he visually examined the locomotive underground, he could not tell how much of the brake shoe surfaces were in contact with the wheels when the brakes were applied, and no tests were ever made to determine whether or not the brake shoe surfaces could, in fact, contact the wheel surfaces when the brakes were applied. It would seem to me that since two of the six brake shoes were in good condition, and the flanges were only partly worn, the question of braking efficiency of the brake shoes would necessarily depend on actual physical testing rather than speculation based on visual observations.

It seems to me that in a case of this kind, MSHA should have taken the initiative at the outset and subjected the locomotive to underground testing while it was on the tracks, at a time and place closer to the event, and under actual working conditions. Here, the inspectors merely made a visual observation of the brake shoes, which did not include any observations as to whether the shoes were, in fact, contacting the braking surface of the wheels, and from those cursory observations they speculated that the brakes would not hold. Neither MSHA nor the respondent retained custody of the brake shoes, no photographs were made, and even though the brake shoes were at one time apparently removed from the locomotive once it was taken to the surface shop, no one subjected the six shoes to further testing to determine the effect of the misalignment or worn flanges on the actual braking capabilities of those shoes. In view of the fact that two of the shoes were found to be in good condition, and in light of the testimony presented by both parties concerning the physical and mechanical interrelationships between the braking shoes, braking surfaces, and the wheel surfaces with respect to braking capacities and effectiveness, it would seem that such further tests are critical.

With regard to Judge Merlin's decision in the Sewell case, it seems clear to me that the factual setting which prevailed in that

case can be distinguished from the facts presented in the instant proceeding. Judge Merlin's finding of a violation in the Sewell case turned on the manner in which the tandem locomotives were operated at the time of the fatality. It is clear from his bench decision that he was impressed with the fact that the tracks were in terrible condition, the sanders were inoperative, the grades were too steep for the locomotive, the adverse experiences with motormen on prior occasions indicating that the tandem locomotive in question could not handle the loads placed on it, and the fact that the mine operator was aware of these prior difficulties. Here, there is no evidence that the track conditions were other than in good condition, the grades over which the locomotive traveled were not shown to be such as which prevented the locomotive and trips from operating in other than normal condition, the sanders were operating, the normal procedures for the use of additional braking "skids" were followed, and there is no indication that the locomotive operator experienced any difficulties in negotiating the grades traveled on the very day of the accident with the trips in question or that he experienced any difficulty in braking and controlling the locomotive with the trips which it was hauling.

After full and careful review of the able arguments presented by both parties in support of their respective positions in this matter, and on the basis of the preponderance of the credible evidence adduced, I conclude and find that the respondent has the better part of the argument and its proposed findings and conclusions both as to the interpretation and application of the cited safety standard in issue, including the alleged violation, are accepted by me as correct and petitioner's proposed findings and conclusions to the contrary are rejected. Accordingly, I conclude and find that petitioner has not established by a preponderance of the evidence that the six brake shoes which were misaligned in fact adversely affected the braking capacity of the No. 2 locomotive in question on the day of the accident. I further find and conclude that petitioner has failed to establish by any credible evidence that the locomotive in question was not being operated within the limits of its design capabilities.

#### ORDER

In view of my findings and conclusions made with respect to Citation No. 7-0102, September 9, 1977, citing a violation of 30 CFR 75.1404, the petition for assessment of civil penalty, insofar as it

seeks a civil penalty assessment for that alleged violation is  
DISMISSED.

  
George A. Koutras  
Administrative Law Judge

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APR 3 1979

RONNIE R. ROSS, : Application for Review of  
Applicant : Acts of Discrimination  
v. :  
: Docket No. VINC 78-38  
MONTEREY COAL COMPANY, :  
McNALLY-PITTSBURG CORPORATION, :  
LOOKING GLASS CONSTRUCTION CO., :  
Respondents :  
and :  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Intervenor :

DECISION

Appearances: Mary Lou Jordan, Esq., for the Applicant;  
Timothy M. Biddle, Esq., for Monterey Coal Company;  
William H. Howe, Esq., and Donald L. Rosenthal,  
Esq., for McNally-Pittsburg;  
James E. Heimann, for Looking Glass Construction  
Company;  
Thomas P. Piliero, Esq., for the United States  
Department of Labor, Mine Safety and Health  
Administration.

Before: Administrative Law Judge Michels

This case involves an application for review of alleged acts of discrimination brought by the Applicant against the Respondents, Monterey Coal Company (Monterey), McNally-Pittsburg Corporation (McNally), and Looking Glass Construction Company (Looking Glass), pursuant to section 110(b) of the Federal Coal Mine Health and Safety Act of 1969 (the Act). 1/

1/ This Act has been superseded by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Pursuant to an order of this court, MSHA conducted an investigation of the alleged acts and on May 5, 1978, filed its report. At the same time, MSHA filed a motion to intervene in this proceeding which was granted.

Mr. Ross alleges that two separate acts of discrimination occurred, one on November 8, 1977, and the other on November 30, 1977, in connection with his making safety complaints and conducting safety inspections. The November 8th incident concerns an allegation that Mr. James Heimann of Looking Glass Construction Company threatened Mr. Ross when Mr. Heimann assertedly told him, in connection with an inspection of his machines, that if he got shut down he would hang Mr. Ross from a water tower. The other incident involves a letter given by McNally-Pittsburg Construction Company, Mr. Ross' employer, to Mr. Ross on November 30, 1977, advising him that if he did not confine his safety activity to the McNally operations he would be suspended and subjected to discharge.

Applicant Ross requests the following relief, including, but not limited to, a clear declaration that the alleged "abuse, harrassment, intimidation and threats perpetrated and/or condoned by Respondents" constitute discrimination proscribed by section 110(b) of the Act; an order that the Commission's decision be posted at the Respondents' worksites; a cease and desist order prohibiting Respondents from engaging in further discriminatory conduct; an order that any unfavorable reports in Applicant's personnel files that exist as a result of his safety activities be removed; and payment of all costs and expenses, including attorneys' fees, incurred by Applicant in connection with the institution and prosecution of the instant case.

A hearing was held in St. Louis, Missouri, on November 7, 1978, at which all parties were present. All the parties, except Looking Glass Construction Company, were represented by counsel. Looking Glass was represented by Mr. James Heimann, the company's president. The parties were given the opportunity to file posthearing briefs and proposed findings of fact and conclusions; such briefs were filed by Applicant Ross and Respondents Monterey and McNally-Pittsburg.

#### General factual background

Monterey in 1974 began development of an underground coal mine near Albers, Illinois, called Monterey No. 2 (Monterey Exh. 2). At the times relevant to Mr. Ross' application, the underground portion of the mine development was completed and Monterey was mining coal (Tr. 284). Construction of surface facilities and related activities were underway by several contractors including McNally and Looking Glass (Tr. 264-265, 308, 315).

In order to work at the mine site, the employees of each contractor were required to be members of Local 2015 of the United Mine

Workers of America (UMWA) (Tr. 73, 76). The relationship between the construction employers and their employees was governed by the National Coal Mine Construction Agreement, effective December 23, 1974 (the 1974 Agreement), between the Association of Bituminous Contractors (an industry wide bargaining unit) and the UMWA (McNally Exh. 1, Tr. 20). This agreement reads in pertinent part: "The Health and Safety Committee may inspect any portion of the project site at which employees of the Employer are employed. \* \* \*" (Art. IV, section (c)2 of the 1974 Agreement).

Mr. Ross was employed by McNally at the Monterey project from May 1975 through the project's termination in August 1978 (Tr. 151). He was hired as a carpenter and he bid for and was awarded the position of lead millwright shortly prior to his layoff (Tr. 151).

Under the 1974 Agreement, the employees of each contractor at the project were entitled to form a health and safety committee. Each committee was authorized to inspect any portion of the project site where the employees of that contractor worked (the 1974 Agreement, Article IV, section (c) (Tr. 73-74, 85)). In October and November of 1977, a number of the contractors at the project had a committee made up of an employee or employees. Some of the small contractors, however, appear not to have had committees (Tr. 89-91).

Such a committee was formed at the Monterey project by McNally employees. While in the employment of McNally, Mr. Ross held the position of project health and safety committeeman (Tr. 151). After becoming committeeman, Mr. Ross took courses at the local junior college and state schools to increase his knowledge of state and Federal safety and health requirements. He was also selected by the local to attend the various training programs offered by MSHA and the State Department of Mines. Because of his background and training and his activities as a committeeman, Mr. Ross tended to be the person to whom employees came when they had a safety problem (Tr. 32-33, 55, 92, 151-156, 169-170). Mr. Ross was also selected by McNally to give employees safety training (Tr. 186).

The practice of the union local was to appoint at the Monterey No. 2 Mine a chairman of all project health and safety committees. Prior to Mr. Ross' appointment, the position was held by the president of the local (Tr. 86-87, 109-110). Mr. Ross, although not president, was appointed by the executive board of the local union sometime in the spring of 1977 as chairman of the safety committee (Tr. 87, 120). This appointment was hand carried to the superintendent of McNally and a carbon copy sent to Monterey (Tr. 120-122, Applicant's Exh. 2). The position of chairman, while sanctioned by the local union by-laws, is not provided for in the 1974 Agreement (Tr. 86, Applicant's Exh. 2).

Under the 1974 Agreement, safety committees made regular safety inspection tours and at the McNally project the committee did this

monthly (Tr. 181). While some of the witnesses suggested that McNally committeemen covered virtually the entire project, other evidence indicates that their tours were basically restricted to the McNally site (Tr. 41, 48, 50-52). Mr. Ross testified that he was authorized to inspect the whole mine site where McNally employees were working, but he claimed generally that he also inspected outside that area (Tr. 201-202).

McNally committeemen, including Mr. Ross, did not inspect underground, the administration building, the shafts and other areas of the mine project (Tr. 41, 50). However, they did observe and report on alleged safety conditions at non-McNally sites. Examples were citations against Zeni, McKinney, Williams for oxygen and acetylene bottle violations and Christian County Contractors for fire extinguisher and backup alarm violations (Tr. 49, 52). These conditions appear to have been observed in connection with a McNally site inspection, although not necessarily on the McNally site. As part of their duties, committeemen accompanied Federal inspectors on their inspection of the job site and usually stayed with them during the entire inspection tour (Tr. 30, 154).

Mr. Ross and his committee made an inspection tour on November 4, 1977, and found certain conditions which they believed to be violations and prepared a request under 103(g) of the Act. 2/ It was Mr. Ross' practice, at least toward the end of his employment, to write up requests for inspection under 103(g). The request written as a result of the inspection tour on November 4, 1977, was given to Inspectors Tisdale and Plaub on November 8. It lists, among others, alleged violations by Looking Glass Construction Company (Tr. 165).

In conducting their inspection on November 8, the inspectors were accompanied by Mr. Ross, Mr. Terry Cannon, a McNally employee and also a member of the McNally safety committee, as well as the management representatives from McNally and Monterey (Tr. 149-150, 164, 207). It was at the time of the inspection on November 8, that Mr. Heimann made his angry outburst about hanging Mr. Ross from the water tower, one of the charges in this proceeding.

2/ Section 103(g) reads as follows:

"Whenever a representative of the miners has reasonable grounds to believe that a violation of a mandatory health or safety standard exists, or an imminent danger exists, such representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger \* \* \*".

The alleged threat of November 8, 1977, which is charged against Looking Glass and Monterey

The first charge for consideration in this proceeding is that Mr. James Heimann, owner and president of Looking Glass, threatened Mr. Ronnie R. Ross, the Applicant, and that this threat was a discriminatory action in violation of section 110(b) of the Act. On November 8, 1977, the Applicant, while on an inspection tour in the company of Federal inspectors and others, was allegedly verbally abused and threatened by Mr. Heimann when the latter told him that if he (Mr. Heimann) got shut down, he would hang Mr. Ross from the water tower. The charge in this connection is against Looking Glass, a contracting company owned by Mr. Heimann, and Monterey, the owner of Monterey No. 2 Mine. Monterey is charged on the basis of the principle of "vicarious liability" as well as on the basis of asserted control at the mine site.

A. Discussion of the specific facts relevant to this charge

On November 8, 1977, MSHA Inspectors Tisdale and Plaub conducted an inspection of Monterey No. 2 Mine. Safety committeemen of Local No. 2015 regularly accompanied MSHA inspectors on their inspections of the mine, and on this occasion, Mr. Ross, as well as Mr. Terry Cannon, another committeeman, was on the tour. At the beginning or during the inspection tour, Mr. Ross presented the inspectors with a 103(g) request. The request cited, among others, a number of alleged violations or safety conditions involving the equipment of Looking Glass (Tr. 142, 162, 165, Applicant's Exh. No. 3).

The inspection party included not only the inspectors and committeemen Ross and Cannon, but Leonard Lewis, a McNally supervisor, and John Lanzerotte, a Monterey safety official (Tr. 18, 149-150, 207, 235). It toured several parts of the mine before arriving at the Looking Glass area.

When the inspecting group came to this area, Mr. Heimann was not at the site. He was at home eating lunch and he returned to the site after receiving a telephone call from one of his employees who notified him of the inspection (Tr. 268, 272). Mr. Heimann thus arrived at the site aware that several persons were inspecting his equipment. His testimony indicates that he did not become angry because of the telephone call and that prior to his arrival at the work site he did not foresee any problem (Tr. 272-273). A few days before November 8, Mr. Heimann had discussed safety aspects of all his equipment at the site with the same inspectors and, as the result of these conversations, he believed his equipment complied with the applicable safety standards (Tr. 256-257, 267).

When Mr. Heimann arrived at the site, he saw that a particular tractor was being inspected for possible violations (Tr. 273). At

this point, he became angry. He first made a statement to the effect that he could easily quit his Monterey contracting work and go back to farming. Next, he used language to the effect that if he were closed down, he would hang the person responsible from a nearby water tower (Tr. 143, 166, 274). Witnesses testified that the statement was made in such a way that it was clearly directed toward Mr. Ross. Also, Mr. Heimann testified that although he did not use Mr. Ross' name, he felt that the latter knew who he meant (Tr. 274). Mr. Heimann had not had any significant contact with Mr. Ross previously and knew about him by reputation. The indications are that Mr. Heimann was angry because of a history of difficulties in carrying out his work at the site--difficulties which, rightly or wrongly, he attributed to the union. He testified that destructive and increasingly violent actions had been taken against his property on the site and near his home (Tr. 265). The presence of Mr. Ross on the inspection tour, was apparently an embodiment of his troubles. His own explanation for his outburst is contained in the following exchange:

Q. Do you recall any particular statement or anything at all that caused you to get angry enough to say something to the effect about hanging somebody from the water tower?

A. It was the fact that the very tractor that had been declared unsafe had been declared safe just several days before by Mr. Plaub and Mr. Tisdale, and I was almost convinced that Mr. Ross had pressured them into going back and reexamining it.

(Tr. 273).

After making his angry statement, Mr. Heimann walked away from the site and returned home (Tr. 143, 274-275). He testified that a little later he went back to the site to talk with Inspectors Plaub and Tisdale, but they were no longer present. The record does not contain evidence of any further interaction between Mr. Ross and Mr. Heimann immediately following this confrontation. There is testimony about a later meeting between the two men at which time Mr. Heimann asserts they agreed to get along better in the future (Tr. 198). Nothing further came of the incident. There is no evidence that Mr. Heimann was in any way thereafter abusive to Mr. Ross.

The angry outburst of Mr. Heimann on its face appears to be a threat to do bodily harm to Mr. Ross. However, under the circumstances and in light of the actual statement made it seems relatively obvious that this was not a threat which Mr. Heimann either intended to carry out or had the capability of executing. There is no evidence of Mr. Heimann having a past history of physical violence at the site or of mistreating employees. In fact, the record shows generally to the contrary (Tr. 77-78, 104-105). Mr. Heimann had never before threatened anyone else with hanging them from the water

tower or with injury. He characterized his threat as "more a figure of speech" and explained clearly that he did not intend to hang anyone (Tr. 278).

There is little indication that Mr. Ross felt actually threatened. He testified that the statement made him feel sick to his stomach, but that could have been because of the stress caused by the confrontation. It strains credulity to suggest that anyone would believe Mr. Heimann intended to carry out the act of hanging. It was an outburst of pent-up anger; not an actual threat. There is no evidence that the incident had any impact on Mr. Ross' subsequent activities. As will be shown under the second charge, after this incident Mr. Ross continued his inspection tours as he had done before.

Thus, I find that the statement made on November 8 by Mr. Heimann about hanging someone from the water tower was a statement made to Mr. Ross. I further find that while this angry outburst was verbally abusive, it was not an actual threat on Mr. Ross' life.

B. Consideration of the law and the sufficiency of the evidence to prove the charge

The Applicant contends, as mentioned above, that Mr. Heimann's statement constitutes discriminatory action under section 110 of the Act and that both Looking Glass, which is owned by Mr. Heimann, and Monterey, the owner of the mine, are liable.

The part of the section charged and that pertinent to this action reads as follows:

No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger  
\* \* \*

The Applicant argues that (a) in notifying the inspectors about the Looking Glass equipment, Mr. Ross brought himself under the protection of section 110; and (b) that he is entitled to protection, not only from his own employer, McNally, but also from other employers on the project site, including Looking Glass. He contends that "[t]o hold otherwise would completely thwart the purpose of the Act, since retaliation from contractors other than one's employer can, nevertheless, result in a chilling effect on the exercise of a miner's right to notify the Secretary" (Applicant's Brief, p. 16).

Looking Glass filed no posthearing brief. Respondent Monterey, however, addressed itself to the subject in its brief. It contends

the alleged threat did not amount to discrimination under the Act, and, among other things, argues that although section 110(b) prohibits "persons"--as opposed to employers--from discriminating against miners, it is reasonable to assume that by the use of the term "discrimination" Congress intended some connection between the person alleged to have committed an act of discrimination and the miner's employer. According to Monterey, such connection could be one of conspiracy, encouragement, ratification, remuneration, or promise, but it would have to be something to connect the employer. It avers that never has liability been put on someone such as Mr. Heimann, who is neither the employer, nor an agent or fellow employee, but one who bears no relation to the employer at all (Monterey Brief, pp. 9-10).

The language of the Act and the few references in the legislative history to the provision appear to suggest that its coverage is limited to an employment connection of some kind. The principal specific reference is to a discharge and this presupposes an employment status. The relief provided in section 110(b), although not limited, specifies only rehiring or reinstatement which again presupposes prior employment. The Senate Conference Report, in its section-by-section analysis in a brief reference to section 110(b), states that the subsection provides procedures for obtaining reinstatement and back pay for miners discharged by operators and other remedies for miners discriminated against (Legislative History of the Act, House Committee on Education and Labor, March 1970, p. 1122). Again, the only specific remedies referred to are reinstatement and back pay which are employment connected. While other remedies are mentioned, there is lacking any indication that the reference is to actions having no connection with employment.

The U.S. Court of Appeals for the District of Columbia has interpreted the section in two leading decisions: Munsey v. Morton, 507 F.2d 1202 (D.C. Cir. 1974), and Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974). Therein, the court delineated the elements necessary for relief under section 110, which will be discussed, infra, in more detail as they relate to this proceeding. It is apparent, however, that these cases concern actions taken by an employer against employees or former employees. Even though the court indicates that a liberal construction of the statute is warranted, there is no hint of an application of this provision beyond the employment context.

It is worth noting that the new law, the Federal Mine Safety and Health Act of 1977, expanded the rights of miners under this provision, but even so, there is no indication in the law or the legislative history that the reach of the provision was extended beyond the employment context. Administrative Law Judge Broderick in interpreting the comparable provision in the new Act held that the Secretary and other administrative officials are not proper parties,

ruling to the effect that the rights granted by section 105(c) arise from an employment relationship. Neil Humphreys, et al. v. R. C. Samples, et al., MORG 78-370 (October 26, 1978). This is not the definitive word on the meaning of section 105(c) in the new Act, but it illustrates a point of view favoring such a construction. If the new Act is confined to employment relationships in discrimination cases, there is considerably more reason to hold that the 1969 Act is similarly limited. 3/

In light of the considerations mentioned above, I hold that the phrase in the Act "No person shall \* \* \* in any other way discriminate against or cause to be \* \* \* discriminated against \* \* \*" means that protection is granted only in connection with employment. The "person" so discriminating need not necessarily be the employer, but, if not, he must be one who in some way, such as by conspiracy, aiding or abetting or otherwise, affects the employment status of the reporting miner.

There was no direct employment connection with respect to either party named in this charge. Mr. Ross was not employed, presently or in the past, by either Looking Glass or Monterey. The remaining question is whether the alleged act of discrimination in any other way affected his employment status or pay. No discriminatory action was proposed to the employer, McNally, by either party nor was any discriminatory action taken by McNally after the incident.

So far as Looking Glass is concerned, the incident began and ended with the angry outburst. Since Looking Glass did not employ Mr. Ross, its action did not directly affect his employment or pay. The record shows that McNally wrote a disciplinary letter on November 30, 1977, to Mr. Ross, the second charge considered herein, which action was at least in part caused by the November 8 incident. However, Looking Glass did not request that this letter be written, nor did it request any other action against Mr. Ross. As found below, the letter was not a retaliatory action against Mr. Ross and was not a discriminatory act by McNally. To an extent, Looking Glass was a cause of the action taken by McNally in that it was involved in one of the acts which McNally considered before writing the letter, but

3/ In a decision in Ronnie R. Ross v. Maurice S. Childers, et al., VINC 78-158 (October 28, 1977), Judge Luoma held the 1969 Act is limited in that the Secretary and other enforcement officials are not proper parties to be charged for acts of discrimination. In that case, Mr. Ross had filed an application for review of acts of discrimination charging: (1) MESA and the Secretary of Labor with failing to properly administer the 1969 Act, and (2) Inspector Marcell Chamner with having "verbally abused, harassed, intimidated, and threatened Applicant Ross." The appeal from Judge Luoma's decision was withdrawn by Mr. Ross and the proceeding was terminated by the Federal Mine Safety and Health Review Commission on October 25, 1978.

since it did not cause a retaliatory or discriminatory act, there is no liability under the section.

Monterey, like Looking Glass, was not the employer of Mr. Ross and none of its actions directly affected the employment or pay of Mr. Ross. Indirectly, Monterey was the cause of the disciplinary letter from McNally to Mr. Ross dated November 30, 1977, referred to above. While Monterey had requested that Mr. Ross be stopped from making inspection tours outside the McNally project area, there is no evidence that it caused McNally's specific actions against Mr. Ross. (See discussion of this subject in next section of the decision). Since the letter was not retaliatory or discriminatory, Monterey, although it indirectly caused the action, is not liable under the Act.

Accordingly, I find that the actions of Looking Glass and of Monterey resulting from the incident of November 8 are not in violation of section 110(b) of the Act.

The allegation against McNally and Monterey involving the letter

The second charge concerns a letter which was delivered to the Applicant by McNally on November 30, 1977, signed by McNally project superintendent Robert W. Stearman. The Applicant contends that this letter which threatened him with discharge was a discriminatory act in violation of section 110(b)(1)(A) of the Act. 4/ The entire text of the letter is as follows:

This is to advise you that your duties as Project Union Health and Safety Committeeman are limited exclusively to McNally Operations at the Monterey Coal Mine # 2.

In the event of your violating the above, you will be suspended-Subjected to discharge.

McNally, the contractor for whom Mr. Ross worked, and Monterey Coal Company, the owner of the mine, are named as Respondents in this charge. As with the threat, Monterey is charged on the basis of the principle of "vicarious liability" as well as on the basis of asserted control at the mine site.

A. Discussion of the specific facts relevant to this charge

A few weeks after the November 8 inspection, at which time Mr. Heimann made his angry outburst about hanging Mr. Ross from the water tower, Mr. Ross received the disciplinary letter from

4/ See relevant provisions of the Act quoted above.

Mr. Stearman which is here in issue. In this letter, as quoted above, he was told that unless he limited his duties as committeeman to the McNally site, he would be suspended, subject to discharge. No such letter was sent to Mr. Cannon, who was also a committeeman and who had been at the scene at the time of the Heimann outburst.

It does not appear, however, that the letter was prepared solely because of the November 8 incident. Mr. Charles Bradley, vice president of construction for McNally, testified it had come to his attention that Mr. Ross was inspecting areas other than where McNally employees were working, and that he learned of this when he received a call from Monterey. The information as to Mr. Ross' inspections in other areas was first received the latter part of October 1977, and it had to do with Monterey's underground mine. Other notices of his activity continued to come in and "the letter was written because the inspection of other areas had continued after that" such as the Looking Glass area (Tr. 225). Prior to October 1977, Mr. Bradley had not received any similar complaints either at Monterey No. 2 Mine or other projects in which McNally was working.

Mr. Bradley testified that upon receiving the notice from Monterey he told the company that he "would take care of it" and thereupon called Mr. Stearman. The latter was told to limit the committee's activities to the McNally scope of work. Mr. Bradley also instructed Mr. Stearman to write and deliver to Mr. Ross the letter (Tr. 216, 224-225). Mr. Bradley testified that the letter was written as a result of the Looking Glass incident and other reports of Mr. Ross' activities outside the McNally site (Tr. 226). He also had knowledge that Mr. Ross was filing 103(g) requests. Mr. Stearman was given instructions to write the letter on November 8, but it was not delivered until the 30th of November (Tr. 231). Information the same as that in the letter were also given orally to Mr. Ross (Tr. 184, 192).

Mr. Ross, during the course of his employment with McNally, had frequent occasions to report what he believed to be violations or unsafe conditions. He claimed that McNally was slow to correct the conditions reported and that he reached the point where upon finding a safety problem he would write up a 103(g) request for inspection (Tr. 167, 182, 188-189, 187). Michael Hill, a McNally employee, also testified that McNally was slow to correct reported safety infractions (Tr. 40).

Mr. Ross upon reporting asserted safety violations was frequently given the task of correcting the conditions (Tr. 155, 36-38, 95). He believed he was required to do such clean up jobs more than other safety committeemen. He was assigned at different times to clean up the tipple and the wash house and at another time to repair handrails (Tr. 155). He was also assigned to pick up scraps after citing an area as being full of debris (Tr. 36). Mr. Ross upon insisting that

a portal man, that is, a man who works at the top of the portal, was needed, was given the job of portal man. This was a class C or B position and Mr. Ross at the time was a class A millwright. His pay, however, was not reduced (Tr. 37, 38, 95, 185). Mr. Ross and his coworkers testified to their belief that he was harrassed by McNally (Tr. 37, 60, 95, 155).

There is evidence that it was a regular practice of McNally to assign the person reporting unsafe conditions to correct those conditions if they were qualified to do so. Mr. Lewis, McNally's control supervisor, testified that he would assign the first individual handy if danger was imminent and that he had assigned Terry Cannon, a safety committeeman, to clean up cited conditions. If Mr. Cannon reported the violation, he was usually asked to correct it (Tr. 241). Mr. Lewis followed a practice of assigning the individual best suited to handle the situation (Tr. 252-253).

After Mr. Ross was instructed orally and by letter to restrict his safety inspections to the McNally site, he continued to inspect both the McNally site and other areas as he had done before (Tr. 191). He was not discharged, reprimanded or penalized for failing to comply with the instruction set forth in the letter of November 30.

#### B. Discussion of the law and the sufficiency of the proof

Insofar as the November 30 letter is concerned, the charge is that the document which threatened the applicant with discharge was a discriminatory action in violation of section 110(b)(1)(A) of the Act. This provision, to again quote it for convenience, reads as follows:

No person shall discharge or any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger \* \* \*.

The Applicant must show in this instance three elements to sustain a charge of a violation of the Act: (a) The reporting of an alleged violation or danger in the mine to the Secretary, (b) that the reporting miner was discriminated against and (c) that the reporting was the precipitating cause of the discrimination, that is, that the discrimination was in retaliation for the reported alleged violations or danger. Munsey v. Morton, supra; Phillips v. Interior Board of Mine Operations Appeals, supra.

The first element is established without question. Mr. Ross had on a number of occasions and in particular on the occasion of the Looking Glass incident, reported asserted violations by requesting

103(g) inspections and this reporting was known to the McNally management.

In regard to the second element of proof, i.e., an act of discrimination, the evidence shows that a disciplinary letter was given to Mr. Ross and that it was not given to other committeemen in approximately similar circumstances. No letter was given to Mr. Terry Cannon, who was with the group on the day of the Looking Glass incident. I have ruled in a prior case that a disciplinary letter may be a discrimination within the meaning of the phrase "in any other way discriminated" in the Act. Local Union 1110, UMWA, et al., v. Consolidation Coal Company, Docket No. MORG 76X138 (May 26, 1977). In that case, I found that such a letter in an employee's personnel file might affect further pay, advancement or even employment. In that respect, it is or may be a punitive act. Mr. Ross in this instance was singled out to receive the letter and was thus discriminated against within the meaning of the Act.

The third and final element of proof is whether this discrimination was motivated by or in retaliation for the reporting of an alleged danger or violation. The letter, as the parties generally agree, was directed to Mr. Ross' safety inspections outside of the McNally area of operations. The letter does not limit inspections otherwise. It is not directed at the fact that Mr. Ross, as a committeeman, was looking for and reporting conditions which he believed to be a danger or a violation. It was directed solely at his activity of inspecting for safety violations off the McNally site, which was perceived by McNally management to be unauthorized.

McNally had good reason to believe, and there is no evidence to the contrary, that the 1974 Contract was the governing instrument in its relationship with its employees. The contract provided that Mr. Ross or other committeemen might inspect at any portion of the project site on which McNally employees were employed. This document might fairly be interpreted as limiting a committeeman to inspections on the McNally site and, at least in the usual circumstances, that requirement does not appear to be unreasonable. Even without a contractual provision, an employer would be reluctant to have his employees inspect and report on violations of other employers. The employer would lose some control over activities of its employees and its relationship with other employers could be adversely affected.

There is not the slightest question that Mr. Ross regularly made off-site inspections. He readily concedes this in his testimony and such activity was confirmed by other witnesses. Mr. Ross, even before he was appointed the chairman of the committee, accompanied Mr. Bathens to "Mr. Heimann's job site across the road" (Tr. 156). The 103(g) request which was written up and handed to the inspectors on November 8, included a listing of alleged deficiencies in the Looking Glass Construction Company equipment which was not located on the McNally site.

The testimony of Mr. Bradley and other evidence demonstrates that the letter of November 30, was written and given to Mr. Ross solely because of the reports of Mr. Ross' safety inspections outside of the McNally site and in particular his off-site inspection of the Looking Glass equipment. There is no evidence to show that the letter is in any way a pretext to hide an unlawful motive. The motive was to prevent Mr. Ross from inspecting off the McNally site, not to punish him for reporting asserted dangers or violations.

The issue thus narrows to whether Mr. Ross was disciplined for unauthorized activity. In this sense the matter is not unlike that dealt with by the undersigned in Local Union 1110, UMWA et al., v. the Consolidation Coal Company, supra, in which I found that the disciplinary letters were not issued in retaliation for reporting alleged dangers or violations; they were issued because the committeemen had infringed upon an area reserved to management. I am satisfied that my findings and conclusions should be the same in the circumstances of this proceeding. Accordingly, I find that the letter presented on November 30, 1977, to Mr. Ross was to prevent him from engaging in activity reasonably perceived by management to be unauthorized and it was not in retaliation for safety reporting to the Secretary. 5/

The evidence shows that Mr. Ross, when he reported assertedly unsafe conditions, was given the task of correcting these conditions. As a result, he frequently found himself doing jobs like cleaning up washroom facilities. On one occasion, he was assigned as a top man on the portal after reporting a need therefore, although he was overqualified for the position. There is no charge here that these assignments were a violation of section 110. The record also shows that such assignments were normal and that the miner who reported the violation, where he was capable of doing so, was usually told to correct it. Other committeemen were assigned to correct unsafe conditions which they reported. There is no showing the reporting by Mr. Ross which led to his work details was connected with or that it influenced the writing of the letter of November 30. 6/

5/ This decision should not be construed as affirming a policy of limiting safety committee inspections to the employer's area. Since in developing a mine contractors frequently work in close conjunction with one another and affect employees of one another, there may be instances in which inspections off the immediate site of the employer are justified. That is not a specific question before me, however, and possibly is a subject which should be considered in negotiations between employees and their employers.

6/ While not an issue before me, the policy of assigning the miner to clean up or correct the conditions he has reported, particularly where dirty work is involved, is one that is far from satisfactory. It could well have a chilling effect on the reporting of unsafe and unhealthy conditions. Though apparently permitted under the labor agreement, it seems to me the practice should be curtailed or eliminated wherever possible.

In summary, I find that the letter of November 30 to Mr. Ross was discriminatory, but it was not in retaliation for the reporting by Mr. Ross of alleged safety violations; rather it was motivated by the desire to limit Mr. Ross' off-site activity. In this connection, I note that the letter was subsequently removed from Mr. Ross' file (Tr. 185). Further, it appears that other effects of McNally's action are mooted since the McNally contract at the Monterey site has been completed and Mr. Ross is no longer in the employ of McNally.

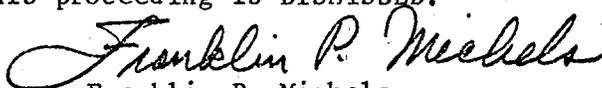
Inasmuch as I have found above that the Act was not violated by McNally, the contractor, in giving the letter of November 30, 1977, to Mr. Ross, it follows that the owner, Monterey Coal Company, is also not in violation of that section of the Act.

#### CONCLUSIONS

1. Monterey Coal Company, McNally-Pittsburg Corporation, and Looking Glass Construction Company are subject to the Federal Coal Mine Health and Safety Act of 1969.
2. The Administrative Law Judge has jurisdiction over this proceeding.
3. The application for review of acts of discrimination and the relief requested by Applicant should be denied for the reasons stated in the findings above.

#### ORDER

IT IS ORDERED that the application for review of acts of discrimination is DENIED and this proceeding is DISMISSED.



Franklin P. Michels  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
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APR 3 1979

KERR COAL COMPANY,	:	Application for Review
Applicant	:	
v.	:	Docket No. DENV 78-507
	:	Order No. 389989; June 6, 1978
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 79-285-P
Petitioner	:	A.C. No. 05-02660-03004
v.	:	
	:	Marr Preparation Plant
KERR COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Warren L. Tomlinson, Esq., and Deborah Friedman, Esq., Holland & Hart, Denver, Colorado, for Kerr Coal Company; Edward H. Fitch, Esq., Office of the Solicitor, Department of Labor, for MSHA.

Before: Administrative Law Judge Michels

Docket No. DENV 78-507 in the above-captioned proceedings involves an application for review of Withdrawal Order No. 389989 and the underlying Citation No. 389988 issued at Applicant's Marr Preparation Plant for an alleged violation of section 109(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 819(a). The pertinent part of that section of the Act requires that "[a]t each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine."

Citation No. 389988 was issued on June 5, 1978, by MSHA inspector Harvey Padgett, who alleged that there was no sign designating the office at Applicant's preparation plant. On June 6, 1978, Inspector

Padgett issued Order No. 389989 pursuant to section 104(b) of the Act, alleging Applicant's failure to abate the cited condition. The cited condition was abated on June 6, 1978, following issuance of the withdrawal order.

Pursuant to section 105(d) of the Act, Applicant filed its application for review of the withdrawal order and underlying citation with the Federal Mine Safety and Health Review Commission.

A hearing was held on January 17, 1979, in Denver, Colorado, at which both parties were represented by counsel. Applicant's counsel filed a posthearing brief on February 21, 1979.

On January 30, 1979, after the hearing discussed above, but before a decision had been issued, MSHA filed a petition for the assessment of a civil penalty in Docket No. DENV 79-285-P based on the violation alleged in Citation No. 389988, the same citation involved in DENV 78-507. In answer thereto, Kerr Coal Company filed a motion requesting that the civil penalty case be stayed until a decision was issued in DENV 78-507.

Thereafter, on March 22, 1979, MSHA filed a motion to withdraw the petition for assessment of a civil penalty in DENV 79-285-P. As grounds for this motion, MSHA counsel asserted: (a) the same violation was the subject of Application for Review Docket No. DENV 78-507; (b) Citation No. 389988 was issued in error; (c) both Citation No. 389988 and Withdrawal Order No. 389989 had been vacated.

On March 26, 1979, Kerr Coal Company filed a motion to withdraw its application for review in DENV 78-507 in which it advised that on March 13, 1979, MSHA inspector Stephen Pryor issued Citation No. 389988-1, in which he vacated both Citation No. 389988 and Order No. 389989, stating "[a] review of citation No. 389988 dated 5 June 1978 determines the citation was issued in error, also subsequent action of a 104 B order No. 389989 is cancelled." A copy of Citation No. 389988-1 was attached to this motion.

Under the circumstances outlined above, I hereby find that good cause has been shown for granting both motions. Accordingly,

In Docket No. DENV 78-507, it is ORDERED that Applicant's motion to withdraw its application for review is hereby GRANTED. That proceeding is hereby DISMISSED.

In Docket No. DENV 79-285-P, it is ORDERED that Petitioner's motion to withdraw its petition for the assessment of a civil penalty is GRANTED. That proceeding is hereby DISMISSED with prejudice.

  
Franklin P. Michels  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 4, 1979

CLIMAX MOLYBDENUM COMPANY,	:	Application for Review
Applicant	:	
v.	:	Docket No. DENV 74-300-M
	:	Citation No. 331857
	:	January 5, 1979
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Climax Mill & Crushers
ADMINISTRATION (MSHA),	:	Safety Line
Respondent	:	

ORDER GRANTING MOTION TO DISMISS

On January 31, 1979, applicant filed an application for review of Citation No. 331857, issued January 5, 1979, pursuant to Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977. Respondent MSHA, on February 26, 1979, filed a motion to dismiss on the ground that the citation has been abated and that applicant is not entitled to review of an abated citation. In support of its motion, respondent cites the case of United Mine Workers of America v. Andrus, 581 F.2d 888 (D.C. Cir. 1978), and the decisions of numerous Commission Judges dismissing review petitions in circumstances identical to those in this case.

On March 7, 1979, applicant filed a response to MSHA's motion to dismiss and characterized the citation as a "citation and order" involving alleged imminent danger. Applicant asserted that it has a right to a review of both the imminent danger portion of the order and the abated citation. Subsequently, as a result of an Order issued by me on March 19, 1979, requiring the parties to clarify their own erroneous characterizations of the citation sought to be reviewed, it was discovered that no "imminent danger" is involved in these proceedings and that the issue presented is the reviewability of an abated citation.

After due consideration of the arguments presented by the parties, I conclude that respondent's position is correct, and I believe it is clear that applicant is not entitled to review an abated citation at this time, absent an assertion that the time fixed to abate was unreasonable, and in support of this I refer the parties to previous rulings on this issue by various Commission Judges in the cases of Helvetia Coal Company, PITT 78-322 (August 23, 1978); Monterey Coal Co., VINC 78-372 (June 19, 1978); Peter White Coal Mining Corp., HOPE 78-371 (June 16, 1978); Itmann Coal Co., HOPE 78-356 (May 26, 1978).

In view of the foregoing, respondent's motion to dismiss is granted without prejudice to applicant's right to contest the citation in any future civil penalty assessment proceeding which may be filed by MSHA pursuant to Section 110(a) of the Act. Applicant's opposition to the motion, including its supporting arguments, are rejected.

  
George A. Koutras  
Administrative Law Judge

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Edwin Matheson, Chairman, International Brotherhood of Electrical Workers, Local Union No. 1823, P.O. Box 102, Minturn, CO 81645

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 4, 1979

ENERGY FUELS CORPORATION, : Application for Review  
Applicant : and  
v. : Civil Penalty Proceedings  
: :  
SECRETARY OF LABOR, : Docket Nos. DENV 78-421  
MINE SAFETY AND HEALTH : DENV 79-69-P  
ADMINISTRATION (MSHA), : (A/O No. 05-00303-03003)  
Respondent :  
: Nos. 1 and 2 Strip Mines

DECISION

Appearances: Eugene McGuire, Attorney, Holland and Hart, Denver, Colorado, for Applicant;  
Robert A. Cohen, Trial Attorney, Office of the Solicitor, Department of Labor, for Respondent.

Before: Judge Littlefield

Introduction

This is a combined application for review and proceeding for assessment of civil penalty which is governed by sections 105(d) and 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Section 105(d) provides in relevant part:

(d) If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of

such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.

Section 110(a) provides:

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.

#### Alleged Violation

On May 11, 1978, Applicant, Energy Fuels Corporation (EFC), filed for review of Order No. 389944 dated April 18, 1978. On November 20, 1978, the Mine Safety and Health Administration (MSHA), through its attorney, filed a petition for assessment of a civil penalty charging one violation of the Act.

#### Tribunal

A hearing was held on the above-consolidated matters in Denver, Colorado, on February 27, 1979. Both MSHA and EFC were represented by counsel (Tr. 2).

#### Motion

After a conference referred to, infra, EFC moved to withdraw its application for review (Tr. 4). The motion was GRANTED (Tr. 4-5).

#### Evidence

The Judge held a prehearing conference before bringing the hearing to order and heard preliminary discussions bearing on the issues on the part of counsel for both parties (see, supra).

The Judge, after hearing all evidence, studying the record, reviewing the exhibits, giving sympathetic regard to mitigating circumstances, and fully considering the criteria shown in section 110(i) of the Act, made findings of fact, conclusions of law and issued an ORDER on the record, rendering his decision from the bench. One violation was found as originally charged.

Findings of Fact and Conclusions of Law

The findings of fact, conclusions of law, and ORDER made on the record from the bench are hereby incorporated herein by reference and are AFFIRMED (Tr. 24-26).

Civil Penalty Assessed

<u>Order No.</u>	<u>Date</u>	<u>Standard 30 CFR</u>	<u>Penalty</u>
00389944	4/18/78	77.404(a)	\$900

Disposition

The Judge was notified by letter from the Office of the Solicitor, U.S. Department of Labor, that the Respondent had submitted payment of \$900, as ordered for the one violation found by the Judge in his BENCH decision. WHEREFORE the above-captioned is CLOSED.

  
Malcolm P. Littlefield  
Administrative Law Judge

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MSHA's Petitions for Assessment of Civil Penalty were filed on April 18, 1978, in Docket Nos. HOPE 78-315-P through HOPE 78-317-P and each of those Petitions seeks assessment of a civil penalty for one alleged violation of the mandatory health and safety standards. The Petition in Docket No. HOPE 78-415-P was filed on May 19, 1978, and seeks assessment of a civil penalty for one alleged violation. The remaining eight Petitions in Docket Nos. HOPE 78-559-P through HOPE 78-566-P were all filed on June 27, 1978, and seek assessment of a civil penalty for one alleged violation with the exception of the Petitions in Docket Nos. HOPE 78-562-P and HOPE 78-565-P which seek assessment of civil penalties for four and three violations, respectively.

### Issues

The issues raised by the 12 Petitions for Assessment of Civil Penalty are whether 17 violations of the mandatory health and safety standards occurred and, if so, what monetary penalties should be assessed.

At the conclusion of the hearing on December 8, 1978, counsel for both petitioner and respondent stated that they would waive the opportunity for filing posthearing briefs (Tr. 628).

### General Considerations

Section 110(i) of the Act provides that civil penalties shall be assessed after giving consideration to six criteria. Four of those six factors may usually be given a general evaluation, while the remaining two, namely, the gravity of the violation and whether the operator was negligent, should be considered specifically in reviewing the evidence introduced with respect to each violation. The criteria which may be given a general review will be evaluated first.

### History of previous violations

Counsel for MSHA introduced as Exhibit G-2, a 130-page computer printout listing alleged violations for which respondent has previously paid civil penalties. Exhibit G-2 is arranged so that previous violations are listed under the specific mine where the alleged violations occurred. The 12 Petitions for Assessment of Civil Penalty pertain to five different mines and to one preparation plant. Additionally, although the 12 Petitions allege a total of 17 different violations of the mandatory health and safety standards, 11 of the alleged violations relate to repetitious violations of the same standard. The result is that the 17 alleged violations pertain to 10 different sections of the regulations. Of the 10 different sections, respondent has violated all but sections 75.1103-4 and 77.205 on at least one prior occasion.

I have consistently applied the criterion of history of previous violations by increasing a penalty otherwise assessable for a given violation under the other five criteria when there was evidence in the record to show that respondent had violated the same section of the regulations on a prior occasion. Therefore, when penalties are hereinafter assessed, I shall give specific consideration to the criterion of history of previous violations each time that a penalty is assessed and the penalty otherwise assessable will be increased to the extent that respondent's history of previous violations warrants an increase.

Appropriateness of penalty to size of operator's business

Exhibit G-1 was submitted by counsel for MSHA. That exhibit lists the mines which are under the control of respondent and the annual tonnage attributable to those mines. Counsel for respondent stated that the data shown in Exhibit G-1 were somewhat inaccurate and Exhibit G-1 was received in evidence subject to respondent's right to submit proposed corrections to that exhibit (Tr. 616). Those corrections were submitted on December 13, 1978, and counsel for MSHA has filed no objections to the corrections submitted by respondent. Therefore, I am accepting the proposed changes submitted by respondent as the correct tonnages produced by respondent for the years 1976 and 1977.

Respondent's administrative superintendent testified as to the daily production figures for nine of the 11 mines listed on Exhibit G-1, but one of those mines (Lundale No. 1) is no longer owned by respondent (Tr. 602). The remaining eight mines produced a total of 6,659 tons per day in 1977. <sup>1/</sup> The total annual production for all mines under respondent's control amounted to 1,638,312 tons in 1976 and 1,369,532 tons in 1977. Respondent has approximately 990 employees of whom 860 are union miners and 130 are management personnel (Tr. 603).

On the basis of the foregoing information, I find that respondent is a large operator and that any civil penalties which may hereinafter be assessed should be in an upper range of magnitude to the extent that they are determined by the criterion of the size of respondent's business.

1/ Daily production for 1977 was not given with respect to the No. 5, Lundale No. 2, and MacGregor No. 8 Mines. Therefore, the daily production for those three mines is for 1976. The record does not show whether the daily production for the Lundale No. 3A Mine was for 1976 or 1977 (Tr. 603).

### Effect of penalties on operator's ability to continue in business

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

### Good faith effort to achieve rapid compliance

With respect to 12 of the 17 violations alleged in this proceeding, counsel for MSHA either stipulated to the operator's good faith effort to achieve rapid compliance or the inspectors testified that there was good faith compliance (Tr. 56; 83; 126; 161; 189; 263; 349; 375; 382; 517; and 617). As to the remaining five alleged violations, I find that the orders or notices of termination show that respondent made a good faith effort to achieve rapid compliance after receiving notification that the alleged violations existed (Exhs. G-13; G-20; G-41; G-43; and G-46). Therefore, when violations are hereinafter found to have occurred so that penalties have to be assessed, respondent will be given full credit for having demonstrated a good faith effort to achieve rapid compliance.

### Consideration of Remaining Factors

As indicated above, two of the six criteria set forth in section 110(i) of the 1977 Act, that is, gravity of the violations and whether the operator was negligent, must be specifically considered in reviewing the evidence presented by MSHA and respondent with respect to each violation. When violations are hereinafter found to have occurred, findings as to gravity and negligence will be made and penalties will be assessed accordingly.

Docket No. HOPE 78-315-P (4-H UG Mine)

Notice No. 1 DTN (6-39) 11/30/76 § 75.400 (Exhibit G-3)

Findings. Section 75.400 requires that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustibles be cleaned up and not be permitted to accumulate in active workings or on electric equipment. Respondent violated section 75.400 because loose coal, coal dust, and float coal dust had accumulated up to 14 inches deep along the 4 road conveyor belt entry beginning at the surface of the mine and extending inby for a

distance of 1,700 feet to the No. 63 road conveyor drive. Additionally, loose coal had been allowed to accumulate as high as a person's hips in piles of from 3 to 5 tons at approximately five locations where conveyor belt tailpieces had existed prior to movement of the belt conveyors to keep up with the advancement of the face areas (Exh. G-3; Tr. 37-42; 59-60). The accumulations were moderately serious because there were some places where coal accumulations had risen high enough to push the belt up off the bottom rollers so as to cause the belt to drag in the loose coal. The friction resulting from the belt dragging in coal might have produced enough heat to have caused a fire along the beltline. Although electric wires supplied power to the belt drives, the inspector saw no "active" ignition sources which made him think that there was any likelihood that an immediate fire would occur (Tr. 44-48). Respondent was negligent for allowing the accumulations to form along the 4 road conveyor belt because the superintendent of the 4-H Mine knew that the accumulations existed, but he said that he could not get the miners to shovel in that uncomfortably cold portion of the mine. The inspector said that the 4 road conveyor belt was so close to the outside of the mine that the coal which fell from the belt was frozen each day as it accumulated (Tr. 37; 41-46). Respondent was grossly negligent for failing to clean up the hip-deep accumulations which had been left each time the belt tailpiece was advanced to a new position into the mine (Tr. 36; 42).

Discussion. In the findings given above, I have indicated that the inspector's testimony was sufficiently detailed to support findings that coal accumulations existed along the 4 road conveyor belt and at the sites where belts had been advanced. Additionally, the inspector's notice of violation (Exhibit G-3) alleged that accumulations existed along the 63, 73, 73B, and 73C road conveyor belts for distances of 600, 1,900, 2,800, and 500 feet, respectively. The inspector, however, had no specific recollection as to the nature of the alleged accumulations except for those which have been found to have existed along the 4 road conveyor belt (Tr. 41). Although the inspector said that he would not have cited the accumulations along the other conveyor belts if they had not existed (Tr. 58), the former Board of Mine Operations Appeals held in Bishop Coal Co., 4 IBMA 52 (1975), that an inspector's statement to the effect that he had no doubt but that he had observed coal accumulations is not probative enough as to depth of the accumulations or the extent of the accumulations' combustibility to support a finding that the accumulations had occurred. Likewise, the Board held in Armco Steel Corp., 2 IBMA 359 (1973), that an inspector's statement that it was his unvarying practice to issue notices of violation when coal accumulations are deeper than 1-1/2 inches, was not evidence showing the actual depth of the accumulations cited and did not permit anyone to make a finding as to the existence of the accumulations or the seriousness of such accumulations. For the foregoing reasons, the evidence does not permit me to find that coal accumulations were proven to have existed along the 63, 73, 73B, and 73C road conveyor belts.

The inspector's testimony as to the accumulations along the 4 road conveyor belt and at the sites where the belt had been advanced was sufficiently detailed to prove that the accumulations existed under the former Board's holding in Old Ben Coal Co., 8 IBMA 98 (1977), because the evidence shows that those accumulations had existed long enough for the loose coal and coal dust beneath the conveyor belt to freeze over a period of days as layer after layer of loose coal fell from the belt. The mine superintendent was aware of the accumulations and stated that it was difficult to get the loose coal cleaned up because the miners were unwilling to work in the cold long enough to clean up the loose coal accumulations. Nevertheless, after the inspector's notice was issued, the superintendent was able to get all of the frozen coal removed from the 4 road conveyor belt entry. Therefore, the evidence shows that the loose coal accumulations had existed long enough to support a finding that the operator was aware of the accumulations and was permitting them to occur (Tr. 37-39; 46; 67). The evidence also supports a finding that the piles of loose coal which existed where tailpieces had been advanced had been left there over a long period of time. Consequently, the operator was aware of those accumulations and was permitting them to occur (Tr. 42-43; 59-60).

Conclusions. The inspector's testimony fails to show that the coal accumulations constituted a serious hazard. The accumulations were not continuous from the surface of the mine to the tailpiece. Of the 1,700 feet of coal accumulations along the 4 road belt conveyor, about 1,200 feet were in a frozen condition which would have reduced their combustibility (Tr. 32). The inspector saw no active electrical ignition sources and did not seem to think that the places where the belt was "scooting in coal" were sources of friction which were hazardous (Tr. 44; 48-49).

On the other hand, there was a high degree of negligence in the operator's permitting the coal to accumulate along the 4 road conveyor belt and there was an even higher degree of negligence in respondent's failure to clean up around the tailpieces before the belts were advanced. Such isolated piles of coal did not create particularly hazardous accumulations from the standpoint of propagation of any fire or explosion that might have occurred, but the piles were left on each side of the belt as it was advanced and did create a lingering obstruction and potential hazard in the vicinity of the belt conveyors (Tr. 42). Considering that respondent is a large operator, that there was good faith compliance, that payment of penalties will not cause respondent to discontinue in business, that the violation was moderately serious, and that there was a high degree of negligence, a penalty of \$500 will be assessed for this violation of section 75.400.

Exhibit G-2 indicates that 14 prior violations of section 75.400 occurred at respondent's No. 4-H Mine from 1970 through May of 1976.

No violations occurred in either 1973 or 1974 and no more than two violations of section 75.400 occurred in any year except for 1972 when six violations occurred. Respondent should increase its efforts to have additional years in which no violations of section 75.400 occur. Nevertheless, respondent's apparent efforts to reduce the number of violations of section 75.400 at its No. 4-H Mine warrants only a small increase in the penalty otherwise assessable under the other five criteria. Therefore, the penalty of \$500 will be increased by \$50 to \$550 because of respondent's relatively favorable history of previous violations.

Docket No. HOPE 78-561-P (4-H UG Mine)

Order No. 1 JCH (7-8) 5/13/77 § 75.400 (Exhibit G-12)

Findings. Section 75.400 requires that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustibles be cleaned up and not be permitted to accumulate in active workings or on electric equipment. Respondent violated section 75.400 because float coal dust was permitted to accumulate over previously rock-dusted areas along the No. 73-B belt conveyor entry and connecting crosscuts to a depth of from 0 to 1/8 of an inch beginning at the tail roller and extending outby to the conveyor belt drive for a distance of 2,800 feet. The majority of the float coal dust was on the mine floor on the nontraveled side of the belt conveyor and in the connecting entries where permanent stoppings had been constructed on each side of the belt entry (Tr. 113). The violation was only moderately serious because in some places the float coal dust was thin enough to have prevented the propagation of an explosion and if the entire entry had been as effectively rock dusted as it was in such places, the inspector would not have cited the operator for a violation of section 75.400. Respondent was extremely negligent for allowing the float coal dust to accumulate because the mine superintendent knew that the condition existed but had delayed having the float coal dust cleaned up and an additional layer of rock dust applied (Tr. 106). Power control wires were located at the belt head. While such wires constituted a possible ignition hazard, the inspector saw no specific ignition points because all the wires appeared to be in good condition (Tr. 104; 111).

Conclusions. The evidence supports a finding that respondent was aware of the float coal dust accumulations described in the inspector's order (Exh. G-12), but failed to have the float coal dust cleaned up before it was observed by the inspector. Therefore, the violation was proved within the holding of the Board in the Old Ben case, supra. In assessing a penalty, it must be borne in mind that the violation was only moderately serious because there were no known ignition sources and because the accumulations were not so continuous as to have propagated an explosion throughout the 2,800-foot

expanse of the belt conveyor entry. There was a high degree of negligence in that the mine superintendent was aware of the black condition developing in the 73-B belt conveyor entry, but failed to take action to ameliorate that condition until the inspector wrote Order No. 1 JCH. This accumulation, however, was more serious than the previous violation of section 75.400 because none of the accumulations in this instance were wet and frozen as was the case in the prior violation, and this violation involved an accumulation which extended for a distance of 2,800 feet as compared with the expanse of 1,700 feet involved in the prior violation. Therefore, a penalty of \$800 will be assessed for this violation of section 75.400.

Respondent's history of previous violations now includes the preceding violation of section 75.400 which occurred on November 30, 1976. That violation increased the number of violations of section 75.400 which occurred in 1976 to three violations. The data in Exhibit G-2 thus show that respondent's trend in violating section 75.400 has deteriorated from no violations in 1973 and 1974, to two violations in 1975 and three violations in 1976. The penalty of \$800 assessed for this violation should, therefore, be increased by \$150 to \$950 in order to impress on respondent the importance of augmenting its efforts to reduce the number of violations of section 75.400 which are occurring at the 4-H Mine.

Docket No. HOPE 78-560 (4-H UG Mine)

Order No. 1 DPC (7-35) 8/4/77 § 75.200 (Exhibit G-44)

Findings. Section 75.200 requires each operator of a coal mine to submit a roof-control plan suitable to the roof conditions and mining system of each coal mine. Respondent's roof-control plan provided that in the rehabilitation of roof-fall areas, respondent would install temporary supports as cleanup and roof-bolting operations advanced. Additionally, the roof-control plan specified that no operator of a machine would advance the controls of the machine beyond permanent roof support. Respondent violated both of the aforementioned provisions of its roof-control plan by having cleaned up a roof fall without having installed temporary supports and by having advanced the controls of a loading machine beyond permanent supports for a distance of from 3 to 7 feet (Tr. 425-430). The violation was very serious because rocks were still hanging in the cavity left by a fall of rock measuring approximately 6 feet in thickness. The violation was serious also because respondent's No. 4-H Mine has a generally poor roof condition (Tr. 431-432).

Respondent was extremely negligent in allowing the violation to occur because a strike was in progress at the time the violation was cited and five section foremen had done the cleaning up of the rock fall without using temporary supports. Additionally, the mine foreman was present in the vicinity at the time the inspector observed

a section foreman removing a bolting machine from the fall area. The section foreman agreed that he had just finished installing four roof bolts in the fall area. At the time the roof bolts were installed, the inspector could find no timbers of a length which could have been used as temporary supports at the time the roof bolts were installed (Tr. 434). The inspector observed three headers about 20 feet in length lying along the rib in the fall area, but the height of the mine in the fall area was 11 feet and the 20-foot headers could not have been used as temporary supports (Tr. 428-429).

Discussion. The superintendent of the 4-H Mine testified on behalf of respondent with respect to Order No. 1 DPC. The superintendent introduced as Exhibit C a one-page drawing of the 207 Road Unit cited in Order No. 1 DPC (Tr. 470). The superintendent's description of the roof fall area is largely at variance with the inspector's description of the same area. Whereas the superintendent stated that the roof fall extended for a distance of about 100 feet, the inspector said that the roof fall extended for only 35 feet. Whereas the superintendent said that at least 45 feet of the roof fall area had been permanently bolted in accordance with the roof-control plan "as far as he could remember" (Tr. 474; 478), the inspector said that the entire roof fall area contained only four roof bolts which had been installed just a few minutes before the inspector observed the violation (Tr. 445; 451). Whereas the superintendent testified that the inspector made his measurements by standing in the belt entry where the roof fall had occurred, the inspector stated that he had never at any time entered the roof fall area and had made all his measurements by standing in a crosscut which opened into the belt entry where the roof fall had occurred (Tr. 449; 494). Whereas the superintendent said that the inspector had taken two measurements extending in an outby direction, the inspector stated that he stood in a crosscut and took one measurement of 20 feet to his left toward the face and took another measurement of 16 feet to his right away from the face (Tr. 427; 440; 442; 471; 486).

Although a comparison of the superintendent's testimony with the inspector's testimony shows many variances, the superintendent did not really dispute the essential points made by the inspector. The superintendent did not contest the fact that a large part of the roof fall area was still unsupported and he did not claim that the inspector had made any mistakes in measuring the distance between the last permanent roof support and the fallen materials which still had to be cleaned up (Tr. 478; 487-488). The superintendent did not contest the fact that the distance from the controls on the loading machine to the end of the machine was 13 feet (Tr. 474). Since the superintendent did not doubt that there was a distance of from 20 to 16 feet from the last permanent support to the remaining materials which had to be cleaned up, there is nothing in the record to rebut the inspector's claim that the operator of the loading machine would have had to

have gone from 3 to 7 feet beyond permanent support in order to have cleaned in an area measuring from 16 to 20 feet with a loader which measured only 13 feet from the controls to the front of the machine (Tr. 426).

The superintendent did not see but one temporary support in the entire area where the roof fall was being cleaned up (Tr. 483). It is certain that one temporary support could not have brought respondent's section foremen into compliance with the roof-control plan because there is no way that one temporary support could be considered as adequate for roof bolting in an unsupported area which measured from 13 to 20 feet in length and was 20 feet wide (Exhs. G-49 and C).

Conclusions. The foregoing discussion shows that there was a high degree of negligence involved in respondent's violation of its roof-control plan. Because of a strike at the 4-H Mine, five of respondent's section foremen had done the cleaning up of the roof materials left in the belt entry by the roof fall. At the time the inspector's order was written, the mine foreman was near the site of the roof fall and would have had to have known, or if he had exercised due diligence, the mine foreman should have known that the section foremen were exposing themselves to possible injury or death by working beyond the last permanent support and by failing to erect temporary supports before installing roof bolts. The negligence was especially great because the six men who were ignoring the safety provisions of the roof-control plan were all trained in principles of proper roof control and were obligated to know the provisions of respondent's roof-control plan. In such circumstances, a penalty of \$4,000 is warranted. Far too many miners continue to be killed and injured by roof falls to permit violations of the roof-control plan to be taken lightly.

Exhibit G-2 shows that 33 prior violations of section 75.200 have occurred at Respondent's 4-H Mine. Twelve of those violations occurred in 1971. Four violations of section 75.200 occurred at the 4-H Mine in 1976. Two had occurred in 1977 prior to the one in August here under consideration. Since reduction in the number of roof-control violations is essential for promotion of safety, I believe that respondent should augment its efforts to reduce the number of violations of section 75.200 which have occurred at the 4-H Mine. Therefore, the penalty of \$4,000 will be increased by \$400 to \$4,400 because of respondent's unfavorable history of previous violations.

Docket No. HOPE 78-559-P (4-H UG Mine)

Notice No. 1 JCH (7-7) 5/13/77 § 75.1103-4 (Exhibit G-10)

Findings. Section 75.1103-4 requires that automatic fire sensors be able to provide identification of a fire within each belt

flight. Respondent violated section 75.1103-4 because the automatic fire sensor system for the 4-H Mine was disconnected at the master control box. When the sensor system was reconnected, it was inoperative and would not identify any of the seven <sup>2/</sup> belt flights which were being operated at the 4-H Mine. The violation was moderately serious because miners were stationed at each belt head to give warnings if a fire should occur and firefighting materials and equipment existed along the belt conveyors. Nevertheless, a sensing system which is working properly will identify the location of a fire and improve the probability of early extinguishment of a fire if one occurs. Respondent was grossly negligent for disconnecting the sensors and for failing to obtain expert assistance for repair of the system until it became the subject of a notice of violation (Tr. 73-77; 91; 94; 97).

Discussion. The inspector was very critical of respondent's management for allowing the fire sensing system to be disconnected because there was an indicator on the monitoring system near the mine office which showed when the system was inoperative. Therefore, the inspector said that management either knew the system was not working or should have known about it (Tr. 74-75). Respondent's chief electrician testified that when the system was first installed, it operated on only one main line. At a later time, a branch line was installed. The system worked for a short time after the branch line was installed, but then began to show only 7,500 ohms at the box on the outside of the mine, whereas a reading of 15,000 ohms was needed to make the system work properly. The chief electrician had been trying to get the system to operate for about 4 days before the notice of violation was issued. He estimated that he had spent about a fourth of his time during those 4 days working on the sensors. After the notice was issued, the chief electrician asked respondent's electrical engineer for advice and the electrical engineer explained to him that he would have to set the end-line resistors at 30,000 ohms in order to obtain a reading of 15,000 ohms on the outside of the mine. The increase to 30,000 ohms was required because of the addition of the branch line to the system (Tr. 91-96).

The chief electrician had not asked for assistance from respondent's electrical engineer until after the notice of violation was

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<sup>2/</sup> Respondent's chief electrician testified that the 4-H Mine operates seven belt flights (Tr. 92), whereas the inspector's notice and testimony refer to nine belt flights. The inspector had gone to examine the fire sensors on the basis of a complaint filed by the UMWA. Since this was the first and only visit the inspector made to the 4-H Mine, I find that the chief electrician's testimony as to the number of belt flights in the 4-H Mine is more likely to be correct than the count of an inspector who had made only one trip to the 4-H Mine.

issued. The chief electrician said that he did not think that any special precautions needed to be taken while the sensors were inoperative because there was a man stationed at each belt head and because there was firefighting equipment along the beltlines such as water deluge systems and a waterline with outlets for attaching fire hoses at 300-foot intervals (Tr. 93-94; 97-98).

Conclusions. If the miners are given early warning of the existence of a fire, they are likely to be able to put it out before anyone is injured. Even though respondent did have men stationed at each belt head, there was a distance of from 500 to 2,800 feet between the belt heads (Exh. G-3). Therefore, it would be possible for a fire to start on a belt flight at a point which would be beyond the range of the vision of the miners who were stationed at the belt heads. Because of the firefighting aids which existed along the belt, the violation was only moderately serious, but there was a high degree of negligence in the chief electrician's failure to seek the assistance of respondent's electrical engineer until after the notice of violation was issued. All that was required to make the sensors work was to readjust the end-line resistors. Therefore, in assessing a penalty, I am primarily trying to translate into monetary terms an amount which will be sufficient to cause respondent to impress on its supervisors the need to make an early effort to correct safety violations as soon as they can possibly be corrected by reliance upon all the technical assistance which is available to the supervisors charged with compliance with the safety standards. For the foregoing reason, I believe that a penalty of \$1,000 should be assessed for this violation of section 75.1103-4.

Exhibit G-2 does not show that there has been a previous violation of section 75.1103-4 at respondent's 4-H Mine. Consequently, there is no history of previous violations to be considered in this instance.

Docket No. HOPE 78-316-P (No. 5 Mine)

Order No. 1 RAN (6-77) 11/30/76 § 75.302-1 (Exhibit G-30)

Findings. Section 75.302-1 requires that the line brattice be installed at a distance of no more than 10 feet from the area of deepest penetration when coal is being cut, mined, or loaded. Respondent violated section 75.302-1 because coal was being cut, mined, or loaded in the Nos. 1, 2, and 3 rooms in the 34 Road Section while the brattice curtains were 30, 35, and 30 feet, respectively, from the working faces. The violation was serious because the curtains have to be close to the working face in order to assure that respirable dust and noxious fumes will be carried away from the miners who are working at the faces. Respondent was grossly negligent because the preshift examiner had reported the line brattices' excessive distances from the faces, but the section foreman had started production of coal on the day shift without moving the brattice curtains to

their proper location which would have been within 10 feet of the working faces (Tr. 378-385).

Conclusions. Respondent presented no evidence showing any mitigating circumstances in connection with this violation of section 75.302-1. The inspector stated that the men would have had to work for more than one shift without moving the curtains for the curtains to be from 30 to 35 feet from the working faces. While the inspector stated that no methane has ever been detected in respondent's No. 5 Mine, the inspector noted that the No. 5 Mine is above other mines in which methane has been detected and he said that it was possible that methane could seep up to the No. 5 Mine from the mines beneath it. Therefore, he was unwilling to eliminate the possibility that the line curtains would need to be within 10 feet of the faces in order to protect the men from a possible hazardous concentration of methane (Tr. 381). The section foreman was especially negligent in failing to have corrected the placement of the line brattices when it is considered that the preshift examiner had reported the improper placement of the curtains when he made his preshift report (Tr. 382). In view of the fact that the violation was serious and that there was a high degree of negligence, a penalty of \$2,000 will be assessed for this violation of section 75.302-1.

Exhibit G-2 shows that six violations of section 75.302-1 have occurred in respondent's No. 5 Mine since 1973. There has been one violation of section 75.302-1 in each year except for 1974 when three violations occurred. Some consideration should be given to the criterion of history of previous violations in assessing penalties as I believe that respondent should be able to mine coal without violating section 75.302-1 at all. Therefore, the penalty of \$2,000 will be increased by \$25 to \$2,025 because of respondent's history of previous violations.

Docket No. HOPE 78-317-P (No. 5 Mine)

Notice No. 1 RAN (6-76) 11/30/76 § 75.402 (Exhibit G-28)

Findings. Section 75.402 requires that all underground areas of a coal mine be rock dusted to within 40 feet of all working faces unless such areas are too wet or too high in incombustible content to propagate an explosion or unless such areas are inaccessible or unsafe to enter or the Secretary has ruled that a given mine is to be excepted from the need to apply rock dust. Additionally, section 75.402 requires that rock dust be applied in all crosscuts which are less than 40 feet from the working face.

Respondent violated section 75.402 because no rock dust had been applied in the Nos. 1, 2 and 6 rooms in the 34 Road Section for distances of 50, 60, and 50 feet, respectively, from the working faces and no rock dust had been applied in the crosscut between Nos. 1 and

2 entries or the crosscut between Nos. 2 and 3 entries. Since the inspectors' distances of 50, 60, and 50 feet included the 40-foot distances in entries which did not have to be rock dusted, the violation really pertained to distances of 10, 20, and 10 feet, respectively, in the Nos. 1, 2 and 6 rooms, but the inspector testified that each crosscut was 70 feet in length so the unrock-dusted area consisted of 140 feet of crosscuts and 45 feet of entries. The violation was serious because no rock dust at all had been applied in the entries and crosscuts cited in the inspector's notice and production was in progress so that a mine fire or an explosion could have occurred. Respondent was grossly negligent in continuing to produce coal without applying rock dust in the crosscuts or within 40 feet of the working faces. The inspector testified that none of the exceptions in section 75.402 for rock dusting were applicable, that is, the areas were not so wet or incombustible that rock dusting was unnecessary, the areas were not inaccessible or unsafe to enter, and the Secretary had not excepted the No. 5 Mine from the rock-dusting requirements of section 75.402 (Tr. 372-376; 385).

Conclusions. The only excuse offered by the section foreman for his failure to rock dust was that he had ordered rock dust, but it had not been sent into the mine yet (Tr. 373). Despite the claim that rock dust could not be obtained, the violation was corrected within 1 hour and 10 minutes after the inspector issued Notice No. 1 RAN (Exh. G-29). It would appear that this was a case in which the section foreman simply concluded that production was more important than complying with the safety standards. The inspector testified that the working place looked black everywhere and that he did not think the place should have been allowed to get in such a dangerous condition (Tr. 376). Since the violation was both serious and there was a high degree of negligence, a penalty of \$2,000 will be assessed for this violation of section 75.402.

Exhibit G-2 shows that one violation of section 75.402 occurred in respondent's No. 5 Mine in 1974. No prior violations of section 75.402 have occurred since 1974. In such circumstances, I find that the penalty in this instance should not be increased at all under the criterion of history of previous violations.

Docket No. HOPE 78-415-P (MacGregor Preparation Plant)

Notice No. 1 NK (7-5) 4/7/77 § 77.205(a) (Exhibit G-26)

Findings. Section 77.205(a) requires that respondent provide and maintain a safe means of access to all working places. The inspector alleged in Notice No. 1 NK that respondent had erected work platforms on the outside of two coal-drying cyclones and that respondent had violated section 77.205(a) by failing to provide a safe means of access to the work platforms because "the employees were required to walk the structure beams which were only approximately 10 inches wide

and open to all sides and located approximately 30 feet above the lower floor" (Exh. G-26). No men were working on the outside of the cyclones when the inspector made his examination. The inspector did not see any men walk on the beams to gain access to the work platforms and the inspector did not talk to any men who had walked on the beams (Tr. 262-263).

Although the inspector made his examination of the cyclones because of a complaint received from the UMWA, the complaint stated that "the work area on the flash dryers had an old wooden walkway with no guard rails. The men are being requested to work in this very dangerous area" (Exh. G-24). The inspector also wrote Order No. 1 NK citing respondent for failure to provide a safe working platform. That order is not a part of the violations alleged by MSHA in any of the 12 Petitions for Assessment of Civil Penalty which are involved in this proceeding. Therefore, when the inspector wrote Notice No. 1 NK which is here involved, he was citing respondent for a violation which was not a part of the UMWA's written complaint. The evidence presented by respondent shows that respondent had erected a ladder between the cyclones. The means of access provided by respondent was for workers to climb the ladder to the top of the cyclones. After stepping onto the top of the cyclones from the ladder which was equipped with backguards, the workers lowered themselves onto the work platforms by using safety ropes and belts (Tr. 273; 308).

The inspector wrote Notice No. 1 NK on the incorrect assumption that the only means of access to the work platforms was by walking on the steel beams (Tr. 255-259). The inspector had not heard of the ladder and safety ropes used for gaining access to the platforms until respondent presented its evidence at the hearing. The inspector did not thereafter offer any rebuttal testimony to show whether or not he believed that the use of the ladder and safety ropes was an unsafe means of gaining access to the work platforms. It is true that counsel for MSHA diligently tried to show on cross-examination that it was unsafe to use the ladder and safety ropes to gain access to the platforms, but there is no evidence in the record to show that if the inspector had actually known the means of access provided by respondent that he would have cited the use of the ladder and safety ropes as a violation of section 77.205(a). Moreover, even if the inspector had testified at the hearing that use of the ladder and ropes was a violation of section 77.205(a), that would have been an entirely different violation of section 77.205(a) from the violation cited in the inspector's notice.

The difficulty in finding a violation of section 77.205(a) on the basis of the evidence is that MSHA has alleged that walking on steel beams to gain access to the work platforms was a violation of section 77.205(a), but that was not the means of access provided by respondent and the cross-examination conducted by MSHA's counsel did

not result in any admissions by either of respondent's witnesses that use of the ladder and safety ropes was an unsafe means of gaining access to the work platforms (Tr. 284; 293; 297; 311-319). Therefore, the evidence simply will not support a finding that a violation of section 77.205(a) occurred.

Discussion. Respondent's foreman at the MacGregor Cleaning Plant testified that there were two coal-drying cyclones at the plant. The foreman said that about once a year it was necessary to weld steel patches on the outside of the cyclones and that work platforms had been constructed on the outside of the cyclones so that welders could stand on the platforms for the purpose of welding the patches onto the sides of the cyclones. The foreman said that respondent had constructed a ladder between the two cyclones and that respondent intended for the employees who worked on the platforms to gain access to them by going up the ladder to the top of the cyclones and letting themselves down to the platforms by use of safety ropes and belts (Tr. 270-273).

The foreman stated that respondent had received complaints from the men about the safety of the work platforms and that before the notice of violation here involved was written, respondent had contracted with the Daniels Company of Bluefield, West Virginia, to have additional walkways and stairways constructed to improve the safety of the men who had to work on the cyclones (Tr. 274-278). The foreman said that he was not aware that employees were walking on the steel beams in order to gain access to the work platforms. The foreman stated that the miners' primary complaint was failure of respondent to have handrails on the work platforms (Tr. 274-294).

A tipple mechanic testified that he had worked for the construction company which originally built the preparation plant for respondent in 1951 (Tr. 271; 307). Thereafter, he began to work for respondent and he has been a tipple mechanic at the plant for about 20 years (Tr. 306). The tipple mechanic stated that he generally gained access to the work platforms by climbing the ladder between the cyclones and letting himself down with safety ropes from the top of the cyclones. While the tipple mechanic said that he had walked the steel beams to gain access to the work platforms, he said that he was not required to use the beams for that purpose and that he used the ladder between the cyclones most of the time (Tr. 305-309; 321).

Conclusions. I have considered finding that respondent violated section 77.205(a) by ruling that respondent was obligated to know how its workers were at times gaining access to the work platforms, but the inspector stated that work on the cyclones was done on the maintenance shift which is worked from midnight to 8 a.m. (Tr. 262). The plant foreman worked on the day shift and would have had no way of knowing that any of the workers were gaining access to the platforms at times by walking on the steel beams instead of using the ladder and safety ropes provided by respondent as a safe means of access to

the work platforms. I have also considered holding that respondent was obligated to warn the men that they were not supposed to walk on the steel beams to get to the platforms and that respondent should have warned its employees that it would take disciplinary action against any worker who did walk on the beams. The difficulty with making such rulings is that there is not a scintilla of evidence in the record to show that respondent's management had ever heard from any source that the workers were walking on the steel beams. The plant foreman stated that no workers at union safety meetings or at any other time had ever complained to him about having to walk on the steel beams. He said the safety complaints related to the way the work platforms were constructed and that there was no mention at any time about the fact that the men lacked a safe means of gaining access to the work platforms (Tr. 286; 291-292; 294; 299).

The evidence shows that after the notice and order discussed above were issued, respondent installed an elaborate system of stairways and platforms around the cyclones (Tr. 266). Although the tippie mechanic stated that he did not feel unsafe in working on the tippie before the new facilities were installed, he would agree that he feels safer now than he did before the new facilities were constructed and that the ease of making repairs has been enhanced by the new permanent work platforms (Tr. 319). Respondent has paid civil penalties for other violations cited by the inspector in connection with the repair of the cyclones. Those penalties were paid in connection with the unsafe conditions which were the subject of UMWA's written complaint (Tr. 323-328). Consequently, I believe that the purposes of the Act in bringing about safe working conditions at the cyclones have already been fully served. In any event, the evidence adduced in this proceeding does not support a finding that respondent violated section 77,205(a). Therefore, MSHA's Petition for Assessment of Civil Penalty filed in Docket No. HOPE 78-415-P will hereinafter be dismissed.

Docket No. HOPE 78-562-P (MacGregor No. 7 UG Mine)

Order No. 1 SWG (7-88) 11/4/77 § 75.400 (Exhibit G-50)

Foreword. After the parties had presented evidence in this proceeding for 3 days, it became necessary to continue the hearing to December 8, 1978, because of the unavailability of one of MSHA's witnesses. When the hearing was reconvened on December 8, some of the witnesses were again unavailable because heavy rains which fell on the day and evening preceding December 8 had flooded some of the roads and made it impossible for some of the witnesses to attend the hearing. Therefore, counsel for MSHA and respondent agreed that they would submit the issues with respect to two of the violations alleged in Docket No. HOPE 78-562-P on the basis of a stipulation of the facts (Tr. 605; 610-611).

Findings. Section 75.400 requires that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustibles be cleaned up and not be permitted to accumulate in active workings or on electric equipment. Respondent violated section 75.400 because loose coal and coal dust in depths of from 2 to 10 inches had been permitted to accumulate under or along the Nos. 20, 314, and 344 belt conveyor flights. Additionally, float coal dust had accumulated under and along the Nos. 20, 314, and 344 belt conveyors and into the adjacent crosscuts to the left and right of the belt conveyors. The accumulations were continuous for the entire distance of the belt flights whose total length was 2,220 feet. The accumulations ranged from 6 to 8 feet in width. There is no evidence to show that any ignition sources were present, but the continuous nature of the accumulations in conjunction with the continuous coating of float coal dust warrants a finding that the violation was serious. Respondent was grossly negligent for permitting such a large expanse of combustible materials to accumulate (Tr. 617-618; Exh. G-50).

Conclusions. Although there is no testimony to show that the violation was proven under the strict standards of proof enunciated by the former Board of Mine Operations Appeals in Old Ben Coal Co., 8 IBMA 98 (1977), I believe that the exhibits and stipulations support a finding that the accumulations had existed for a sufficient period of time that respondent, by exercise of due diligence, should have discovered the accumulations before they were cited by the inspector in Order No. 1 SWG. That conclusion is supported by the exhibits. Order No. 1 SWG was written on a Friday at 2:23 p.m. Assuming that no cleanup work was done on either Saturday or Sunday at the mine, 3 working days in the following week were required to clean up the accumulations and apply an ample coating of rock dust in the areas cited in the inspector's order (Exhs. G-50 and G-51). I conclude that accumulations which required 3 days for cleanup would have had to have accumulated over a time period during which respondent should have been aware of them so as to have taken action to clean them up before they were cited by the inspector. Counsel for respondent stated that the accumulations described in the inspector's order were not a condition which was condoned or approved of by respondent's management (Tr. 612).

Considering that the instant violation of section 75.400 was serious and involved a high degree of negligence, a penalty of \$2,000 will be assessed for this violation.

Exhibit G-2 shows that 58 prior violations of section 75.400 have occurred at respondent's No. 7 Mine. The number of violations ranged from two to five per year from 1970 to 1975. In 1976 there were 29 violations and in 1977 there were eight violations of section 75.400 prior to the one here under consideration. The evidence shows

that respondent made a commendable reduction in the number of violations between 1976 and 1977, but I consider that occurrence of eight violations in 1977 is still an unwarranted number of violations of section 75.400. Therefore, the penalty of \$2,000 will be increased by \$500 to \$2,500 because of respondent's unfavorable history of previous violations at its No. 7 Mine.

Docket No. HOPE 78-562-P (MacGregor No. 7 UG Mine)

Order No. 1 SWG (7-102) 11/9/77 § 75.514 (Exhibit G-54)

Foreword. The facts concerning Order No. 1 SWG dated November 9, 1977, were stipulated by counsel for MSHA and respondent for the same reasons stated above under my discussion of Order No. 1 SWG dated November 4, 1977.

Findings. Section 75.514 provides that all electrical connections or splices in conductors shall be mechanically and electrically efficient and that suitable connectors shall be used. The section also requires that electrical connections or splices in insulated wires be reinsulated at least to the same degree of protection as the remainder of the wire. Respondent violated section 75.514 because of the existence of the facts hereinafter given.

The end of the trailing cable of a three-fourths horsepower pump had been stripped of all insulation to expose both conductors for a distance of about 1 inch and the ground conductor had been cut out of the cable. Each of the bare conductors had been wound about a separate nail. The end of the pump's trailing cable with the nails attached to the bare conductors, as described above, was found by the inspector at a point along a trailing cable to a Joy 21 shuttle car. There were two holes in the shuttle car's cable which were far enough from each other to match the distance between the two nails in the pump's trailing cable. The existence of the bare conductors and nails in proximity to the holes in the shuttle car's trailing cable supports a finding, and I so find, that the nails had been driven into the shuttle car's cable for the purpose of obtaining electricity to power the pump (Tr. 618-620; 625-628; Exhs. G-54 and G-58).

Such a crude connection was not mechanically or electrically efficient; suitable connectors were not used; and no attempt at reinsulation of either trailing cable had been made. The violation was very serious because the bare conductors would have exposed to electrocution any person who might have touched the bare conductors and nails while they were being used to power the pump. There was also a strong likelihood that sparks could come from the bare conductors so as to cause a fire or explosion. The nail holes left in the shuttle car's trailing cable would have continued to be an electrocution hazard if they had not been discovered by the inspector so that the holes in the cable could be reinsulated to the same degree of protection as the remainder of the trailing cable.

Conclusions. Since the violation was very serious and there was an extremely high degree of negligence, a penalty of \$6,000 will be assessed for this violation of section 75.514. Exhibit G-2 shows that 10 prior violations of section 75.514 have occurred at respondent's No. 7 Mine. The largest number of violations of section 75.514 occurred in 1976 when five were cited by inspectors. It is encouraging to note that only one violation of section 75.514 had occurred in 1977 prior to the instant violation, but there is no reason for violations of section 75.514 to occur if respondent's electricians are properly trained and supervised. Therefore, the penalty of \$6,000 will be increased by \$50 to \$6,050 under the criterion of history of previous violations.

Docket No. HOPE 78-562-P (MacGregor No. 7 UG Mine)

Order No. 1 RJW (7-103) 11/11/77 § 75.518 (Exhibit G-40)

Findings. Section 75.518 requires the use of automatic circuit-breaking devices or fuses to protect all electric equipment against short circuit and overloads. Respondent violated section 75.518 because two 60-amp fuses in the switch box for a pump motor had been blown and wire had been used to bridge over the fuses so that the pump would continue to run. Bridging over the fuses eliminated short circuit and overload protection for the pump. The violation was moderately serious because, at the time the violation occurred, a malfunction in respondent's ventilating system had caused intake air to come out of the mine instead of going into the section of the mine here involved. Therefore, if the pump motor had become overheated from lack of short circuit and overload protection, any smoke from the pump motor would have been carried out of the mine instead of going into the mine so as to endanger any miners who might have been working in by the pump. Respondent was grossly negligent for deliberately destroying the pump motor's short circuit and overload protection (Tr. 544-549; 555; 575-579).

Discussion. Respondent's second-shift maintenance foreman testified that the pump was receiving power through a nip attached to a trolley wire. The maintenance foreman said that there was a fuse in the nip and that the fuse in the nip would have continued to provide the pump motor with short circuit and overload protection (Tr. 563-564). The inspector presented rebuttal testimony in which he stated that when he wrote his order citing the bridging over of the two fuses in the switch box, he specifically noted that there was no fuse in the nip. The inspector said that when the maintenance foreman replaced the fuses at the switch box, he also replaced the nip with one which had a fuse in it (Tr. 585). I am accepting the inspector's version that there was no fuse in the nip because respondent's maintenance foreman stated that there was a fuse in the nip the last time he inspected it, but that he did not inspect the nip on the day the inspector's order was written (Tr. 566). Therefore, I have found

above that the bridging over of the fuses in the switch box had the effect of destroying short circuit and overload protection for the pump because I find that no fuse existed in the nip attached to the trolley wire.

Another discrepancy between the inspector's testimony and that of the maintenance foreman is that the foreman claimed that the motor on the pump was a 10-horsepower motor instead of a 5-horsepower motor as reported by the inspector (Tr. 560; 585). I find that it is unnecessary to determine which witness was right about the size of the pump motor since the inspector said that either a 10-horsepower or a 5-horsepower motor would have had adequate protection if 60-amp fuses had been used (Tr. 586). The inspector agreed that the mine superintendent's testimony about the fact that intake air was actually coming out of the section instead of going in could be correct (Tr. 584). For that reason, I have found above that the violation was moderately serious because any smoke which might have come from the motor if an overload had occurred would have been unlikely to go toward the working face so as to create a hazard for the miners who are working in by the pump cited in the inspector's order.

Conclusions. A large penalty is not warranted under the criterion of gravity, but I have always considered the deliberate act of bridging over fuses to be an act of extreme and intentional negligence. <sup>3/</sup> Therefore, a penalty of \$1,000 will be assessed for this violation of section 75.518. Exhibit G-2 shows that 14 previous violations of section 75.518 have occurred at respondent's No. 7 Mine. The number of violations ranged from two to three in 1971, 1972, and 1974, but there were seven violations of section 75.518 at the No. 7 Mine in 1976. That is a sharp increase in failure to provide proper short circuit and overload protection justifying an increase of \$500 under the criterion of history of previous violations. Therefore, the penalty of \$1,000 will be increased by \$500 to \$1,500 because of respondent's unfavorable history of previous violations.

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<sup>3/</sup> The inspector testified that the mine foreman told him that he had personally bridged over the fuses in the switch box (Tr. 551; 556). The mine foreman testified that he did not tell the inspector that he had bridged over the fuses (Tr. 622). I have found that respondent was grossly negligent in bridging over the fuses. I would not change the finding as to negligence regardless of whether the mine foreman did the bridging or some other employee did it as all of respondent's witnesses agreed that fuses of the proper size were readily available at the time and that it was unnecessary to bridge over the fuses (Tr. 564; 576; 594).

Docket No. HOPE 78-562-P (MacGregor No. 7 UG Mine)

Order No. 2 RJW (7-104) 11/11/77 § 75.518 (Exhibit G-42)

Findings. Respondent violated section 75.518 a second time on November 11, 1977, by bridging over two 10-amp fuses for a three-fourths-horsepower pump. The second pump was located about 60 to 80 feet inby the pump which was discussed above in connection with Order No. 1 RJW. The seriousness of the violation is moderate because intake air was traveling in the wrong direction at the time the violation occurred so that any smoke that might have come from an overloaded motor would have come out of the mine and would not have created any hazard for the miners working inby the pump. There was an extremely high degree of negligence because the two fuses in the switch box as well as a fuse in the nip at the trolley wire had all been bridged over with copper wire (Tr. 588-591).

Discussion. The testimony given by the second-shift maintenance foreman indicated that he could not be certain whether he replaced the nip before or after the inspector's Order No. 2 RJW was issued because he said that the motor crew tears out the nips with considerable regularity (Tr. 593). The maintenance foreman could not understand why anyone would have bridged over the fuses with wire because he said there were plenty of fuses at the mine to replace any that might be blown (Tr. 594).

Conclusion. Since the testimony is almost identical for the second violation of section 75.518 as it was with respect to the first violation, I conclude that a penalty of \$1,000 should also be assessed for this second violation of section 75.518. There is no difference in respondent's history of previous violations because the first and second violations were cited on the same day by the same inspector within a period of 15 minutes. There would not have been time between the citing of the two violations for respondent to have instituted an improved program for inspection of electrical equipment. In such circumstances, the penalty of \$1,000 will be increased by \$500 to \$1,500 because of respondent's unfavorable history of previous violations of section 75.518 at the No. 7 Mine.

Docket No. HOPE 78-563-P (MacGregor No. 7 UG Mine)

Notice No. 3 OEB (7-13) 9/16/77 § 75.604 (Exhibit G-37)

Findings. Section 75.604 requires that permanent splices be mechanically strong and effectively insulated and sealed so that the splices will exclude moisture. The splices are also required by that section to be made of suitable materials which will provide flame-resistant qualities and good bonding to the outer jacket. Respondent violated section 75.604 because there were five defective permanent splices on the trailing cable to the No. 86 shuttle car operating in

the No. 373 Section. The five splices had been rubbed and frayed to the extent that at least one electrical conductor was showing for a distance of from one-fourth to three-fourths of an inch in each splice. The five splices began at a point about 60 feet outby the shuttle car and were all located within an additional 40 feet of the cable so that all of the defective splices were located within 100 feet of the shuttle car. The violation was very serious because anyone who might have had reason to pick up the trailing cable could have been electrocuted if he had touched any part of the bare conductors. Respondent was grossly negligent for allowing the five splices to deteriorate so as to expose the conductors. Respondent should have discovered the defective splices and should have repaired them before they deteriorated to the hazardous condition described in the notice (Tr. 511-516).

Discussion. Respondent's witness testified that there was a wildcat strike at the No. 7 Mine which began on June 21, 1977, and ended on September 7, 1977. No weekly inspections of electrical equipment were made during the strike and the first inspection made after the strike was on September 16, 1977, which was the same day that the instant notice of violation was written. Additionally, respondent's witness stated that the five permanent splices cited in the notice were not in as bad a condition as the inspector claimed because he could see bare conductors at the ends of three of the splices only by lifting up on the ends of the sleeves on those three permanent splices. Respondent's witness agreed with the inspector that two permanent splices had holes in the middle about the size of a match stem, but he said that the conductors in those two splices were still covered by their individual wrappings so that no bare conductors were exposed (Tr. 527-530).

Respondent's witness also testified that 2 days after they had replaced the permanent splices cited in the inspector's notice, they examined the new splices and found that the same conditions cited in the inspector's notice again existed. They then discovered that the cable guide was too small for the standard-sized trailing cable being used on the shuttle car. The guide was large enough to accommodate the trailing cable until such time as permanent splices were made in it. The splices, however, were so large that the guide squeezed them and caused them to wear out very fast. The excessive wear in the splices stopped when the cable guide was replaced with a guide large enough to permit permanent splices to pass through it (Tr. 531-532).

Respondent's defense is not persuasive. Respondent's witness stated that it would not be normal for five permanent splices to be made in a single trailing cable within a time period of 12 weeks (Tr. 540). Since the five permanent splices again wore out within 2 days after they were replaced following the writing of the inspector's notice (Tr. 531), there is reason to conclude that respondent should have discovered the worn condition of the splices over the period of

several weeks during which the five permanent splices would originally have been made. In other words, it is highly improbable that five permanent splices were made in the cable during a single day. Since all the splices were within 40 feet of each other, the electricians who installed the second, third, fourth, and fifth splices should have observed the worn and dangerous condition of the prior splices because they were wearing out within a period of 2 days after being made. If the electricians who made the successive permanent splices did not discover the worn condition of the prior splices at the time they were making additional splices, there was an ample period prior to the strike when the worn splices should have been discovered and corrected during the weekly examination of electrical equipment.

Conclusions. Respondent's witness claimed that bare conductors were visible only in three of the five worn splices, but he agreed that it would have been possible for a person handling the cable at one of the locations of those three splices to have been electrocuted (Tr. 538-539). Therefore, regardless of whether one accepts respondent's description of the splices or MSHA's description of the splices, the violation was very serious. As I have explained and found above, the violation was the result of gross negligence. Therefore, a penalty of \$2,000 will be assessed for this violation of section 75.604.

Exhibit G-2 shows that 11 prior violations of section 75.604 have occurred at respondent's No. 7 Mine since 1973. Five violations occurred in 1974, two occurred in 1975, one occurred in 1976, and one occurred in 1977 prior to September 16, 1977, when the instant violation was cited. The evidence shows, therefore, that respondent has made an effort to reduce the number of violations of section 75.604 which have occurred at its No. 7 Mine, although its record for 1977 had deteriorated to two violations by September of 1977. Consequently, the penalty of \$2,000 will be increased by only \$50 to \$2,050 in view of respondent's relatively favorable history of previous violations.

Docket No. HOPE 78-564-P (MacGregor No. 9 Mine)

Notice No. 3 BRS (7-32) 9/22/77 § 75.514 (Exhibit G-35)

Findings. Section 75.514 provides that all electrical connections or splices in conductors shall be mechanically and electrically efficient and that suitable connectors shall be used. The section also requires that electrical connections or splices in insulated wires be reinsulated at least to the same degree of protection as the remainder of the wire. Respondent violated section 75.514 because five permanent splices in the trailing cable to the No. 03 shuttle car in the 9 Road Section had been made by tying the conductors together instead of using proper connectors which were

available at respondent's No. 9 Mine. In two of the five defective splices, the ground conductors had been laid parallel and taped. There were holes in the external covering over two of the five permanent splices. The violations were very serious because conductors tied together are inclined to slip which, in turn, may have the effect of causing the two ends of the ground conductors to lose contact when the ends are taped and placed parallel with each other. If a bare conductor should happen to make contact with the frame of a shuttle car at a time when the ground conductor is not connected, any person touching the shuttle car's frame could be electrocuted. Additionally, if the ground conductor is ineffective, the cable may become overheated and cause a spark which could produce a fire or an explosion. The probability of an explosion in the No. 9 Mine was reduced by the fact that no methane has ever been detected in the mine. Respondent was grossly negligent for allowing the permanent splices to be made by tying knots in the conductors because respondent's chief electrician knew that his electricians were prone to tie knots in conductors when making splices, but he has never discharged anyone for such practices and there is nothing in the record to show that he has imposed any sanctions on employees who make splices by tying knots in conductors (Tr. 331-334; 337-343; 356; 363-364; 365).

Discussion. Respondent's chief electrician and the inspector agreed that if splices are made in cables by tying knots in the conductors instead of using proper connectors, there is no way to discover that the splices have been made improperly once the splices have been covered by the vulcanized sleeves which are required to be placed over permanent splices (Tr. 353; 358; 365). Respondent's chief electrician, however, knew that the five electricians who were employed at respondent's No. 9 Mine had a propensity for tying knots in conductors (Tr. 365). The practice of making splices by tying knots in the conductors was so prevalent at the No. 9 Mine that the inspector who wrote the instant notice of violation stated that he performed his examination of the permanent splices in this instance because UMWA had made a complaint to MSHA that splices were being improperly made at the mine (Tr. 337). The same five electricians who were employed at the No. 9 Mine when the five improper splices were made are still working at the No. 9 Mine (Tr. 366). There is nothing in the record to show that respondent has announced any sanctions which will be used to assure that proper connectors will be used when splices are made at the No. 9 Mine.

Conclusions. Since the violation was very serious and respondent was grossly negligent for allowing the violation to occur, a penalty of \$2,000 will be assessed for this violation of section 75.514. Exhibit G-2 shows that one prior violation of section 75.514 has occurred at respondent's No. 9 Mine. Therefore, the penalty of \$2,000 will be increased by \$25 to \$2,025 under the criterion of respondent's history of previous violations.

Docket No. HOPE 78-565-P (Paragon Mine)

Order No. 1 RM (7-56) 4/14/77 § 75.400 (Exhibit G-17)

Findings. Section 75.400 requires that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustibles be cleaned up and not be permitted to accumulate in active workings or on electric equipment. Respondent violated section 75.400 because loose coal, coal dust, and float coal dust existed on the structures and electrical components of the belt head of the No. 713-C belt conveyor. Additionally, loose coal and coal dust existed along the belt line from the belt head to the tailpiece in depths of from 0 to 17 inches for a distance of 1,500 feet. Most of the accumulations were either under the belt conveyor or in close proximity to the belt (Tr. 155-156). While electrical wires supplied power to the belt drive, the inspector saw no bare wires which created an explosion hazard. The Paragon Mine releases methane, but the inspector did not think methane would be likely to accumulate in the belt entry. For the foregoing reasons, the violation was only moderately serious. Respondent was negligent for permitting the accumulations to occur (Tr. 155-159; 164).

Discussion. The assistant superintendent of respondent's Paragon Mine testified that respondent has a belt examiner who checks the condition of the conveyor belts in the Paragon Mine on each shift. He stated that the belt examiner's book showed that the No. 713-C belt conveyor was okay on April 11. The next entry for April 12 stated "[n]eeds water fixed on head". The subsequent entry for April 13 stated "713-C needs spot cleaned". The entry for the day the instant order was written stated "713-B and C belts need cleaned, needs rollers". The assistant superintendent stated that the belt was not cleaned on April 13 after the belt examiner had indicated that the belt conveyor needed to be "spot cleaned". The inspector testified that no cleaning was being done along the belt at the time he wrote his order on April 14 at 11:22 a.m. (Tr. 157). In such circumstances, the preponderance of the evidence shows that respondent knew about the accumulations before they were cited in the inspector's order, but respondent was taking no steps to clean up the loose coal and coal dust at the time the accumulations were first observed by the inspector. Therefore, I find that the violation of section 75.400 was proved under the former Board's opinion in Old Ben Coal Co., 8 IBMA 98 (1977), which has previously been discussed in this decision.

Conclusions. Since the violation of section 75.400 was only moderately serious and since the combustibles had not been accumulating for a very long period before they were cited by the inspector, a penalty of \$400 will be assessed.

Exhibit G-2 indicates that 65 prior violations of section 75.400 have occurred at respondent's Paragon Mine. In 1970 and in every year

thereafter, there have been at least four violations of section 75.400 at the Paragon Mine. A total of 16 violations occurred in 1976 and five violations of section 75.400 had occurred in 1977 at the Paragon Mine by April 14, 1977. Respondent has not exercised a sufficient effort to reduce accumulations of combustible materials at the Paragon Mine. Therefore, the penalty of \$400 will be increased by \$500 to \$900 because of respondent's unfavorable history of previous violations.

Docket No. HOPE 78-565-P (Paragon Mine)

Order No. 1 RM (7-46) 5/4/77 § 75.400 (Exhibit G-18)

Findings. Respondent again violated section 75.400 on May 4, 1977, or just 2 weeks after the preceding order citing a violation of section 75.400 was written. This time loose coal, coal dust, and float coal dust existed along the No. 697-A conveyor belt for a distance of 4,000 feet. The accumulations ranged from 0 to 16 inches in depth and were effectively continuous. The accumulations were deepest on both sides of the tailpiece, but float coal dust existed for the entire 4,000-foot length of the conveyor belt. Although the existence of the accumulations had been recorded in the preshift examination book, the inspector saw no cleaning along the belt at the time he issued his order. The violation was moderately serious because no ignition sources were observed by the inspector. Respondent was negligent in permitting the accumulations to occur (Tr. 180-187).

Conclusions. Since the accumulations were reported by the preshift examiner and no steps were being taken to clean up the accumulations at the time the order was written, I conclude that respondent was permitting the accumulations to occur and that a violation of section 75.400 was therefore proven under the former Board's opinion in Old Ben Coal Co., 8 IBMA 98 (1977), supra.

Although the inspector saw no active ignition sources with respect to either the preceding violation of section 75.400 or this violation of that section, the inspector said that he would classify the violation cited on May 4 as more serious than the one cited on April 14 because the violation of May 4 involved an expanse of loose coal, coal dust, and float coal dust which was 2,500 feet longer than the accumulations observed on April 14. I agree with the inspector that the violation observed on May 4 was potentially more serious than the one observed on April 14. The penalty for the violation of May 4 should, therefore, be greater than the penalty previously assessed for the violation of April 14. Consequently, a penalty of \$800 will be assessed for this violation of section 75.400.

Exhibit G-2, as indicated above, shows that 65 prior violations of section 75.400 have occurred at respondent's Paragon Mine. The

preceding violation of section 75.400 which occurred on April 14 raises to six the number of violations of section 75.400 which had occurred in 1977 at the Paragon Mine by April 14, 1977. In view of respondent's unfavorable history of previous violations, the penalty of \$800 will be increased by \$550 to \$1,350.

Docket No. HOPE 78-565-P (Paragon Mine)

Order No. 1 RP (7-62) 4/14/77 § 75.200 (Exhibit G-19)

Findings. Section 75.200 requires each operator of a coal mine to submit a roof-control plan suitable to the roof conditions and mining system of each coal mine. Respondent's roof-control plan provided that the width of the entries should not exceed 20 feet where roof bolts are the sole means of roof support. Respondent violated section 75.200 because the Nos. 2, 3, 4, 5, and 6 entries in the No. 2 Section were up to 23 feet wide for a distance of 60 feet in by the last open crosscut. The entries were up to 3 feet wider than the 20-foot width permitted by the roof-control plan. Wide entries narrow the size of the pillars left for supporting the roof and increase the stress on the roof span. Although the inspector did not detect any actual loose roof, he said that 80 to 85 percent of the fatalities which occurred in underground coal mines in 1974 and 1976 resulted from failure of operators to comply with their roof-control plans. The potential for a roof fall made the violation serious. Respondent was grossly negligent for allowing the widths to be driven excessively wide for a distance of 60 feet because 2 or 3 days would be required for the miners to advance 60 feet while continuously cutting the entries excessively wide (Tr. 195-205).

Discussion. Respondent's assistant superintendent testified that because of illness, vacations, etc., respondent had a shortage of section foremen at the time Order No. 1 RP was written and that it had been necessary to use a section foreman from another mine. The substitute section foreman was inexperienced in supervising a section in which a continuous mining machine was used (Tr. 210). The assistant superintendent conceded, however, during cross-examination that the excessive widths occurred over a period of several days and that during part of that time, an experienced section foreman was also driving the entries excessively wide (Tr. 213). The assistant mine superintendent said there was no way to know which foreman had driven which parts of the entries and he concluded that both of them were probably driving the entries wider than they should have been driven.

The inspector said that it was a section foreman's duty to note when excessive widths were being driven and that he should have been able to narrow the cuts back to the proper width (Tr. 207). Additionally, since the roof bolter had begun to install five rows of bolts to compensate for the excessive width, the section foremen should have noticed the extra row of roof bolts and should have narrowed

the entries so that the extra row of roof bolts would not have been necessary. Moreover, the section foremen should have recognized the excessive widths and should have installed timbers or cribs in order to give the roof increased support (Tr. 205).

Respondent's assistant mine superintendent also testified that after the inspector cited the excessive widths, respondent had its engineers measure the entries cited in the inspector's order. The engineers measured the entries at 10-foot intervals and found the widths of the entries to be as follows: No. 2 entry ranged from 17.95 to 21.70 feet and averaged 20.33 feet. No. 3 entry ranged from 19.70 to 22.20 feet and averaged 20.82 feet. No. 4 entry ranged from 21.5 to 23 feet and averaged 22.25 feet. No. 5 entry ranged from 19.70 to 22.50 feet and averaged 20.74 feet. No. 6 entry ranged from 20.75 to 23.20 feet and averaged 21.71 feet (Tr. 212). The engineers' measurements support the inspector's order by showing that all the entries cited in the inspector's order were excessively wide in some places. The No. 4 entry was especially wide since it averaged 2.25 feet in excess of the 20-foot width required by respondent's roof-control plan.

Conclusions. As the inspector's testimony shows, it is extremely important that operators carefully adhere to their roof-control plans. Although the evidence fails to show that roof conditions were fragile in the No. 2 Section, it is essential that miners be given as much protection against potential roof falls as possible. Since the violation was serious and respondent was grossly negligent for allowing the entries to be driven wide for several days, a penalty of \$2,000 will be assessed for this violation of section 75.200.

Exhibit G-2 indicates that 53 prior violations of section 75.200 have occurred at respondent's Paragon Mine. There were 10 violations in 1975 and eight violations in 1976. Only one violation had occurred in 1977 prior to April 14, 1977, the date of the instant violation. The evidence, therefore, shows that respondent has made an effort to reduce the number of violations of section 75.200 which have been occurring at its Paragon Mine. Therefore, the penalty of \$2,000 will be increased by only \$100 to \$2,100 because of the improving trend in frequency of violations of section 75.200 at respondent's Paragon Mine.

Docket No. HOPE 78-566-P (Paragon Mine)

Order No. 1 EW (7-129) 9/20/77 § 75.517 (Exhibit G-15)

Findings. Except for certain wires not here relevant, section 75.517 provides that power wires and cables shall be insulated adequately and be fully protected. Respondent violated section 75.517 because the trailing cable to the continuous mining machine in the No. 2 Unit contained six places in the outer jacket with insufficient

insulation. Bare wires for a distance of 1 inch were exposed at three of the locations and the mine floor was wet. The continuous mining machine was not operating at the time the six inadequately insulated places were observed, but the machine had been operating on the previous shift. When the machine did operate, the trailing cable conducted 440 volts of alternating current. The six inadequately insulated places began at a point 30 feet outby the continuous mining machine and ended at a point 50 feet outby the machine. A defect in a trailing cable no larger than a pinhole is a sufficiently large opening to cause electrocution if a cable is touched where the hole exists. The violation was very serious (Tr. 117-121).

The inspector had examined the No. 2 Section on September 16, 1977, or 4 days prior to the day he wrote Order No. 1 EW here involved. During the previous inspection, he had observed the inadequate insulation but he did not then inspect the trailing cable because the continuous mining machine was out of service and was being repaired. The inspector, however, advised the section foreman, and both the assistant mine superintendent and the mine superintendent that the trailing cable to the continuous mining machine needed repairs and that he would inspect the trailing cable at a later date (Tr. 125; 130).

After the inspector had told them about the inadequate insulation on the trailing cable on September 16, the assistant mine superintendent called the supply house and ordered the supply house personnel to send to the mine the materials needed to repair the cable. The chief electrician told the electrician on the night shift to make the required repairs. The chief electrician then entered in the electrical book provided for recording examinations of electrical equipment that the repairs had been made. After the inspector issued his order on September 20, 1977, citing the six defective places in the trailing cable, the assistant mine superintendent again asked the chief electrician about the repairs which were supposed to have been made on September 16, and the chief electrician insisted that the repairs had been made on September 16. Therefore, the assistant mine superintendent testified that he had to assume that the repairs were made on September 16 and that additional defective places appeared in the cable between the inspector's cursory examination on September 16 and his careful inspection on September 20 when the order citing the inadequate insulation was issued (Tr. 130-138).

No one doubted the inspector's finding that six inadequately insulated places were observed in the trailing cable on September 20 (Tr. 135). The inspector presented rebuttal testimony in which he stated that he believed that the six inadequately insulated places he observed on September 20 were the same defective places which he saw in the cable on September 16, but he conceded that he did not observe the cable continually between September 16 and September 20 and could

not, therefore, state with certainty that no repair work had been performed on the cable between September 16 and September 20 (Tr. 143; 147-148). Respondent was negligent for failing to make certain that the defective places in the trailing cable were repaired (Tr. 143; 147-148).

Discussion. The entry made by the chief electrician in the electrical examination book was "[r]etaped bad splices in cable, Number 22 miner" (Tr. 132). That entry supports a conclusion that the chief electrician may have misunderstood what type of defects the inspector wanted corrected because no "bad splices" were involved. There had been no severed wires which would have required the making of splices. The bare conductors observed by the inspector were places where the insulation had been damaged so as to expose conductors. That type of defective insulation can be repaired simply by covering the defective places with proper tape so as to restore the insulation and prevent possible shock (Tr. 149-150). The assistant mine superintendent was definitely under the impression that permanent splicing materials would be required to repair the trailing cable because the materials which he ordered the supply department to send to the mine were materials for making permanent splices (Tr. 142).

There is every reason to believe that the defective insulation reported to management on September 16 was not repaired before September 20 simply because the assistant mine superintendent and mine superintendent misunderstood the type of defect which the inspector wanted corrected. Therefore, the electrician who made the actual repairs could easily have retaped permanent splices in the trailing cable without realizing what he was supposed to be looking only for defective insulation at places where no splices were needed.

Despite the confusion about what the inspector actually told management on September 16, the fact remains that extremely dangerous bare conductors were exposed in the trailing cable at a point which was no more than 50 feet cutby the continuous mining machine. The machine was out of service for repairs on September 16. The section foreman knew that the inspector had seen some defects in the trailing cable. The least he could have done between September 16 and September 20 would have been to have examined the trailing cable so as to make sure that it was properly insulated from one end to the other. The gravity of existence of bare conductors in a 440-volt trailing cable in a wet section is so great that no section foreman or chief electrician should have left any doubt as to whether such bare conductors had been located and fully reinsulated as required by section 75.517.

Conclusions. Respondent's witness did not dispute the fact that bare conductors in a trailing cable expose miners to possible electrocution, particularly when it is considered that the mine was wet in the area where the continuous mining machine was being operated. There was at least ordinary negligence by management in not having

made sure that the trailing cable was adequately insulated between the inspector's informal warning given on September 16 and his official inspection made on September 20. In any event, the extreme gravity of the violation warrants assessment of a penalty of \$4,000 (Tr. 121-124).

Exhibit G-2 indicates that there have been 11 prior violations of section 75.517 at respondent's Paragon Mine. One violation occurred in 1970 and none occurred in 1971 or 1972. In all other years between 1970 and 1977 one violation occurred except for the years 1973 and 1976 when three and four violations, respectively, occurred. In 1977 one violation had occurred prior to September 20, 1977, when the instant violation occurred. The largest number of violations of section 75.517 occurred in 1976. Two had occurred by September 20, 1977, and that is a poorer record of compliance than the Paragon Mine has achieved for 5 other years prior to 1976. In such circumstances, the penalty of \$4,000 will be increased by \$200 to \$4,200 under the criterion of respondent's history of previous violations.

Summary of Assessments and Conclusions

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

Docket No. HOPE 78-315-P (No. 4-H UG Mine)

Notice No. 1 DTN (6-39) 11/30/76 § 75.400 ..... \$ 550.00

Total Assessments in Docket No. HOPE 78-315-P ... \$ 550.00

Docket No. HOPE 78-559-P (No. 4-H UG Mine)

Notice No. 1 JCH (7-7) 5/13/77 § 75.1103-4 ..... \$ 1,000.00

Total Assessments in Docket No. HOPE 78-559-P ... \$ 1,000.00

Docket No. HOPE 78-560-P (No. 4-H UG Mine)

Order No. 1 DPC (7-35) 8/4/77 § 75.200 ..... \$ 4,400.00

Total Assessments in Docket No. HOPE 78-560-P ... \$ 4,400.00

Docket No. HOPE 78-561-P (No. 4-H UG Mine)

Order No. 1 JCH (7-8) 5/13/77 § 75.400 ..... \$ 950.00

Total Assessments in Docket No. HOPE 78-561-P ... \$ 950.00

Docket No. HOPE 78-316-P (No. 5 Mine)

Order No. 1 RAN (6-77) 11/30/76 \$ 75.302-1 ..... \$ 2,025.00  
Total Assessments in Docket No. HOPE 78-316-P ... \$ 2,025.00

Docket No. HOPE 78-317-P (No. 5 Mine)

Notice No. 1 RAN (6-76) 11/30/76 \$ 75.402 ..... \$ 2,000.00  
Total Assessments in Docket No. HOPE 78-317-P ... \$ 2,000.00

Docket No. HOPE 78-562-P (MacGregor No. 7 UG Mine)

Order No. 1 SWG (7-88) 11/4/77 \$ 75.400 ..... \$ 2,500.00  
Order No. 1 SWG (7-102) 11/9/77 \$ 75.514 ..... 6,050.00  
Order No. 1 RJW (7-103) 11/11/77 \$ 75.518 ..... 1,500.00  
Order No. 2 RJW (7-104) 11/11/77 \$ 75.518 ..... 1,500.00  
Total Assessments in Docket No. HOPE 78-562-P ... \$11,550.00

Docket No. HOPE 78-563-P (MacGregor No. 7 UG Mine)

Notice No. 3 OEB (7-13) 9/16/77 \$ 75.604 ..... \$ 2,050.00  
Total Assessments in Docket No. HOPE 78-563-P ... \$ 2,050.00

Docket No. HOPE 78-564-P (MacGregor No. 9 Mine)

Notice No. 3 BRS (7-32) 9/22/77 \$ 75.514 ..... \$ 2,025.00  
Total Assessments in Docket No. HOPE 78-564-P .... \$ 2,025.00

Docket No. HOPE 78-565-P (Paragon Mine)

Order No. 1 RM (7-46) 5/4/77 \$ 75.400 ..... \$ 1,350.00  
Order No. 1 RM (7-56) 4/14/77 \$ 75.400 ..... 900.00  
Order No. 1 RP (7-62) 4/14/77 \$ 75.200 ..... 2,100.00  
Total Assessments in Docket No. HOPE 78-565-P ... \$ 4,350.00

Docket No. HOPE 78-566-P (Paragon Mine)

Order No. 1 EW (7-129) 9/20/77 § 75.517 ..... \$ 4,200.00  
Total Assessments in Docket No. HOPE 78-566-P ... \$ 4,200.00  
Total Assessments in This Proceeding ..... \$35,100.00

(2) MSHA's Petition for Assessment of Civil Penalty filed in Docket No. HOPE 78-415-P should be dismissed for failure of MSHA to prove that a violation of section 77.205(a) existed as alleged in Notice No. 1 NK (7-5) dated April 7, 1977.

(3) Respondent at all pertinent times was the operator of the Amherst No. 4-H UG Mine, the Amherst No. 5 Mine, the MacGregor Preparation Plant, the MacGregor No. 7 UG Mine, the MacGregor No. 9 Mine, and the Paragon Mine and as such is subject to the provisions of the Act and to the health and safety standards promulgated thereunder.

WHEREFORE, it is ordered:

(A) Amherst Coal Company is assessed civil penalties totaling \$35,100.00 which it shall pay within 30 days from the date of this decision.

(B) The Petition for Assessment of Civil Penalty filed in Docket No. HOPE 78-415-P is dismissed for the reason stated in paragraph (2) above.

*Richard C. Steffey*

Richard C. Steffey  
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 5, 1979

JOSEPH D. CHRISTIAN,	:	Application for Review
Applicant	:	
v.	:	Docket No. BARB 77-184
	:	
SOUTH HOPKINS COAL COMPANY,	:	South Hopkins No. 2 Underground
INC.,	:	Mine
Respondent	:	

DECISION

Appearances: Philip G. Sunderland Esq., Washington, D.C., for Applicant;  
Carroll S. Franklin, Byron L. Hobgood, Esqs., Madisonville, Kentucky, for Respondent.

Before: Administrative Law Judge Stewart

FACTUAL AND PROCEDURAL BACKGROUND

On February 16, 1977, Joseph Christian (Applicant) filed an application for review of discriminatory discharge by South Hopkins Coal Company, Inc. This application sought relief under section 110(b) of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter, the Act), 30 U.S.C. § 820(b). <sup>1/</sup> Service of this application was effected on March 9, 1977. Respondent submitted its answer, a plea of limitations, and a motion to dismiss on May 6, 1977.

1/ Section 110(b) provides as follows:

"(1) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (a) has notified the Secretary or his authorized representative of any alleged violation or danger, (b) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (c) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

"(2) Any miner or representative of miners who believes that he has been discharged or otherwise discriminated against by any person in violation of paragraph (1) of this subsection may, within thirty days after such violation occurs, apply to the Secretary for

On June 28, 1977, the application for review was dismissed pursuant to Respondent's plea of limitations. This order was reversed by the Board of Mine Operations Appeals in light of an intervening decision, Phil Baker v. The North American Coal Company, 8 IBMA 164 (1977), which held that the 30-day filing period in section 110(b)(2) is a statute of limitations, and not a jurisdictional prerequisite. The Board noted that Respondent had raised the issue of late filing in a timely fashion and remanded the case for determination whether Applicant had overcome this affirmative defense.

A hearing on the merits was conducted on March 1 and 2, 1978, and again on April 26, 1978. A total of 11 witnesses were called. Applicant introduced four exhibits and Respondent introduced 12. Applicant filed a posthearing brief on July 3, 1978. Respondent's plea of limitations and posthearing brief were filed on August 7, 1978. Applicant's final posthearing brief and reply to Respondent's plea of

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fn. 1 (continued)

a review of such alleged discharge or discrimination. A copy of the application shall be sent to such person who shall be the respondent. Upon receipt of such application, the Secretary shall cause such investigation to be made, as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to enable the parties to present information relating to such violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of title 5 of the United States Code. Upon receiving the report of such investigation, the Secretary shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein, requiring the person committing such violation to take such affirmative action to abate the violation as the Secretary deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner or representative of miners to his former position with back pay. If he finds that there was no such violation, he shall issue an order denying the application. Such order shall incorporate the Secretary's findings therein. Any order issued by the Secretary under this paragraph shall be subject to judicial review in accordance with section 106 of this Act. Violations by any person of paragraph (1) of this subsection shall be subject to the provisions of sections 108 and 109(a) of this title.

"(3) Whenever an order is issued under this subsection, at the request of the applicant, a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation."

limitations was filed on August 21, 1978. The request for an opportunity to present additional oral arguments contained therein was denied. Applicant filed a supplemental memorandum regarding relief on January 5, 1979. The request contained therein, that Applicant be permitted to file documentation of costs and expenses after the issuance of a decision, was denied. On January 19, 1979, Respondent submitted its memorandum concerning relief. Applicant submitted what was to be its final memorandum on relief on February 5, 1979. Because this memorandum contained a great deal of information relating to fees and expenses which was seen by Respondent for the first time, Respondent was given the opportunity to submit an additional memorandum on relief. This memorandum was filed on March 14, 1979. Applicant submitted a final reply brief on March 23, 1979.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Joseph Christian was discharged from his employment at South Hopkins No. 2 Underground Mine at approximately 8:30 a.m. on November 11, 1976, at the completion of the third shift. He was first employed at the No. 2 Mine in August of 1975 as a bratticeman. Early in the summer of 1976, Applicant began working as a greaser. During his tenure as a greaser, Applicant had three supervisors. His final supervisor, Paul Long, was his superior for approximately 3 months, from mid-September of 1976 until his employment was terminated in November. At that time, Long was the foreman in charge of maintenance employees.

At the start of the third shift on November 10-11, Christian was assigned by Long to hang telephone line along 5,000 feet of the main west belt line. Christian was to start at the "bottom," proceed up through the "high place," down the west supply road to the second crosscut and through a brattice to the main west belt line (Applicant's Exh. No. 1). He was to proceed from there down the main west belt line to the face areas. The line was to be taken off 500-foot reels and spliced into telephones at various places along the route.

Upon receiving his assignment from Long, Christian immediately objected, telling Mr. Long that he did not want to work by himself in certain areas through which the phone cable was to be strung because he felt they contained dangerously bad roof conditions. He stated that he was especially concerned with an area of roof located along the main west belt line one crosscut west of the north belt (hereinafter, area #5. See area marked #5 on Applicant's Exhibit No. 1), as well as several other unspecified areas down the main west line. Long replied that the stringing of telephone line was the only job he had for Christian to do and that he did not have anyone to send with Christian. Long also stated that he did not think that the top complained of was bad and that the area was better protected than anywhere else in the mine. In hopes of convincing Christian that the top was safe, Long called James Gardner, the third shift mine foreman

at the No. 2 Mine, to obtain a second opinion. Gardner told Christian that the roof in the belt line area was not particularly unsafe. He told Christian, however, that he would send another man down to him later, if one could be spared. Christian then told Long that he would work in the area rather than lose his job.

Long testified that he would not have fired Christian for the refusal to work, but that he had no other work for him to do that shift. If Mr. Christian had persisted at the beginning of the shift in refusing to carry out his assigned task, he would have been sent home, thereby losing a day's wages.

Long also testified that it was unusual for him to fire a man for doing less than was expected. He had fired three men other than Christian. Only one of these three was discharged for failure to do his job.

Long expected Christian to string between 2,000 and 2,500 feet of line. In his estimation, Christian had 5 or 6 hours in which to accomplish his task. He felt that hanging line in the bottom and in the high place would not be more difficult or time-consuming than doing so along the belt. Along the belt line, the telephone line would be suspended with tape from a nail driven into a prop. In the area from the bottom up through the brattice where props were not continuous, the line could be suspended from roof bolts.

The usual route for miners into the west section of the mine was the supply road, not the belt line. The belt line was regularly traveled by beltmen and rock dusters, who worked in groups of two or three. In addition, the belt was inspected by a foreman every shift.

Neither Long nor Gardner examined the roof along the main west belt line, or, more specifically, in area #5 immediately before assuring Christian that it was safe. Both were familiar with its condition. Long estimated that he was on the belt line every other shift. Gardner testified that he was in area #5 on a daily basis. On the other hand, Applicant had been in the main west belt area only once, and that several months earlier in the summer of 1976.

Long did examine the area in which Christian refused to work later on in the shift. He did so before Christian arrived there and satisfied himself that the roof was safe. He did not inform Christian that he had done so.

Before he proceeded to work, Christian was told by Long to help Richard Ford with the repair of a pinner. When Ford finished this repair work, he was to help Christian string cable. Long told both Ford and Christian that Christian was to help only with the installation of the hydraulic jack on the pinner. This particular repair

could be quickly done and it was the only part of the job that required two men. Christian understood that he was to help Ford on the pinner and Ford was to help him string cable.

Christian began loading cable onto the supply car for transportation into the mine approximately 1 hour and 30 minutes after receiving his assignment. At the beginning of the shift, this supply car is used to bring rock dust and maintenance equipment into the mine. Long testified that ordinarily the transportation of these supplies took no more than 30 minutes. However, he did not know whether the supply car was actually in use for 2 hours that shift and he had no reason to believe that Christian was delaying during this time. Christian performed no work while he was waiting.

After transporting 12 spools of cable into the mine, Christian transferred them to a personnel carrier and took them to an area three crosscuts in by the north belt line just off the west supply road (Applicant's Exh. No. 6; area marked 3a). He proceeded back to the high place looking for Richard Ford to help him repair the pinner. Since Ford was not there, Christian continued on to the bottom and started hanging line by himself. Christian estimated that he began stringing cable at approximately 2 o'clock in the morning. He strung cable from the bottom until he reached the high place at 2:30 or 3 a.m. He met Richard Ford there and helped him work on a pinner until 3:30 or 3:45 a.m. At that time, Don McGeehan, a third shift welder, called the bottom and requested that somebody bring supplies and equipment which he needed at the west end of the mine. Christian loaded the material on the personnel carrier and transported it as requested. He covered the three-quarters of a mile between the high place and the west end of the mine in 20 minutes, helped unload the carrier and, upon request, agreed to assist McGeehan tack a brace onto the back end of the feeder. Christian arrived back at the high place at 4:30 or 4:45. He and Ford continued to work on the pinner until 5 o'clock when they broke for supper. Supper break lasted until 5:30.

When Mr. Ford and the Applicant had nearly completed their supper, another miner, Earl Massey, arrived at the high place. He told the Applicant that he was supposed to help him string the phone cable. After the Applicant finished his supper, he and Massey decided to use the personnel carrier, which Massey then had with him, to transfer to the first crosscut in by the North belt some of the spools which had been stored by the Applicant earlier in the third crosscut. However, Mr. Massey told the Applicant that first he had to go to the west end of the mine to do an errand. Since they had decided to transfer the spools with the personnel carrier which Mr. Massey was to use to get to the west end of the mine, the Applicant decided to wait until Mr. Massey returned. Applicant was not sure how long Mr. Massey would be gone, but he did not think it would be long. Mr. Massey carried him to the place where the spools had

been stored and Applicant then waited for him to return. Mr. Massey left to do his errand at about 5:45 and returned at approximately 6:15. During this half-hour period, Paul Long saw the applicant sitting on the spools of cable. Mr. Long asked him what he was doing and Applicant replied that he was waiting for Mr. Massey to return from the west part of the mine. Mr. Long said nothing further and went on his way.

When Mr. Massey returned about 6:15, he and the Applicant dropped their previous decision to transfer the spools and decided to hang additional phone line instead. They therefore returned to the point near the high place up to which the cable had already been hung and began hanging more line. They took the line through the high place, down the west supply road, under the north belt, and up to the first crosscut where they spliced it to an existing phone. They then continued with the line to the brattice that lay in the crosscut. They arrived at the brattice about 7:10. At that time, miners on the first shift had started to arrive in the first crosscut. The Applicant spent a few minutes talking with some of those miners and then, around 7:20, proceeded to leave the mine. Cable had been strung up to, but not into, the area of the mine which Applicant had told Paul Long at the start of the shift that he did not want to work in alone.

After leaving the mine on the morning of November 11, 1976, Applicant went to the bathhouse to take a shower. Another miner, David Cotton, approached him in the bathhouse and asked him where he had stored the spools of phone cable. The Applicant told him where the spools had been stored. He also told Cotton that he thought the top was bad in the area in which the cable was to be strung and that he did not think that he, Cotton, should work in that area alone. He also stated that he would not work in that area by himself because he considered the top to be bad. Mr. Cotton subsequently expressed fears about the top to Mr. Long.

After the Applicant had finished his shower, Paul Long came into the bathhouse. He asked the Applicant whether he had told Cotton that he would not work under bad top by himself. Applicant admitted that he had told Cotton that he had done so. Mr. Long testified that he then asked the Applicant why he had not hung more cable during the just-completed shift. According to Mr. Long, the Applicant said it was because he did not want to work in the west belt entry by himself since he felt it was dangerous due to the bad top. Mr. Long then told the Applicant that he was fired.

Immediately after being discharged by Paul Long, the Applicant attempted to talk to Alton Taylor, the mine superintendent. He believed that once Mr. Taylor heard that Mr. Long had fired him for making a complaint about and expressing reluctance to work under unsafe conditions, he would assign him to another job. Applicant

could not reach Mr. Taylor at the mine on the morning of November 11. He eventually talked to Mr. Taylor over the phone during the evening of November 11. Mr. Taylor, however, refused to rehire Christian and said that if Paul Long could not use him, neither could he.

Christian did not attempt to contact the Mining Enforcement and Safety Administration (MESA) office in Madisonville, Kentucky, until the following Monday, 4 days after his discharge. He did not go a mile out of his way to stop at the MESA office on his way home Thursday, because he assumed that he would be rehired that night by Alton. Christian testified that he did not go on Friday because he was shaken up at being fired, nor on the weekend because he assumed the office would be closed.

When Christian arrived at the MESA office on Monday, he spoke with a Federal mine inspector. He told the inspector about the roof conditions at the South Hopkins Mine that he considered to be dangerous and he discussed his discharge. He was informed by the inspector that MESA was not involved with discharges or other personnel actions taken by coal companies. He also made fruitless inquiries at the Kentucky Department of Labor.

The roof along the main west belt line has more support than other areas of the mine. Roof bolts and props are used along its entire length. Crossbars are used in those areas with particularly bad roof. The props were boards which were 60 inches long, 6 inches wide, and 2 inches thick. Wedges are hammered in at the top and bottom to bring the prop into contact with the roof. There are three rows of props along the belt line. One row of props is situated along the northern rib. Two more rows run down the center of the entry, 4 feet apart. Throughout most of the mine, props are set on 5- to 6-foot centers. Belt-line props, however, are set on 3-foot centers.

The crossbars were 20-foot long, 8- by 12-inch bars which were placed across the top and supported by props. The number and closeness of crossbars is related to the quality of the roof. They are installed at odd intervals along the belt line.

The roof along the main west belt line is comprised of shale. This shale runs in a north-south direction. Any falls in this area would run crosswise, rather than lengthwise. In addition, the roof is very rough. Cracks can exist in this roof up to a depth of one-fourth inch without it being considered bad.

Applicant was particularly concerned with the roof in area #5, just beyond the brattice into the belt line entry. The roof in this area was rough, containing cracks up to an inch in depth. When tested, it was found to be drummy. It was warped and sagging. Roof pressure was great enough to damage prop wedges. The roof was broken

along both ribs for a distance of 50 feet, beginning approximately 5 feet outby the crosscut which contained the brattice. Small pieces of roof had fallen from time to time. The area was roof bolted and contained 10 to 16 props.

There were no major roof falls along the main west belt line as of Applicant's discharge. A minor fall did occur in August of 1977, approximately eight to 10 crosscuts inby area #5. This fall forced a 2-hour shutdown of the belt line. Major falls had occurred prior to November of 1976 in the north belt line. The area affected extended 200 to 300 feet up from a point 60 feet above the intersection of the west and north belts. The north sections had been sealed off and were no longer active at the time Christian was discharged.

South Hopkins was a nonunion mine. Christian was not working pursuant to a written contract. There was no organization at the mine that represented or otherwise acted on behalf of the miners, and there was no formal grievance procedure in effect for handling safety reports or disputes at the No. 2 Mine in November of 1976. The document entitled "South Hopkins Coal Company Health and Safety Policy" (Respondent's Exh. No. 7), which was issued in the summer of 1976 and purported to reflect the company's safety policy, indicated that the president and safety director had responsibility over safety-related matters. It did not establish a formal mechanism for the reporting of safety violations or dangerous conditions. John Campbell, the safety director at South Hopkins, testified that before contacting MESA, miners are expected to report safety problems to their immediate supervisors. Most questions of safety are resolved at this level. If a dispute were to arise and the miner did not receive satisfaction from his foreman, the miner would then contact Mr. Campbell. Mr. Campbell testified that he has never been confronted by a miner who disagreed with management at both levels. He believed that MESA had no role in the resolution of safety disputes until such an impasse was reached. None of the miners who testified at the hearing were aware of the procedure related by Mr. Campbell.

The safety record at the No. 2 Mine appears to be quite good. The rate of fatal and nonfatal injuries at this mine was appreciably lower than the industry as a whole in the last two quarters of 1976 (Respondent's Exh. Nos. 8, 9).

The consensus of those individuals who worked with Christian, both supervisors and fellow workers, was that he had a greater fear of the top than was common. Each of Christian's supervisors felt that his fear was unreasonable. Christian frequently commented on roof conditions. In one of these instances, Christian was asked to pass under top which had cracked overnight to retrieve a grease bucket. He refused to do so, and Long retrieved it himself. On another occasion, Christian was directed to retrieve cable from underneath bad top. He did so protestingly, but only because he was accompanied by another miner.

Marshall Lutz, a foreman on the second shift, was frequently asked by Christian to come and check the roof for him. Justice Uzzle, a timberer, testified that Christian complained about the roof more than anyone else and that these complaints about the roof were not always justified, however, he also testified that Christian's fear of the top was not unreasonable. Two other witnesses for the Applicant--Oats and Littlepage--also testified that Christian's fear of the top was not unreasonable.

The presence of a second miner can be of some value when working under bad top. If a miner is alone and is injured, he might wait several hours before help arrives. It is also useful to have one miner looking at and listening to the top. Before top falls, it may move slightly or make a popping noise, and most falls start with chipping of rock. The condition of the roof at the time of Applicant's discharge did not present an imminent danger nor constitute a violation of mandatory safety standards.

Each of Christian's supervisors testified that he was a poor worker. Christian did what he was told and the quality of his work was good, but he worked very slowly. Marshall Lutz felt that Christian built brattices at about half the speed of his predecessor, a man who was 55 to 60 years of age. Christian had to be helped on occasion to catch up. Lutz testified that he had considered discharging Christian, but that he had not done so at the request of Alton Taylor, the mine foreman. Long stated that he talked to Christian a couple of times about failure to get work done. Both Long and Lutz thought that Christian's slowness was at least, in part, the result of fear of the top and laziness. Christian testified that he received only one adverse comment on his work while at South Hopkins; in particular, Paul Long never reprimanded him. Witnesses for the Applicant generally conceded that Christian was somewhat slow. Justice Uzzle qualified the observation of Christian's slowness by noting that he never saw him loafing on the job.

#### Plea of Limitations

Section 110(b)(2) of the Act requires that application to the Secretary for review of alleged discrimination be made within 30 days of the violation. This 30-day period is in the nature of a statute of limitations, rather than a jurisdictional requirement. Therefore, upon a showing of extenuating circumstances, it can be tolled or extended. Baker v. North American Coal Company, 8 IBMA 164 (1977).

Applicant's failure to file within the section 110(b) limitations period is justified by the circumstances in this case. At the time of his discharge, he was not aware that he had any rights under the Act to challenge respondent's action. In addition, he was misled by a MESA inspector as to the existence of those rights.

Applicant approached two organizations which he believed would be able to inform him of his rights--the Mining Enforcement and Safety Administration (MESA) of the Department of the Interior and the Kentucky State Department of Labor. On Monday, November 14, 1976, approximately 4 days after his discharge, he visited the MESA office in Madisonville, Kentucky, where he spoke with a MESA inspector. He explained to the inspector that he believed he had been discharged by the South Hopkins Coal Company because of his safety-related complaints. Applicant asked the MESA inspector whether he had any redress for his discharge under Federal law. The inspector stated that the MESA office did not become involved in discharges or other personnel actions taken by coal companies. He did not inform the Applicant of his right to seek a review of his discharge under section 110(b), but suggested that Applicant contact the Kentucky Department of Labor.

On that same day, Applicant contacted by phone the Kentucky Department of Labor in Frankfort, Kentucky. After locating an individual who could respond to his questions, Applicant explained the circumstances of his discharge and asked whether he had any right to challenge Respondent's action. He was informed that the Kentucky Department of Labor had nothing to do with mining matters as they were solely within the jurisdiction of the Federal Government.

Having exhausted the only sources of information he was aware of and not having been informed of any means to challenge Respondent's action, Applicant concluded that he had no right or opportunity to redress his discharge.

Applicant obtained construction work in December 1976. He gradually became friends with a co-worker, Bill Stevens, who had previously been a miner at the Peabody Coal Company's Vogue Mine. In mid- to late January 1977, Applicant discussed his discharge with Mr. Stevens and expressed his frustration at the absence of a means for him to challenge it. Mr. Stevens informed him that a miner with whom he had previously worked at the Peabody Vogue Mine, Ernest Johnston, had challenged a similar adverse action by filing a complaint with the Department of the Interior. He suggested that the Applicant contact Mr. Johnston.

In early February of 1977, the Applicant phoned Mr. Johnston and arranged to meet with him at his home. They met at Mr. Johnston's home on February 10. At that time, Mr. Johnston informed the Applicant of his right to file an application for review under section 110(b) and explained to him what information an application should contain and to whom it should be sent. Applicant personally prepared the application and filed it on February 16, 1977.

It is clear that the Applicant did not unnecessarily delay in the filing of this application for review. The circumstances warrant an extension of the 30-day period.

The purpose of this 30-day limitation period is to prevent unfairness to coal operators by preventing the revival of old claims. There is no indication that Respondent has been prejudiced by the late filing of the application. Respondent's assertion that the application for review was not timely filed is rejected.

#### Discriminatory Discharge

The central issues presented herein are whether Christian engaged in protected activity and whether this activity was a motivating factor in the management's decision to discharge him. Section 110(b) of the Act, in pertinent part, provides a remedy for any discriminatory act against a miner by reason of the fact that such miner either (a) notified the Secretary or his authorized representative of any alleged violation or danger, or (b) filed, instituted, or caused to be filed or instituted, any proceedings under the Act. If he invoked the protection of 110(b), and if his discharge was improperly motivated, Christian is entitled to reinstatement to his former position with back pay.

In Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), the court held that a miner's

[N]otification to the foreman of possible dangers is an essential preliminary stage in both (A) the notification to the Secretary and (B) the institution of proceedings and consequently brings the act into play.

Notification of a foreman does not automatically bring the miner under the protection of the Act. Examination in each instance must be made of "the overall remedial purpose of the statute; the practicalities of the situation \* \* \* and particularly (of) the procedure implementing the statute actually in effect at the (mine)" in each instance.

As noted above, notification of the foreman was recognized as the first step in the safety report or dispute procedure in effect at the No. 2 Mine. It was also the most practical means of registering a safety complaint in that mine at that time. Even though this safety complaint procedure was informal, Christian's initiation of a complaint with Long was sufficient to bring the Act into play.

In Baker v. U.S. Department of the Interior Board of Mine Operations Appeals, \_\_\_ F.2d \_\_\_ (D.C. 1978), the court held that "a miner who makes a safety complaint is protected from employer retaliation whether or not the miner intended the complaint to reach federal officials at the time it was made." Whether Christian intended to notify Federal officials is, therefore, no longer an issue.

In Munsey v. Federal Mine Safety and Health Review Commission, F.2d \_\_\_ (D.C. 1978), the court held that it was error to impose a good faith and not frivolous test for section 110(b) reports. In this case it is clear that Christian's complaint was not frivolous.

The Act provides recourse for a miner who has been discharged by reason of the fact of his participation in protected activities. That is, the miner's participation in protected activity must be an underlying factor in the discharge. By "underlying" is meant "the moving force but for which the discharge would not have occurred." Shapiro v. Bishop Coal Company, 6 IBMA 28 at 59 (1976).

The discharge by Paul Long was motivated by a combination of protected and unprotected activities on the Applicant's part. It is clear that the immediate precipitating factor was Christian's failure to complete his assigned task. However, the failure to do so was inextricably bound up with his refusal to work in certain areas along the main west belt line for what he perceived to be safety-related reasons. Foreman Long had been told by Christian that he did not complete his work because of his fear of the top. Long did not regard this as a legitimate fear, and, therefore, discharged Christian.

Long had a number of grounds for refusing to accept Christian's excuse of fear of the top. Among these, were Christian's reputation for excessive fear of top, his substandard work and Long's personal examination of the top early in the shift.

Most of those who testified at the meeting agreed that Christian was a poor worker. The quality of his work was up to par, but his speed was substandard. Prior to November 11, the day of the discharge, Long was dissatisfied with Christian's work. His observation of Christian on the day of discharge bore out this dissatisfaction. Not only did Christian string far less than was expected of him, but he was observed at one point lying atop the spools of cable.

Long also believed that Christian had an excessive, unreasonable fear of top. He felt that this fear contributed in part to Christian's slowness. He suspected that Christian might be using his expressed fear of top as a cover for his slowness or laziness.

Finally, Long gave little or no weight to Christian's safety complaints on the day of discharge. He believed the top was safe at the beginning of the shift, and a personal examination of the area reinforced this belief.

Because of these considerations, Long failed to treat Christian as if a legitimate safety dispute was at issue when, in fact, one was. This was evident not only in the discharge, but also in Long's earlier activities as well. When Christian complained at the beginning of

the shift that the roof was bad, Long properly sought the opinion of a more experienced foreman to alleviate Christian's fears. At the same time, however, he also stated that he had no other work for Christian to do, thereby inferring that Christian would be sent home with loss of a day's pay if he persisted. The threat and subsequent discharge were discriminatory acts improperly motivated by the Applicant's refusal to work under what he considered to be bad roof.

Because his complaint gave use to the protection of section 110(b) and his discharge was improperly motivated, Christian is entitled to the relief provided for in the Act.

#### Relief Due

Under the provisions of 110(b)(2), the Applicant is entitled to an order requiring Respondent "to take such affirmative action to abate the violation as the Secretary deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay."

At the time he was fired, Applicant was the greaser on the third shift at Respondent's mine. There are no circumstances in this case which would warrant denial of reinstatement to this position.

The back pay due Applicant is the difference between the income he would have received if he had not been discharged by Respondent, but had continued working as a third shift greaser until February 2, 1979, offset by the income he actually received in that same period from other sources. The cut-off date of February 2, 1979, is appropriate because the hourly wage rate received by Applicant in his current job exceeds the hourly wage rate he would be receiving were he still employed by Respondent. In its supplemental memorandum regarding relief, filed on January 19, 1979, the Respondent advanced the figure of \$48,746.37 as the amount Respondent would have earned as a greaser from November 10, 1976 to February 2, 1979. The Applicant had no objections to this figure.

In the period from November 10, 1976, to February 2, 1979, the Applicant received \$41,523.97 in income and unemployment benefits. Applicant has argued that two elements of the income and benefits included in the figure should be excluded. The first of these elements is \$470 in unemployment compensation benefits received by Christian in February and March of 1978. After he had received these benefits, the Kentucky Department of Human Resources determined that he was ineligible for them and that he was obligated to return this sum to the State. This sum is, therefore, properly excluded from the computation of back pay. The second of these elements is the \$2,951.36 earned by the Applicant in February and March of 1978. During this period, Respondent had closed down its coal mining operations because of a strike by the United Mine Workers of America. The

Applicant argued that because of this closure, he would have been free to earn this income even if he had been one of Respondent's employees. As a consequence, this \$2,931.35 should not be offset against the income he would have earned from Respondent. Because of the absence of any indication on the record that Applicant would not have been free to earn this income if he had remained in Respondent's employ, this argument is accepted.

The exclusion of these two elements lowers the amount by which Applicant's recovery of back pay is offset to \$38,103.01. Applicant is, therefore, entitled to a recovery of back pay in the amount of \$10,643.36.

### Interest

In theory, interest on each dollar of back pay should be calculated from the date on which the Applicant would have received it if he had been employed by Respondent. Because of the great difficulty of such a calculation, Applicant suggested a formula by which interest would be computed on the entire back pay award from a date approximately midway between the date of discharge and the date of this decision. Respondent did not object and did not propose an alternative. The formula proposed by the Applicant is, therefore, accepted.

Using this formula, The Applicant is entitled to interest of \$751.42. This figure represents 6 percent of the total back pay owed, calculated from January 1, 1978, through February 28, 1979.

### Medical Expenses

In its "Second Supplemental Memorandum on Relief," filed on February 5, 1979, the Applicant asserted for the first time that he was entitled to reimbursement for certain medical expenses incurred since his discharge. As a result of the discharge, the Applicant lost the medical insurance which Respondent provided to all its employees. This insurance covered and paid for all medical expenses incurred by Respondent's employee and his dependents.

The medical expenses and insurance premiums incurred by Applicant since the date of his discharge amount to a total of \$441.99. Applicant is entitled to reimbursement of these premiums and expenses because they constitute expenses which he would not have incurred if he had not been discharged in November, 1976.

### Costs and Expenses of Litigation

Under the provisions of section 110(b)(3) of the Act, the Applicant is entitled to "a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary to have been reasonably incurred by the applicant for, or

in connection with, the institution and prosecution" of these 110(b) proceedings. Applicant is entitled, in the instant case, to the recovery of the following three categories of expenses: attorney's fees, the costs incurred by Applicant's attorneys and the costs incurred directly by the Applicant.

With respect to attorney's fees, counsel for Applicant submitted the following hourly totals, hourly rates and proposed fees:

	<u>Hours</u>	<u>Hourly Rate</u>	<u>Fees</u>
Sunderland	373.50	\$60	\$23,640.00
Terris	4.50	85	382.50
Paralegals	36.00	20	720.00

Given the experience and ability of Mr. Sunderland, the novelty of the legal issues presented, and the quality of the services rendered, the \$60 hourly rate he proposes for his services is reasonable and appropriate. Moreover, the amount of time which he devoted to the case was well documented. The number of hours, the hourly rates, and the fees proposed for the services of Mr. Terris and the paralegals, also seem reasonable and well documented. The total fee proposed by Applicant's counsel of \$24,742.50 is, therefore, accepted.

The 50-percent bonus factor proposed by Applicant is inappropriate. Its application would result in an unjustifiably high, unreasonable award for attorney's fees. The hourly fees proposed by Applicant and accepted here adequately compensate his attorneys for any risks they may have taken in pressing his claim, as well as for the quality of their representation.

The expenses incurred by Applicant's attorneys in connection with this case are also reasonable and well documented. They include amounts for xeroxing, court and reporting services, messengers, telephone calls, postage, airline and local transportation, lodging and food during long distance traveling, and secretarial overtime. These expenses amounted to a total of \$1,488.82.

The costs incurred directly by the Applicant amounted to a total of \$235.76. This figure includes the costs of transportation at \$.10 per mile and telephone calls.

In summary, the relief due the Applicant, is as follows:

Back pay	\$ 10,643.36
Interest on back pay	751.42
Medical Expenses	441.99
Attorney's fees	24,742.50
Costs incurred by attorneys	1,488.82
Costs incurred directly by Applicant	235.76
	<u>\$ 38,303.85</u>

All findings of fact and conclusions of law inconsistent with this decision are hereby rejected.

ORDER

It is hereby ORDERED that Respondent reinstate the Applicant to the position of greaser if he still desires to be reinstated.

It is FURTHER ORDERED that Respondent pay to the Applicant the sum of \$38,303.85 within 30 days of the date of this decision.

*Forrest E. Stewart*

Forrest E. Stewart  
Administrative Law Judge

Issued: April 5, 1979

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 5, 1979

SECRETARY OF LABOR, : Civil Penalty Proceedings  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. HOPE 78-422-P  
Petitioner : A.O. No. 46-05018-02005V  
v. :  
: Docket No. HOPE 78-423-P  
SIMRON FUEL COMPANY, : A.O. No. 46-05018-02006V  
Respondent :  
: Lobo No. 1 Mine

DECISIONS AND ORDER APPROVING SETTLEMENT

Appearances: John H. O'Donnell, Trial Attorney, Office of the  
Solicitor, Department of Labor, Arlington, Virginia,  
for Petitioner;  
Donald Lambert, Esq., Charleston, West Virginia,  
for Respondent.

Before: Judge Koutras

These proceedings concern petitions for assessment of civil penalty filed by the petitioner on May 19, 1978, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, seeking in Docket No. HOPE 78-422-P, a \$4,000 civil penalty assessment for a violation of the provision of 30 CFR 75.200, cited in section 104(c)(1) Order No. 7-0007 (1 JDW), January 6, 1977, and in Docket No. HOPE 78-423-P, a \$1,500 civil penalty assessment for a violation of the provisions of 30 CFR 75.200, cited in section 104(c)(1) Notice No. 7-0002 (2 JDW), January 6, 1977. Petitioner has filed a motion seeking approval of a proposed settlement, whereby respondent has agreed to payment of a civil penalty in the amount of \$2,000 in satisfaction of the violation in Docket No. HOPE 78-422-P and \$800 in satisfaction of the violation in Docket No. HOPE 78-423-P

In support of its motion for approval of the proposed settlement, petitioner has submitted proposed findings and conclusions with respect to the statutory criteria to be considered in the assessment of a civil penalty for a violation of any mandatory safety standard, and has included a detailed analysis of the factual circumstances surrounding the alleged violations.

Gravity, Negligence and Good Faith

Docket No. HOPE 78-422-P

This case involves an alleged violation of 30 CFR 75.200 in that a roof fall had occurred and had been cleaned up on the left side of the No. 2 belt conveyor, approximately 200 feet outby the tailpiece. However, no roof support had been set and the roof remained unsupported.

Petitioner asserts that the roof fall was unintentional and the respondent's personnel were in the process of cleaning it up and supporting the roof and ribs when the inspector arrived on the scene. There were still broken unsupported pieces of rock present, but petitioner maintains that such would have been cleaned up and the necessary timbering installed even if the inspector had not appeared. Thus, according to petitioner, the primary violation was in failing to post the cleanup plan in the area for cleaning up and supporting where the unplanned roof fall had occurred as the approved roof control plan requires (Govt Exh. P-3). Usually, posting of the plan consists of copying pages 11, 12 and 13 of the roof control plan (which is part of the plan concerned with unplanned roof falls) and posting it in the area--even though the miners must already be thoroughly familiar with the contents and requirements of that roof control plan. The violation was nonserious according to petitioner, but it was the result of ordinary negligence. The mine operator knew the requirements of the roof control plan, but the foreman failed to post the plan as required.

With respect to a showing of good faith on the part of respondent, an order of termination (Govt. Exh. P-5) was issued on January 7, 1977. The area had been timbered and cribbed as the inspector required, so a normal degree of good faith was demonstrated.

Docket No. HOPE 78-423-P

This case involves an alleged violation of 30 CFR 75.200 in that the roof at the entrance of all openings along the belt and mantrip haulageway were not being supported with posts in various locations from the entrance to the face area of the mine. Petitioner asserts that there had been posts installed along the haulageway, but the inspector considered certain places not adequate, so additional timbering was required. Petitioner asserts that the issue is a judgment call between the opinion of the mine operator's experts and the opinion of the inspector. The approved roof control plan in effect (Govt. Exh. No. P-8 at page 5) requires that all ribs shall be adequately supported and the inspector considers in places this was not done adequately. The personnel for the mine operator consider the supports to have been adequate. If the supports were not adequate the condition is serious, and the degree of negligence would depend on whether the inspector's opinion was supportable.

With respect to a showing of good faith on the part of respondent, Government Exhibit No. P-9 indicates that additional posts were installed the following morning, which demonstrates a normal degree of good faith.

Size of business and effect of penalty assessment on respondent's ability to remain in business.

Petitioner asserts that there is a limited present market for the quality of coal produced at the Lobo No. 1 Mine, but that the respondent can make payment for civil penalties assessed for the two violations in question. Further, petitioner states that respondent's total coal production for 1976 was 386,685 tons and that the mine in question produced 14,100 tons. Thus, it would appear that respondent is a small operator and that the payment of civil penalties approved by me in this matter will not adversely affect its ability to continue in business.

Previous History of Violations

Petitioner has submitted a computer printout concerning respondent's prior history of violations for the period beginning January 1, 1970, and ending January 6, 1977. During this 7-year period, respondent has paid assessments for 23 violations, none of which were for violations of 30 CFR 75.200. I cannot conclude that this constitutes a significant prior history of violations.

In addition to its arguments concerning gravity, negligence, and good faith, petitioner relies on what it considers to be unique factual situations in support of the proposed settlement. Regarding the first alleged violation in Docket No. HOPE 78-422-P, petitioner points to the fact that the roof fall was unintentional, that the respondent was in the process of cleaning up and taking corrective action when the inspector happened on the scene, and that the crux of the violation was the fact that a cleanup plan had not been posted in the area, and that this was not a serious condition. As for the second alleged violation, petitioner obviously believes that the question of proof concerning the adequacy or inadequacy of roof supports at certain places along a haulageway which was otherwise apparently adequately supported, would depend on the credibility of the witness presented and that the matter is really one of "judgment call." Taking into account the fact that the respondent is a small operator, with an insignificant prior history of violation, petitioner believes that the proposed settlement is reasonable. I agree.

ORDER

After careful consideration of the detailed analysis submitted by the petitioner in support of its motion, particularly with respect

to the question of gravity, good faith compliance, and the respondent's size and history of prior violations, I conclude that petitioner's proposed civil penalty assessments are reasonable in the circumstances presented. Accordingly, the settlement is approved and respondent IS ORDERED to pay a civil penalty in the amount of \$2,000 for Violation No. 7-0007, January 6, 1977, 30 CFR 75.200 (Docket No. HOPE 78-422-P) and \$800 for Violation No. 7-0002, January 6, 1977, 30 CFR 75.200 (Docket No. HOPE 78-423-P) within thirty (30) days of the date of this decision and order.

  
George A. Koutras  
Administrative Law Judge

**Distribution:**

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U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA  
22203

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 5, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. HOPE 77-313-P
Petitioner	:	A.O. No. 46-01659-02005V
v.	:	
	:	Angus No. 1 Mine
ROBINSON-PHILLIPS COAL CO.,	:	
Respondent	:	

## DECISION AND ORDER APPROVING SETTLEMENT

Appearances: John H. O'Donnell, Trial Attorney, Office of the Solicitor, Department of Labor, Arlington, Virginia, for petitioner;  
Donald Lambert, Esq., Charleston, West Virginia, for respondent.

Before: Judge Koutras

This proceeding concerns a petition for assessment of civil penalty filed by the petitioner on September 12, 1977, pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, now section 110(a) of the 1977 Act, seeking a \$1,500 civil penalty assessment for one alleged violation of the provisions of 30 CFR 75.200, cited in section 104(c)(1) Notice No. 6-0043 (1 ATC), December 20, 1976. Petitioner has filed a motion pursuant to Commission Rule 29 CFR 2700.27(d), seeking approval of a proposed settlement, whereby respondent has agreed to payment of a civil penalty in the amount of \$500 in satisfaction of the violation.

In support of its motion for approval of the proposed settlement, petitioner has submitted proposed findings and conclusions with respect to the statutory criteria to be considered in the assessment of a civil penalty for a violation of any mandatory safety standard, and a factual discussion and analysis concerning the alleged violation.

### Gravity, Negligence and Good Faith

This case involves an alleged violation on December 20, 1976, of the provisions of 30 CFR 75.200 in that the approved roof control plan was not being followed and the inspector observed along the

active shuttle car roadways overhanging ribs and rocks which he considered to be loose. According to the notice of violation, this situation existed beginning at survey station No. 870 and through the connecting crosscuts to Nos. 3 and 4 entries and inby for a distance of approximately 40 feet in each entry. The respondent insists that the rocks and ribs were not loose and were taken down with considerable effort.

Respondent admits that as a matter of "good housekeeping" in the mine, the rocks should have been taken down, but it insists there was no danger to the miners. The roof in this mine is known as a "hard blue shale" which is an excellent mine roof which does not fall easily. The Assessment Office Narrative Statement (Govt. Exh. No. P-5) notes that the miners had to bend over because of the low roof, and the mine operator at a hearing would point out that this also means if a rock did fall from the roof it would have less distance to fall so it would do less damage than if it fell from a greater distance. The mine crew was small that day because the Christmas holidays were near and as a result they had failed to do a good housekeeping job in the mine by trimming the overhanging rocks. Respondent insists the condition was nonserious, however, the Office of the Solicitor considers it serious if the rocks were, in fact, loose. Petitioner asserts that the negligence is ordinary since the condition was observable and miners did pass by.

With respect to a showing of good faith on the part of respondent, a notice of abatement was issued the following day, thus indicating a normal degree of good faith.

#### Size of Business

Petitioner maintains that there is a limited present market for the quality of coal produced in the Angus No. 1 Mine, but that respondent can afford to pay any reasonable civil penalty for the subject violation without an adverse effect on its business. Eleven miners were employed at the Angus No. 1 Mine and the annual production for the company, as shown by MSHA records for the year 1976, was 3,483,827 tons.

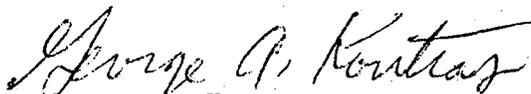
#### Previous History

Petitioner has submitted a computer printout concerning respondent's prior history of violations for the period January 1, 1970, to September 20, 1976. During this period of time, respondent has paid assessments for 197 violations, 11 of which were for violations of 30 CFR 75.200. For the period of time noted, including respondent's size, I cannot conclude that this constitutes a significant prior history of violations.

In addition to the elements of good faith, size of the respondent's mining operation, and the prior history of violations for which assessments have been paid, petitioner relies on the fact that the roof conditions in the mine in question are normally good and it is obvious to me that if the case were to go to an evidentiary hearing, respondent would advance the proposition that the roof in question was not loose and that the ribs and rocks were in fact taken down with considerable effort. Taking into account these factors, and the fact that the citation issued over 3 years ago and that the proposed assessment made by the Assessment Office was computed under a "special assessment" formula, I conclude that petitioner's proposals are reasonable and should be accepted.

ORDER

After careful consideration of the detailed factual and evidential analysis submitted by the petitioner in support of its motion, particularly with respect to the question of gravity, good faith compliance, and the respondent's size and history of prior violations, I conclude that petitioner's proposed civil penalty assessment is reasonable in the circumstances presented. Accordingly, the settlement is approved and respondent IS ORDERED to pay a civil penalty in the amount of \$500 for Violation No. 6-0043 (1 ATC), December 20, 1976, 30 CFR 75.200, within thirty (30) days of the date of this decision and order.

  
George A. Koutras  
Administrative Law Judge

Distribution:

John H. O'Donnell, Trial Attorney, Office of the Solicitor,  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 5, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. BARB 79-3-P
Petitioner	:	A.O. No. 40-01612-03004V
v.	:	
	:	Docket No. BARB 79-4-P
FIRE CREEK COAL COMPANY OF	:	A.O. No. 40-01612-03005V
TENNESSEE,	:	
Respondent	:	Docket No. BARB 79-57-P
	:	A.O. No. 40-01612-03001
	:	
	:	Docket No. BARB 79-58-P
	:	A.O. No. 40-01612-03002
	:	
	:	Docket No. BARB 79-59-P
	:	A.O. No. 40-01612-03003V
	:	
	:	Fire Creek No. 1 Mine

DECISIONS

Appearances: Edward H. Fitch, Trial Attorney, Department of Labor, Office of the Solicitor, Arlington, Virginia, for the petitioner;  
Michael R. Kizerian, Vice President, Fire Creek Coal Company, Knoxville, Tennessee, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern petitions for assessment of civil penalties filed by the petitioner against the respondent in October 1978, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with a total of 27 alleged mine safety violations issued pursuant to the Act and implementing safety standards. Respondent filed timely answers in the proceedings and requested a hearing regarding the proposed civil penalties initially assessed for the alleged violations. Respondent asserted that due to its adverse financial and economic condition,

payment of the assessed penalties would directly affect its ability to continue in business. A hearing was held in Knoxville, Tennessee, on February 27, 1979.

### Issues

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

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the 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 Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., now the Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978.

2. Sections 109(a)(1) and (a)(3) of the 1969 Act, 30 U.S.C. §§ 819(a)(1) and (a)(3), now section 110(i) of the 1977 Act.

### Discussion

The alleged violations and applicable mandatory safety standards in issue in these proceedings are as follows:

Docket No. BARB 79-3-P

Section 104(d)(1) Citation No. 140809 issued at 9:25 a.m. on March 15, 1978, cites a violation of 30 CFR 75.302-1, and states as follows:

Line brattice used to provide face ventilation was not installed continuously to within 10 feet of the working face of the No. 3 entry in working section 001, where coal was being mined with a continuous mining machine. The No. 3 entry working place had been developed approximately 100 feet in by the last open crosscut and no line brattice installed.

The notice was terminated at 10:05 a.m., the same day it issued after the installation of the required line brattice to within 10 feet of the working face.

Docket No. BARB 79-4-P

Section 104(d)(2) Order No. 140845, issued at 9:10 a.m., April 7, 1978, cites a violation of 30 CFR 75.301, and states as follows:

The active workings of the coal mine were not ventilated while miners were working underground in that the main fan was not operating and miners were working underground in No. 1 entry working place removing a fall of roof.

The order was terminated at 9:15 a.m., the same day it issued after the main fan was placed in operation.

Section 104(d)(2) Order No. 140849, issued at 10 a.m., April 7, 1978, cites a violation of 30 CFR 75.301, and states as follows:

Face ventilation was not provided in the Nos. 2, 3, 4, and 5 entry working places in the 001 working section in that ventilation was short circuited at the last open crosscuts. The above-mentioned working places were developed approximately 100 feet inby the last open crosscuts where the ventilation was short circuited.

Section 104(d)(2) Order No. 140850, issued at 10:15 a.m., April 7, 1978, cites a violation of 30 CFR 75.302 and states as follows:

Line brattices were not used continuously from the last open crosscut to the faces of the Nos. 2, 3 and 4 entries in that these working places in 001 working section were developed approximately 100 feet inby crosscuts and no line brattice installed. The inby end of line brattices in No. 5 entry was 50 feet from the face and coal had been mined from the working places.

Section 104(d)(2) Order No. 140851, issued at 10:30 a.m., April 7, 1978, cites a violation of 30 CFR 75.303(a), and states as follows:

A preshift examination of the mine had not been made prior to miners entering the underground area of the mine. A record was not made of preshift examinations since 3-27-78 and dates, times and initials were not in working places. The certified person at the mine stated he had not made an examination and did not know of anyone else making examinations.

Citations 140849, 140850, and 140851 were all terminated on April 10, 1978, after abatement of the conditions cited.

Docket No. BARB 79-58-P

Section 104(a) Citation 140853, issued at 8 a.m., April 10, 1978, cites a violation of section 103(d) of the Act, and states as follows:

An unintentional roof fall had occurred in the No. 3 entry working place of 001 working section and the operator had not made an investigation of the fall, made a written record or notified the District Office of Coal Mine Safety.

The citation was terminated on April 17, 1978, after abatement of the cited condition.

Docket No. BARB 79-59-P

Section 104(d)(1) Citation No. 140808, issued at 9:20 a.m., March 15, 1978, cites a violation of 30 CFR 75.301-1, and states as follows:

Face ventilation was not provided in the No. 3 heading working place in 001 working section where coal was being mined with a continuous mining machine. Ventilating devices were not installed in the working place and coal was being mined 100 feet inby the last open crosscut. The section foreman was operating a mine tractor and had just brought a load of coal to surface.

The citation was terminated at 10:05 a.m., the same day it issued after abatement of the condition cited.

Docket No. BARB 79-57-P

This docket concerns a total of 20 section 104(a) citations issued by Federal mine inspector Harrison R. Boston as follows:

March 15, 1978

Citation No. 140810, 30 CFR 75.303(a), failure to make an adequate preshift examination.

Citation No. 140811, 30 CFR 75.301, failure to provide face ventilation in four entries in the 001 working section, and failure to provide line brattice or other ventilation devices.

Citation No. 140812, 30 CFR 75.302, failure to use line brattice or other approved ventilation devices to provide ventilation to working places in the 001 working section.

Citation No. 140813, 30 CFR 75.316, failure to install permanent stoppings in the third crosscut outby the working face in the 001 working section as required by the approved mine ventilation system and methane and dust control plan.

Citation No. 140814, 30 CFR 75.503, failure to maintain a tractor in permissible condition by failing to provide padlocks for the battery receptacles, and failing to secure battery cover lids as required by schedule 2-G.

Citation No. 140815, 30 CFR 75.503, failure to maintain a scoop in permissible condition by failing to provide padlocks for the battery receptacles, and failing to secure battery cover lids as required by schedule 2-G.

Citation No. 140816, 30 CFR 75.202, failure to support roof at the 001 section rectifier station for a width of 8 feet and a distance of 18 feet directly around the rectifier. Posts had been installed, but were taken out to install the rectifier.

Citation No. 140817, 30 CFR 75.523-1, inoperative deenergization switch on a roof-bolting machine.

Citation No. 140818, 30 CFR 75.523-2(c), inoperative deenergization activating bar on a continuous mining machine.

March 16, 1978

Citation No. 140819, 30 CFR 75.316, failure to supplement the mine ventilation system and methane and dust control plan by failing to submit required mine maps and other required information.

Citation No. 140820, 30 CFR 75.1704-2(d), failure to post a map of the 001 working section escapeway.

Citation No. 140821, 30 CFR 75.1100-2(d), failure to provide a portable fire extinguisher for the mine tractor, serial No. 270A-509, used to pull loaded coal cars from the 001 working section.

Citation No. 140822, 30 CFR 75.1100-2(d), failure to provide a portable fire extinguisher for mine tractor, serial No. 270A-510.

Citation No. 140823, 30 CFR 75.307-1, failure to conduct a methane examination at the face of the No. 5 entry working place in the 001 working section prior to the entrance of an electrically-operated roof-bolting machine.

Citation No. 140824, 30 CFR 75.503, failure to maintain the scoop, serial No. 482-1022, used in by the last open crosscut in the 001 working section in a permissible condition in that the headlights were inoperative.

April 7, 1978

Citation No. 140843, 30 CFR 75.1600-1, failure to provide a responsible person on duty at the surface communication facility to answer communications from three miners who were underground.

Citation No. 140844, 30 CFR 75.1713, failure to provide an emergency communications system to the nearest point of medical assistance.

Citation No. 140847, 30 CFR 75.503, inoperative headlights and lack of padlocks on the Unitrack scoop and scoop battery receptacle.

Citation No. 140848, 30 CFR 75.200, failure to submit a plan detailing cleanup and support procedures concerning a roof fall as required by the approved roof-control plan of May 20, 1977, page 7, item 19.

Citation No. 140852, 30 CFR 75.300-4, failure to maintain a record of the daily fan examination, the last recorded date being March 27, 1978.

### Findings and Conclusions

#### Fact of Violations

Respondent did not contest any of the citations issued in these cases, and except for a few comments and observations made during the course of the hearing, did not rebut any of the citations and candidly admitted that he was responsible for them (Tr. 18-21). In the circumstances, I find that petitioner has established the fact of violation as to each of the citations issued in these proceedings.

#### Gravity

Except for Citation No. 140817 (Docket BARB No. 79-57-P), concerning a roof-bolting machine deenergization device, petitioner stipulated that all of the remaining citations issued in these proceedings were in the moderate to low range of seriousness and that the inspector who issued the citations did not believe that any of the citations were of "great severity" (Tr. 10-11, 23). Petitioner also pointed out that the mine is only developed some 500 feet high on a mountain, thereby eliminating any real ventilation problems, and no methane has ever been detected (Tr. 10).

After careful review of the evidence adduced, including copies of the citations issued by the inspector, I conclude and find that all of the violations cited in these proceedings were serious.

### Negligence

Petitioner stipulated that except for the section 104(d) orders, all of the other violations in these cases resulted from ordinary negligence on the part of the respondent (Tr. 12). Petitioner takes the position that the section 104(d) orders resulted from gross negligence on the part of the respondent (Tr. 12). Respondent conceded that both he and the persons hired to manage the mine should have been aware of the conditions cited, and he conceded that failure to correct the conditions cited constituted ordinary negligence (Tr. 22). Aside from the fact that the section 104(d) orders were issued, petitioner has presented no evidence or testimony supporting the assertion that the violations resulted from gross negligence. I find nothing in the record to support a conclusion that respondent deliberately and recklessly disregarded the safety standards cited. He candidly admitted that as the mine operator, he was responsible, along with the hired mine manager, for the safe operation of the mine. However, the manager is no longer employed by the respondent, and petitioner agrees that marked improvements have been made in the operation of the mine. In the circumstances, I find that all of the violations resulted from ordinary negligence on respondent's part and the conditions cited were conditions which respondent admits he should have been aware of and should have corrected.

### Good Faith Compliance

The present mine operator took over the operation and ownership of the mine in May 1977, and he instituted changes in the mine's management, including replacing the prior mine manager. Petitioner agrees that the respondent has taken steps to improve its mining practices to insure that the mine is operated safely, and that prior to taking over the mine, the present owners had no previous mining experience and had to rely on its prior manager who has since left the employ of the company (Tr. 65-66, 68). As for the citations in question in these proceedings, the record supports a finding that they were timely abated and that respondent exercised normal good faith in abating the conditions once the conditions were brought to his attention. The parties stipulated that all of the citations issued in these proceedings were timely abated and that the respondent exercised good faith in correcting the conditions once they were brought to his attention (Tr. 21), and this is supported by statements made by counsel on the record with respect to conversations he had with MSHA mine inspector Harrison R. Boston, the inspector who issued all of the citations and orders in these proceedings.

### History of Prior Violations

Petitioner has submitted a computer printout reflecting respondent's prior history of violations. That document reflects that 75 violations were issued for the period May 20, 1977, to March 12,

1979, and that respondent has made payment for 26 violations during that period of time. Petitioner asserts that this reflects a moderate history of previous violations, and I agree and adopt that proposed finding as my finding on this issue.

Size of Business and Effect of Penalties Assessed on Respondent's Ability to Continue in Business

The evidence adduced in these proceedings reflects that the present mine owners took over the operation of the mine on May 20, 1977, and that total mine production since that time amounts to some 15,000 tons of coal (Tr. 29, Exh. R-5). Copies of an MSHA quarterly mine employment and coal production reports reflect that the 1978 mine production was 7,620 tons, and that mine employment was seven workers underground and three workers on the surface, with a seasonal employment for 3 months of 53 employees (Exh. R-8). The mine was shut down for 3 months from July to November 1978, and this was corroborated by petitioner (Tr. 36). The mine presently employs seven miners, and during the time the violations issued, employed 9 to 10 fulltime miners (Tr. 47). The mine is a nonunion drift mining operation using a conventional miner, and petitioner stipulated that the mine is a very small mining operation which at one time was being improperly supervised, but which appears to be on its way to functioning much safer with the individuals now operating it.

The initial assessments made in these cases by MSHA's Office of Assessments did not take into consideration the financial plight of respondent's mining operations (Tr. 13-14). At the hearing in this matter, respondent (Michael Kizerian) submitted detailed documentary evidence concerning the financial condition of the company. Included are copies of financial statements for the year ending June 30, 1978, billings from creditors, checkbook bank records indicating deposits and payments made on the company account, bank statements, State of Tennessee Department of Revenue and Taxation records indicating state severance taxes paid for coal produced by the respondent's mine, and State and local sales and use tax returns (Exhs. R-1 through R-6).

The testimony and evidence adduced by the respondent in these proceedings reflects that for the initial 13 or 14 months of its operation, the mine lost \$277,898.47, and that as of February 1979, respondent has outstanding debts in terms of accounts payable in the amount of \$70,206.37, and which do not include a price adjustment penalty levied on the respondent by the TVA charging respondent's account for \$8,587.05 for failure to guarantee the dry ash content of its product. Respondent testified that he is concerned over the fact that he cannot meet his expenses since he wants to pay his bills. However, he stated that one of the reasons that he did not contest the violations cited against him is the fact that he is on the verge

of going out of business, that he is operating from week-to-week with some \$70,000 in outstanding debts, and that one major breakdown at the mine will place his operation in jeopardy (Tr. 58-59).

The Fire Creek Coal Company is a mining venture and wholly owned subsidiary of Real Estate West, an investment company operated by Mr. Kizerian's father in Utah. Mr. Kizerian was hired by his father to operate the coal mining venture known as Fire Creek Coal Company, and he is compensated by the coal company (Tr. 51-56). Real Estate West is not in the primary business of mining coal, and petitioner suggested that absent any evidence to the contrary, the question of the amount of civil penalties which should be assessed for the violations in question in these proceedings should be directed toward the operations of Fire Creek Coal Company and its ability to remain in the coal mining business (Tr. 56).

Petitioner has filed posthearing arguments concerning the financial condition of the respondent, including an analysis of the documentary evidence concerning this issue. Petitioner asserts that the information submitted supports a finding that payment of normally reasonable fines for the violations would, in fact, have an adverse effect on the respondent's ability to remain in the business of mining coal. In support of this conclusion, petitioner argues that the controlling company here, Real Estate West, has been heavily subsidizing this coal mining venture, and that the records indicate that the current payable liabilities are in excess of \$48,000 and that long term debt to Real Estate West is in excess of \$400,000. Petitioner submits that civil penalties in the aggregate of \$2,000 will not cause the respondent to go out of business, and that petitioner is agreeable to a schedule of up to four payments for the respondent to pay whatever penalties are assessed in the matter.

In Robert G. Lawson Coal Company, 1 IBMA 115, 117-118 (1972), the former Board of Mine Operations Appeals made the following observations:

We view the provisions of section 109(a)(1) as manifesting an intent by Congress to require a balancing process in arriving at an appropriate penalty to be assessed in any given case. Application of the criteria of section 109(a)(1) requires weighing the importance of imposing pecuniary penalties, as a measure of deterring insufficient concern for the health and safety of miners, against other deterrents specified in the Act, such as closure orders. The amount of a monetary penalty imposed should be sufficiently high to deter any laxity of vigilance on the part of an operator to keep his mine in compliance with the Act. In our view, however, the imposition of a penalty which would cripple an operator's

ability to continue his production of coal without a counter-balancing benefit to the safety of miners would not be appropriate.

We do not view the civil penalty assessment procedure as a tool to force closure of mines; we look upon it as an auxiliary tool to bring about compliance. The Act contains several enforcement provisions permitting the closure of mines to protect the health and safety of miners. We believe that the intent of Congress was to give the Secretary great latitude in the assessment of monetary penalties so as to permit him to weight the equities and render justice on a case-by-case basis. Of course, in doing so we must be particularly conscious of two of the statutory criteria--the size of the operator's business and the effect of a penalty on the operator's ability to continue in business. The most severe penalty authorized by the Act is mine closure with its consequent loss of production, idlement of miners, and impact upon both the operator and the public. We believe Congress intended a balanced consideration of all statutory factors, including the size of mine and the ability to remain in business, to permit assessments which would be equitable and just in all situations but which would not have the effect of drastically curtailing coal production or employment of miners to the ultimate detriment of the public interest.

Where numerous violations are found and cited during a tour of inspection, the aggregate amount of the proposed assessments, even though each separate violation may be assessed at a nominal value, may be an amount beyond the operator's ability to pay, and thus, for no other reason than this, may be unreasonable. In such cases it is incumbent upon an Examiner and this Board to look at the total amount and impact of the monetary penalty in arriving at a fair assessment.

The Board followed its Lawson Coal reasoning with respect to the question of the effect of civil penalties on small operators in two subsequent decisions, Newsome Brothers, Inc., 1 IBMA 190 (1972), and Hall Coal Company, 1 IBMA 175 (1972). In Hall, the Board also ruled that in addition to the six statutory criteria, a civil penalty may also be mitigated by the fact that the infraction was a first offense, committed shortly after the effective date of the Act, by a small operator who demonstrated good faith by immediate abatement. The Board also observed that there is a presumption that such an operator will not be affected adversely by the imposition of a sizeable civil penalty, but that it is incumbent upon the operator to present evidence of an adverse effect of a monetary penalty upon his mining operation.

After careful review of all of the evidence adduced in these proceedings, I am in agreement with petitioner's proposed finding that the imposition of the initial civil penalty assessments recommended in these dockets, would in the aggregate, effectively put respondent out of business. Having viewed respondent's chief witness on the stand during the course of the hearing, I find he is a candid and honest individual. He voluntarily produced his company financial records, including bank statements, ledgers, tax returns, operating expenses, income statements, etc., and I find his testimony to be credible. Considering the fact that the respondent is a very small operator and is in serious financial difficulties, as attested to by the evidence adduced herein, I find that the proposed civil penalties in the total amount of \$8,830 could jeopardize respondent's ability to remain in business. I therefore conclude that the circumstances presented justifies mitigation of the initial assessments made in these proceedings, and should be considered by me in assessing appropriate penalties.

In view of the foregoing findings and conclusions, respondent is assessed civil penalties for the violations which have been established as follows:

Docket No. BARB 79-3-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Assessment</u>
140809	03/15/78	75.302-1	\$150

Docket No. BARB 79-4-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Assessment</u>
140845	04/07/78	75.301	\$350
140849	04/07/78	75.301	300
140850	04/07/78	75.302	300
140851	04/07/78	75.303(a)	100

Docket No. BARB 79-58-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Assessment</u>
140808	03/15/78	75.301-1	\$ 80

Docket No. BARB 79-57-P

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Assessment</u>
140810	03/15/78	75.303(a)	\$ 60
140811	03/15/78	75.301	100
140812	03/15/78	75.302	50

140813	03/15/78	75.316	40
140814	03/15/78	75.503	20
140815	03/15/78	75.503	20
140816	03/15/78	75.202	50
140817	03/15/78	75.523-1	75
140818	03/15/78	75.523-2(c)	35
140819	03/16/78	75.316	20
140820	03/16/78	75.1704-2(d)	15
140821	03/16/78	75.1100-2(d)	20
140822	03/16/78	75.1100-2(d)	20
140823	03/16/78	75.307-1	25
140824	03/16/78	75.503	20
140843	04/07/78	75.1600-1	25
140844	04/07/78	75.1713	25
140847	04/07/78	75.503	30
140848	04/07/78	75.200	50
140852	04/07/78	75.300-4	20

ORDER

Respondent is ORDERED to pay the civil penalties assessed herein, in the amount of \$2,000, within thirty (30) days of this order, or within a mutually agreeable time schedule which may be negotiated with the petitioner.

  
 George A. Koutras  
 Administrative Law Judge

**Distribution:**

Ned Fitch, Trial Attorney, Office of the Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

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Standard Distribution

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 5, 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. DENV 78-566-PM  
Petitioner : A.O. No. 02-01843-05001  
v. :  
 : Don Luis Pit Mine  
A. J. GILBERT CONSTRUCTION CO., :  
Respondent :

DECISION

Appearances: Marshall P. Salzman, Trial Attorney, Office of the  
Solicitor, U.S. Department of Labor, San Francisco,  
California, for the petitioner;  
A. J. Gilbert III, Bizbee, Arizona, for the  
respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a petition 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 September 21, 1978, charging the respondent with two alleged violations of the Act and implementing mandatory safety standards. Respondent filed a notice of contest and requested an opportunity for a hearing in the matter. A hearing was conducted in Tucson, Arizona, on March 6, 1979, the parties appeared and participated therein, and waived the filing of posthearing proposed findings and conclusions.

Issues

The issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalty 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.

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 Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) et seq.
2. Section 110(a) of the Act, 30 U.S.C. § 820(a).
3. Part 2700, Title 29, Code of Federal Regulations, 43 Fed Reg. 10320 et seq. (March 10, 1978), the applicable rules and procedures concerning mine health and safety hearings.

#### DISCUSSION

Section 104(b) Citation No. 376649, dated June 15, 1978, cites a violation of 30 CFR 56.9-87, and states as follows: "The backup warning device on the L4 front-end loader was not working. This loader was being operated in and around the plant area in a backward as much as a forward operation."

30 CFR 56.9-87 provides:

Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

The inspector fixed the abatement time as 3 p.m., June 15, 1978, and the termination notice reflects that the condition cited was abated at 1 p.m. on June 15, after a new backup signal was installed.

Section 104(a) Citation No. 376650, dated June 15, 1978, cites a violation of 30 CFR 56.11-2, and states as follows: "The elevated walkway along the crusher above the flywheel that employees use to get to the screen was not provided with handrails."

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

The inspector fixed the abatement time as 7 a.m., June 15, 1978, and the termination notice reflects that the condition was abated at noon time, June 15, after handrails were manufactured and installed during lunch.

#### Stipulations

The parties stipulated to the following:

1. Respondent is subject to the jurisdiction of the Act and the Administrative Law Judge (Tr. 6).
2. Respondent is a small operator and the initial proposed civil penalties, if finalized and levied, will not adversely affect respondent's ability to remain in business (Tr. 5).
3. Respondent has no prior history of violations (Tr. 6).
4. The conditions cited were abated within the time fixed by the inspector who issued the citations (Tr. 6).

#### Testimony and Evidence Adduced by Petitioner

MSHA inspector Robert M. Hunter confirmed that he conducted an inspection at the mine in question on June 15, 1978, and that he issued the two citations in issue in this proceeding. He described the mining operation conducted by the respondent, and indicated that it is a surface operation entailing the removal of overburden and the mining of silica.

With regard to the citation concerning the inoperative backup alarm on the front-end loader, inspector Hunter testified that he observed the loader in operation, that it operated in a backward motion 50 percent of the time, and forward for 50 percent of the time. The operator had obstructed vision when backing up, and this was due to the physical configuration of the loader. Although he observed no one in close proximity to the machine while it was in operation, since the machine was backing up for a distance of some 200 to 300 feet without an operative backup alarm, he considered the violation to be serious. He also believed that the mine foreman should have been aware of the condition cited because the loader was in operation and the lack of an operative audible alarm was readily apparent. Once the condition was called to the attention of the operator, the loader was immediately taken out of service, taken to the shop, and the condition was corrected before the time fixed for abatement. Under the circumstances, he believed the operator abated the condition rapidly and exercised good faith in this regard (Tr. 10-15).

Regarding the handrail violation, Inspector Hunter testified that the elevated walkway in question was approximately 5 feet long,

18 to 24 inches wide, and some 15 feet from the ground. Normally, one employee would use the walkway, but on the day in question he observed two employees using it. He believed the lack of a handrail was serious because an employee using the walkway could slip and fall to the ground sustaining injuries or possible death. Since the walkway was elevated and employees used it, the operator should have been aware of the requirement that it be provided with a handrail. He indicated that the condition was rapidly abated and that the operator immediately called a welder and had a handrail installed immediately during the lunch hour on the day the citation issued (Tr. 20-28).

Inspector Hunter testified that inspections at the respondent's operation began in March 1978, and that respondent has had no previous citations. He also indicated that the respondent is aware of the need to conduct a safe operation, is cooperative, and has made a good faith effort to comply with all applicable safety regulations.

#### Testimony Adduced by the Respondent

A. J. Gilbert III, respondent's vice-president, testified that his company is a small operation engaged in a crushed stone operation in Bisbee, Arizona, and that the operation includes the mining of silica and silica flux which is processed and sold to several smelters in the state. He stated that his company employs four to six permanent employees, but has had as many as thirty on the payroll on a seasonal basis, depending on existing work demands and contracts for the sale of his products.

Regarding the citations in question, Mr. Gilbert candidly conceded that mine management should have been aware of the conditions cited. However, he stated that he does not employ a safety director, and due to the fact that the law in question is new and that his operation is also inspected by state inspectors, he is not as fully informed as he should be with regard to all of the Federal requirements of the Act. He also indicated that he has always welcomed Federal inspectors since they do present an opportunity for him to be advised as to what the requirements are, and that he is aware of the importance of insuring a safe working environment for his operations (Tr. 30-32).

Regarding the audible alarm citation, Mr. Gilbert stated that while he was not present at the time the citation issued, he did not believe that the distance allegedly backed up by the loader was 300 to 400 feet as testified to by the inspector was accurate. He believed the distance was less than 300 feet. He also indicated that in the usual normal course of loading operations, the loader operator will only backup for a short distance and then travel in a forward direction along a regular route which is known by all of the employees at the site. He also indicated that the loader operator is an experienced worker and that these factors mitigate the seriousness of the violation (Tr. 16-18).

With respect to the lack of a handrail at the crusher, Mr. Gilbert testified that the walkway is elevated some 9 to 10 feet and that due to the fact that a new protective cage had recently been installed around the crusher, employees who were required to be in the area had to travel around the walkway, and that this was not usually a normal practice. He conceded that the walkway was elevated and that a handrail should have been installed to prevent one from falling to the ground and possibly sustaining injuries and that the failure to install a handrail was an oversight which apparently had not been considered at the time the work was performed on the crusher (Tr. 32).

### Findings and Conclusions

#### Fact of Violations

Respondent did not rebut the conditions cited by Inspector Hunter, and stipulated that the citations were duly served by Mr. Hunter in his capacity as an authorized representative of the Secretary. I find that the testimony and evidence adduced by the petitioner supports a finding that the conditions cited were in fact present on the day in question and that they constitute violations of the mandatory safety standards cited in Citation Nos. 376649 and 376650 as issued by Inspector Hunter on June 15, 1978.

#### Negligence

I find that the respondent knew or should have known of the conditions cited and that it failed to exercise reasonable care to prevent the conditions leading to the two violations. Under the circumstances, I conclude that this constitutes ordinary negligence.

#### Gravity

Although the inspector testified that no employees were within close proximity of the loader, and that the chances of an accident were slim, the fact is that he did observe a helper in the area where the loader was operating (Tr. 20), observed the loader back up for some distance, and he indicated that the loader operated had an obstructed view to the rear. In the circumstances, I find that the violation (376649) was serious.

Regarding the handrail citation (376650), I find that the 18 to 24 inches walkway elevated some 10 to 15 feet off the ground without a handrail presented a serious falling hazard to the men who used it. Accordingly, I find the violation was serious.

#### Good Faith Abatement

I find that the respondent abated the conditions rapidly and in good faith.

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

The parties stipulated that respondent is a small operator and I adopt this as my finding. I also find that the penalties assessed by me in this matter will not adversely affect respondent's ability to remain in business.

Penalty Assessments

It is clear from the evidence presented in this case that the respondent violated the two safety standards cited. While the violations were serious and were caused by the respondent's ordinary negligence, the evidence also establishes that the respondent is a very small operator, has no prior history of violations, and abated the conditions rapidly. With regard to the handrail citation, respondent took extraordinary measures to achieve abatement in the shortest possible time. In the circumstances, I find and conclude that the penalties initially assessed in this proceeding are appropriate and they are affirmed and adopted as my civil penalty assessments for the two citations namely \$48 for Citation No. 376649 and \$56 for Citation No. 376650.

ORDER

Respondent is ordered to pay the penalties assessed, in the amount of \$104 within thirty (30) days of the date of this order.

  
George A. Koutras  
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 5, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 78-359-P
Petitioner	:	A/O No. 14-01116-02005 V
v.	:	
	:	Docket No. DENV 78-437-P
BILL'S COAL COMPANY, INC.,	:	A/O No. 14-01116-02007 V
Respondent	:	
	:	Docket No. DENV 78-438-P
	:	A/O No. 14-01116-02006 V
	:	
	:	Docket No. DENV 78-493-P
	:	A/O No. 14-01116-02009 V
	:	
	:	Fort Scott Strip Mine
	:	
	:	Docket No. DENV 78-439-P
	:	A/O No. 14-01230-02002 V
	:	
	:	Fulton Strip Mine

DECISION

Appearances: Judith N. Macaluso, Esq., Office of the Solicitor,  
Mine Safety and Health Administration, U.S. Department  
of Labor, on behalf of the Petitioner;  
O. B. Johnston III, Esq., and Donald Switzer, Esq.,  
Vinita, Oklahoma, on behalf of the Respondent.

Before: Administrative Law Judge Stewart

FACTUAL AND PROCEDURAL BACKGROUND

The above-captioned cases are civil penalty proceedings brought pursuant to section 109 1/ of the Federal Coal Mine Health and Safety

1/ Section 109(a)(1) of the Act reads as follows:

"The operator of a coal mine in which a violation occurs of a mandatory health or safety standard \* \* \* shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which

Act of 1969, 30 U.S.C. § 819 (1970), hereinafter referred to as the Act.

Petitioner filed a petition for assessment of civil penalty in Docket No. DENV 78-359-P with the Mine Safety and Health Review Commission on April 27, 1978. This petition was answered on May 30, 1978. On May 31, 1978, petitions for assessment of civil penalty were filed with the Commission in Docket Nos. DENV 78-437-P, DENV 78-438-P and DENV 78-439-P. Respondent filed its answer to these petitions on July 5, 1978. Docket No. DENV 78-493-P, the final petition involved herein, was filed on June 20, 1978, and answered on July 25, 1978. At the request of Respondent, the above cases were consolidated.

A hearing was held on September 13 and 14, 1978, in Tulsa, Oklahoma. At that hearing, Petitioner called two witnesses and introduced 66 exhibits. Respondent called two witnesses and introduced five exhibits. MSHA submitted a posthearing brief on November 15, 1978, and a reply brief on December 13, 1978. Respondent submitted its brief on December 4, 1978.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### Stipulations

The parties entered into the following stipulations:

1. Respondent Bill's Coal Company owns and operates the Fort Scott Strip Mine and the Fulton Strip Mine.
2. In 1976 Bill's Coal Company produced 842,819 tons of coal. The Fort Scott Strip produced 559,140 tons.
3. All the violations that are involved in these proceedings were abated with normal good faith.
4. Bill's Coal Company is subject to the Federal Coal Mine Health and Safety Act of 1969.

---

fn. 1 (continued)

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. In determining the amount of the penalty, the Secretary 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 operator charged in attempting to achieve rapid compliance after notification of a violation."

5. The Administrative Law Judge has jurisdiction over the parties and subject matter of these proceedings.

Docket No. DENV 78-359-P

On September 6, 1977, Larry L. Keller, then a surface mine inspector with MSHA, visited the Fort Scott Strip Mine to conduct a safety and health inspection. At about 2:45 p.m., Mr. Keller issued 104(c)(1) Notice of Violation No. 1-LLK, citing 30 CFR 77.208(d). <sup>2/</sup> This mandatory standard requires that "[c]ompressed and liquid gas cylinders shall be secured in a safe manner." While in the tipple area of the mine, the inspector had observed an oxygen cylinder and an acetylene cylinder standing unsecured in their wheeled cart. The cart had chains attached to it to secure the bottles, but these chains were left unconnected. As a result, the bottles could fall from the cart.

The Respondent admitted in its answer that the condition existed in violation of section 77.208.

The operator was negligent in that it knew or should have known of the violation yet failed to take time corrective action. The violation had existed for a long enough time to have been discovered and corrected. The condition had arisen prior to the lunch period when a welder-mechanic changed one of the cylinders. Although the mine superintendent who examined the tipple area during the lunch period failed to observe it, the condition was obvious. The bottles were in an active walkway in plain view of Respondent's employees as they proceeded to the No. 1 or No. 2 belts or into the tipple operator's compartment.

In this instance not only were the cylinders unsecured but the hoses of the bottles were strung out across an active walkway. An accident was probable because a person walking by could accidentally jerk the hoses, hit the bottles, or in some other way knock the bottles out of the cradle. The caps were off the cylinders. In the event that the cylinders fell, it was probable that the valves would be knocked off causing sudden release of the gas. In addition, torches were being used nearby, presenting the chance of explosion.

The bottles are 4 feet high, 8 inches in diameter, and under approximately 2,000 pounds of pressure. If a bottle fell and the valve was knocked off, the bottle would become a large, high-speed projectile. Accidents have happened in which fallen cylinders have "run wild" inside a building. They have been known to go through

<sup>2/</sup> 30 CFR 77.208(d) reads as follows:

"Compressed and liquid gas cylinders shall be secured in a safe manner."

8-inch concrete walls and have penetrated one-quarter-inch steel bulkheads. The evidence clearly establishes that the workers in the tippie were exposed to a risk of serious injury or death.

Respondent's Assessed Violations History Report (Govt. Exh. No. 1) indicates that it had 27 paid violations from December 20, 1976, through December 12, 1977, at the Fort Scott Strip Mine. No evidence indicates that a penalty in this case would adversely affect the operator's ability to continue in business.

Docket No. DENV 78-439-P

On November 8, 1977, Inspector Keller issued 104(c)(1) Notice of Violation No. 1-LLK, citing a violation of 30 CFR 77.410. 3/ This section requires that trucks must be equipped with an audible automatic backup warning device. The Respondent admitted in its answer that an independently-owned coal hauler truck, which was not equipped with such a warning device, came onto the premises of its Fulton Strip Mine. Respondent further admitted that the presence of this truck constituted a technical violation of section 77.410.

Petitioner has not shown that this violation was the result of Respondent's negligence. When Inspector Keller arrived at the mine that morning, Respondent's safety director, Homer Little, was in the process of conducting a company inspection of the mine. As part of this inspection, Mr. Little spot-checked a number of coal hauler trucks at the weighing scale for compliance with Federal regulations. Normally, the checking of trucks for compliance is the responsibility of a nonmanagement employee, the scale man. This employee was left to perform the safety checks when Mr. Little accompanied Mr. Keller during his inspection.

Mr. Keller subsequently discovered the inadequately equipped coal haulage truck. This truck had entered Respondent's property after Mr. Little left the weighing scale, and he was unaware that it was without a backup alarm until the absence was discovered by Mr. Keller. The violation was abated within 10 minutes when the vehicle was permitted to leave the property. The driver of the cited truck stated that he had not been at the mine for approximately 3 weeks. It was further developed by Respondent's Exhibits R-1 and R-2, and by admission of Inspector Keller, that Respondent had procedures which would normally insure that independent drivers complied with the relevant safety requirements. It was not established that under the circumstances that the operator knew or should have known of the violation

3/ 30 CFR 77.410 reads as follows:

"Mobile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse."

or failed to exercise reasonable care to prevent the occurrence of the violation.

The failure of the truck to have a backup alarm did not present a serious hazard under the circumstances at the mine. It is improbable that an accident would have occurred because of this failure. The trucks had little occasion to back up, once they were on mine property. They pulled up in forward gear, and, after being front-loaded, they pulled away in forward. Moreover, pedestrian traffic in the area was very light. At the time the notice was issued, there were no pedestrians in the area.

The operator had four prior paid violations at the Fulton Strip Mine, none of which were for violations of 30 CFR 77.410. A total of 1,841,420 tons of coal were produced at the Fulton Strip Mine in 1978. There is no evidence indicating that a penalty in this case would adversely affect the operator's ability to continue in business.

Docket No. DENV 78-437-P

On December 12, 1977, inspector Larry Keller and inspector-trainee Don Summers, arrived at Respondent's Fort Scott Mine to conduct a safety and health inspection. In the course of this inspection, Inspector Keller issued at least three notices of violation and 13 withdrawal orders, all of which were directed at conditions existing in the mine tibble. The mine tibble had ceased operation during the evening hours of Friday, December 9, when a drive motor of the No. 2 conveyor burned out. The tibble did not operate on December 10 and 11, during which time repairs were carried out.

A single violation is alleged in Docket No. DENV 78-437-P. Inspector Keller issued 104(c)(1) Notice No. 1-LLK, citing a violation of 30 CFR 77.205(b). 4/ He described the condition at issue as follows:

The walkway extending along the #2 and #3 belts had the following stumbling and tripping hazards: two 20 lb. propane bottles, pulley and belt guard, log chain, rope, 2 shovels, angle iron, pry bar, drop light, grease gun and a coal accumulation great enough at the transfer point from #2 to #3 belt to render the walkway in that area inaccessible.

The inspector also alleged that the violation was of such a nature as could significantly and substantially contribute to the cause and

4/ 30 CFR 77.205(b) reads as follows:

"Travelways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards."

effect of a mine safety or health hazard, and that it was caused by an unwarrantable failure to comply with such standard.

In its answer, the Respondent admitted the presence on the No. 2 and No. 3 walkways of the items and materials listed by the inspector, but maintained that they were not extraneous and did not constitute a stumbling or tripping hazard in violation of section 77.205(b).

In support of this contention, the Respondent explained the presence of each of the items or materials as follows:

(a) The 20-pound propane bottles with torches were used throughout the winter months to melt ice from the conveyor idlers;

(b) The pulley and belt had been removed during the drive motor repair of December 10 and 11;

(c) The log chain and rope were used to hoist the drive motor to its mounting;

(d) The shovels were used to remove coal from the belts and to break ice;

(e) The pry bar and angle iron were used as a lever to move the No. 2 motor and to remove ice from the conveyor;

(f) The grease gun was used to lubricate pulley sheaves after work on the idlers was done; and

(g) The drop light was used to illuminate the walkway and the burnt out motor on the evening of December 9.

Section 77.205(b) requires that travelways be maintained clear of stumbling hazards and there is no express exception of this requirement during repairs. Some of these items, including the rope and tackle, the drop light, log chain and grease gun, were no longer needed in the repair process. The inspector saw no workers actively engaged in actual repair work at the time of his inspection.

Coal had accumulated in two areas--at the transfer point from the No. 2 to the No. 3 conveyor and at the drive end of the No. 3 conveyor. At the first of these areas, as much coal as the walkway could hold had accumulated. Although coal was no longer being transferred to the No. 3 belt, it had accumulated in passing. The accumulation at the drive of the No. 3 conveyor was far less than at the transfer point, but there were pieces of coal lying on the walkway.

The presence of the equipment, items and coal accumulations on the walkway created stumbling hazards in violation of section 77.205(b).

The evidence indicates that the operator was negligent in its failure to properly maintain the walkways. Even though the items and materials were readily observable and had been used, for the most part, during the weekend repair efforts, no mention was made of the condition on Monday morning in the onshift examination record book. The operator knew or should have known of the condition, yet failed to take steps to correct it.

The only access to conveyor belts No. 2 and No. 3 was along the walkways in question. Any employee assigned to work on these walkways would have been exposed to the stumbling hazard. Given the condition of the walkways, it was probable that a stumbling accident would occur.

The injuries threatened ranged from bruises to broken bones--the normal consequences of a fall. It was also possible that an individual might fall from the walkway to the coal pile below. The distance from the walkway to the coal pile was 25 feet in the vicinity of the coal accumulation at the transfer point from the No. 2 to No. 3 belts, the place where this more severe accident was most likely to occur.

Of the 27 paid violations at the Fort Scott Strip Mine between December 20, 1976, and December 12, 1977, two were for violations of 77.205, including one which was issued on December 12, 1977. No evidence indicates that a penalty in this case would adversely affect the operator's ability to continue in business.

Docket No. DENV 78-438-P

Two violations are alleged in Docket No. DENV 78-438-P. Both alleged violations were the subject of 104(c)(1) notices of violation issued by Inspector Keller in the course of the December 12 inspection at the Fort Scott Strip Mine.

The first of these was Notice No. 5-LLK which cited a violation of 30 CFR 77.1713(c). 5/ The inspector described the condition as follows:

5/ 30 CFR 77.1713(c) reads as follows:

"After each examination conducted in accordance with the provisions of paragraph (a) of this section, each certified person who conducted all or any part of the examination required shall enter with ink or indelible pencil in a book approved by the Secretary the date and a report of the condition of the mine or any area of the mine which he has inspected together with a report of the nature and location of any hazardous condition found to be present at the mine. The book in which such entries are made shall be kept in an area at the mine designated by the operator to minimize the danger of destruction by fire or other hazard."

The on-shift examination records of the tipple area by certified persons during the day shift on 12-12-77 indicated no hazardous conditions had been found. The 4 notices of violation and the 14 closure orders issued at the tipple area this date indicated there were some hazardous conditions in that area which were not recorded.

Undisputed testimony established that an onshift examination of the tipple area was conducted on December 12, and there were no hazardous conditions noted in the examination record book. Respondent's contention that no hazardous conditions existed is rejected. The stumbling hazard discussed above in Docket No. DENV 78-437-P existed at the time of the onshift examination. In addition, the Respondent admitted the existence of three violations alleged in Docket No. DENV 78-493-P--Order Nos. 7-0032, 7-0033 and 7-0034. These violations involved the substantial accumulations of coal and the blockage of an escapeway. The inspector testified that the coal accumulations in these areas had existed for numerous operative shifts. As discussed below, there were also instances of unguarded machinery in the tipple. The failure to record these hazards in the examination record book was in violation of section 77.1713(c).

The operator's failure to record the existing hazards was negligence in that the conditions were visually apparent.

It is improbable that the failure to record the hazards which existed in Respondent's tipple increased the risk of accident and injury. The above-mentioned hazards were visually apparent. It is unlikely that entry in the examination book would have increased the awareness of Respondent's employees with regard to these hazards.

The second Notice, No. 2-LLK, cited a violation of 30 CFR 77.512. 6/ The inspector described the condition as follows: "The junction box located near the drive pulley of the No. 2 belt was not provided with a cover plate."

The Respondent admitted in its answer that the condition existed as alleged. It contended, however, that the absence of the cover plate was not in violation of section 77.512 because of the "testing" exception contained therein. Section 77.512 provides that cover plates shall be kept in place at all times except during testing or repairs.

The plate had been removed in order to allow replacement of the drive motor on the No. 2 conveyor. While the junction box was

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6/ 30 CFR 77.512 reads as follows:

"Inspection and cover plates on electrical equipment shall be kept in place at all times except during testing or repairs."

unguarded, the belt had been operated for testing purposes only. As such, this condition did not constitute a violation of 30 CFR 77.512.

The history of prior paid violations at Respondent's Fort Scott Strip Mine has been noted above. No evidence indicates that a penalty in this case would adversely affect Respondent's ability to remain in business.

Docket No. DENV 78-493-P

Thirteen violations were alleged in Docket No. DENV 78-493-P. These alleged violations gave rise to 104(c)(1) withdrawal orders which were issued by Inspector Keller on December 12 at the Fort Scott Strip Mine. In its answer, Respondent included a Motion to Confess Partial Judgment with regards to three of the violations. This motion is the equivalent here of a motion for approval of settlement. The Respondent admitted the occurrence of these violations and tendered a check for payment in full of the civil penalty as originally assessed by MSHA. The three orders and corresponding civil penalties assessed and paid are as follows:

- No. 12-LLK (No. 7-32) for a violation of 77.1104 7/ \$2,200
- No. 13-LLK (No. 7-33) for a violation of 77.213 8/ \$2,500
- No. 14-LLK (No. 7-34) for a violation of 77.205(b) 9/ \$2,200

Inspector Keller issued Order of Withdrawal No. 12-LLK after observing accumulations of loose coal and coal dust in the draw-off tunnel, under the No. 1 belt conveyor from the tail pulley to the east side of the tipple building and along the No. 1 belt conveyor. Order of Withdrawal No. 13-LLK was issued by the inspector because no usable escapeway was provided from the closed end of the draw-off tunnel to a safe location on the surface. Coal had accumulated to a height of 4 feet on the trap door leading from the tunnel to

7/ 30 CFR 77.1104 reads as follows:

"Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard."

8/ 30 CFR 77.213 reads as follows:

"When it is necessary for a tunnel to be closed at one end, an escapeway not less than 30 inches in diameter (or of the equivalent, if the escapeway does not have a circular cross section) shall be installed which extends from the closed end of the tunnel to a safe location on the surface; and, if the escapeway is inclined more than 30 degrees from the horizontal it shall be equipped with a ladder which runs the full length of the inclined portion of the escapeway."

9/ See footnote 4.

the surface, preventing escape. The last of these three orders, Order of Withdrawal No. 14-LLK, was issued by the inspector because he observed that both walkways along the coal dump hopper were full of loose coal and coal chunks. In addition, coal had accumulated around the ladder leading to the walkways to a height of approximately 4 feet.

The inspector found that each of these three violations was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard and that each was caused by an unwarrantable failure to comply with the respective standard on the part of Respondent. All three conditions were abated within the time prescribed by the inspector.

In view of the above, the negotiated settlement of these three orders of withdrawal is hereby approved.

The remaining 10 orders were directed at the absence or inadequacy of guards in various places throughout the tippie and along the conveyor belts. In each of them, Inspector Keller cited either section 77.400(a) or section 77.400(c). <sup>10/</sup> Section 77.400(a) states that exposed moving machine parts, such as drive, head and tail pulleys, which may be contacted by persons, and which may cause injury to persons shall be guarded. Section 77.400(c) states that guards at the conveyor drive, conveyor head and conveyor tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

The inspector also found that each alleged violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and was caused by unwarrantable failure on the part of the operator.

In its posthearing brief, the Respondent asserted that the single overriding issue is whether the orders were directed at equipment

10/ 30 CFR 77.400 reads as follows:

"(a) Gears; sprockets; chains; drive, head, tail, and take-up pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

"(b) Overhead belts shall be guarded if the whipping action from a broken line would be hazardous to persons below.

"(c) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

"(d) Except when testing the machinery, guards shall be securely in place while machinery is being operated."

which was being tested and/or repaired. This is an oversimplification. The alleged violations considered below are separate and apart and must be treated as such.

As noted above, there were 27 paid violations at the Fort Scott Strip Mine from December 20, 1976, until December 12, 1977. There is no evidence which would indicate that a penalty would affect the Respondent's ability to continue in business.

The alleged violations are considered below in the sequence in which the corresponding orders were issued.

a. Order No. 1-LLK

Order No. 1-LLK cited section 77.400(c) and was directed at the following condition: "The belt drive pulley of the No. 3 horizontal conveyor had not been guarded." The Respondent admitted in its answer that the pulley was unguarded as alleged, but argued that no violation existed because its No. 3 conveyor belt was inoperative.

Larry Pommier, Respondent's chief engineer, testified that the No. 3 belt had been inoperative since late summer or early fall of 1977. Respondent had experienced icing problems with the belt during the prior winter, and, after unsuccessful attempts to correct the problems, had shut down the belt in anticipation of the oncoming winter. This testimony was uncontradicted. Since the belt was not operational and had not been used for a long period of time, the record does not establish a violation of section 77.400(c). Under the circumstances, the belt did not present the hazard which the regulation was intended to prevent.

b. Order No. 2-LLK

Order No. 2-LLK cited section 77.400(a) and was directed at the following condition: "The V-belts and pulleys of the No. 2 belt conveyor drive were not guarded. The guard had been removed and not replaced." The Respondent admitted in its answer that the guard was not in place. It had been removed to facilitate replacement of the No. 2 conveyor motor which had burned out on the evening of December 9, 1977.

Respondent asserted in its defense that the equipment had been operated for testing purposes only while in its unguarded condition. The conveyor system was not operated from the time the motor failed until the morning of December 12, 1977. At that time, two short test runs were made in order to check the newly-installed drive motor, as well as the alignment of the belt. Coal was carried on the belt during the second run in order to test the belt under normal operating tension.

Section 77.400(d) states: "Except when testing the machinery, guards shall be in place at all times while the machinery is being tested." Respondent established that the guard in question had been removed to facilitate repairs, and the belt was thereafter operated in an unguarded condition for testing purposes only. The absence of the guard in this instance did not constitute a violation of section 77.400(a).

c. Order No. 3-LLK

Order No. 3-LLK cited section 77.400(c) and was directed at the following condition: "The belt drive pulley of the No. 2 conveyor had not been guarded to prevent a person from reaching behind the guard and becoming caught between the belt and pulley. One side of the guard had been removed and not replaced and one guard was inadequate."

The Respondent admitted in its answer that the belt was unguarded as alleged. Chief Engineer Pommier testified that the guard on the south side of the belt had been taken off to allow replacement of conveyor idlers, as well as deicing of the belt. The guard had been removed to facilitate repair and other than test runs, the belt had not been operated without this guard. With respect to this side of the belt drive pulley, no violation existed.

The testimony of Inspector Keller and Inspector-Trainee Summers established that the guard on the north side of the drive pulley was inadequate, as alleged. This guard did not extend a sufficient distance down the belt to prevent a person from coming into contact with the pinchpoint between the belt and pulley.

The operator was negligent in its failure to adequately guard the belt drive pulley. The condition was readily observable and existed along a regularly traveled portion of the belt. The operator knew or should have known of its existence, yet failed to take corrective action.

It is improbable that a person would come into contact with this particular pinchpoint. No evidence exists on the record that a person could do so inadvertently. The testimony adduced as to the probability of the occurrence of an accident and injury related to the absence of the guard from the south side of the belt and the record did not establish that it would be likely for a person to be injured by inadvertently reaching behind the guard.

If a person were to be caught between the belt and pulley at the pinchpoint, loss or breakage of a limb or fingers might occur.

d. Order No. 4-LLK

Order No. 4-LLK cited section 77.400(c) and stated: "[T]he tail pulley of the No. 3 belt conveyor had not been guarded. The guard was laying on the walkway under about 12 inches of loose coal." The Respondent admitted in its answer that the tail pulley was unguarded, but asserted in its defense that the No. 3 belt was inoperative and that the guard in question had been removed for purposes of repair.

As noted above, the uncontradicted testimony of Larry Pommier, Respondent's chief engineer, established that the No. 3 belt had been inoperative since late summer or early fall of 1977. As such, the unguarded tail pulley did not present a hazard and was not in violation of section 77.400(c).

e. Order No. 5-LLK

Order No. 5-LLK cited section 77.400(c). Inspector Keller observed that: "The drive pulley and feeder chain of the salting machine located over the No. 2 belt conveyor had not been guarded." Respondent admitted in its answer that this equipment was unguarded. The guard had been taken off to repair the drive pulley of the salting machine. The guard was in the vicinity, but it had not been replaced after repairs were completed.

This condition was a clear violation of 77.400(c). Respondent's argument that no violation existed because the belt was being tested is rejected. Although Respondent asserts in its posthearing brief that repairs were "recent," there is no evidence on the record which indicates the time at which the repairs had been carried out. Respondent failed to establish a connection between the testing and the absence of this guard.

Evidence indicates that the Respondent was negligent in its failure to guard this equipment. The absence of the guards was readily observable.

It is probable that an accident would occur. The pulley was located along a walkway and was accessible to passersby. The inspector estimated the pulley to be within 12 inches of the walkway. If such an accident were to occur, it is probable that a loss of fingers or a hand would result.

f. Order No. 6-LLK

Order No. 6-LLK cited section 77.400(c) and stated that "the drive pulley of the No. 1A belt conveyor had not been guarded." Inspector Keller testified that this drive pulley had never been guarded. The Respondent admitted in its answer that the equipment was unguarded, but asserted the absence of a guard did not constitute a violation because the tipple had been operational for testing

purposes only on December 12, 1977. This defense is rejected in this instance because no causal link was established between the absence of this guard and the operation of the belt for testing purposes.

The Respondent was negligent in its failure to guard this drive pulley because the condition was readily observable and had existed for a long period of time. It knew or should have known of the condition, yet it failed to take corrective action.

The pinchpoint between the pulley and belt was estimated by Inspector Keller to be 18 inches from the walkway between knee and waist height. Given the close proximity of the pinchpoint to the walkway, it was probable that an accident would occur. If such an accident were to occur, it is probable that the resulting injury would be disabling. Inspector Keller testified that it was likely that an individual caught at this pinchpoint would be dragged into the belt and killed.

g. Order No. 7-LLK

Order No. 7-LLK cited section 77.400(c) and stated that "the tail pulley of the No. 1A belt conveyor had not been provided with a guard." The Respondent had removed the guard because the pulley area could not be kept clear of coal otherwise. The Respondent admitted in its answer that the tail pulley was unguarded, but again asserted that the absence of a guard did not constitute a violation because the tipple operated on December 12, 1977, for testing purposes only. This defense is rejected because no causal link was established between the absence of the guard and the operation of the belt for testing purposes.

The operator was negligent in that it knew the absence of the guard, yet it failed to take corrective action.

Inspector Keller testified that an accident was probable because Respondent's employees were required to clean in the area. He knew of accidents where fatalities had occurred when a person caught a shovel in a tail pulley and was dragged into a belt. Larry Pommier testified that all cleaning in the area was accomplished with water under high pressure. Even so, the finding that an accident was probable is warranted because Respondent's employees had occasion to work in the area and the unguarded pulley was readily accessible.

It is probable that a disabling injury would occur if a person was caught between the belt and pulley.

h. Order No. 8-LLK

Order No. 8-LLK cited section 77.400(a). The inspector described the condition as follows:

The guard on the north end (face) of the rotary breaker was not adequate to prevent personal contact of the drive chain and the breaker drum itself. The guard was not of sufficient height and in addition had been damaged and repairs had been attempted by wiring the guard back in place.

The guard on the rotary breaker normally reached a height of more than 6 feet. However, the guard had been damaged so that on one side it reached a height of only 4 feet and extended out into the walkway. An attempt had been made to repair this damage with wire. The testimony of Inspector Keller and Inspector-Trainee Summers established that an individual could come into contact with and be injured by the rotary breaker where its guard had been damaged.

The Respondent was negligent in that it was or should have been aware of the damage to the guard, but failed to take adequate corrective measures.

An accident was probable in that the inadequately guarded breaker was adjacent to a walkway frequently traveled by Respondent's employees. Inspector Keller testified that a falling man could reach for support and contact the breaker.

If such an accident were to occur, the probable result would be a disabling injury. Loss of fingers, a hand or an arm might have resulted.

i. Order No. 10-LLK

Order No. 10-LLK cited section 77.400(c) and stated that "the tail pulley of the No. 1 belt conveyor had not been guarded." The Respondent admitted in its answer that this tail pulley was unguarded and Inspector Keller testified that a person could become caught between belt and pulley while performing his normal duties in the area.

The "testing" defense interposed by Respondent is again rejected. No connection was established between the testing of the belt on December 12 and the absence of the guard on the tail pulley.

The operator was negligent in that it knew or should have known that the pulley was unguarded. The condition was visually apparent. That accumulations of coal contacted and engulfed the pulley indicated that the condition existed for a long enough time that it should have been discovered by the Respondent. If a guard had been present, it would have prevented contact between the pulley and the accumulations.

It is probable that an accident would occur because of the absence of this guard. The pulley was adjacent to a walkway which

was used by Respondent's employees in the performance of their duties. The presence of a water pump on the walkway and coal accumulations in the area increased the likelihood that an accident would occur causing a miner to be caught in the belt. Larry Pommier testified that the pinchpoint between this pulley and the belt was inside a truss which was itself guarded. At the same time, Mr. Pommier testified that he was "not that familiar" with this tail pulley. Accordingly, Inspector Keller's testimony is given greater weight.

If an accident were to have happened, it is probable that a disabling injury would have occurred. Loss of fingers or a hand might have resulted.

j. Order No. 11-LLK

Inspector Keller issued Order No. 11-LLK, citing section 77.400(a). He stated that "the V-belt, clutch and pitman arms of the feeder drive located in the draw off tunnel had not been guarded." The Respondent admitted in its answer that this equipment was unguarded. Larry Pommier testified that they had been removed to allow for repair of the feeder and replacement of the clutch. Respondent argued that a violation of 77.400(a) did not exist because repairs had been made and the guards had been left off until testing could be accomplished. This defense must be rejected because the record contains no indication of the time when these repairs were effected. More specifically, there is no indication that the repairs were made in the period from December 10 through 12, and therefore, no causal link was established between the absence of guards and the testing carried out on December 12.

The operator was negligent in its failure to guard the machines. This condition was visually apparent and should have been known to the operator.

Because of the absence of guards on this equipment, an accident was probable. One employee per shift was required to work in the area, and the walkway around the equipment had only a 16-inch clearance.

If an accident occurred, the probable result would have been the loss of fingers or a hand.

Penalties

In consideration of the findings of fact and conclusions of law in this decision based on stipulations and evidence of record, the following assessments are appropriate under the criteria of section 109(a) of the Act.

Docket No. DENV 78-359-P

Notice of Violation No. 1-LLK (9/6/77) \$ 1,000

Docket No. DENV 78-439-P

Notice of Violation No. 1-LLK (11/8/77) 75

Docket No. DENV 78-437-P

Notice of Violation No. 1-LLK (12/12/77) 1,000

Docket No. DENV 78-438-P

Notice of Violation No. 5-LLK (12/12/77) 100

Docket No. DENV 78-493-P

Order of Withdrawal No. 3-LLK (12/12/77) 1,000

Order of Withdrawal No. 5-LLK (12/12/77) 1,000

Order of Withdrawal No. 6-LLK (12/12/77) 1,500

Order of Withdrawal No. 7-LLK (12/12/77) 1,500

Order of Withdrawal No. 8-LLK (12/12/77) 1,000

Order of Withdrawal No. 10-LLK (12/12/77) 1,000

Order of Withdrawal No. 11-LLK (12/12/77) 1,000

ORDER

The civil penalty proceedings with respect to Notice of Violation No. 2-LLK (December 12, 1977), Order of Withdrawal No. 1-LLK (December 12, 1977), Order of Withdrawal No. 2-LLK (December 12, 1977), and Order of Withdrawal No. 4-LLK (December 12, 1977), are hereby DISMISSED.

It is ORDERED that the settlement negotiated by MSHA and Respondent with regard to Order of Withdrawal No. 12-LLK (December 12, 1977), Order of Withdrawal No. 13-LLK (December 12, 1977), and Order of Withdrawal No. 14-LLK is hereby approved.

With respect to the remaining notices of violation and orders of withdrawal, it is ORDERED that payment in the amount of \$10,175 be made within 30 days of the date of this decision.

*Forrest E Stewart*

Forrest E. Stewart  
Administrative Law Judge

Issued: April 5, 1979

Distribution:

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Administrator, Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 5, 1979

SECRETARY OF LABOR, : Civil Penalty Proceedings  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. DENV 78-51-P  
Petitioner : A/O No. 41-02632-02002  
v. :  
 : Docket No. DENV 78-485-P  
TEXAS UTILITIES GENERATING CO., : A/O No. 41-02632-02001  
Respondent :  
 : Docket No. DENV 78-503-P  
 : A/O No. 41-02632-02003  
 :  
 : Martin Lake Strip Mine  
 :  
 : Docket No. DENV 78-486-P  
 : A/O No. 41-01900-02002  
 :  
 : Docket No. DENV 78-487-P  
 : A/O No. 41-01900-02003  
 :  
 : Monticello Fuel Facilities Strip  
 : Mine  
 :  
 : Docket No. DENV 78-491-P  
 : A/O No. 41-01192-02001  
 :  
 : Docket No. DENV 78-492-P  
 : A/O No. 41-01192-02002  
 :  
 : Big Brown Strip Mine

DECISION

Appearances: John H. O'Donnell, Esq., U.S. Department of Labor,  
Office of the Solicitor, MSHA, on behalf of Petitioner;  
Richard L. Adams, Esq., Dallas, Texas, on behalf of  
Respondent.

Before: Forrest E. Stewart, Administrative Law Judge .

## FACTUAL AND PROCEDURAL BACKGROUND

The above-captioned civil penalty proceedings were brought pursuant to section 109 1/ of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 819 (1970), hereinafter referred to as the Act.

These proceedings were consolidated pursuant to a motion submitted by Petitioner on September 19, 1978. Hearings were held on October 18 and 19, 1978, in Dallas, Texas. The Petitioner called three witnesses and introduced 55 exhibits. The Respondent called three witnesses and introduced eight exhibits.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Docket Nos. DENV 78-51-P, DENV 78-485-P, and DENV 78-503-P, concern conditions which were allegedly observed at Respondent's Martin Lake Strip Mine. The Martin Lake Strip Mine is a surface lignite mine located in Beckville, Texas. Production started at this mine in the early part of 1977. At the time of the hearing, 200 to 300 men were employed at the mine. A total of six prior paid violations occurred there in the period from September 15, 1976 through May 16, 1977.

### Docket No. DENV 78-51-P

Inspector Larry Maloney issued section 104(b) Notice of Violation No. 2-LGM on May 17, 1977. The inspector cited 30 CFR 77.1605(d) and described the condition allegedly in violation of this standard as follows: "The Caterpillar V 300 forklift (company #3405) was not provided with an operative audible warning device. The forklift was located in the shop yard."

The testimony of Inspector Maloney clearly established the existence of a violation of section 77.1605(d). This section requires

1/ Section 109(a)(1) of the Act reads as follows:

"The operator of a coal mine in which a violation occurs of a mandatory health or safety standard \* \* \* shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than \$10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary 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 operator charged in attempting to achieve rapid compliance after notification of a violation."

that mobile equipment be provided with audible warning devices. The inspector tested the horn on the forklift and found that it was not working. The cause of this malfunction was a faulty control button.

At the time the notice was issued, there was no operator on the machine and it was not running. However, one of Respondent's mechanics told the inspector that the forklift was operational. At this mine, a tag forbidding use is normally placed on a machine in need of repair. No such tag had been placed on the forklift and nothing prevented its use.

The inspector testified that it was improbable that an accident would occur because of the inoperative horn.

No showing was made of negligence on the part of the Respondent. The inspector estimated the probability that the Respondent knew of the malfunction to be minute.

The parties stipulated that the condition was abated with a normal degree of good faith.

Docket No. DENV 78-485-P

Four alleged violations of mandatory standards are included within Docket No. DENV 78-485-P. All four were objects of notices of violation issued at the Martin Lake Strip Mine. They are discussed below in the order of their issuance.

A. Notice of Violation No. 2-LGM (September 15, 1976)

Inspector Maloney issued Notice of Violation No. 2-LGM on September 15, 1976. He cited 30 CFR 77.1711 and described the condition allegedly in violation of this standard as follows:

An employee was smoking a cigarette in close proximity (approximately 2 feet) with the Chevrolet service truck's cargo bed (company #3516). The truck was provided with warning signs prohibiting smoking or open flames in the immediate area of the employee. The truck was carrying a one thousand gallon diesel storage tank (over 1/2 full), oil, grease, and varsol.

Inspector Maloney testified that he had stopped the service truck in order to inspect it. The inspector had twice before issued notices of violation directed at this same truck. Because of this, the operator of the vehicle was very nervous. He climbed down from the cab, leaned against a pipe at the top of which was a sign which read "No smoking or open flame," took out a cigarette and lit it in the presence of the inspector. The truck was transporting a large quantity of oil, varsol, grease and diesel fuel.

30 CFR 75.1711 states that "No person shall smoke or use an open flame where such practice may cause a fire or explosion." A clear violation of this standard on the part of one of Respondent's employees is evident here.

This violation was not accompanied by negligence on the part of the Respondent. The Texas Utilities Safety Manual contains a provision which reads, "Employees shall not smoke on company property where this act constitutes a fire hazard." Respondent's safety representative, David Thompson, testified that the company made a diligent effort to enforce this provision. The operator of the truck was immediately given a strong oral reprimand and, later, was issued a written reprimand which was placed in his file. It should be noted once again that the employee lit the cigarette directly under a "No smoking" sign.

It is probable that this type of activity, if left unchecked, would cause a fire or an explosion. A disabling injury or a fatality would be the likely result of such an accident. At the time this infraction occurred, three people, including the truck operator, a representative of the Respondent, and Inspector Maloney, were threatened with injury.

The parties stipulated that the Respondent demonstrated a normal degree of good faith in abating these conditions once the notice of violation was issued.

B. Notice of Violation No. 5-LGM (September 15, 1976)

Inspector Maloney issued 104(b) Notice of Violation No. 5-LGM on September 15, 1976, citing 30 CFR 77.1702(c). The citation was issued because it was reported to the inspector that the company had not submitted a report on emergency medical or ambulance service arrangements to the MSHA subdistrict or district offices.

Section 77.1702(c) requires that each operator shall, on or before September 30, 1971, report emergency medical or ambulance service arrangements to the MSHA district office. The Martin Lake Strip Mine had not yet produced coal by September of 1976. Even so, the definitions of "operator" and "coal mine" in sections 3(e) and (h) of the Act are broad enough to have encompassed the Respondent and its mine at that time. The Respondent was required to comply with the provisions of section 77.1702(c).

The testimony of Inspector Maloney established a technical violation of section 77.1702(c). The Respondent failed to file the report in question because it was unaware that such a report was required.

There is no indication that the Respondent was negligent in its failure to file this report. Approximately 6 weeks before the citation was issued, the inspector delivered a "new mine packet" which contained forms to be submitted by the Respondent. The inspector did not set a date by which these forms had to be submitted. This packet did not contain a form for the report in question and the inspector could not remember if the need for the report had been discussed.

Prior to September 15, 1976, the Martin Lake Strip Mine had not been issued a mine I.D. number. This number is the legal identification of the mine and must accompany an operator's submissions to MSHA. Without this identification, there is a possibility that the information would be misplaced.

The inspector did not consider the failure to submit the report to be a serious infraction. The company had provided for emergency medical and ambulance services, but failed only in its duty to notify MSHA of these arrangements. Emergency phone numbers had been posted on the bulletin board and each supervisor carried a pocket card with these numbers.

The parties stipulated that the operator demonstrated a normal degree of good faith in abating the condition, once the notice of violation issued.

C. Notice of Violation No. 1-LGM (September 16, 1976)

Inspector Maloney issued section 104(b) Notice of Violation No. 1-LGM on September 16, 1976, citing 30 CFR 77.1713(c). The citation was issued because the onshift examination of the mine shop had not been recorded for the 12 a.m. to 8 a.m. shift. The inspector asked to see the onshift examination book for the shop area and was informed by Chad Abernathy, the operating engineer, that this book was not yet being kept.

The operator was negligent in its failure to maintain an onshift examination record book. The inspector testified that the mine superintendent and other personnel had worked at mines where the record books were required. The superintendent and certified individuals qualified to make the examinations knew or should have known of the requirement.

The inspector was of the opinion that this was not a serious violation. No showing was made that the operator failed to carry out the onshift examination. In the event that such an examination was carried out, it is improbable that the failure to keep a record would result in accident and injury. The record serves primarily as a check to make certain that such an inspection did occur.

The parties stipulated that there was a normal degree of good faith demonstrated in the abatement of the condition, once the notice of violation was issued.

D. Notice of Violation No. 2-LGM (February 2, 1977)

Notice of Violation No. 2-LGM was issued by Inspector Maloney on February 2, 1977. He cited 30 CFR 77.1110 and issued the notice because he observed that the fire extinguisher in a winch truck was "not maintained in a useable and operative condition." The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by an unwarrantable failure on the part of the Respondent. The condition was abated within the time specified by the inspector.

The parties agreed to settle this case for \$43, the amount originally assessed by MSHA's Office of Assessments. This settlement was approved by the administrative law judge at the hearing and this approval is affirmed here.

Docket No. DENV 78-503-P

A single alleged violation is included under this docket number. On October 12, 1977, Inspector Maloney issued Notice of Violation No. 1-LGM at the Martin Lake Strip Mine. The inspector cited 30 CFR 77.1104 and described the condition found by him as follows:

Excessive oil spillage and oil soaked rags were allowed to accumulate creating a fire hazard on and around the swing gear case and hydraulic control valves on the Koehring 1266 backhoe. The gear case and control valves are located in the front of the machine house next to the operator's cab. The backhoe is used to load coal in 001 pit.

The testimony of the inspector established that the condition existed as alleged. The backhoe had leakage problems. At the time the condition was first observed by the inspector, the machine had been out of service for approximately 1 hour and had been removed 200 to 300 feet from the location at which it had been working. The machine had not been tagged to prevent its use because the repair to be made was considered minor.

Oil covered a 4-foot by 8-foot plate. Some of the oil had gathered in puddles of approximately one-quarter inch deep. In other places, it was smeared. Two to four rags of a size approximately 2 feet by 2 feet had been thrown in the oil.

No plans to clean up the oil spillage had been made by the Respondent. Before issuing the notice, the inspector spoke with

representatives of mine management and ascertained that a cleanup program had not been initiated. The machine operator also denied responsibility.

The inspector believed that this condition created a fire hazard. The accumulations were beside the operator's cab and in the area of the hydraulic tanks.

Given the absence of a cleanup program and the hazard presented by these accumulations, their presence was in violation of section 77.1104.

No showing was made that the Respondent was negligent in its failure to keep the backhoe free of accumulations.

It was improbable that a fire would start and cause injuries. There were no ignition sources in the immediate vicinity. In the opinion of the inspector, the two most likely sources of fire were discarded cigarettes or welding activities. The engine on the backhoe sits towards the rear of the machine and was considered not to be an ignition source by the inspector. Not only was there an absence of ignition sources, but the hydraulic oil was fire-resistant. The temperature at which this oil would ignite was considerably higher than that of untreated hydraulic oil.

Finally, the inspector testified that the operator of the backhoe was the individual most endangered by the accumulations. Since the backhoe had been removed from service, this threat no longer existed.

The Respondent demonstrated a normal degree of good faith in abating the condition, once the notice of violation was issued.

Docket No. DENV 78-486-P

Eleven alleged violations of mandatory standards are included within Docket No. DENV 78-486-P. Each of the 11 occurred at Respondent's Monticello Fuel Facilities Strip Mine. This lignite mine is located in Winfield, Texas. It has an annual production of between 6 and 7 million tons and employs approximately 400 employees. In the period from April 18, 1975, through January 10, 1977, there were a total of 22 prior paid violations at the Monticello Fuel Facilities Strip Mine.

Each of the violations alleged herein was the object of a 104(b) notice of violation. These notices are discussed below in the order of their issuance.

A. Notice of Violation No. 1-JF (March 4, 1976)

Notice of Violation No. 1-JF was issued on March 4, 1976, by inspector John Franco. He issued the notice on the basis of information contained on a printout received from the MSHA Denver Office. This printout indicated that the Respondent had submitted only eight of the 10 valid respirable dust samples required under the provisions of 30 CFR 71.106(c). The Respondent had submitted 10 samples, but two of these were subsequently invalidated. Glen Hood, Respondent's employee in charge of the submission of this data, testified that he filled out a form incorrectly so that the sample appeared to have been taken in the wrong location. He had written "001-0" where he should have written "001-1." The second sample contained oversized particles. Respondent's failure to submit 10 valid samples was in violation of section 71.106(c).

The inspector was of the opinion that the operator would not necessarily know that one of the submitted dust samples contained oversized particles. No showing was made that the Respondent was negligent with respect to the sample invalidated because of clerical error.

It is improbable that the failure to submit valid samples in this instance would lead to the occurrence of accident, illness, or injury. This is particularly true because no respirable dust problem exists at this mine.

The operator demonstrated a normal degree of good faith in complying with the requirements of section 77.106(c), once the notice of violation issued.

B. Notice of Violation No. 1-JDC (May 6, 1976)

Notice of Violation No. 1-JDC, May 6, 1976, was issued in error. It was alleged that the Respondent failed to submit a respirable dust sample for a particular miner as required by the provisions of 30 CFR 71.108. After the notice had issued, it was determined that the Respondent no longer employed the miner in question. A card had been sent to MSHA with this information, but it had been misfiled.

The proceeding with respect to this notice was dismissed at the hearing. This dismissal is ratified here.

C. Notice of Violation No. 1-LGM (May 12, 1976)

Inspector Maloney issued Notice of Violation No. 1-LGM on May 12, 1976, citing 30 CFR 77.1110. He did so because he observed that the automatic halogen gas fire-extinguishing unit on the B.E. 1350 W. dragline did not have a current examination tag. Section 77.1110 requires that an examination of fire extinguishers be carried out

every 6 months and that the date of this examination be recorded on a tag attached to the extinguisher. The last date recorded on the tag of the halogen unit was October 1975. This failure to examine the unit and note the examination within 6 months was in violation of section 77.1110.

There is no indication on the record that the Respondent was negligent in its failure to examine the halogen unit and record this examination on the attached tag.

It is improbable that this violation would result in the occurrence of an accident or injury. The inspector believed that the halogen unit was operational and gauges indicated that its cylinders were full. The unit protects a 12-foot by 24-foot room where the 7200 volt cable enters the dragline. Moreover, it is only one of a number of extinguishers on the machine. The other extinguishers were in good condition and had current examination tags.

The operator abated the condition in good faith, once the notice of violation was issued.

D. Notice of Violation No. 1-LGM (May 13, 1976)

Inspector Maloney issued Notice of Violation No. 1-LGM on May 13, 1976, citing 30 CFR 77.604. Section 77.604 requires that trailing cables be adequately protected to prevent damage by mobile equipment. The inspector issued the notice when he observed that a power cable had been damaged by a bulldozer to such an extent that the current breakers had been tripped and the cable was deenergized. The outer jacket of the cable was noticeably damaged.

The inspector felt that the best way to avoid this kind of accident was to provide a spotter for the operator of the bulldozer.

No showing was made that the operator was negligent in its failure to adequately protect the cable. The person operating the bulldozer should have seen the cable which was clearly visible at the point where it was run over. The cable is black and the sand on which it lies is light-colored. Yellow flags are also used to mark the location of the cable. This use of flags was of limited effectiveness because they were frequently knocked out.

No injury resulted from this accident. When the circuit breaker system is functioning properly, the cable is deenergized after a small time lag. An individual sitting on the bulldozer would not be injured. There was some risk of injury to a person if he were to touch the bulldozer while standing on the ground. It was unlikely, however, that anyone would have been in contact with the machine when it was in motion.

This condition was abated with a normal degree of good faith, once the notice of violation was issued.

E. Notice of Violation No. 1-LGM (May 24, 1976)

The inspector issued Notice of Violation No. 1-LGM on May 24, 1976, citing 30 CFR 77.1605(d). He did so after discovering that the "trouble shooter's" truck did not have an operative audible warning device. This condition was quickly abated. The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by an unwarrantable failure on the part of the Respondent. The condition was abated within the time specified by the inspector.

The operator and MSHA agreed at the hearing to settle this case for \$78, the amount originally assessed by MSHA's Office of Assessments. The settlement was approved by the administrative law judge at the hearing and this approval is affirmed here.

F. Notice of Violation No. 3-LGM (May 24, 1976)

Inspector Maloney issued Notice No. 3-LGM on May 24, 1976, citing 30 CFR 77.1110. He did so when he observed that the fire extinguisher on the "trouble-shooter's" truck had not been inspected in the prior 6 months. The order was terminated within 3 hours of its issuance. The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by an unwarrantable failure on the part of the Respondent.

At the hearing, the operator and MSHA agreed to settle this case for \$55, the amount originally assessed by MSHA's Office of Assessments. This settlement was approved at that time by the administrative law judge and this approval is affirmed here.

G. Notice of Violation No. 1-LGM (May 25, 1976)

The inspector issued Notice of Violation No. 1-LGM on May 25, 1976, citing 30 CFR 77.410. He issued the notice because he discovered that a four-wheel drive buggy had a nonoperational backup alarm. The inspector based his decision that a backup alarm was necessary on the type of equipment involved and the visibility from the operator's seat. In this instance, the operator of the vehicle would be unable to see an individual immediately behind the vehicle if that individual was crouching, kneeling, or on the ground. Because the operator's vision was impaired, the absence of an automatic backup alarm was in violation of section 77.410.

There was no negligence on the part of the Respondent in its failure to equip the buggy in question with an operable backup alarm.

The truck was equipped with an alarm, but it was not functioning. No showing was made which would establish when the warning device stopped functioning. Although it is probable that the driver of the vehicle knew the horn was not working, there is no evidence that the Respondent or any of its agents, knew or should have known of the problem.

It is improbable that this violation would result in accident or injury. Only a small area immediately behind the machine could not be seen from the operator's seat.

The parties stipulated that the Respondent demonstrated a normal degree of good faith in abating this condition, once the notice of violation was issued.

#### H. Notice of Violation No. 1-LGM (August 16, 1976)

The inspector issued Notice No. 1-LGM on August 16, 1976, citing 30 CFR 77.1004(b). This section requires that overhanging highwalls and banks shall be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted. The inspector discovered visible cracks at the top of the highwall, a few feet from the edge. In addition, a seam of sand with water running through it undercut the top of the highwall. Because of these conditions, the inspector believed that the highwall was unstable. Immediately prior to the issuance of the order, one of Respondent's operations foremen brought two employees into the area and began to post it. The inspector felt that the unstable condition of the highwall had developed prior to the beginning of the shift, and that it had not been posted in a timely fashion. The failure to correct the condition or to post the area of the unstable highwall in a timely fashion was in violation of section 77.1004(b).

There is no evidence on the record which would indicate that the Respondent negligently violated section 77.1004(b).

It is improbable that an accident and injury would have occurred because the area in question was not marked off. There was no pedestrian traffic in the area. The coal trucks which passed the highwall did so on the spoils side of the cut, at least 60 feet from the wall. Men are required periodically to walk in the area threatened in order to set pumps. There are safety procedures which must be followed at these times, including the requirement that one man watch the highwall at all times for sloughage. These procedures make it improbable that a pump setter would be injured.

This condition was abated with a normal degree of good faith.

I. Notice of Violation No. 2-LGM (August 16, 1976)

Inspector Maloney issued Notice No. 2-LGM on August 16, 1976, immediately after he issued Notice No. 1-LGM. He again cited section 77.404(b) because he believed that a section of Respondent's highwall was unstable. The notice dealt with a separate pit along the same highwall approximately one-half mile down from the area at which the first notice was directed. The inspector believed the second area to be worse than the first. The upper portion of the highwall had been undercut by ground water. The inspector observed a section of wall break and fall while he was in the area. A violation of section 77.404(b) existed in this instance because the area was unposted even though the highwall was in an unstable condition.

No showing was made that the Respondent was negligent in its failure to post this area, as required by section 77.404(b).

It was improbable that this violation would have resulted in injury. As discussed above, coal-bearing trucks do not travel within 60 feet of the highwall and safety procedures were in effect to prevent an accident when pumps are reset in the area. Immediately prior to the inspector's arrival in this pit, a loading shovel had been moved through the area. Because of this, it was necessary for four of Respondent's employees to carry cable past the affected area on the highwall side of the pit. As a safety precaution, one of these employees did nothing but watch the highwall for hazardous areas, in order to give warning if sloughage occurred.

This condition was abated with a normal degree of good faith, once the notice of violation was issued.

J. Notice of Violation No. 1-LGM (September 29, 1976)

Inspector Maloney issued Notice No. 1-LGM on September 29, 1976, citing 30 CFR 77.1109(c)(1). The notice was issued because a "cherry picker" which was being operated in the 001 pit was not equipped with a fire extinguisher. The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by an unwarrantable failure on the part of the Respondent. This violation was immediately abated.

At the hearing, the parties agreed to settle this case for \$78, the amount originally assessed by the MSHA Office of Assessments. The administrative law judge approved the settlement at that time. This approval is affirmed here.

K. Notice of Violation No. 2-LGM (September 30, 1976)

Notice of Violation No. 2-LGM was issued by Inspector Maloney on September 30, 1976. The inspector cited 30 CFR 77.513 which reads as follows: "Dry wooden platforms, insulating mats, or other electrically nonconductive material shall be kept in place at all switchboards and power-control switches where shock hazards exist." (Emphasis added.) The inspector issued the notice because the Respondent had not placed electrically nonconductive material on the floor at the power switch for the dust suppression system. The power switch was located on the ground floor of a crusher plant and a considerable amount of water was present on the floor around it. The switchboard in question had two grounding systems. There was a grounding system for the conduit and case, and a separate system for the conductors themselves.

The inspector believed at the time he issued the notice that the power switch itself presented a shock hazard and that this hazard was aggravated by the wet floor. He did not examine the switchboard's grounding systems. At the hearing, he admitted that he no longer believed the condition presented a hazard. Section 77.513 requires nonconductive platforms or mats only if a shock hazard exists. A violation of this section is not evident here because no shock hazard existed.

Docket No. DENV 78-487-P

Seven alleged violations of mandatory standards are included within Docket No. DENV 78-487-P. Each of these alleged violations was the object of a 104(b) notice of violation issued at Respondent's Monticello Fuel Facilities Strip Mine. These notices are discussed below in the order of their issuance.

A. Notice of Violation No. 1-CH (December 28, 1976)

Inspector Clarence Horn issued Notice No. 1-CH on December 28, 1976, during the course of a spot electrical inspection. He cited 30 CFR 77.902 which requires that three-phase, low-voltage resistance-grounded systems to portable and mobile equipment shall include a fail-safe ground check circuit or other no less effective device to monitor continuously the grounding circuit to assure continuity. The inspector issued this notice after observing two portable welders were without a fail-safe monitoring device on their ground circuit. These welders were located at the field house between pits A and C. The power to these welders was supplied from a portable transformer through a 440-volt three-phase, resistance-grounded system. The transformer was equipped with a ground circuit breaker, but it was not hooked up to the welders.

The two welders were low-voltage, portable equipment and were subject to the provisions of section 77.902. The inspector based

his conclusion that this equipment was portable on the manner in which the welders were wired. The absence of a monitoring device on these two welders was in violation of section 77,902.

The operator was negligent in its failure to provide a ground monitor on this equipment. Inspector Maloney was told by David Nesmith, fuel engineer at Respondent's mine, that the monitoring circuit was not hooked up because it could not be stopped from tripping out. The operator knew of the absence of a ground monitor on this equipment, yet continued to operate it.

In order for an accident and injury to occur, two events would have to occur simultaneously. A ground failure would have to occur at the same time as a phase-to-ground fault. The inspector testified that such an occurrence was probable. At least two of Respondent's employees were subjected to the hazard in question. If a phase-to-ground fault occurred, the frame of the welders would be charged with 227 volts. An individual who came into contact with the frame could be severely injured.

The operator demonstrated good faith in abating the condition, once the notice of violation was issued.

B. Notice of Violation No. 1-LGM (January 5, 1977)

Inspector Maloney issued Notice No. 1-LGM on January 5, 1977, citing 30 CFR 77.1607(a). The inspector issued the notice because a coal haulage truck was not properly trimmed so as to prevent coal from falling off. The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by an unwarrantable failure on the part of the Respondent. The condition was abated within the time specified by the inspector.

At the hearing, the parties agreed to settle this case for \$115, the amount originally proposed by MSHA's Office of Assessments. The settlement was approved at that time by the administrative law judge. This approval is affirmed here.

C. Notice of Violation No. 2-LGM (January 5, 1977)

Inspector Maloney issued 104(b) Notice of Violation No. 2-LGM on January 5, 1977. He cited 30 CFR 77.1605(k). This section requires that berms or guards shall be provided on the outer banks of elevated roadways. The notice was issued because the inspector observed that a 300-foot section of the coal haulage roadway at the bottom of the No. 3 ramp in pit 001 was without berms or guards on its outer bank. The roadway turned approximately 90 degrees to the left at this point and was elevated approximately 15 feet. It was being used by three 100-ton haulage trucks. Despite its being in

the pit, this area was a "roadway" within the meaning of section 77.1605(k). The absence of berms or guards in this area was in violation of section 77.1605(k).

The operator was negligent in its failure to place guards or berms in this area. It had not done so because it did not consider this area to be part of the roadway.

The inspector was of the opinion that the berms would not prevent a haulage truck which was out of control from running off the roadway. However, berms might be of assistance in guiding a truck, thereby keeping it on the roadway.

The operator demonstrated good faith in abating the condition, once the notice of violation was issued.

D. Notice of Violation No. 1-LGM (January 6, 1977)

Inspector Maloney issued Notice No. 1-LGM on January 6, 1977, citing 30 CFR 77.409(b). This section requires that handrails shall be provided around all walkways and platforms on shovels. The notice was issued because the inspector observed one handrail to be missing and another to be damaged on Respondent's loading shovel in pit 002. These handrails had been struck and damaged by parts of the shovel which perform the function of running the bucket in and out when the shovel is in operation.

At the time the notice was issued, the shovel had been walked out of the pit a distance of 200 to 300 feet. The machine had been taken out of service in order to allow repairs to be made. One of the repairs to be made was the replacement of these handrails. The inspector testified that he would not have issued the citation if his supervisor had not been there with him.

In view of the above, no violation of section 77.409(b) existed here. The shovel had been provided with handrails as required, but these rails were damaged. Thereafter, the machine had been removed from service so that repairs could be made, including the replacement of these handrails.

E. Notice of Violation No. 2-LGM (January 6, 1977)

Inspector Maloney issued 104(b) Notice of Violation No. 2-LGM on January 6, 1977, citing 30 CFR 77.1607(d). This section requires that cabs of mobile equipment shall be kept free of extraneous materials. The inspector issued the notice because he observed goggles, rubber gloves, air hoses, five welding rod cans, rags, four aerosol cans, and a headlight lying on the floorboard inside the cab of a boom truck. This truck was being used in pit 002 at the time the notice was issued.

No showing was made that the Respondent knew or should have known of the failure to keep the truck's cab free of extraneous materials. The record does not contain evidence of the length of time which the materials had been left in the cab and these materials could be observed only when the cab door was open.

The inspector testified that this material presented a hazard because it might strike the operator of the truck if it ever overturned. It is improbable that this condition would cause accident or injury. The truck was not moving at the time the condition was observed by the inspector. Even if it was moving, it is highly unlikely that it would overturn under the circumstances.

The operator demonstrated a normal degree of good faith in abating the condition, once the notice of violation was issued.

F. Notice of Violation No. 1-LGM (January 10, 1977)

Inspector Maloney issued 104(b) Notice No. 1-LGM on January 10, 1977, citing 30 CFR 77.1605(a). This section requires that cab windows be of safety glass or equivalent, in good condition. The inspector issued this notice when he observed a shattered upper right side window in the cab of a coal haulage truck. Gray tape was used to hold the window together, further obscuring the truck operator's vision. The operator of the truck agreed with the inspector that the cracked window and tape obscured his vision.

The operator was negligent in its violation of this safety standard. Even though the condition was readily observable, the operator failed to replace the window.

It was improbable that an accident and injury would occur because of this condition. The driver of the truck did not feel that the window interfered with the truck's operation. The righthand window was seldom used in maneuvering.

The Respondent demonstrated a normal degree of good faith in abating the condition.

G. Notice of Violation No. 2-LGM (January 10, 1977)

Notice of Violation No. 2-LGM was issued by Inspector Maloney on January 10, 1977. He cited 30 CFR 77.1605(b) which requires that front-end loaders shall be equipped with parking brakes. The inspector issued this notice when he observed a front-end loader which was not equipped with an operative parking brake. This condition was abated by the following day with the installation of a new parking brake. The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by an unwarrantable failure on the part of the Respondent.

The parties agreed to settle this case at the hearing for \$98, the amount proposed by MSHA's Office of Assessments. The administrative law judge approved the settlement at that time. This approval is affirmed here.

Docket No. DENV 78-491-P

Nine alleged violations of mandatory standards are included within Docket No. DENV 78-491-P. Each of these alleged violations was the object of a 104(b) notice of violation issued at Respondent's Big Brown Strip Mine. The Big Brown Strip Mine is located in Fairfield, Texas, produces from 4 to 5 million tons per year of lignite, and employs approximately 300 men. There were 16 prior paid violations at this mine between August 18, 1975, and June 16, 1977.

The notices are discussed below in the order of their issuance.

A. Notice of Violation No. 3-JF (March 29, 1976)

Inspector John Franco issued Notice No. 3-JF on March 29, 1976, citing 30 CFR 77.505. This section requires that cables shall enter metal frames, splice boxes, and electrical compartments only through proper fittings. The inspector issued the notice when he observed that the fittings around a cable were not secured with proper fittings where the cable entered the frame of a circuit breaker. The cable was comprised of two segments. The first segment, the trailing cable, led from the dragline to the circuit breaker. The second segment, the power cable, led from the circuit breaker to the main power source. Wooden fittings had been placed around the cable at both entry points, but they were not bolted or clamped to the cable.

The Respondent was negligent in its failure to secure the cable with proper fittings. The inspector was of the opinion that the fittings had never been secured. Moreover, the condition was readily observable. The Respondent should have known of the condition.

It was improbable that an accident would occur. No damage to the cables was observed.

The condition was abated with a normal degree of good faith.

B. Notice of Violation No. 1-LGM (July 28, 1976)

Inspector Maloney issued 104(b) Notice of Violation No. 1-LGM on July 28, 1976, citing 30 CFR 77.1605(a). The inspector issued this notice because the front windshield on a grader had shattered badly. It had shattered to the extent that the wiper blades would be damaged if used. At the time the notice was issued, the window had been raised. The condition was clearly in violation of section 77.1605(a), which requires that cab windows be kept in good condition.

No showing was made that the Respondent was negligent in its failure to maintain the cab window in good condition. The inspector testified that he was unsure whether the Respondent knew of the condition and he did not give an indication of the length of time which the windshield had been damaged.

It was improbable that the shattered windshield would lead to an accident or injury. Because the windshield was up, its condition did not reduce visibility. The weather conditions were not such that the operator would need to lower the windshield.

The operator demonstrated a normal degree of good faith in abating this condition, once the notice of violation was issued.

C. Notice of Violation No. 1-LGM (August 4, 1976)

This notice of violation was issued on August 4, 1976. The inspector cited 30 CFR 77.1110, which requires that an examination of fire extinguishers be carried out once every 6 months, and that the date of this examination be recorded on a permanent tag attached to the extinguisher. The inspector issued the notice when he observed that the fire extinguisher on the trouble-shooter's truck did not have an attached tag. He did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard, or that the violation was caused by an unwarrantable failure on the part of Respondent. The condition was abated within the time prescribed by the inspector.

The parties agreed at the hearing to settle this case for \$61, the amount originally assessed by MSHA's Office of Assessments. This settlement was approved by the administrative law judge at the hearing. This approval is affirmed here.

D. Notice of Violation No. 2-LGM (December 20, 1976)

Inspector Maloney issued Notice of Violation No. 2-LGM on December 20, 1976, citing 30 CFR 77.400(a). He issued the notice after he observed that the V-belt and pulleys on a gasoline motor and air compressor mounted on the bed of a service truck were unguarded. The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by unwarrantable failure on the part of the Respondent. The condition was abated within the time prescribed by the inspector.

The parties agreed at the hearing to settle this case for \$90, the amount originally assessed by MSHA's Office of Assessments. This settlement was approved by the administrative law judge at the hearing. This approval should be affirmed here.

E. Notice of Violation No. 1-LGM (December 22, 1976)

Inspector Maloney issued Notice No. 1-LGM on December 22, 1976, citing 30 CFR 77.1104. The inspector issued the notice when he observed that the ground in the area of the storage tanks was saturated with diesel fuel. Diesel fuel oozed from the ground when the inspector kicked away a surface layer of pea gravel. The inspector did not observe an ignition source in the area and warning signs against smoking and open flames were present. This accumulation of diesel fuel was in violation of section 77.1104.

It was improbable that an accident would occur because of the absence of ignition sources. Fire extinguishers are set in the area to stop fire which occurred outside the tanks. However, if a fire were to occur within the tanks, it could not be stopped.

No negligence on the part of the Respondent was shown. The inspector testified that the condition was not readily observable. People did not walk in the area on a regular basis.

The condition was abated with a normal degree of good faith, once the notice was issued.

F. Notice of Violation No. 4-LGM (February 17, 1977)

Inspector Maloney issued Notice of Violation No. 4-LGM on February 17, 1977, citing 30 CFR 77.1607(d). This section requires that cabs be kept free of extraneous material. The inspector issued the notice when he observed extraneous items in the cab of a truck being used by welders. These extraneous materials were as follows: welding rod containers, tank regulators, a cutting torch, a welding hood, a jumbo air chuck, a fire extinguisher and other miscellaneous materials. The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that the condition was caused by an unwarrantable failure on the part of the Respondent. The condition was abated within the time limit prescribed by the inspector.

The parties agreed at the hearing to settle this case for \$74, the amount originally assessed by MSHA's Office of Assessments using the approved formula. This settlement was approved at the hearing by the administrative law judge. This approval is affirmed here.

G. Notice of Violation No. 1-LGM (March 9, 1977)

Inspector Maloney issued Notice No. 1-LGM on March 9, 1977, citing 30 CFR 77.1110. He issued the notice when he observed that a permanent tag recording a current examination date had not been attached to the fire extinguisher in a coal haulage truck. The inspector did not find

that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by an unwarrantable failure on the part of the Respondent. The condition was abated within the time specified by the inspector.

The parties agreed at the hearing to settle this case for \$74, the amount originally assessed by MSHA's Office of Assessments. This settlement was approved by the administrative law judge at the hearing. This approval is affirmed here.

H. Notice of Violation No. 2-LGM (March 9, 1977)

Inspector Maloney issued Notice No. 2-LGM on March 9, 1977, citing 30 CFR 77.1110. He issued this notice when he observed that the extinguisher on a coal haulage truck did not have an examination date tag affixed to it and its pin had been pulled. The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by unwarrantable failure on the part of the Respondent. The condition was abated within the time prescribed by the inspector.

The parties agreed at the hearing to settle this case for \$46, the amount originally assessed by MSHA's Office of Assessments. This settlement was approved by the administrative law judge at the hearing. This approval is affirmed here.

I. Notice of Violation No. 1-LGM (March 10, 1977)

Inspector Maloney issued Notice No. 1-LGM on March 10, 1977, citing 30 CFR 77.204(b). He issued the notice when he observed a buildup of grease in two places along a catwalk which went up the boom on the dragline. The grease covered steps and handrails in the affected area.

At the hearing, the inspector testified that he had incorrectly cited 30 CFR 77.204(b) in the notice when he had intended to cite 30 CFR 77.205(b). Because of this, the parties agreed to settle this case for \$25, rather than the \$58 originally assessed by MSHA's Office of Assessments.

There is no indication on the record that this was a serious violation or one involving negligence on the part of the Respondent. The condition was abated within the time prescribed by the inspector.

This settlement was approved at the hearing by the administrative law judge. This approval is affirmed here.

Docket No. DENV 78-492-P

Three violations of mandatory standards are included within Docket No. DENV 78-492-P. Each of these alleged violations was the object of a 104(b) notice of violation issued at Respondent's Big Brown Strip Mine. These notices are discussed below in the order of their issuance.

A. Notice of Violation No. 3-LGM (March 14, 1977)

Inspector Maloney issued Notice No. 3-LGM on March 14, 1977, citing 30 CFR 77.1102. The inspector issued this citation when he noted that a service truck was equipped with a sign warning against smoking, but not with one warning against open flame. At the time the notice was issued, the truck had been hauling a quantity of oil and diesel fuel on the mine haul road. Section 77.1102 requires that signs warning against smoking and open flame be posted so that they can be readily seen in places where fire or explosion hazards exist. In view of the cargo carried by the truck, the failure to equip it with a sign warning against open flame was in violation of section 77.1102.

The inspector did not find that the condition was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard or that it was caused by an unwarrantable failure on the part of the Respondent. The condition was abated with a normal degree of good faith.

The parties agreed at the hearing to settle this case for \$46, the amount originally assessed by MSHA's Office of Assessments. This settlement was approved by the administrative law judge at the hearing. This approval is affirmed here.

B. Notice of Violation No. 1-LGM (March 16, 1977)

Inspector Maloney issued Notice No. 1-LGM on March 16, 1977, citing 30 CFR 77.1607(p). While in the No. 2 pit, the inspector stopped a front-end loader which had been loading coal. The operator of the vehicle left the cab and stepped to the ground without lowering the bucket to the ground first. The bucket remained suspended approximately 3-1/2 feet in the air. This failure to lower the bucket was in violation of section 77.1607(p) which requires that "buckets \* \* \* shall be secured or lowered to the ground when not in use."

No negligence existed on the part of the Respondent. It was not a policy at the mine to allow buckets to remain suspended when not in use. This violation was the fault of the machine operator.

It was improbable that the machine operator's failure to lower this bucket would cause accident or injury. There were four people

in the area at the time the violation occurred. All four were immediately aware of the condition and the danger presented by it.

The condition was abated immediately.

C. Notice of Violation No. 1-LGM (June 16, 1977)

Inspector Maloney issued Notice No. 1-LGM on June 16, 1977, citing 30 CFR 77.1605(a). The inspector issued the notice because the bottom windows in the cab doors of a bulldozer had been removed. These windows had been removed by the machine operator to allow better ventilation of the cab. The absence of this glass was technically a violation of section 77.1605.

It is improbable that this violation would cause accident or injury. The inspector testified that he saw very little danger to be presented by this condition.

The inspector had no knowledge of the length of time the window had been missing.

The Respondent demonstrated good faith in abating the condition, once the notice of violation was issued.

There is no evidence that any penalty which might be assessed in the cases discussed above would affect Respondent's ability to continue in business.

Penalties

In consideration of the findings of fact and conclusions of law in this decision based on stipulations and evidence of record; the following assessments are appropriate under the criteria of section 109(a) of the Act.

Docket No. DENV 78-51-P

Notice of Violation No. 2-LGM (May 17, 1977) \$100

Docket No. DENV 78-485-P

Notice of Violation No. 2-LGM (September 15, 1976) \$24  
Notice of Violation No. 5-LGM (September 15, 1976) \$28  
Notice of Violation No. 1-LGM (September 16, 1976) \$28

Docket No. DENV 78-503-P

Notice of Violation No. 1-LGM (October 12, 1977) \$82

Docket No. DENV 78-486-P

Notice of Violation No. 1-JF (March 4, 1976)	\$61
Notice of Violation No. 1-LGM (May 12, 1976)	\$55
Notice of Violation No. 1-LGM (May 13, 1976)	\$74
Notice of Violation No. 1-LGM (May 25, 1976)	\$78
Notice of Violation No. 1-LGM (August 16, 1976)	\$78
Notice of Violation No. 2-LGM (August 16, 1976)	\$78

Docket No. DENV 78-487-P

Notice of Violation No. 1-CH (December 28, 1976)	\$98
Notice of Violation No. 2-LGM (January 5, 1977)	\$120
Notice of Violation No. 2-LGM (January 6, 1977)	\$90
Notice of Violation No. 1-LGM (January 10, 1977)	\$90

Docket No. DENV 78-491-P

Notice of Violation No. 3-JF (March 29, 1976)	\$110
Notice of Violation No. 1-LGM (July 28, 1976)	\$78
Notice of Violation No. 1-LGM (December 22, 1976)	\$86

Docket No. DENV 78-492-P

Notice of Violation No. 1-LGM (March 16, 1977)	\$90
Notice of Violation No. 1-LGM (June 16, 1977)	\$64

Settlements

The settlements discussed above were negotiated and approved in conformance with the statutory criteria for assessment of civil penalties. In each instance, the approval of settlement by the administrative law judge at the hearing is affirmed here. The settlements and corresponding penalties are as follows:

Docket No. DENV 78-485-P

Notice of Violation No. 2-LGM (February 2, 1977)	\$43
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Docket No. DENV 78-486-P

Notice of Violation No. 1-LGM (May 24, 1976)	\$78
Notice of Violation No. 3-LGM (May 24, 1976)	\$55
Notice of Violation No. 1-LGM (September 29, 1976)	\$78

Docket No. DENV 78-487-P

Notice of Violation No. 1-LGM (January 5, 1977)	\$115
Notice of Violation No. 2-LGM (January 10, 1977)	\$98

Docket No. DENV 78-491-P

Notice of Violation No. 1-LGM (August 4, 1976)	\$61
Notice of Violation No. 2-LGM (December 20, 1976)	\$90
Notice of Violation No. 4-LGM (February 17, 1977)	\$74
Notice of Violation No. 1-LGM (March 9, 1977)	\$74
Notice of Violation No. 2-LGM (March 9, 1977)	\$46
Notice of Violation No. 1-LGM (March 10, 1977)	\$25

Docket No. DENV 78-492-P

Notice of Violation No. 3-LGM (March 14, 1977)	\$46
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ORDER

The civil penalty proceeding with respect to Notice of Violation No. 1-JDC (May 6, 1976), Notice of Violation No. 2-LGM (September 30, 1976), and Notice of Violation No. 1-LGM (January 6, 1977), are hereby DISMISSED.

With respect to the remaining notices of violation included within the above-captioned civil penalty proceedings, it is ORDERED that payment in the amount of \$2,395 be made within 30 days of the date of this decision.



Forrest E. Stewart  
Administrative Law Judge

Issued: April 5, 1979

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Standard Distribution



Gravity, Negligence and Good Faith

Order of Withdrawal No. 1 JDD (7-8) (Order No. 7-0008)

The subject order alleged that the roof support plan was not being followed on the 4th East Section to a point approximately 150 feet outby the belt fender in that a boom hole had been shot out in the mine roof and the roof bolts were installed 5-1/2 to 6 feet apart, whereas the roof support plan required that they be set on 4-foot centers lengthwise and crosswise. Petitioner asserts that the mining height in the No. 2-A Mine is low so areas must sometimes be dug out of the roof into the rock so certain machinery or activities can have enough height to be performed--these holes into the rock are called "boom holes". To make a boom hole, of course, the existing roof bolts in that area must be removed and then should be replaced in the boom rock hole. The roof bolts had been replaced in the boom hole a greater distance apart than allowed by the roof control plan (Govt. Exh. No. P-3). According to petitioner, Inspector Dotson would deny that the area had been mined wider than allowed as stated in the Narrative Statement of the Office of Assessments (Govt. Exh. No. P-9). The violation was not having the roof bolts in the boom hole close enough together. Inspector Dotson is of the opinion that no miner was endangered although any of 14 miners could be injured or killed in the unlikely event the boom hole roof did fall.

Petitioner maintains that the mine operator knew the requirements of its roof control plan and the violation is the result of ordinary negligence. The condition was abated in 3 hours which demonstrated a normal degree of good faith.

Order of Withdrawal No. 2 JDD (7-11) (Order No. 7-0011)

The above order again alleged that the roof control plan was not being followed in the 4th East Section in that a boom hole had been dug out of the mine roof to allow enough height and the roof bolts had either not been reinstalled or were installed too far apart. There were no excessive widths mined in a roadway as stated in the Office of Assessment's Narrative Statement.

Petitioner maintains that Inspector Dotson is of the opinion that two workers were exposed to probable risk by reason of the condition. Since respondent knows the requirements of its roof control plan, ordinary negligence was demonstrated.

With respect to a showing of good faith on the part of respondent, the condition was abated in less than 3 hours, which demonstrates a normal degree of good faith.

Order of Withdrawal No. 3 JDD (7-13) (Order No. 7-0013)

The above order alleged that the roof control plan was not being followed in the No. 2 Entry in the 4th East Section in that the roof bolts were spaced further apart than the plan called for. But again, petitioner asserts that there were no excessive widths in the roadway as mentioned in the Narrative Statement of the Office of Assessments. However, the roof was drummy. According to petitioner, the condition is the result of ordinary negligence for the same reasons stated in discussing the above two orders of withdrawal. Petitioner further submits that the condition was abated the following day which demonstrates a normal degree of good faith.

Size of Business

Petitioner asserts that there is a limited present market for the quality of coal produced by the No. 2-A Mine, but the respondent can still pay any reasonable amount that may be assessed for each of the three violations under consideration, without an adverse effect on its business.

Previous History

Petitioner has submitted a computer printout concerning respondent's prior history of violations for the period January 1, 1970, to January 26, 1977. During this 7-year period, there have been eight prior 30 CFR 75.200 violations, and a total of 280 prior violations of all types. I cannot conclude that this constitutes a significant prior history of violations.

ORDER

After careful consideration of the detailed analysis submitted by the petitioner in support of its motion, particularly with respect to the question of gravity, good faith compliance, and respondent's size and history of prior violations, I conclude that petitioner's proposed civil penalty assessment is reasonable in the circumstances presented. Accordingly, the settlement is approved, and respondent IS ORDERED to pay for violations of 30 CFR 75.200 a civil penalty in the amount of \$1,800 for Order No. 7-0008 (1 JDD), January 26, 1977,

\$2,000 for Order No. 7-0011 (2 JDD), January 26, 1977, and \$2,500 for Order No. 7-0013 (3 JDD), January 26, 1977, within thirty (30) days of the date of this decision and order.

  
George A. Koutras  
Administrative Law Judge

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Standard Distribution

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 9, 1979

CLIMAX MOLYBDENUM COMPANY,	:	Applications for Review
A division of AMAX, Inc.,	:	
Applicant	:	Docket No. DENV 78-556-M
v.	:	Citation No. 331770
	:	August 2, 1978
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. DENV 78-562-M
ADMINISTRATION (MSHA),	:	Citation No. 333299
Respondent	:	August 7, 1978
	:	
CLIMAX MOLYBDENUM WORKERS,	:	Climax Mine
LOCAL NO. 2-24410, OIL,	:	
CHEMICAL AND ATOMIC WORKERS	:	
INTERNATIONAL UNION,	:	
Respondent	:	

DECISION GRANTING MOTIONS TO DISMISS

Appearances: William F. Schoeberlein, Esq., Charles W. Newcom, Esq., Dawson, Nagel, Sherman & Howard, Denver, Colorado, for Applicant;  
Robert A. Cohen, Esq., Office of the Solicitor, Department of Labor, for Respondent, MSHA;  
Edward L. Farley, Leadville, Colorado, for Respondent, Oil, Chemical and Atomic Workers International Union, Local No. 2-24410.

Before: Judge Cook

Applications pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (1977 Mine Act), for review of citations issued pursuant to section 104(a) of the 1977 Mine Act, were filed for Climax Molybdenum Company (Climax).

On February 15, 1979, MSHA filed motions to dismiss these proceedings in which it was alleged that the citations involved have been fully abated and that such citations have been terminated. Those motions went on to state, in part, as follows:

\* \* \* \* \*

2. The Board of Mine Operations Appeals in considering a similar review provision in the Federal Coal Mine Health and Safety Act of 1969 (1969 Act) (Sec. 105(a)) held that Citations such as the subject one (104(b) Notices in the 1969 Act) could not be reviewed after the cited violation had been abated because there no longer existed an issue for review. Reliable Coal Corporation, 1 IBMA 50, 59 (1971).

3. The 1977 Act likewise does not provide for review of an abated Citation, and provides for review of an unabated citation only as to whether or not the time for abatement is reasonable. Helvetia Coal Company, PITT 78-322 (August 23, 1976); Monterey Coal Company, VINC 78-372 (June 19, 1978); Peter White Coal Mining Corp., HOPE 78-371 (June 16, 1978); Itmann Coal Co., HOPE 78-356 (May 26, 1978).

Climax filed a memorandum in response to such motions on February 28, 1979. In that memorandum Climax agreed that such citations had been abated, but set forth legal arguments in opposition to such motions.

The motions to dismiss will be granted because Climax in these proceedings is apparently not now challenging the reasonableness of the length of abatement time fixed in the citations and the Applicant is premature as to a review of the citations on any other issue. There is no showing that a notice of proposed assessment of penalty has been issued in these cases as yet.

Section 104(a) of the 1977 Mine Act provides for the issuance of citations by an inspector for violations committed by an operator of a mine.

Section 105(a) of the 1977 Mine Act provides in pertinent part:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. \* \* \* If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the

citation and the proposed assessment of penalty shall be deemed a final order of the Commission \* \* \* [Emphasis added.]

Section 105(d) of the 1977 Mine Act also sets forth provisions for the assessment of penalties where the Secretary believes an operator has failed to correct a violation within the period permitted for its correction. Under this provision, the operator also has 30 days within which to contest the Secretary's "notification of the proposed assessment of penalty."

Section 105(d) of the 1977 Mine Act provides in pertinent part:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, \* \* \* the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing \* \* \*. [Emphasis added.]

A study of subsection 105(d) shows that Congress provided for review to be obtained as relates to three categories of actions taken by representatives of the Secretary of Labor. First, an operator is permitted to "contest the issuance or modification of an order issued under section 104." Second, an operator is permitted to obtain review of a "citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b)" of section 105. Third, an operator is permitted to obtain review of "the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104."

In view of subsection 105(a), the words of subsection 105(d) referring to review of "a citation or notification of proposed assessment of a penalty issued under subsection (a) or (b) \* \* \*" must be read to mean that the citation can be reviewed when the notification of proposed assessment is reviewed.

It is therefore clear that the time for Climax to file an application to review a citation will not begin to run until after a notice of proposed assessment of penalty has been received by the operator, except in the instance where the operator intends to contest the reasonableness of the length of abatement time fixed in the citation. The issue as to the validity of the citation will then be determined in the civil penalty proceeding.

The operator can then contest both the fact of violation (i.e., the citation) and the amount of the penalty, assuming there is a violation. If it fails to file such a notice within 30 days as provided, both the citation and the penalty become a final order of the Commission.

This interpretation is supported by the legislative history. An extensive discussion of this history is contained in decisions on similar motions by Judge Steffey in Itmann Coal Company v. MSHA (HOPE 78-356), dated May 26, 1978, and Judge Merlin in United States Steel Corporation v. MSHA (PITT 78-335), dated July 11, 1978.

It should be further noted that under the Federal Coal Mine Health and Safety Act of 1969 (1969 Act) notices of violation (citations under the 1977 Mine Act) were not reviewable where abatement had occurred and no penalty was sought. Freeman Coal Mining Company, 1 IBMA 1 (1970); Reliable Coal Corporation, 1 IBMA 50 (1971); Lucas Coal Company, et al. v. Interior Board of Mine Operations Appeals, 522 F.2d 581 (3rd Cir. 1975).

The Court of Appeals for the Third Circuit stated that:

The Board's interpretation here (of section 105 of the 1969 Act as expressed in Freeman and Reliable) is a particularly acceptable one in view of the safety objectives of the Act, the obvious desirability of encouraging prompt abatement of violations while still allowing ultimate review, and the necessity of limiting review in order to permit more expeditious consideration of serious grievances. Lucas Coal Co., v. Interior Board of Mine Operations Appeals, 522 F.2d 581, 587 (1975). (Parenthetical portion added.)

The legislative history of the Federal Mine Safety and Health Amendments Act of 1977 contains nothing to indicate that Congress intended to change the Board's interpretation of section 105 of the 1969 Act as stated in Freeman and Reliable. Since all of the alleged violations were abated, the subject citations may not be reviewed under section 105(d). The "reasonableness of the length of time set for abatement by a citation" is the only issue reviewable in a section 105(d) proceeding to review citations. Abatement of the citation renders the issue of "reasonableness of time" moot. Review of fact of violation remains available through a challenge to the civil penalty assessed under section 110.

The Procedural Rules of the Federal Mine Safety and Health Review Commission contain certain regulations relating to the processing of applications for review of citations and orders. Part of these rules are contained in 29 CFR 2700.18(a). If it were not for the fact that the intent of Congress is expressed in subsections 105(a) and (b) and subsection 105(d) of the 1977 Act, it would be possible to argue that

29 CFR 2700.18(a) allows review of citations generally rather than only as to the reasonableness of the length of abatement time. However, the word "citation" in the regulation cannot be construed to grant more than the type of review of a citation which the statute itself grants at that stage, and that is a review of the reasonableness of the time for abatement. Unlimited review of the citation will eventually be obtained, but that will take place during the course of the civil penalty proceeding.

In view of the statements of the Court of Appeals in Sink v. Morton, 529 F.2d 601 (4th Cir. 1975), it is clear that no due process problem arises in this instance.

The court therein noted that the District Court:

[T]hough concluding that the obligation of the plaintiff to "exhaust his administrative remedies under the Act [was] entirely reasonable and in accord with accepted principles of administrative law," held that the plaintiff had made a showing of irreparable harm, without any countervailing interests of safety, by reason of the "failure of the Secretary of the Interior to utilize his discretion in order to provide a hearing before a mine closure order is issued" and had "had no opportunity to present his case to the appropriate authorities." For these reasons, it granted an injunction against the enforcement of the notice and withdrawal orders "pending a final administrative determination of the issues involved." [Footnote omitted.]

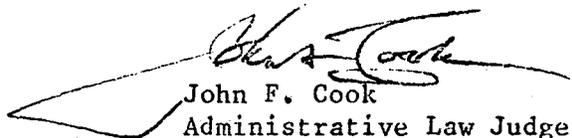
at 603.

The Court of Appeals ruled that the District Court erred in this finding. It went on to state:

Nor is it of any moment that the inspector's withdrawal orders were issued without a hearing. By appeal, the plaintiff can obtain a hearing, which, by the terms of the Act, is to be held as soon as practicable, and he is accorded the right to apply, as an incident to that appeal, for a temporary stay of the orders. Such procedure accords the plaintiff due process. Due process does not command that the right to a hearing be held at any particular point during the administrative proceedings; it is satisfied if that right is given at some point during those proceedings. Reed v. Franke (4th Cir. 1961) 297 F.2d 17, 27.

at 604.

Accordingly, MSHA's motions to dismiss are GRANTED. IT IS THEREFORE ORDERED that the above-captioned proceedings be, and they hereby are, DISMISSED.

  
John F. Cook  
Administrative Law Judge

Issued: April 9, 1979

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 11, 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PITT 79-11-P  
Petitioner : A/O No. 36-00926-03001  
v. :  
HELEN MINING COMPANY, : Homer City Mine  
Respondent :

DECISION

Appearances: Leo McGinn, Esq., Office of the Solicitor, Department of Labor, Arlington, Virginia, for Petitioner, MSHA; Todd D. Peterson, Jones, Day, Reavis and Pogue, Washington, D.C., for Respondent, Helen Mining Company.

Before: Judge Merlin

Statement of the Case

This case is a petition for the assessment of a civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977.

MSHA alleges a violation of section 103(f), the "walkaround" provision of the Act. A hearing was held on March 20, 1979. Both parties presented oral evidence (Tr. 9-36). At the conclusion of the taking of evidence, counsel waived the filing of written briefs, presented oral argument, and agreed to have a decision rendered from the bench (Tr. 36-80). Upon the conclusion of oral argument, a decision was rendered from the bench (Tr. 80-89).

Bench Decision

The bench decision is as follows:

The issue presented in this case is whether a miner representative who accompanies an MSHA inspector during a section 103(i) "spot inspection" is entitled to be paid pursuant to the provisions of section 103(f) of the Federal Mine Safety and Health Act of 1977.

The facts are undisputed. On April 6, 1978 an inspector of the Mine Safety and Health Administration made a spot inspection pursuant to section 103(i) of the Act. Section 103(i) directs, inter alia, that where a mine liberates excessive quantities of methane, it shall be inspected during every five working days.

On April 6, 1978 the inspector made a 103(i) inspection and during that inspection was accompanied by a miner representative for three hours. The operator refused to pay the miner representative for the three hours, resulting in the issuance of the subject citation and order, and also resulting in the assessment of a civil penalty and filing of the instant petition.

The evidence also shows that three days earlier, on April 3, 1978, this inspector had begun a "regular" inspection of the mine. Section 103(a) requires that each underground coal mine be inspected in its entirety at least four times a year. Each total inspection is of course done over a period of time, and the individual inspections which comprise the total inspection are referred to as "regular" inspections.

On April 6, 1978 the inspector performed a 103(i) spot inspection for methane instead of continuing on the regular inspection which he was performing during that period. The inspector testified, however, that a regular 103(a) inspection and a 103(i) spot inspection could be going on at the same time with two different inspectors, and that if this were so, MSHA would require that if miner representatives accompanied both inspectors, both miner representatives be paid. Accordingly, it makes no difference that in this case only the spot inspection was being performed because it is MSHA's position that all walkarounds on 103(i) spot inspections must be compensated pursuant to section 103(f). Section 103(f) provides that a miner representative shall be given the opportunity to accompany the MSHA inspector during the physical inspection of any coal or other mine made under section 103(a), and that the miner representative shall suffer no loss of pay while he so participates in the inspection.

It is the operator's position that under 103(f) it is required to pay only the miner representative who accompanies an MSHA inspector on a regular inspection, and that, therefore, it was not required to pay the miner representative in this case who accompanied the inspector on a section 103(i) spot inspection.

MSHA's position is that the operator is required to pay the miner representative who participated for three hours in the 103(i) spot inspection. As the Solicitor's oral argument makes clear, MSHA's position is predicated essentially upon the Interpretive Bulletin published by the Secretary of Labor at 43 Federal Register 17546, April 25, 1978. The Bulletin recognizes that the participation and payment provisions of section 103(f) refer to inspections made pursuant to section 103(a). However, the Bulletin refers to all the purposes enumerated in 103(a) for which inspections are made, including determinations for imminent danger and violations. Since 103(i) spot inspections are made for the purposes of finding imminent dangers or violations, the Bulletin takes the position that a spot inspection constitutes an inspection under 103(a) for purposes of the participation and payment provisions of 103(f). According to the Bulletin, the requirement of four inspections per year for each mine in its entirety as set forth in section 103(a) is only a statutory minimum and has nothing to do with the right of participation or the right to compensation. It is on this basis that MSHA contends in this case the operator must pay the miner representative who accompanied the inspector under 103(i) spot inspections.

I have carefully considered MSHA's position as explained here today at length by the Solicitor and as set forth in the Interpretive Bulletin. I am unable to accept MSHA's position. I recognize the Interpretive Bulletin represents the Secretary's position, and that it should be reviewed in light of the Secretary's responsibilities under the Act. However, the Interpretive Bulletin is not binding upon me. This was expressly decided by the United States District Court for the District of Columbia in Bituminous Coal Operators Association, Inc. versus Marshall and the United Mine Workers, Civil Action No. 78-0731, (January 11, 1979).

I must review and judge the Interpretive Bulletin in light of the language of the statute and the legislative history. The Interpretive Bulletin and the interpretation advanced by the Solicitor here today in effect, read section 103(i) back into 103(a). In addition, the Bulletin recognizes that there are other inspections such as those under 103(g) which are performed at the request of a miner. The Bulletin also reads these inspections back into subsection (a) by relying upon the purposes for which such inspections

are carried out, i.e., discovering violations or imminent dangers.

The insuperable difficulty I have with this approach is that if section 103(f) covered all inspections, it could have provided for walkarounds and payments for all inspections without making any reference whatsoever to subsection (a). Reference to subsection (a) must be regarded as a limitation because it leaves out the other subsections pursuant to which inspections also are undertaken. Any other interpretation renders the reference to subsection (a) as it appears in subsection (f) meaningless. Accordingly, reading the other subsections, such as (i) and (g) back into subsection (a) in the manner of the Interpretive Bulletin in effect violates the language of the statute and the way it is written and organized. In this connection also I note that subsection (f) precedes (i) and (g). I conclude, therefore, that the reference in 103(f) to inspections under 103(a) means the regular inspections described in that section.

On this basis, I conclude the operator was not required to pay for the walkaround in this case, and that, therefore, there was no violation.

During oral argument great attention was given, both by the Solicitor and operator's counsel, to the remarks of Congressman Perkins who was the manager of the Conference Committee for the House of Representatives. When introducing the conference bill and report to which the House and Senate conferees had agreed, Congressman Perkins explained on the floor of the House the meaning of section 103(f) with respect to compensation. First, the congressman set forth all the purposes for which inspections are performed under 103(a) and that each mine must be inspected in its entirety at least four times a year. He then pointed out that in addition to the regular inspections performed under subsection (a), inspections also were performed under subsections (i) and (g). Turning then to section 103(f), Congressman Perkins gave the following explanation with respect to compensation: "Since the conference report reference is limited to the inspections conducted pursuant to section 103(a), and not to those pursuant to section (g) (1) or 103(i), the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the federal inspector, including pre and post-conferences, at no loss of pay only during the four regular inspections

of each underground mine and two regular inspections of each surface mine in its entirety, including pre and post-inspection conferences."

Congressman Perkins then compared section 103(f) of the present Act with section 103(h) of the 1969 Act, which gave the miner representatives the right to participate in "any" inspection, but which had no provision at all for compensation. The congressman then stated as follows: "Since the conference report does not refer to any inspection, as did section 103(h) of the 1969 Act, but rather to an inspection of any mine pursuant to subsection (a), it is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the regular inspections mandated by subsection (a), and not for the additional inspections otherwise required or permitted by the Act."

Finally, the congressman stated: "Beyond these requirements regarding no loss of pay, a representative authorized by the miners shall be entitled to accompany inspectors during any other inspection exclusive of the responsibility for payment by the operator."

The congressman's statements appear at Volume 123, No. 174, Congressional Record, H-11663, Daily Edition, October 27, 1977; and in Legislative History, Committee Print (July 1978) at pages 1356 to 1358.

Immediately after Congressman Perkins' statements, the House of Representatives voted to pass the bill. I believe the congressman's remarks regarding the operator's obligation to pay for walkarounds are too clear to be ignored and do not point to any interpretation other than that the operator only has to pay for the walkarounds on the four regular inspections. As the Solicitor has persuasively stated, it may be desirable to compensate miner representatives who accompany MSHA inspectors on all inspections. This, however, is not what the Act presently says. Moreover, the congressman, who perhaps had more to do with the enactment of this legislation than any other, specifically stated the opposite. I cannot legislate and neither can the Secretary. Change must come from Congress.

One final matter: I recognize that limiting the right to compensation to regular inspections performed

under subsection (a) may raise a question of whether there is a walkaround right for inspections other than regular inspections. Congressman Perkins' statement quoted above indicates that the miner representative can accompany the inspector during any inspection other than a regular inspection, exclusive of the operator's responsibility to pay. The statutory basis of the congressman's assertion of the general walkaround right for all inspections is not apparent. Be that as it may, however, the congressman's explanations limiting the operator's obligation to compensate walkarounds is so clear and the statutory language regarding the limited obligation to pay under these circumstances is so clear to me that they simply cannot be ignored. Here, again, if the walkaround right without compensation has inadvertently been limited, then the remedy lies with Congress. However, I must point out that for present purposes, this issue is not presented in this case, and I do not have to decide it. I only make the general observation that if the problem exists, it is one to be set right by legislation and not by administrative fiat. Of course, based upon the representations made to me during oral argument, it appears that as a practical matter, the problem does not exist because the walk-around right is available during all inspections, generally, pursuant to the union contract.

In light of the foregoing, therefore, I find there was no violation. <sup>1/</sup> MSHA's petition for the assessment of a civil penalty is hereby dismissed. I express my appreciation to both counsel for the very fine oral arguments that were made.

#### ORDER

It is hereby ORDERED that the foregoing bench decision be affirmed, that no penalty be assessed for the reason that no

1/ Administrative Law Judge Michael A. Lasher, Jr., interpreted section 103(f) in a similar manner in two recent decisions. Kentland-Elkhorn Coal Corporation v. Secretary of Labor and United Mine Workers (PIKE 78-399) and Magma Copper Company v. Secretary of Labor and United Steel Workers (DENV 78-533-M), dated March 8, 1979.

violation existed and that the instant petition for a penalty assessment be DISMISSED.



Paul Merlin  
Assistant Chief Administrative Law Judge

Issued: April 11, 1979

**Distribution:**

Leo McGinn, Esq., Office of the Solicitor, MSHA, U.S.  
Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Todd D. Peterson, Esq., Jones, Day, Reavis & Pogue,  
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Administrator, Coal Mine Safety and Health, U.S. Department  
of Labor

Standard Distribution

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 12, 1979

CONSOLIDATION COAL COMPANY,	:	Application for Review
Applicant	:	
v.	:	Docket No. PITT 79-161
	:	
SECRETARY OF LABOR,	:	Order No. 231630
MINE SAFETY AND HEALTH	:	January 19, 1979
ADMINISTRATION (MSHA),	:	
Respondent	:	Westland Mine
	:	
UNITED MINE WORKERS OF AMERICA,	:	
Respondent	:	

DECISION

Appearances: Michel Nardi, Esq., and Karl Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Applicant;  
James H. Swain, Esq., and Sidney Salkin, Esq., Office of the Solicitor, Department of Labor, Philadelphia, Pennsylvania, for Respondent MSHA;  
Joyce Hanula, Esq., and Mary Lu Jordan, Esq., for the United Mine Workers.

Before: Judge Merlin

Statement of the Case

This is a proceeding filed under section 105(d) of the Federal Mine Safety and Health Act of 1977 by Consolidation Coal Company for review of an order of withdrawal issued by an inspector of the Mine Safety and Health Administration (MSHA) under section 104(d)(2) of the Act.

Pursuant to a notice of hearing issued March 5, 1979, this case was set for hearing on April 3, 1979, in Arlington, Virginia. The hearing was held as scheduled. The operator, MSHA, and the United Mine Workers appeared and presented evidence (Tr. 8-132). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, agreed to have a decision rendered from the bench, and set forth their positions in oral argument.

### Bench Decision

The decision rendered from the bench is as follows:

The validity of a section 104(d)(2) order is being challenged in this case. The parties agree that the issues are the existence of a violation and unwarrantable failure.

With respect to the existence of a violation the cited section is 75.1002 which provides "Trolley wires and trolley feeder wires, high voltage cables and transformers shall not be located in by the last open cross-cut and shall be kept at least 150 feet from pillar workings."

Admittedly, a battery charger was within the area prohibited by the mandatory standard. The question is whether a battery charger is a transformer within the meaning of the mandatory standard. The Government's electrical expert testified that a battery charger has two components, a transformer and a rectifier. With respect to the battery charger in this case, the transformer would reduce voltage, and the rectifier would convert AC voltage to DC voltage. Because a transformer is one of the two integral parts of a battery charger, I hold that where a transformer is present in the battery charger, the citation of a battery charger under section 75.1002 includes a transformer.

In this case the inspector did not actually look in the battery charger to see if the transformer was present. However, batteries on the scoop were changed in the normal manner with the rundown battery being placed on the rack of this battery charger either for storage or to be recharged. Indeed, because the battery charger was in the subject location for 10 days, and because the scoop during that period was being used to haul materials for longwall mining, I conclude that the battery charger must have been used to charge batteries. Of course, in order to charge the scoop's batteries, the battery charger had to have its transformer. Accordingly, I conclude the battery charger, in this instance, contained the transformer, as would be normal practice. If the transformer was not in the battery charger, then it was incumbent upon the operator to prove this deviation from normal practice, which it did not do.

I recognize that another mandatory standard, section 75.1105, specifically refers to transformer

stations and battery charging stations. Section 75.1105 is, of course, a different mandatory standard designed to cover other situations. I do not view it as dispositive here. Rather, I remain persuaded by the fact that in this case the transformer is one of the two indispensable components of the battery charger, a fact which the testimony of MSHA's electrical expert shows is known to all knowledgeable people in the field. All of the operator's employees do not, of course, have to be electricians; but those in charge should be apprised of the components of the equipment they are dealing with so that they may discharge their duties in accordance with the mandatory standards.

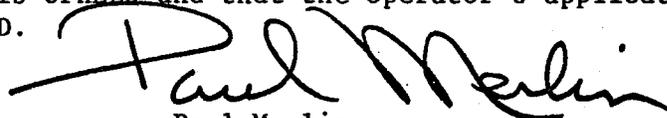
Accordingly, I conclude a violation within the purview of section 75.1002 existed and was validly cited.

Longwall mining had been going on for 10 days before the subject order was issued. The evidence shows without dispute that for these 10 days this equipment was in a prohibited location. The operator, through its management personnel, knew of this situation during the entire period. This constitutes unwarrantable failure.

The subject order is hereby upheld. The application for review is dismissed.

ORDER

The bench decision is hereby affirmed. Accordingly, it is ORDERED that Order No. 231630 is UPHeld and that the operator's application for review is DISMISSED.



Paul Merlin  
Assistant Chief Administrative Law Judge

Issued: April 12, 1979

Distribution:

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Joyce A. Hanula, Legal Assistant, United Mine Workers of America, 900 15th Street, NW., Washington, DC 20005 (Certified Mail)

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES

4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

APR 13 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner : Docket No. MORG 78-314-P  
v. : A. C. No. 46-01429-02020I  
EASTERN ASSOCIATED COAL CORP.,  
Respondent : Federal No. 1 Mine

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, U.S.  
Department of Labor, for Petitioner;  
R. Henry Moore, Esq., Rose, Schmidt, Dixon, Hasley,  
Whyte, and Hardesty, Pittsburgh, PA, for Respondent.

Before: Judge Lasher

This proceeding arose under section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970). Pursuant to section 301(c)(3) of the Federal Mine Safety and Health Act of 1977, proceedings pending at the time such act takes effect shall be continued before the Federal Mine Safety and Health Review Commission.

A hearing on the merits was held in Morgantown, West Virginia, on March 20, 1979. After considering evidence submitted by both parties, and argument, I entered a detailed oral opinion on the record at the close of the hearing. It was found that the violation charged did occur. I also found that the violation was serious, that it resulted from gross negligence on the part of Respondent, that Respondent is a large mine operator with an average history of violations, and had abated the violation in good faith. It was further determined that a penalty otherwise warranted by consideration of the other penalty assessment criteria provided by statute would have no adverse affect on Respondent's ability to continue in business. Respondent was assessed a penalty of \$5,000.00 for the violation charged in Notice No. 1 MES dated September 2, 1976.

Respondent is ordered to pay MSHA the penalty assessed of \$5,000.00 within 30 days from the date of this decision.

  
Michael A. Lasher, Jr., Judge

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 17, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding	
MINE SAFETY AND HEALTH	:		
ADMINISTRATION (MSHA),	:	<u>Docket Nos.</u>	<u>Assessment Control Nos.</u>
Petitioner	:		
v.	:	PIKE 78-365-P	15-09746-02005V
	:	PIKE 78-380-P	15-09746-02006
SKYVIEW MINING, INC.,	:		
Respondent	:	No. 4 Mine	

DECISION

Appearances: Eddie Jenkins, Esq., Office of the Solicitor,  
Department of Labor, for Petitioner;  
Harold Akers, President, Skyview Mining, Inc.,  
Pikeville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to written notice dated October 11, 1978, a hearing in the above-entitled proceeding was held on November 14, 1978, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

The Petitions for Assessment of Civil Penalty in Docket Nos. PIKE 78-365-P and PIKE 78-380-P were filed on May 12, 1978, and June 8, 1978, respectively, and each Petition seeks assessment of a civil penalty for one alleged violation of the mandatory safety standards.

Completion of the Record

Respondent's president asked that his company's financial condition be considered in the assessment of penalties. As part of respondent's evidence, respondent agreed to provide bank statements received by respondent from the time respondent stopped mining coal in June 1978 up to the time of the hearing held in November 1978. It was agreed at the hearing that the bank statements would be provided to me after all testimony had been received and that I would mark the bank statements as exhibits and would receive them in evidence at the time I prepared my decision in this proceeding (Tr. 23).

A one-page statement of account for Skyview Mining, Inc., issued on July 31, 1978, by the First National Bank of Pikeville is marked as Exhibit A; a one-page statement of account dated August 31, 1978, is marked as Exhibit B; a one-page statement of account dated September 30, 1978, is marked as Exhibit C; and a one-page activity statement dated October 31, 1978, is marked as Exhibit D. Pursuant to the agreement of the parties, Exhibits A through D are received in evidence (Tr. 22-24).

### Issues

The issues raised by the Petitions for Assessment of Civil Penalty are whether violations of 30 CFR 75.523 and 30 CFR 75.200 occurred and, if so, what monetary penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. At the hearing, respondent stipulated that the alleged violations occurred. Therefore, it was agreed that insofar as the criteria of negligence and gravity were concerned, penalties would be assessed on the basis of the conditions set forth in the inspector's notices of violation which were attached to the Petitions. Respondent, however, did elect to present evidence concerning two of the six criteria, namely, the size of respondent's business and the question of whether payment of penalties would affect respondent's ability to continue in business (Tr. 4).

I shall hereinafter make findings of fact with respect to the six criteria and penalties will thereafter be assessed based on those findings.

### History of previous violations

The inspector who wrote the notices of violation here involved stated that there is no history of previous violations to be considered (Tr. 15). Therefore, when penalties are hereinafter assessed, it will be unnecessary to consider the criterion of history of previous violations.

### Appropriateness of penalty to size of operator's business

Respondent opened the No. 4 Mine in 1976. The mine was developed with three entries for a distance of about 1,500 feet. Respondent then pulled out of the mine, extracting pillars as it withdrew. All coal reserves were exhausted at that point (Tr. 7-8).

During the time that the No. 4 Mine was in operation, respondent employed five miners to produce about 200 tons of coal per day. Respondent's equipment consisted of a scoop, loading machine, roof-bolting machine, and two Joy end-dump shuttle cars. The coal was shot from the solid, that is, no cutting machine was used before the coal was blasted loose. Respondent did not have conveyor belts and

all coal was transported to the surface in the shuttle cars (Tr. 6-8; 18).

On the basis of the facts given above, I find that respondent operated a small mine and that any penalties which are hereinafter assessed should be in a low range of magnitude to the extent that the penalties are based on the size of respondent's business.

Effect of penalties on operator's ability to continue in business

Summary of Respondent's Evidence Regarding Its Financial Condition

Skyview Mining, Inc., is a family corporation which was formed by the issuance of 300 shares of stock. The president of the corporation testified as a witness at the hearing. He owned 100 shares of stock, a cousin owned another 100 shares, and two other family members owned 50 shares each (Tr. 6). After the coal reserves in the No. 4 Mine had been exhausted, the members of the corporation recognized that they were not getting along harmoniously in running the corporation. Each of the four family members who had advanced capital to form Skyview Mining, Inc., was repaid in full and the president of Skyview Mining formed another corporation under the name of A. A. & W. Coal, Inc. When Skyview Mining, Inc., stopped mining coal in June 1978, it had in its possession a roof-bolting machine and a scoop on which a total amount of \$75,000 was owed. A. A. & W. assumed Skyview's payments on the scoop and roof-bolting machine in return for the use of the equipment in the new mine which A. A. & W. had opened (Tr. 9-11).

Skyview's president testified at the hearing that the balance in Skyview's bank account amounts at the present time to about \$1,300 and that there are no outstanding obligations to be paid from that balance other than the payment of civil penalties for violations of the mandatory health and safety standards. The president said that if respondent only owed for the two violations which are involved in this proceeding, he would not be concerned about having enough money in respondent's account to pay all penalties. The president noted, however, that respondent also owes penalties for several other violations which occurred while respondent was producing coal, but which have not yet become the subject of civil penalty proceedings. Skyview's president stated that he believed that the Assessment Office had proposed total penalties for all outstanding violations which would be greater than the assets which Skyview has for payment of such penalties (Tr. 13-14).

Discussion. Any findings that I make must be based on the facts presented by the parties. Examination of the bank statements submitted by respondent's president makes it difficult to find that respondent would be unable to pay any penalties that might be assessed in this proceeding. I base that conclusion upon several facts in the record.

First, Exhibit A shows that the other corporation, A. A. & W., formed by respondent's president advanced \$10,300 to Skyview's account in order to pay taxes and compensation owed by Skyview. Second, although respondent's president stated that he did not have authority as president of A. A. & W. to assume any of Skyview's obligations except for the roof-bolting machine and scoop which A. A. & W. is using, Exhibit A clearly shows that A. A. & W. advanced \$10,300 to Skyview in July 1978 to enable Skyview to pay taxes and other obligations.

The burden was on respondent to show that payment of penalties would have caused respondent to discontinue in business if it had not already done so. Alternatively, the burden was on respondent to demonstrate that if it had had to pay civil penalties when it was producing coal, such payments would have had an adverse effect on its ability to continue in business. The evidence shows instead, however, that respondent discontinued in business because all the coal reserves in the No. 4 Mine had been exhausted (Tr. 7). Although respondent's president testified that Skyview could not afford at the present time to open a new mine because it now costs about \$75,000 more to open a new mine than it did in 1976 (Tr. 8-9), the president later stated that the problem of Skyview's being able to continue in business was not a question of raising capital, but a question of the "family" stockholders' ability to run the corporation in an amiable fashion (Tr. 11).

The evidence also shows that A. A. & W. has assumed Skyview's obligations as to payment for equipment and payment of taxes. While respondent's president stated that he did not have authority to assume any of Skyview's other obligations (Tr. 12), it is a fact that the penalties which are sought in this proceeding relate to violations which occurred while Skyview was mining coal and therefore the payment of civil penalties is as much an obligation to be met by Skyview as the payment of taxes. There was certainly a balance in respondent's account as of the date of the hearing to pay any penalties which might be assessed in this proceeding. 1/

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1/ It should be noted that respondent still has in its possession two shuttle cars and a loading machine (Tr. 8) on which no debts are presumably owed because A. A. & W. did not have to assume any payments on that equipment to keep it from being repossessed when respondent stopped producing coal. Therefore, if respondent should not have enough funds in its checking account to pay penalties on all outstanding violations, and if A. A. & W. does not wish to deposit additional funds into respondent's account, respondent should be able to sell some of its equipment to obtain money for payment of civil penalties because the evidence indicates that respondent has no plans to open any more coal mines (Tr. 11).

### Good faith effort to achieve rapid compliance

Notice No. 12 RHH was written on February 1, 1977, citing respondent for failure to have an adequate panic bar on its Joy loading machine. The notice of termination was written on February 17, 1977, after two short extensions of time had been granted. Inspectors normally consider that an operator has shown good faith efforts to achieve rapid compliance when the violations are corrected within the time originally given or within the time given in notices of extension of time.

The other notice of violation involved in this proceeding, Notice No. 7 RHH, was also written on February 1, 1977. One extension of time was given and the violation was corrected by the expiration of the extended time period.

Based on the notices of extension of time and notices of termination, I find that respondent showed a normal good faith effort to achieve rapid compliance with respect to each notice of violation. Therefore, when penalties are hereinafter assessed, respondent will be given full credit for having achieved rapid compliance.

### Gravity and Negligence

Docket No. PIKE 78-365-P

#### Notice No. 7 RHH (7-8) 2/1/77 § 75.200

Findings. Section 75.200 requires each operator of a coal mine to submit to MSHA and to adopt a roof-control plan suitable to the roof conditions and mining system of each coal mine. Respondent's roof-control plan provides that roof bolts are to be installed on 4-foot centers. Respondent violated the provisions of its roof-control plan by installing roof bolts in the No. 1 through No. 5 entries in widths ranging from 5 to 15 feet from the rib line, starting at spad No. 1525. The violation was very serious because distances of up to 15 feet between roof bolts expose the roof to unusual stress with the result that a roof fall is likely to occur. Respondent was grossly negligent in installing roof bolts at distances which were almost four times the spacing permitted by its roof-control plan.

Conclusions. Roof falls continue to be the primary cause of deaths and injuries in underground coal mines. Even though respondent was a small operator, a roof-control violation of the gravity and high degree of negligence which is here involved warrants assessment of a penalty of \$300. There is no history of previous violations to be considered.

Docket No. PIKE 78-380-P

Notice No. 12 RHH (7-13) 2/1/77 § 75.523

Findings. Section 75.523 requires that electric face equipment be provided with devices which will permit the equipment to be deenergized quickly in the event of an emergency. Respondent violated section 75.523 because its Joy loading machine had not been provided with an adequate panic bar having proper design. The inspector's notice shows that respondent had equipped the loading machine with a panic bar but it was not properly designed. Since respondent had made an effort to provide a panic bar, there was a low degree of negligence. The fact that two notices of extension of time had to be issued for the reason that additional time was needed to obtain a satisfactory panic bar is an indication that respondent had difficulty in locating or designing the proper type of panic bar. Moreover, the inspector's notice does not say that the panic bar was inoperable. Consequently, I conclude that the panic bar would work but was not as long or in as convenient position as it should have been. In such circumstances, the evidence shows that the violation was only moderately serious.

Conclusions. Considering that a small operator is involved, that there was a low degree of negligence, that the violation was only moderately serious, and that there is no history of previous violations, a penalty of \$15 will be assessed for this violation of section 75.523.

Summary of Assessments and Conclusions

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

Docket No. PIKE 78-365-P

Notice No. 7 RHH (7-8) 2/1/77 § 75.200 ..... \$ 300.00

Total Assessments in Docket No. PIKE 78-365-P ... \$ 300.00

Docket No. PIKE 78-380-P

Notice No. 12 RHH (7-13) 2/1/77 § 75.523 ..... \$ 15.00

Total Assessments in Docket No. PIKE 78-380-P ... \$ 15.00

Total Assessments in This Proceeding..... \$ 315.00

(2) Respondent at all pertinent times was the operator of the No. 4 Mine and as such is subject to the provisions of the Act and to the health and safety standards promulgated thereunder.

WHEREFORE, it is ordered:

Skyview Mining, Inc., is assessed civil penalties totaling \$315.00 which it shall pay within 30 days from the date of this decision.

*Richard C. Steffey*  
Richard C. Steffey  
Administrative Law Judge

**Distribution:**

Eddie Jenkins, Trial Attorney, Office of the Solicitor, U.S.  
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22203

Skyview Mining, Inc., Attention: Harold Akers, President,  
Box 458, Pikeville, KY 41501 (Certified Mail)

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 17, 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. VINC 78-455-P  
Petitioner : A.O. No. 11-00598-02037V  
v. :  
PEABODY COAL COMPANY, : Eagle No. 2 Mine  
Respondent :

DECISION

Appearances: Inga A. Watkins, Trial Attorney, Office of the  
Solicitor, U.S. Department of Labor, Arlington,  
Virginia, for the petitioner;  
Thomas F. Linn and Thomas R. Gallagher, Esqs.,  
St. Louis, Missouri, for the respondent.

Before: Judge Koutras

Statement of the Proceeding

This is a civil penalty proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, initiated by the petitioner against the respondent on August 17, 1978, through the filing of a petition for assessment of civil penalty, seeking a civil penalty assessment for one alleged violation of the provisions of mandatory safety standard 30 CFR 75.316, as set forth in a section 104(c)(2) order issued by a Federal coal mine inspector on June 14, 1977, pursuant to the 1969 Act. Respondent filed an answer and notice of contest on September 7, 1978, denying the allegations and requesting a hearing. A hearing was held in St. Louis, Missouri, on February 13, 1979, and the parties submitted posthearing proposed findings, conclusions, and briefs, and the arguments set forth therein have been considered by me in the course of this decision.

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 petition for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty.

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 Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., now the Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978.

2. Part 2700, Title 29, Code of Federal Regulations, 43 Fed. Reg. 10320 et seq. (March 10, 1978), the applicable rules and procedures concerning mine health and safety hearings.

#### Stipulations

The parties stipulated to the court's jurisdiction, agreed that the respondent is a large coal mine operator, and that any civil penalty assessed by me in this matter will not adversely affect respondent's ability to remain in business (Tr. 9).

#### Discussion

On June 14, 1977, MSHA inspector Harold Gulley issued section 104(c)(2) Order No. 1 HG, 7-0232, charging a violation of 30 CFR 75.317, and it states as follows:

The ventilation system and methane and dust control plan was not being followed on section 033, 4 North off 2 Main East in that the permanent stoppings were not substantially constructed and reasonably air tight to minimize air leakage on the intake aircourse to the section. (1) Permanent stopping no'd 9 had 4 holes where the stopping was partially crush [sic] out. (2) No. 10 stopping had a hole beside the man door where stopping had partially crush [sic] out and not repaired or rebuilt.

Three crosscuts outby trap door on the 4 North supply roadway a stopping had a hole 4 inches by 13 inches and not repaired or plastered. No. 24 and 25 stopping had been rebuilt and not plastered and 25 holes were observed in the 2 stoppings. No. 28 stopping had hole 6 inch by 8 inch and had not been repaired. The approve plan states stoppings, overcast or undercast, shall be

properly maintained for the life of the stoppings to assure minimum air leakage.

Testimony and Evidence Presented by Petitioner

MSHA inspector Harold Gulley testified as to his expertise and training as a mine inspector, and confirmed that he issued the order of June 14, 1977, after observing the conditions cited and described. He was accompanied by George Morris, respondent's safety inspector. While walking the roadway next to the intake stopping line that separates the intake from the return, they observed the permanent stoppings in question and identified their approximate location by means of a mine map (Exh. P-2). Some of the stoppings had been crushed out, some had been partially replaced and blocks had been stacked, but they were not wood-fibered or sealed so as to exclude leakage. He believed that the stopping leaks would affect the ventilation that goes to the 2 West and Main North sections, since the crushed stoppings along the intake would cause the air to short circuit and travel to the belt isolation and into the return to the areas at the areas shown at the top of the mine map. The defective stoppings were on the intake aircourse from the left isolation (Tr. 10-22).

Inspector Gulley identified the notes which he made during his inspection (Exh. P-3), and a copy of the mine ventilation plan (Exh. P-4, Tr. 25-26). The specific ventilation plan provision which he believes was violated is No. 4(f), labeled "General, Methane and Dust Control Plan," which reads "These stoppings, overcast and undercast shall be properly maintained for the life of the stoppings, overcast and undercast to assure minimum air leakage." He also relied on plan No. 4(f)(2) and (3). He described what he believed was a substantially constructed stopping and stated that a stopping which is reasonably airtight would be one that has a minimum of air leakage. He believed that the stoppings cited in his order were not substantially constructed because they had been partially crushed out and partially built back. Stopping No. 9 had four holes in it which he could see through and they were pulling the air from the intake into the belt isolation. The No. 10 stopping had holes beside the man door where the stopping had partially crushed out and the outer layer of blocks had a hole in it 4 inches by 8 inches by 26 inches. The stopping No. 3 crosscuts outby the trap door on the supply road had a 4-inch long hole at the top, and he observed 13 other holes and cracks in the stopping which were not plastered. Pieces of concrete were simply shoved into the holes and were not plastered or wood-fibered to keep them in place. The Nos. 24 and 25 stoppings had crushed out and were rebuilt and he observed 25 holes in the stoppings, 1/2 to 4 inches and he could observe that ventilation was going through them. The No. 28 stopping had a hole in it 6 inches by 8 inches which had not been repaired (Tr. 34-40).

Inspector Gulley stated that the stopping conditions affected the ventilation in the entire mine. The crushed-out stoppings at No. 4 could have dropped and short circuited the ventilation. The No. 10 stopping door was not fitting tightly because the blocks and steel frames were crushed out and he could see through the holes. The 25 holes in the Nos. 24 and 25 stoppings resulted from failure to mortar the block joints when the stopping was built, and the No. 28 stopping hole allowed the ventilation to be sucked out (Tr. 40-44). He used a smoke tube to detect that the air was leaking through the stoppings in question, and an anemometer where the ventilation was going through the stoppings, and it turned. The mine does liberate gas, and gas feeders have been found and recorded on the mine books (Tr. 47).

On the particular day in question, Inspector Gulley did not take air readings and he could not state the danger to which the men may have been exposed (Tr. 48). Although he checked the preshift examination books, he could not state whether the specific stoppings which he cited were recorded in the books (Tr. 49). The company was aware of the stopping problems because they were having problems with smaller type blocks which were taking weight and the section foreman should have observed the stoppings when he drove by the stopping line. Weekly examinations of the intake and returns are required to be made. Abatement took about 5 hours and all of the 10 to 13 men on the section were used to abate the conditions (Tr. 50-52).

On cross-examination, Mr. Gulley testified that there was sufficient air on the last open crosscut of the 033 unit on the day the order issued. He indicated the area being worked that day, but could not recall the specific rooms on the map. He took no anemometer readings and only used that instrument to detect air movement. He did not know how much air was leaking through the stopping in question and made no calculations regarding air loss. He issued the order because the stoppings were not substantially constructed and not because of lost air velocity. The Nos. 24 and 25 stoppings were completely rebuilt, and the holes resulted because the concrete blocks used to construct the stopping were not plastered properly. Had they been plastered properly, the leakage would have been corrected. He was not aware of the wildcat strike the week before his inspection. The cited area was not subject to excessive roof squeeze. The ventilation plan previously identified was the plan in effect on the day the order issued, and the plan is modified by attaching supplements to it, but he was not aware of any changes in the criteria in question (Tr. 55-78).

Mr. Gulley conceded that his order does not specifically cite the particular ventilation plan requirement allegedly violated by the respondent. He also indicated that stoppings do leak, but good stoppings have a small percentage of leakage, and he is not surprised that

60 to 80 percent of the air that enters a mine never reaches the working face because of leakage through permanent stoppings. He did not know how many stoppings were installed along the stopping line in question. None of the stoppings were completely crushed out, and stoppings crush out because of the weight to which they are subjected. No one advised him that a ventilation man was assigned permanently to the section to repair stoppings. He did not check to see whether air was being directed from the neutral return to the working sections. He made methane checks on the day in question, but found none. The unit had sufficient air and he "possibly" could have told face boss Amos Drone that "I'm not shutting you down for air, I'm shutting you down because of the holes in the permanent stoppings" (Tr. 78-87).

On redirect examination, Mr. Gulley confirmed that there was sufficient air in the last open crosscut where mining was taking place (Tr. 87). The preshift reports for June 13, 1977, reflect air readings of 7,500 cfms on the intake, and 9,200 cfms in the return of the 2 West section, and on another shift that day, the readings were 6,000 in the intake and 8,000 on the return with 2-1/2 percent methane noted in the No. 4 entry (Tr. 90). He reviewed the preshift books for June 14, but could not recall all of the recorded air readings for that day, and did not know whether there was sufficient air throughout the entire mine (Tr. 97). The mine is on a 10-day spot frequency inspection schedule because it liberates methane freely (Tr. 106).

#### Testimony and Evidence Presented by Respondent

Amos Drone, respondent's "floating boss" on the day the order issued, testified that Inspector Gulley advised him of the conditions of the stoppings in question, but there was sufficient air on the unit. He observed the stoppings after Mr. Gulley brought them to his attention, but he did not check them all prior to that time while going underground. The stoppings are on the intake and they serve to maintain the air and to keep it separated from the return. The law does not require the stoppings to be preshifted. There were a total of 60 stoppings on the intake in question, and Mr. Gulley cited six of them. Four of them had holes, and the other two needed plaster. He described the procedure for constructing the stoppings, and indicated they were in the process of rebuilding the two which needed plaster and it would have been completed the same day since a man was on the section to do the work. He indicated that the company has a program for maintaining stoppings and seven men on each of two production shifts are assigned these tasks. It is not uncommon for stoppings to take weight, particularly in the unit in question. He admitted the stoppings cited were in need of repair, but indicated the others were apparently in pretty good shape (Tr. 123-132). Mr. Drone identified Exhibit R-2 as the preshift examination book covering June 14, 5 to 7 a.m. to 8 to 11 a.m. on June 7, 1977, for the unit in question. On June 13, the day he was there, the air reading in the last open crosscut was 10,200, and the two prior shifts were 13,500 and 9,000.

The first preshift indicated 15,000, and he could recall detecting no methane on the unit on June 14 or prior to that time. The preshift for June 7 indicates three intake stoppings were out, and there were strikes on and off for several days and several shifts (Tr. 133-138). There was a wildcat strike at the mine during the week prior to June 14 (Tr. 138). Referring to the preshift books, Mr. Drone indicated the days that the mine was idle due to the strikes or for other reasons (Tr. 146-157). He also indicated the days that stopping conditions were noted in the preshift books (Tr. 157-158).

On cross-examination, Mr. Drone testified that the unit had not yet begun production when the order was issued. He conceded that he was responsible for repairs to the stoppings, and that they were visually obvious once they were pointed out to him, but he did not see them while riding in (Tr. 159-163).

Mark Eppers, respondent's section manager in the safety department, identified Exhibit R-3 as a list of the days between June 4 and June 13, 1977, that the mine was idle due to a wildcat strike (Tr. 187-189).

On cross-examination, he testified that the mine was idle on June 11 and that was a management decision and not a strike day (Tr. 189).

Jerry Tien, mine ventilation specialist, testified as to his expertise and education in mine engineering. He is a specialist in ventilation, has published three articles on the subject, and was accepted as an expert in mine ventilation (Tr. 191-193). Mr. Tien testified it is not uncommon to have a 60- to 80-percent air loss in a mine before it reaches the working face. Air is lost through leakings on the stoppings and overcasts. He identified Exhibits R-5, R-6, and R-7, as the Bureau of Mines' publications supporting his statement regarding air loss. He read excerpts from these publications indicating that due to air leakage, as little as 30 percent, and less than 40 percent, of the air induced in a mine actually reaches the working faces (Tr. 193-197).

Mr. Tien testified that he made a determination as to the amount of air lost in the ventilation system at the Eagle No. 2 Mine. He took a pressure survey in July 1977, and determined an average fresh air loss of 43 percent, and he believed that was acceptable. No significant and substantial changes were made in the mine ventilation system between June 14 and July 5 to 11. He indicated that he is familiar with the order issued by Inspector Gulley and that he has listened to all of the testimony in the case, and he expressed an opinion that the air loss from the areas described was not uncommon or unusual for the areas described because the area was formed by a

flooding plain which resulted in faults and excessive squeeze. His pressure survey reflected 27,000 cfms of air flowing through the 4 North Section, and he explained that air leakage through stoppings is caused by roof convergence, concussions from blasting, and the actual stopping construction itself. He explained the effects of convergence and marked off the areas in question on Exhibit R-8 (Tr. 197-205).

On cross-examination, Mr. Tien testified that he has been in and out of mines during the course of conducting pressure surveys and he reiterated that 60 to 80 percent of the air is lost due to leakage. He stated he was familiar with the Eagle No. 2 Mine, did not know the amount of air leakage on the day the order issued, and conceded that air leakage is a serious problem. He indicated it is possible that the conditions of the stoppings which were cited could have affected the air in the other mine sections, but explained that due to the type of exhaust system used in the mine, the pressure differential across the stopping line would be minimal and would not cause that much difference insofar as air leakage is concerned (Tr. 205-210). Mr. Tien confirmed that the particular mine area in question has had problems with stoppings being squeezed out because of excessive roof squeeze, and that the problem has existed since 1976 and the company is aware of it (Tr. 218-219). He indicated that the total mine air intake is approximately 220,000 cfms, and the 320,000 cfms goes out. The condition of squeeze or convergence of the mine roof and floor is common to all mines and is a natural condition (Tr. 223).

Petitioner's counsel asked Mr. Tien to compute the air leakage in the entry which resulted from the stopping conditions noted by the inspector on the face of his order. After making certain assumptions, and considering the size of the stopping holes described by Mr. Gulley, Mr. Tien stated he could not calculate the precise air leakage because he would have to measure the entire length of the 60 stoppings, and would have to know the amount of air traveling along the stopping line. He indicated that it would be difficult to calculate each individual stopping for leakage, but that the entire stopping line leakage could be calculated by determining the air coming in and the air going out, divided by the number of stoppings (Tr. 228-234). In response to a question from respondent's counsel, Mr. Tien calculated the air loss through three stopping holes of 26 cfms of air (Tr. 236).

### Findings and Conclusions

#### Fact of Violation

The arguments presented by the parties in support of their respective positions in this proceeding, as well as the facts presented, are essentially the same as those raised in the prior consolidated cases of Peabody Coal Company v. MSHA, Docket No. VINC 78-1, and MSHA v. Peabody Coal Company, Docket No. VINC 78-441-P, decided by me on

December 13, 1978. In those proceedings, I found that MSHA had failed to establish a violation and dismissed the petition for assessment of civil penalty. The thrust of my decision is found on page 19 of that decision, which states, as follows:

In order to establish a violation of the ventilation plan, MSHA must first establish by a preponderance of the credible evidence that the failure by Peabody to properly maintain the stoppings and to keep the stopping doors reasonably airtight did not assure minimum air leakage. MSHA's contention is that the conditions of the stoppings and doors resulted in significant air leakage, the magnitude of which it claims made it apparent that the violation could significantly reduce the amount of air reaching the working faces where it was needed to carry away methane and respirable dust. The critical question presented is whether the conditions cited did, in fact, result in any reduction of the air reaching the faces. Since the inspector failed to take any air measurements on the day in question, I cannot conclude that MSHA has established by a preponderance of the evidence that the air leakage was more than minimum or that the failure to maintain the stoppings and doors resulted in a violation of the ventilation plan. In short, I find that MSHA has failed to carry its burden of proof and that a violation has not been established. In the circumstances, the order must be vacated and the petition for assessment of civil penalty must be dismissed. [Emphasis in original.]

Under the circumstances herein presented, I adopt my previous findings and conclusions made in the aforementioned decision as dispositive of the instant proceeding and those previous findings and conclusions are herein incorporated by reference as my findings and conclusions in this case and serve as the basis for my findings and conclusions that MSHA has again failed to establish a violation of 30 CFR 75.316 as charged in Inspector Gulley's Order No. 1 HG, June 11, 1977, and which is the basis for the petition for assessment of civil penalty filed in this proceeding. It is clear to me in this proceeding that in issuing his order of withdrawal, Inspector Gulley believed that the stopping conditions which he observed prevented the legal minimum limit of air from reaching the working faces because of the air loss caused by leakage through the stoppings in question. He also stated that the stoppings condition affected the ventilation in the entire mine. His order charges that the cited stoppings were not substantially constructed and reasonably airtight to minimize air leakage on the intake aircourse to the section. However, by failing to take any air measurements or to otherwise establish that the air leakage through the stoppings did, in fact, result in a diminution of air at the faces below the minimum allowable limits, the inspector's beliefs and conclusions are simply unsupportable.

Petitioner admits that 12,000 cfms of air were present at the last open crosscut of the 4 North Section at the time the order issued (Brief, p. 14). However, petitioner concludes that it would not require a significant increase in the leakage through the stoppings to result in the quantity of air at the face dropping below the minimum required. While this may be true in theory, the short answer to the asserted conclusion is that petitioner has not proved its theory by any credible evidence. I simply fail to understand how one can conclude as a matter of fact that the quantity of air reaching the face is below the minimum required by the law without taking an air reading or otherwise testing the sufficiency of the air reaching the working face, and petitioner's arguments have not enlightened me in this regard.

Petitioner's argument that the physical condition of the stoppings, alone, establishes that less air than that which was possible, was reaching the face of every working section, begs the question. The issue is not whether less air than that which was possible was reaching the face, but rather, the question presented is whether the amount of air required by the law was, in fact, reaching the working faces. In this case, the evidence and testimony adduced establishes that there were a total of sixty (60) stoppings on the stopping line in the section, six (6) of which were found to be in various stages of disrepair. Two of these stoppings had been rebuilt, but were inadequately plastered, one had a hole next to the man door, and the others needed plastering and patching. Based on the testimony and evidence adduced by the petitioner in support of its case, I simply cannot conclude that petitioner has established that the six defective stoppings, out of a total of 60 along the entire stopping line in question, in fact, disrupted the ventilation to the point where it resulted in other than minimum air leakage in violation of the ventilation plan. The ventilation plan requires that stoppings be properly maintained to assure minimum air leakage. The problem is that petitioner has not established by a preponderance of any credible evidence that failure to maintain the six stoppings in question failed to assure minimum air leakage. Petitioner's entire case is built on the proposition that defective stoppings somehow disrupt ventilation in the entire mine, and that this disruption in the ventilation results in less air reaching the face, thereby establishing a violation. Petitioner glosses over what I believe are the critical facts to establish a violation, namely, the amount of air introduced on the section through the normal mine ventilation system, the amount of air lost through leakage through the six defective stoppings, and the amount of air ultimately reaching the working faces. Without these essential ingredients, such ventilation plan terms as "minimum air leakage" and "reasonably airtight" lead to meaningless and speculative guessing games.

Petitioner's reliance on the testimony of respondent's witness Amos Drone and the assertion at page 5 of its brief, that he admitted

that four of the stoppings were not maintained to assure minimum air leakage must be taken in context. The transcript reference relied on by petitioner, at page 132, reflects the following:

Q. Well, in your judgment, as a section boss, was the, were the stoppings on your unit maintained to assure minimum air leakage?

A. Well, I would say, I'd have to, with all honesty, say that, as a whole, we got sixty stoppings there and there's about four of them that were really, you know, right at that time, needed repairs that we found.

Q. So is it your judgment then that they were maintained to assure minimum air leakage?

A. Yes, up to a point.

Q. Why do you say, "Yes, up to a point"?

A. Well, I can't say that these stoppings here didn't need repair. In other words, I couldn't tell you that. They did need repair. But, like I said, in comparison with the whole section and everything, with the problems we had, I can say that the rest of them, you know, apparently were in pretty good shape.

At pages 12 and 14 of its brief, petitioner suggests that the condition of the stoppings "could affect the ventilation of the entire mine," and that the maintenance of the stoppings to assure minimum air leakage is a preventive measure designed to insure continuous adequate ventilation during the mining process in which conditions are in a constant state of flux. I agree with this proposition. My disagreement with the petitioner's position in this case, as well as in my previous decision of December 13, 1978, in VINC 78-1 and VINC 78-441, lies in the fact that petitioner simply has failed to establish a case. In this case, the inspector not only failed to take air readings, but he did not know the total number of stoppings installed along the intake aircourse which he cited, nor did he attempt to determine whether the air from the neutral return was being directed to the working sections. Since he believed there was sufficient air in the last open crosscut where mining was taking place, I simply fail to understand how the 6 defective stoppings adversely affected the entire mine ventilation system or cause significant air leakage of the magnitude suggested by the petitioner.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that petitioner's petition for assessment of civil penalty, insofar as it seeks a civil penalty assessment on Order No. 1 HG, June 14, 1977, be dismissed.

  
George A. Koutras  
Administrative Law Judge

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Standard Distribution

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
 OFFICE OF ADMINISTRATIVE LAW JUDGES  
 4015 WILSON BOULEVARD  
 ARLINGTON, VIRGINIA 22203

April 18, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 78-362-P
Petitioner	:	A.O. No. 05-00296-02008
v.	:	
	:	Allen Mine
C F & I STEEL CORPORATION,	:	
Respondent	:	Docket No. DENV 78-363-P
	:	A.O. No. 05-02820-02008
	:	
	:	Maxwell Mine
	:	
	:	Docket No. DENV 78-369-P
	:	A.O. No. 05-02820-02010
	:	
	:	Maxwell Mine

DECISION

On March 14, 1979, the Mine Safety and Health Administration moved the Judge to approve a settlement to which the parties had agreed and dismiss the above-captioned.

The alleged violations and proposed settlements are as follows:

Docket No. DENV 78-362-P

<u>Citation or Order Number</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Assessment</u>	<u>Settlement</u>
1 DLJ	01/22/74	75.510	\$42	\$42
3 WWT	03/30/74	75.510	42	42
1 CET	07/12/77	75.509	135	0
1 CET	07/13/77	75.400	102	0

Docket No. DENV 78-363-P

7-0003A/ 1 DLJ	04/07/77	77.1901(d)	190	75
7-0003B/ 1 DLJ	04/07/77	77.1911	130	0

7-0003C/ 1 DLJ	04/07/77	77.1914	125	75
7-0024C/ 1 EM	06/08/77	77.205(b)	145	0
7-0024A/ 1 EM	06/08/77	77.202	250	125
7-0024B/ 1 EM	06/08/77	77.512	180	90
7-0047/ 1 LAR	08/01/77	75.200	86	86
7-0059/ 4 CET	08/08/77	75.1712-6(a)	36	0
7-0060/ 5 CET	08/08/77	75.509	52	0
7-0066/ 6 CET	08/09/77	75.509	52	0
7-0067/ 7 CET	08/09/77	75.316	67	0

Docket No. DENV 78-369-P

7-0020/ 4 EM	06/07/77	77.516	67	67
7-0080/ 2 AD	10/19/77	77.1109(d)	49	49

As grounds to support the proposed settlement, MSHA avers as follows:

I. DENV 78-362-P

104(b) Notices 1 DLJ, January 22, 1974 and 3 WWT, March 30, 1974, alleging violations of 30 CFR 70.510 were previously assessed at \$42.00 each in Case No. 3724-0. The assessed amount was paid by Respondent November 14, 1975. Counsel for MSHA therefore moves that these two citations be dismissed.

104(b) Notice 1 CET, July 12, 1977, 30 CFR 75.509 and 104(b) Notice 1 CET, July 13, 1977, 30 CFR 75.400 were issued by Federal Coal Mine Inspector Carl E. Thompson Jr. Inspector Thompson is now deceased, and as MESA's sole witness in establishing a prima facie case as to all elements of the violation, MSHA moves that the two notices of violation be dismissed.

II. DENV 78-363-P

1. 104(a) Order 1 DLJ April 7, 1977 30 CFR 77.1901(d)

The standard cited requires that "no work shall be performed in any slope or shaft, . . . if the methane content

in such slope or shaft is 1.0 volume percentum, or more of methane." Testimony in the review proceeding by witness for C F & I was that work was stopped as soon as the warning light on the continuous mining machine appeared. MSHA's witness testified that when he entered the area, coal was being cut. As a result of the conflicting and inconclusive testimony as to the exact time mining operations ceased when methane was detected, the parties have agreed to a settlement in the amount of \$75.00. The originally assessed amount was \$190.00.

2. 104(a) Order 1 DLJ April 7, 1977, 30 CFR 77.1911(3)

In the above referenced decision the Judge specifically found that the Inspector's testimony failed to establish the recirculating of the air as alleged. As a result of the testimony in the subsequent decision, MSHA moves that the alleged violation of 30 CFR 77.1911(c) be dismissed.

3. 104(a) Order 1 DLJ April 7, 1977, 30 CFR 77.1914

This order was also the subject of the above referenced review proceeding in which the Judge found that the auxiliary fan and the power center, the most important peices [sic] of equipment, were outby the fork or collar of the slope and were not subject to the standards cited. As a result of the diminution in gravity, the parties agreed to a settlement in the amount of \$75.00. The original assessment was in the amount of \$125.00.

4. 104(a) Order 1 EM June 8, 1977, 30 CFR 77.205(b)

This order was the subject of an application for review in which the decision was issued February 8, 1979, by Administrative Law Judge Charles C. Moore, Jr., in which the imminent danger order was vacated. This violation requires that travelways be kept clear of extraneous material or other slipping hazards. The record in the review proceeding clearly indicates that travelway was in the process of being shovelled clean of the wet, muddy material which had spilled. Since the travelway was already in the process of being maintained when the violation was cited, MSHA moves the Administrative Law Judge to dismiss the violation of 30 CFR 77.205(b).

5. 104(a) Order 1 EM June 8, 1977, 30 CFR 77.202

While this violation was not directly litigated in the review proceeding, the record there indicates that the entire area was wet and muddy; and that the conditions

present would significantly reduce any potential for fire or explosion. At a hearing. [sic] Respondent would contend that the accumulations cited would have been cleaned up by the travelway shoveller had time been given. As a result of the potential conflict in testimony and the condition observed, the parties agreed to a settlement in the amount of \$125.00. The original assessment was in the amount of \$250.00.

6. 104(a) Order 1 EM June 8, 1977, 30 CFR 77.512

This condition was in the same area cited above, and as a result of the wet and muddy conditions any possible resulting hazards would be significantly decreased. On this basis the parties agreed to a settlement in the amount of \$90.00. The original assessment was in the amount of \$180.00.

7. 104(b) Notice 1 LAR August 1, 1977, 30 CFR 75.200

This violation was assessed at \$86.00. After consideration of the gravity and negligence involved, MSHA concludes that payment in the full amount of \$86.00 is warranted.

8. 104(b) Notice 4 CET August 8, 1977, 30 CFR 75.1712-6(a)

9. 104(b) Notice 5 CET August 8, 1977, 30 CFR 75.509

10. 104(b) Notice 6 CET August 9, 1977, 30 CFR 75.509

11. 104(b) Notice 7 CET August 9, 1977, 30 CFR 75.316

These four notices of violation were issued by Federal Coal Mine Inspector Carl E. Thompson who is now deceased. As a result, since Inspector Thompson was MSHA's sole witness. [sic] MSHA is unable to present a prima facie case as to each of the elements involved and moves the Administrative Law Judge to dismiss each of the four notices of violation.

### III. DENV 78-369-P

1. 104(b) Notice 4 EM June 7, 1977, 30 CFR 77.516

2. 104(b) Notice 2 AD October 19, 1977, 30 CFR 77.1109(d)

These two notices of violation were initially assessed at \$67.00 and \$49.00 respectively. After a consideration of

the facts, particularly as to gravity and negligence, MSHA believes that payment in full is warranted as a proper settlement in each instance. MSHA therefore moves the Administrative Law Judge to dismiss these violations on the basis of full payment.

The above grounds adequately explain the rationale of the Solicitor in his disposition of the above. I hereby APPROVE the settlement to which the parties agreed.

As section 110(a) makes penalties mandatory for violations, and as MSHA avers that it cannot establish certain of the alleged violations, those that cannot be established, must be vacated.

WHEREFORE Notice Nos. 1 CET, July 12, 1977; 1 CET, July 13, 1977; 4 CET, August 8, 1977; 5 CET, August 8, 1977; 6 CET, August 9, 1977; and 7 CET, August 9, 1977; and Order Nos. 1 DLJ, April 4, 1977; and 1 EM, June 8, 1977, are hereby VACATED.

Pursuant to the motion, the above-captioned are DISMISSED.

The hearings that were scheduled for Wednesday and Thursday, March 21 and 22, 1979, in Pueblo, Colorado, were VACATED.

  
Malcolm P. Littlefield  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
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ARLINGTON, VIRGINIA 22203

APR 20 1979

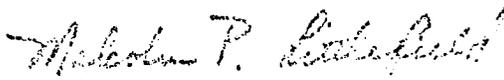
RAY MARSHALL, : Civil Penalty Proceeding  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : Docket No. DENV 78-460-P  
ADMINISTRATION (MSHA), : 42-01211-02005  
Petitioner :  
v. : Trail Mountain Mine  
: :  
: :  
TRAIL MOUNTAIN COAL CO., :  
Respondent :

DECISION

On April 2, 1979, Petitioner moved to withdraw its petition for civil penalty pursuant to 29 CFR § 2700.15(b). As grounds therefore, petitioner avers that Respondent has agreed to pay the assessed civil penalty of \$466 in full.

The motion to withdraw the petition is GRANTED, subject to the case being reopened if the assessed penalty is not paid as agreed to by the parties.

The hearing scheduled for Tuesday, April 10, 1979, in Salt Lake City, Utah was VACATED.

  
Malcolm P. Littlefield  
Administrative Law Judge

Distribution:

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(Attn: Mr. Carson R. Healy) (Certified Mail)

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 23, 1979

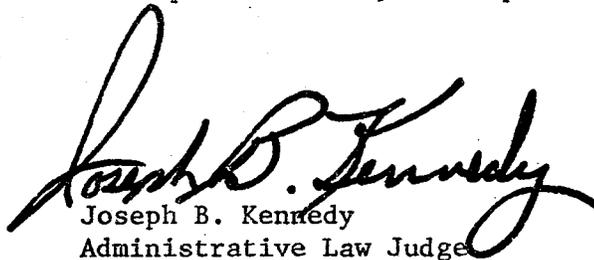
SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WILK 79-11-PM
Petitioner	:	A.O. No. 17-00123-05001
	:	
v.	:	Cumberland Pit & Mill
	:	
BLUE ROCK, INDUSTRIES,	:	Docket No. WILK 79-12-PM
Respondent	:	A.O. No. 17-00001-05001
	:	
	:	Westbrook Quarry & Mill

DECISION AND ORDER APPROVING SETTLEMENT

As the result of a settlement conference held on April 10, 1979, the operator agreed to pay \$700 in settlement of six of the seven violations charged. The Secretary in turn agreed to withdraw the other violation. The amounts agreed upon exceed the penalties proposed by the Assessment Office.

Based upon an independent evaluation and de novo review of the circumstances of each violation as reflected in the parties' prehearing submissions, the representations made at the settlement conference, and the factors set forth in the Secretary's motion to approve settlement, I find the settlement proposed is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED subject to payment and furnishing of a letter from the president of respondent assuring me that steps have been taken to prevent a recurrence of the violation involving the lubrication of machinery in motion, including, if necessary, disciplinary action against errant employees. It is FURTHER ORDERED that respondent pay the agreed upon penalty of \$700.00 and furnish the letter of assurance on or before Wednesday, May 2, 1979. Finally, it is ORDERED that, subject to receipt of payment and the required letter, the captioned petitions be DISMISSED.

  
Joseph B. Kennedy  
Administrative Law Judge

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 24, 1979

PETER WHITE COAL MINING CORP.,	:	Applications for Review
Applicant	:	
v.	:	Docket Nos. HOPE 78-23
	:	HOPE 78-41
SECRETARY OF LABOR,	:	HOPE 78-42
MINE SAFETY AND HEALTH	:	HOPE 78-48
ADMINISTRATION (MSHA),	:	HOPE 78-49
Respondent	:	
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket Nos. HOPE 78-615-P
Petitioner	:	HOPE 78-616-P <u>1/</u>
v.	:	A.O. Nos. 46-04338-02021V
	:	46-04338-02022V
PETER WHITE COAL MINING CORP.,	:	
Respondent	:	War Eagle No. 1 Mine

DECISION

The five applications for review were brought by Peter White Coal Mining Corporation under section 105(a)(1) of the Federal Coal Mine Health and Safety Act of 1969, 2/ 30 U.S.C. § 801 et seq., to vacate five orders of withdrawal issued by Federal mine inspectors under sections 104(c)(2) and 104(b) of the Act.

The parties submitted prehearing statements pursuant to a notice of hearing and the hearing was held in these cases on April 6 and 7,

1/ Jurisdiction in this case is limited to the civil penalty based on Order No. 7-0127 issued on September 30, 1977. A case with the same docket number involving other issues is pending before Judge Moore.

2/ In 1977, Congress passed the Federal Mine Safety and Health Amendments Act of 1977, (P.L. 95-164, 91 Stat. 1290), which supercedes the 1969 Act. The "Act" for the purpose of this decision, refers to the 1969 Act before amendment. Effective March 9, 1978, administration of the Act was transferred from the Department of the Interior to the Department of Labor, and administrative adjudications were transferred from the Interior Department to the newly created Federal Mine Safety and Health Review Commission.

1978, in Bluefield, West Virginia. The United Mine Workers submitted a prehearing statement stating that it would not appear at the hearing and would rely on evidentiary presentations of the Mine Safety and Health Administration.

After the hearing, counsel for MSHA and the operator moved that the above two civil penalty petitions (then before other judges) be consolidated with the subject applications for review and submitted on the prior hearing record. An order granting the motion to sever was issued by Judge Charles Moore on December 8, 1978, to consolidate one of the penalty assessments at issue in HOPE 78-616-P with HOPE 78-41. On January 24, 1979, Judge Richard Steffey issued an order granting the parties' motion to sever Docket No. HOPE 78-615-P from a proceeding before him and to consolidate it with Docket No. HOPE 78-42.

The final submission in these cases was filed on April 9, 1979. MSHA has conceded in its brief that it was in error issuing the orders of withdrawal in Docket Nos. HOPE 78-23, and HOPE 78-49. The two withdrawal orders in those cases are therefore vacated and the applications for review in Docket Nos. HOPE 78-23, and HOPE 78-49 will be GRANTED.

Having considered the evidence and contentions of the parties, I find that the preponderance of the reliable, probative, and substantial evidence, establishes the following:

#### FINDINGS OF FACT

1. At all pertinent times, the Applicant, Peter White Coal Mining Corporation, operated an underground bituminuous coal mine, known as the War Eagle No. 1 Mine, in Mingo County, West Virginia, which produced coal for sales in or affecting interstate commerce.
2. Peter White is a medium-sized operator and the subject mine produces approximately 95,000 tons of coal per year. On September 30, 1977, a total of 166 union and salaried people were employed at the War Eagle No. 1 Mine with a total of 12 people employed in the No. 6 section on the day shift.
3. The assessment of a penalty in these proceedings will have no affect on Peter White's ability to continue in business.
4. Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violations in the two cases in which civil penalties are being sought.
5. Further findings with conclusions as to allegations and defenses are set forth in the following numbered paragraphs (6 through 38):

HOPE 78-41 and HOPE 78-616-P

6. Inspectors Edward M. Toler and Tom Goodman arrived at the War Eagle No. 1 Mine on September 30, 1977, around 7:30 a.m. The inspectors intended to investigate a union complaint concerning ventilation and electrical violations in the mine.

7. When they arrived at the mine, they met with Mr. Tim Maynard, a management representative, and informed him of the complaint. The inspectors, accompanied by Mr. Maynard, went underground about 10 a.m.

8. When the inspectors arrived underground, they announced the purpose of their investigation to the miners present on the section. About 10:30 a.m., Inspector Toler began to take air readings on the intake side and found that the ventilation was inadequate. After completing the investigation at 12:30 p.m., Inspector Toler orally issued a 104(c)(2) withdrawal order. The operator has not rebutted the existence of the violation as described in the order of withdrawal.

9. The fire boss reports indicated that air readings taken by management personnel showed adequate ventilation on September 28, 29, and 30. The amount of air required by the mine's ventilation plan was 9,000 cubic feet per minute, and the fire boss reports showed air circulation in excess of 10,000 cubic feet per minute. The fire boss inspection on September 30, 1977, was made prior to 7:30 a.m.

10. No coal was being produced at the time of the investigation in this section. The ventilation problem was due in part to faulty line curtains and the operator was in the process of installing line curtains to correct the deficiency at the time the inspector was taking air readings. Some of the men on the section were engaged in routine maintenance. Mr. Maynard testified that the lack of adequate ventilation was also due to a damaged stopping and gob in the main intake.

11. The preponderance of the evidence shows that the operator was aware of the inadequate ventilation in the section and was in the process of abating the problem before the inspectors arrived. Considering that the operator was aware of the violation, had stopped production, and was in the process of correcting the violation before the inspectors arrived in the section, I conclude that MSHA has not proved that the operator was negligent. I therefore find that there was no unwarrantable failure on the part of the operator regarding this violation. 3/

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3/ If the subject order were not invalid for other reasons, it could be vacated for MSHA's failure to demonstrate that the violation was due to the operator's unwarrantable failure. See Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976).

12. The failure to provide adequate ventilation in a mine is ordinarily a serious violation. However, the miners were not producing coal in the section at the time the violation was discovered and they were working on improving the ventilation by tightening the check curtains to prevent leakage. Danger to the miners was possible, but not probable.

13. There had been one violation of 30 CFR 75.316-2(b) issued prior to September 30, 1977, at the War Eagle No. 1 Mine.

14. A section 104(c)(2) order of withdrawal is a part of a "chain" and the Act requires an underlying 104(c)(1) order as a prerequisite to a valid 104(c)(2) order. The inspector cited a notice of violation issued on May 5, 1977, as the underlying document to support the 104(c)(2) order. Under the Act, the cited notice could not support a valid 104(c)(2) order. Applicant based its application for review, in part, on the failure of Respondent to properly cite a valid underlying 104(c)(1) order.

15. Respondent attempted to modify the order on two occasions. Respondent issued the first modification on October 5, 1977, after the order was terminated, but before the filing of the subject application for review. This modification was for the purpose of changing the references to "velocity" in the order to "cubic feet per minute." Although the word "velocity" was originally used, it was clear from the figures and the context that volume was meant. It has not been shown that Applicant was prejudiced or misled by this error or the subsequent modification. I find that this modification should be allowed.

16. The second modification was issued on March 30, 1978, by Inspector Toler and was served on Applicant's counsel at the hearing on the application on April 7, 1978. This modification was an attempt to correct the mistaken reference to a notice as the underlying document for the 104(c)(2) order. The modification states:

Order No. 1 EMT, dated September 30, 1977, is hereby modified to refer to Order No. 1 PT, dated May 5, 1977. This order was issued under the provisions of section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969 and Title 30 CFR Section 75.316 on September 30, 1977, and is changed to section 104(c) to reflect the correct section under the 1977 Amendments Act.

The modification is not, as it states, a correction of the section number to conform to the 1977 Amendments Act. Instead, it is an attempt to provide a citation to a required underlying 104(c)(1)

order. <sup>4/</sup> The Applicant objected to this modification at the hearing at the time it was introduced.

17. MSHA contends that it has unlimited authority to modify an order and that Applicant was not prejudiced by either of these modifications. I find that Applicant was prejudiced by MSHA's failure to provide a proper citation to the underlying order prior to the hearing, in adversely affecting its ability to prepare the application for review and to prepare for the hearing thereon.

18. Applicant based its application for review, in large part, on the failure of the inspector to cite a required underlying order. The operator was prejudiced by MSHA's failure to timely modify this order. Applicant's objections to the order and to the attempt to modify the order should therefore be sustained. Furthermore, it was plainly the duty of MSHA to disclose any intention to modify the order in its prehearing submissions required by the notice of hearing. Failure of MSHA to meet this responsibility further misled and prejudiced the operator's rights.

19. For the above reasons, I conclude that Applicant's motion to exclude the attempted modification of Withdrawal Order No. 1 EMT issued on September 30, 1977, at its War Eagle No. 1 Mine, be granted, and the withdrawal order is therefore held to be invalid.

HOPE 78-42 and HOPE 78-615-P

20. After the meeting with the miners described in Finding 8, Inspector Goodman proceeded to the section power center. Inspector Goodman is a qualified electrical inspector. He was accompanied by Mr. Paul Blankenship, the chief electrician at the mine, and Mr. Jerry Halem, the section electrician.

21. When they arrived at the section power center they cut the power off, so that Inspector Goodman could check the section's circuit breakers.

22. The particular section was using three circuit breakers (two 400-amp Westinghouse circuit breakers and one 225-amp Westinghouse circuit breaker). When Inspector Goodman tested the circuit breakers they failed to deenergize under a fault condition.

23. Inspector Goodman informed management at that time that he was issuing a 104(c)(2) order. The operator did not introduce any evidence to show that the violation found by the inspector did not exist and I find that the violation was proven.

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<sup>4/</sup> The correct citation to the corresponding section in the 1977 Amendments Act is 104(d)(2).

24. The reason the circuit breakers failed to operate was that the relays were missing and the sockets that the relays were supposed to be plugged into were bridged with No. 14 strand wires. The inspector testified that he believed the operator was aware of the condition because Mr. Halem immediately reached into the under-voltage relay and pulled out a piece of No. 14 strand wire that bridged the breaker socket.

25. Because of the above condition, none of the breakers in use could operate under a fault condition. Inspector Goodman testified that this condition would have been discovered by someone familiar with electricity who looked at the circuit breakers because the door covering the breakers was open and it was evident that the relays were missing. In addition, he gave his opinion that management should have discovered the condition when the section was deenergized between shifts.

26. The operator had instituted a program of weekly inspections to prevent this type of violation in February, 1977. The last such inspection prior to the discovery of the condition by Inspector Goodman was conducted by Mr. Macky May on September 22, 1977. Mr. May, a certified electrician, testified that all the breakers in use operated properly at that time. Nonetheless, I find that the operator should have been aware of the violation and I find it negligent in failing to have instituted a more effective method of correcting this pattern or practice of unlawfully bridging circuit breaker relays. Following this incident, the operator began installing a radio monitoring fail-safe system to detect and prevent this practice.

27. This violation was very serious. The failure to provide miners with the grounded phase protection afforded by operative circuit breakers could result in serious injury or death.

28. There had been no previous violations of 30 CFR 75.900 at the War Eagle No. 1 Mine.

29. The order of withdrawal indicated, as did the order in Finding 14 above, that the action supporting this order was a notice of violation issued on May 5, 1977. The attempted modification of this order, to reflect a valid 104(c)(1) order as the basis of the 104(c)(2) order as required by statute, was not issued until March 30, 1978, and was not served on Applicant's counsel until the date of the hearing.

30. Applicant included in its application for review of this order the same contention described in Finding 18. The Applicant demonstrated that it was prejudiced by MSHA's failure to timely modify this order. For the reasons discussed in Finding 18, I conclude that Applicant's objection to the attempted modification should be granted, and Withdrawal Order No. 1 TEG issued on

September 30, 1977, at its War Eagle No. 1 Mine is therefore held to be invalid.

HOPE 78-48

31. On October 10, 1977, Inspector Toler, accompanied by Mr. Maynard, came across a splice that was in violation of 30 CFR section 75.514. The notice of violation, issued about 10 a.m., described the violation as follows: "The power cable to the belt control line to the No. 4 pony belt conveyor was not provided with suitable connectors in that the leads were twisted together." The operator was given 30 minutes to abate the violation.

32. Upon leaving the mine, Mr. Maynard told Mr. Blankenship that the notice had been issued and described to him the location of the faulty splice. Mr. Blankenship assigned an electrician on the oncoming shift to repair the splice.

33. There was confusion among the witnesses regarding the location of the violation. In the notice, the inspector stated that the violation was at the No. 4 Pony Belt Conveyor. Mr. Maynard testified that the location of the violation was at the No. 16 section belt head. Mr. Blankenship testified that the No. 4 belt was also called the No. 11 belt.

34. Mr. Blankenship was told by the midnight foreman, on the morning of October 11, that the cable had been repaired. The electrician assigned to repair the cable apparently went to the next belt head past the site of the violation that was specified in the notice.

35. At 4 p.m. on October 11, 1977, Inspector Toler and Mr. Maynard returned to the section and found that the violation had not been abated. Inspector Toler issued a 104(b) order alleging "no attempt was made to splice the belt control line to the No. 4 Pony Belt and the wires were left exposed."

36. Inspector Toler was told by Mr. Maynard that an electrician had been assigned to make the repair on the cable and must have made a splice in another area of the mine. The inspector testified, and I find, that he did not give any consideration to extending the time for abatement.

37. Section 104(b) of the Act provides that an inspector shall issue an order of withdrawal if the time given for abatement in the underlying 104(b) notice expires and the violation is not abated, and "if he also finds that the period of time should not be further extended."

38. Inspector Toler did not comply with the provision of section 104(b) that requires that he make a finding that the period of time

allowed for abatement should not be extended. According to the inspector's testimony, he did not consider extending the time. Moreover, the inspector failed to check on the subsequently issued written order the box indicating that he had made a finding that the time allowed for abatement should not be extended. I therefore find that the subject 104(b) order is invalid and should be vacated.

#### DISCUSSION

##### HOPE 78-41 and HOPE 78-42

The primary issue in an application for review of a withdrawal order is whether the order is valid. Applicant failed to show that the violations described in the subject orders did not exist. However, Applicant did raise serious questions as to the validity of the orders.

The inspectors in both of these cases indicated in the orders of withdrawal that a 104(c)(1) notice supported the 104(c)(2) order. Section 104(c) of the Act provides:

(c)(1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there is a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standard, he shall include such finding in any notice given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, the 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) of this subsection 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) of this subsection shall again be applicable to that mine.

The Act requires a 104(c)(1) order to serve as the basis for a 104(c)(2) order. The inspectors instead cited a 104(c)(1) notice in the orders being contested.

Applicant contends that this failure to provide a correct citation could not be modified once the subject orders were terminated; however, that position does not have to be ruled on in disposing of these cases. The question presented here is whether an order that fails to provide a correct citation can be modified and rehabilitated a few days before a hearing on the application for review.

A review of the facts leads to the conclusion that in these circumstances the modification sought by MSHA should not be allowed. Applicant stated in its application for review of these orders filed on October 25, 1977, that the orders were invalid because they failed to indicate that a statutory prerequisite, a prior 104(c)(1) order, existed. MSHA, therefore, was aware of Applicant's basic contentions in these proceedings 7 months before the hearing.

MSHA did not try to correct these orders by moving to modify them in its answers to the applications for review filed in November 1977, or in its prehearing statement filed on March 6, 1978. MSHA did not issue the modifications until March 30, 1978, about 1 week before the hearing, and approximately 7 months after the orders were terminated. Notice of this action was not given to Applicant's counsel until the hearing on April 7, 1978.

I find that Applicant was entitled to notice of these attempted modifications of the 104(c)(2) orders prior to the hearing, and was prejudiced in preparing for the hearing by the failure of Respondent to timely inform Applicant of the modifications of the orders. A party has a right to know the basic facts in dispute prior to the hearing on an application for review. The Commission's rules provide for prehearing discovery and the parties in this case were required to exchange prehearing statements. MSHA has given no reason for its failure to include the proposed modifications in its prehearing statement.

An operator has the right to expect that information furnished by the Government in an order of withdrawal is accurate. In these

cases, Applicant determined, based on the information supplied by the Government, that a valid (c) chain did not exist, and exercised its right to file the subject applications for review. MSHA has prejudiced Applicant's rights by its 7-month delay in seeking a modification of the orders.

In a similar case, a (c)(2) order was vacated because of the Government's failure to properly document its action. The Judge stated:

It is false reasoning for MESA to argue that the operator has already been served with the earlier (c) chain citation and that therefore, MESA does not have a responsibility for providing accurate citations. The Act clearly requires that notices and orders contain a detailed description of a condition or practice which constitute a violation. This includes proper and correct information on the underlying (c) sequence of citations.

Old Ben Coal Company v. MESA, VINC 76-56 (June 15, 1976) at p. 8.

In the instant cases, MSHA had an obligation to provide accurate information in the withdrawal orders or at least to correct any fundamental errors within a reasonable time. The attempted modifications on March 30, 1978, were not timely. Therefore, Applicant's objection to the modifications, issued on March 30, 1978, made at the hearing are SUSTAINED, and the instant orders are VACATED and the applications for review will be GRANTED.

HOPE 78-615-P and HOPE 78-616-P

Although the withdrawal orders in these proceedings have been found to be invalid, that finding does not constitute a bar to the civil penalty proceedings consolidated with the applications for review. The Commission has reaffirmed the Interior Department's former Board of Mine Operations Appeals' position that the invalidity of a withdrawal order may not be considered as a mitigating factor in a civil penalty proceeding under section 109 of the Act. MSHA v. Wolf Creek Collieries Company, Docket No. PIKE 78-70-P (March 26, 1979).

These civil penalty cases will therefore be considered for appropriate penalties in light of the six statutory criteria in section 109(a)(1).

In Docket No. HOPE 78-616-P, the operator failed to overcome MSHA's prima facie showing of a violation of the ventilation standard. However, the preponderance of the evidence showed that the operator was aware of the problem, had halted production in the affected section, and was in the process of correcting the problem when the inspectors arrived. MSHA did not prove that the operator was

negligent in regard to this violation and a substantial penalty is therefore not warranted.

In Docket No. HOPE 78-615-P, the operator failed to overcome a prima facie showing of the violation as described in the order. It is also evident from the facts that the operator knew or should have known that the violation existed. The failure to provide adequate protection against electrical shock is a very dangerous practice and warrants a substantial penalty. The Applicant has installed a fail-safe radio monitoring system to prevent a reoccurrence of this practice, so it is unlikely to occur in the future.

#### HOPE 78-48

The parties in this case agreed that the primary issue is whether or not the time fixed in the notice should have been extended. A more basic question, though, is whether the inspector followed the statutory framework by failing to consider whether or not the time fixed in the notice should have been extended. Section 104(b) of the Act provides in part:

If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated. [Emphasis added.]

The inspector testified that he gave no consideration at all to extending the time fixed for abatement. Mr. Maynard had told him that apparently the electrician had mistakenly repaired a different splice in another location in the mine. The inspector should have considered and weighed this explanation, and should have considered the confusion, evident on this record, regarding the location of the violation. Mr. Maynard, for example, called the location of the violation the No. 16 section while the inspector referred to it in the notice as the No. 4 Pony belt and Mr. Blankenship thought that No. 4 also was the No. 11 belt entry.

One of the basic requirements for the issuance of a 104(b) order is a reasonable determination by the inspector that the time should not be extended. Since the inspector did not give any consideration to this responsibility, the order should be vacated.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and the subject matter of these proceedings.
2. At all pertinent times, Applicant's War Eagle No. 1 Mine was subject to the provisions of the Act.
3. By concession of MSHA, the withdrawal orders in Docket Nos. HOPE 78-23 and HOPE 78-49 are VACATED and the applications for review are GRANTED.
4. In Docket Nos. HOPE 78-41 and HOPE 78-42, the Applicant showed that the orders issued were invalid because they failed to cite a required underlying 104(c)(1) order, and the attempted modifications made on March 30, 1978, were not timely. The Applicant also proved that the order issued on October 10, 1977, at issue in HOPE 78-48, was invalid because the inspector failed to consider whether the time allowed for abatement should be extended.
5. In civil penalty Docket No. HOPE 78-615-P, the operator violated the mandatory safety and health standard as alleged.
6. In civil penalty Docket No. HOPE 78-616-P, the operator violated the mandatory safety and health standard as alleged. However, no negligence was shown and the operator was in the process of abating the violation when the inspectors arrived in the section.

CIVIL PENALTIES

Based on the statutory criteria for assessing civil penalties, Respondent is assessed the following penalties for the violations found herein:

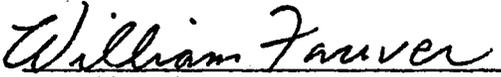
<u>DOCKET NO.</u>	<u>30 CFR</u>	<u>CIVIL PENALTY</u>
HOPE 78-615-P	75.900	\$5,000
HOPE 78-616-P	75.316	\$100

All proposed findings and conclusions inconsistent with the above are hereby rejected.

ORDER

WHEREFORE, IT IS ORDERED that the applications for review are GRANTED and the subject orders of withdrawal are hereby VACATED and IT IS FURTHERED ORDERED that Peter White Coal Mining Corporation

shall pay MSHA the above civil penalties totaling \$5,100 within 30 days from the date of this Decision.

  
WILLIAM FAUVER, JUDGE

**Distribution:**

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Joseph M. Walsh, Esq., Assistant Solicitor, Division of Mine Safety and Health, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Harrison Combs, Esq., United Mine Workers of America, 900 15th St., NW., Washington, DC 20005 (Certified Mail)

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 25, 1979

AUBREY M. BRADLEY III, : Application for Review  
Applicant :  
v. : Docket No. DENV 78-17  
: :  
UNIVERSAL COAL AND ENERGY :  
COMPANY, :  
Respondent :

DECISION

Appearances: David B. Rogers, Esq., Smith, Lewis & Rogers, Columbia, Missouri, for Applicant;  
N. William Phillips, Esq., Milan, Missouri, & George J. Anetakis, Esq., Frankovitch & Anetakis, Weirton, West Virginia, for Respondent.

Before: Judge Charles C. Moore, Jr.

Aubrey M. Bradley III alleges discrimination on the part of Universal Coal and Energy Company (hereinafter referred to as Universal) in that he was fired because of safety violation complaints. Mr. Bradley was employed by Universal as a scraper operator from August 27, 1977, to October 4, 1977. During the last 3 weeks of this time frame, Mr. Bradley noted in his daily time reports that the 627 Cat scraper he was operating did not have effective brakes. Thereafter, he orally reported to the mine superintendent, Mr. Russ Walker, the condition of the relevant brakes. Furthermore, on Friday, October 1, 1977, 3 days before the Applicant was discharged, he spoke with the union safety officer, Don Durham, concerning the condition of the brakes. Mr. Durham immediately contacted Mr. Walker to inquire whether anything could be done about the condition of the brakes. When Mr. Bradley came to work the following Monday, October 4, 1977, he was discharged. He noted that the scraper had been put on blocks and its wheels had been removed for purposes of repairing its brakes.

The Applicant alleges that the brakes on the scraper did not work and that the scraper could not be stopped without the use of the bucket (Tr. 16). In fact, he was of the opinion that if one were going backwards on an incline, the machine could not be stopped (Tr. 17). The Applicant was also of the opinion that Universal never examined or made any repairs in response to his complaints concerning the brakes (Tr. 22).

The Respondent offered evidence that the brakes were examined and the necessary adjustments were made to the brakes. The mechanic, Thomas H. Gann, who had worked in the same pit area as Mr. Bradley, testified that upon receiving a complaint from Mr. Bradley, he would check and adjust the brakes (Tr. 67, 68). He did not find anything wrong with the brakes, nor did he receive a complaint from anyone else about them (Tr. 67).

The Respondent also showed that it was normal procedure to use the pan when stopping the scraper. Mr. Meyer, a scraper operator, who worked the same shift as Mr. Bradley, testified that any brakes would only serve to slow down a fully-loaded scraper. This necessitated the use of the pan to stop a scraper (Tr. 43). Mr. Meyer also testified that he had operated Mr. Bradley's scraper for a few days and during this time, he had no trouble stopping the scraper (Tr. 43).

The president of the union local, Mr. Couch, who operated the same scraper as Mr. Bradley, but on a different shift, testified that he had no trouble with the brakes. He also said a brand new fully-loaded scraper going down a hill would very seldom be stopped by using only the brakes (Tr. 81); thus, it is quite common to use the pan when stopping the scraper (Tr. 87).

The mechanic, Mr. Gann, also explained why the scraper was on blocks on Monday, October 4, 1977. He indicated that the scraper had been in good working order on the previous Friday when he had last checked it (Tr. 70). It was only over the weekend that a problem developed and when it was discovered, it was repaired immediately (Tr. 70, 75, 76, 77).

I thus find that Universal was properly maintaining and repairing the brakes on the 627 Cat scraper. It should be noted that not only did each of the three union witnesses speak favorably as to Universal's regard for the safety of its employees and the maintenance of its equipment (Tr. 58, 71, 82), but the mine in question had recently won a safety award for its low occurrence of accidents (Tr. 83, 90).

Universal maintains that the discharge of Mr. Bradley had nothing to do with his safety complaints (Tr. 88, 105). Under his contract, Mr. Bradley was classified as a probationary employee. This meant that Universal had 60 days to evaluate the performance of Mr. Bradley to determine whether he was qualified to continue working with the company, and thus gain membership in the union (Tr. 20, 87, 116). If the company during this time period, makes a determination that an individual has not performed satisfactorily, they have a right to release him under the contract (Tr. 87). As a consequence of this contractual relationship, Universal argues that Mr. Bradley was properly discharged as an employee whose performance during his probationary period did not merit continued employment (Tr. 116).

In support of its position, Universal presented evidence that Mr. Bradley was not operating his scraper properly. Three witnesses testified that he carried the pan too high, which could cause the machine to overturn (Tr. 45, 46, 92, 102). Also, there was testimony that the Applicant would drive over large rocks which could damage the machine's transmission (Tr. 52). Furthermore, three witnesses testified that not only would Mr. Bradley repeatedly get his machine stuck in the mud; but on a few occasions would intentionally attempt to do so (Tr. 47, 48, 49, 53, 68, 93, 108). Also, there was testimony presented that the Applicant would take excessively long work breaks (Tr. 50, 51, 72, 92); not punch out when his machine was being repaired (Tr. 52, 60); and his behavior was generally uncooperative (Tr. 43, 93, 100, 102, 104). The foregoing evidentiary presentation was not only proffered by the company's vice president of operations and pit foreman, but it is also noteworthy that these observations were made by two of Mr. Bradley's fellow employees who worked in the same pit area with him. It is noted that when the company was having meetings where they reviewed Mr. Bradley's probationary status, they did not even discuss the Applicant's safety reports during such meetings (Tr. 89).

I find from the foregoing that the evidence indicates that Mr. Bradley was fired because he was not operating his scraper properly, he had poor relations not only with management but also with his fellow employees, and his behavior was generally uncooperative.

Based on the foregoing, I find that Applicant has failed to carry its burden of showing he was discharged because of safety complaints. The case is accordingly dismissed.

*Charles C. Moore, Jr.*  
Charles C. Moore, Jr.  
Administrative Law Judge

Issued: April 25, 1979

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Administrator for Coal Mine Safety and Health

Standard Distribution

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 27, 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. VINC 79-119-P  
Petitioner : A.O. No. 12-00329-03004-V  
v. :  
: Old Ben No. 2 Strip Mine  
OLD BEN COAL COMPANY, :  
Respondent :

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner; Edmund J. Moriarty, Esq., Chief Counsel, Old Ben Coal Company, Chicago, Illinois, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE AND FINDINGS OF FACT

This is a civil penalty proceeding. Respondent is charged with a single violation of the mandatory standard contained in 30 CFR 77.1710(g) occurring on April 12, 1978. A hearing was held in St. Louis, Missouri, on April 10, 1979. Joseph Hensley testified for Petitioner. Robert Tooley and Dale Wools testified for Respondent. At the conclusion of the hearing, each party waived its right to file proposed findings of fact and conclusions of law.

The facts are essentially not in dispute. ANSCO, Inc., was constructing a bucket building on Respondent's premises under a contract with Respondent. The building was intended to be used for maintenance and repair of the buckets which Respondent used in extracting coal. On April 12, 1978, one of ANSCO's employees was observed working 15 to 20 feet in the air standing on an I-beam on the side of the building. He was not wearing a safety belt and there was danger of his falling.

The contract between Respondent and ANSCO provided that ANSCO was to erect the building for a fixed sum according to certain specifications. Under the terms of the contract and in carrying it

out, ANSCO was independent of any control by Respondent. Its employees were supervised by its own supervisor and Respondent did not hire, fire, direct or control them in their duties. There were no employees of Respondent close to the area where the alleged violation occurred except Dale Wools, Old Ben mine inspector, who accompanied the Federal inspector, Joseph Hensley. When the violation was observed, Hensley told Wools that he was writing a citation and Wools told the ANSCO employee to come down. The ANSCO supervisor was not in the immediate vicinity at that time. The employee admitted that he had been instructed to wear a safety belt, but thought he could finish his job before the supervisor returned.

On April 11, 1978, Inspector Hensley was at the same site and noticed ANSCO employees in elevated places without safety belts. Hensley discussed this situation with the ANSCO supervisor who promised to instruct his men about the requirements for safety belts. No citations were written as a result of these occurrences.

#### ISSUES

1) Whether Respondent, a coal mine operator, is responsible in a penalty proceeding under the Federal Mine Safety and Health Act of 1977 for violations which involve only the employees of an independent contractor.

2) If so, what is the appropriate penalty?

#### STATUTORY PROVISIONS

Section 110(a) of the Federal Mine Safety and Health Act of 1977 provides:

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.

Section 3(d) of the Act provides:

'Operator' means any owner, lessee, or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or construction at such mine.

#### REGULATION

30 CFR 77.1710 provides in part:

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be

required to wear protective clothing and devices as indicated below:

\* \* \* \* \*

(g) Safety belts and lines where there is danger of falling \* \* \*.

#### THE REPUBLIC STEEL AND COWIN CASES

On April 11, 1979, the day following the hearing in this case, the Commission issued its decisions in Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Republic Steel Corporation, Docket Nos. MORG 76-21 and MORG 76X95-P (79-4-4) and in Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Cowin and Company, Inc., Docket No. BARB 74-259 (79-4-5). Both of these cases arose under the Federal Coal Mine Health and Safety Act of 1969. The 1969 Act defined "operator" as "any owner, lessees or other person who operates, controls or supervises a coal mine." In Cowin, the Commission held that Cowin and Company, a construction contractor under contract with a coal mine owner "was an 'operator' of a 'coal mine' under the 1969 Act \* \* \*." In Republic, the Commission held that "as a matter of law under the 1969 Act an owner of a coal mine can be held responsible for any violations of the Act committed by its contractors."

The legal issue here is therefore a narrow one: Does the specific inclusion in the 1977 Act of independent contractors within the definition of operator affect the liability of coal mine operators for violations of such contractors? The fact that an independent contractor is an "operator" and thus liable under the Act for safety violations, does not necessarily exclude the liability of the coal mine operator, as the two Commission decisions clearly illustrate. I interpret the decisions to give the Secretary discretion under the 1969 Act to assess a penalty for a violation committed by an independent contractor against the contractor or against the mine operator. The fact that a contractor is an operator by explicit statutory language rather than by construction, should logically not limit the Secretary's discretion. The legislative history does not support Respondent's position that Congress intended to limit or withdraw the liability of coal mine operators for acts or omissions of independent contractors. See JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, S. REP. NO. 95-461, 95th CONG., 1st SESS. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 1315.

#### CONCLUSIONS OF LAW

1. Respondent, Old Ben Coal Company, is liable as a matter of law under the Federal Mine Safety and Health Act of 1977 for violations of safety standards committed by its contractor, ANSCO, Inc.

2. On April 12, 1978, Respondent violated the safety standard contained in 30 CFR 77.1710(g), because the employee of ANSCO was not required to wear a safety belt when working on a high place.

3. The violation was serious, since it could have resulted in a fatality or serious injury.

4. The evidence does not establish that the violation resulted from Respondent's negligence. The employee in question was not directly or indirectly under Respondent's control. I do not accept the position that a violation of a safety standard is negligence per se. Such a position makes the specific inclusion of negligence as a criterion for determining the amount of the penalty, nonsensical.

5. Respondent is a large operator. There is no evidence that a penalty will have any effect on its ability to continue in business.

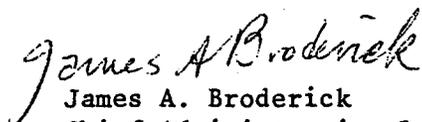
6. There is no evidence concerning Respondent's previous history of violations.

7. Respondent demonstrated good faith in attempting to achieve rapid compliance after being notified of the violation.

I conclude, based on the above findings of fact and conclusions of law, and considering the statutory criteria in section 110(i) of the Act, that an appropriate penalty for the violation is \$750.

ORDER

WHEREFORE Respondent is ORDERED to pay within 30 days of the date of this decision the sum of \$750 as a penalty for the violation found herein to have occurred.

  
James A. Broderick  
Chief Administrative Law Judge

Distribution:

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 30, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. HOPE 78-619-P
Petitioner	:	A.O. No. 46-03859-02033V
	:	
v.	:	Docket No. HOPE 78-620-P
	:	A.O. No. 46-03859-02034V
	:	
SEWELL COAL COMPANY,	:	Sewell No. 1-A Mine
Respondent	:	
	:	Docket No. HOPE 78-516-P
	:	A.O. No. 46-03467-02040V
	:	
	:	Docket No. HOPE 78-661-P
	:	A.O. No. 46-03467-02068V
	:	
	:	Docket No. HOPE 79-202-P
	:	A.O. No. 46-03467-03008
	:	
	:	Meadow River No. 1 Mine
	:	
	:	Docket No. HOPE 78-662-P
	:	A.O. No. 46-01477-02075V
	:	
	:	Docket No. HOPE 78-680-P
	:	A.O. No. 46-01477-02073
	:	
	:	Docket No. HOPE 79-203-P
	:	A.O. No. 46-01477-02020V
	:	
	:	Sewell No. 4 Mine

DECISION AND ORDER APPROVING SETTLEMENT

The captioned penalty enforcement proceedings were assigned to the Presiding Judge in February and March 1979. Notices of hearing and pretrial orders were issued between February 28 and March 27, 1979. On April 18, 1979, the Secretary filed a motion to approve settlement of all 44 violations in the amount of \$115,000.00. In support thereof, the Secretary showed the following:

1. Within 30 days of approval, respondent will pay one hundred and fifteen thousand dollars (\$115,000.00) in settlement of the violations -- the amounts to be allocated among the individual violations at the discretion of the Presiding Judge.

2. The Office of Assessments has, at the request of counsel for the Secretary, had a Committee of Assessment Specialists review all of the violations. As a result of that review the Committee has determined that payment of \$115,000.00 in penalties is a reasonable and appropriate resolution in this instance of all of the violations charged. 1/
3. None of the violations involved in these charges actually resulted in death or disabling injuries to any miner, and, in fact, no injuries were sustained by any miner as a result of any of these violations.
4. The vice-president of Sewell Coal Division of the Pittston Coal Group 2/ has provided a letter stating these matters were brought to his personal attention, that they are a subject of continuing concern, and that he has instructed his safety director to take necessary steps to minimize delays in taking remedial action especially on unsafe roof conditions and accumulations of combustibles, including where necessary disciplinary action against supervisory personnel.
5. The settlement provides for an average penalty of over thirty-five hundred dollars (\$3,500) for each of the 32 unwarrantable failure violations.
6. Of the 12 citations, one originally assessed at \$240.00 (No. 7-0309) has been withdrawn for the reasons stated. The other 11 were issued during the coal strike of 1977-1978. The amounts assessed totalled \$1,316.00. The Secretary states the gravity and negligence involved in these violations was considered minor because very few employees were available to observe or correct the conditions or to be exposed to the hazards created.

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1/ The record shows the amount originally assessed by the Assessment Office was \$213,056.00. The amount now approved for settlement is approximately 54% of the amount initially proposed.

2/ The Pittston Company, owner of Sewell Coal Company, is one of the largest coal producers in the United States.

7. With respect to the fourteen (14) violations originally assessed at ten thousand dollars (\$10,000.00) the Secretary concluded that "some of these were over assessed". In addition it is urged that with respect to several of these violations "the inspectors' failure to keep detailed notes on their inspections could cause the Secretary evidentiary problems should each violation be the subject of an adversary evidentiary hearing."
8. The Secretary urges I consider "substantial reductions" from the proposed penalties for the two roof control violations cited in Orders Nos. 7-159 and 7-161 in Docket No. HOPE 78-620-P. As the Secretary notes: "The physical evidence to establish that violations of 75.200 occurred would probably necessitate reliance on circumstantial evidence and opinion, in that, if in fact any timbers had been set in the fall area, they were covered by falls themselves and direct observation was impossible."

Based on the presiding Judge's independent evaluation and de novo review of the circumstances, 3/ including the gravity and negligence indicated, as well as the other statutory criteria, I find the amount proposed for settlement should be allocated as set forth in Exhibit A, Schedule of Penalties.

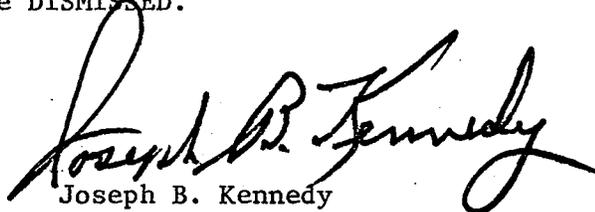
The premises considered, I conclude the total amount proposed for settlement as allocated is in the public interest and in furtherance of the purposes and policy of the Act because of (1) the factors recited in the parties' motion; (2) the fact that my evaluation indicated it is unrealistic to expect litigation would result in any substantial increase in any of the settlement amounts; (3) the absence of any assurance that forcing these matters to trial would be more productive in terms of voluntary

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3/ Counsel for the parties are to be commended for the cooperation furnished the Presiding Judge in making this evaluation. I wish to commend also my law clerks for their prompt, dedicated and perceptive responses to my demands for development of facts necessary to enable me to make the overall evaluation and detailed review of each violation deemed necessary to ensure compliance with the Congressional mandate. As a result of the hard work and cooperation of all concerned, the Presiding Judge has been able to dispose of 107 violations paid or withdrawn since April 5, 1979.

long-run compliance than prompt approval of the penalties proposed. In this connection, I find it significant that the operator has undertaken to institute disciplinary action against errant supervisors for non-compliance with the roof control and combustible accumulations standards.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the agreed upon penalty of \$115,000.00 on or before Wednesday, May 30, 1979, and that, subject to payment, the captioned petitions be DISMISSED.

  
Joseph B. Kennedy  
Administrative Law Judge

Issued: April 27, 1979

Distribution:

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

Edward H. Fitch, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

EXHIBIT A

SCHEDULE OF PENALTIES

<u>DOCKET</u>	<u>ORDER/CITATION</u>	<u>STANDARD</u>	<u>GRAVITY</u>	<u>NEGLIGENCE</u>	<u>AMOUNT</u>
<sup>HOPE</sup> 78-619	7-0158	75.200	Serious	High degree of ordinary negligence	\$2000
78-620	7-159	75.200	Serious	High degree of ordinary negligence	\$1000 (See ¶8, <u>supra</u> )
	7-161	75.200	Serious	High degree of ordinary negligence	\$1000 (See ¶8, <u>supra</u> )
	7-164	75.200	Serious	High degree of ordinary negligence	\$2000
79-202	7-0309	75.1101-10	---	---	Withdrawn
78-516	7-25	75.200	Serious	High degree of ordinary negligence	\$3000
	7-43	75.200	Serious	High degree of ordinary negligence	\$2000
78-661	7-0354	75.400	Extremely serious	Gross negligence	\$7000
	7-0423	75.400	Serious	High degree of ordinary negligence	\$3000
	7-0455	75.1403-6 (b) (3)	Serious	High degree of ordinary negligence	\$3000
	7-0456	75.1403-6 (b) (3)	Serious	High degree of ordinary negligence	\$3000
	7-0457	75.1403-6 (b) (3)	Serious	High degree of ordinary negligence	\$3000
	7-0482	75.1725(a)	Non-serious	High degree of ordinary negligence	\$1000

<u>DOCKET</u>	<u>ORDER/CITATION</u>	<u>STANDARD</u>	<u>GRAVITY</u>	<u>NEGLIGENCE</u>	<u>AMOUNT</u>
HOPE 78-661 (cont.)	7-0483	75.200	Extremely serious	Gross negligence	\$9000
78-662	7-0262	75.200	Extremely serious	Gross negligence	\$5000 (See ¶4, <u>supra</u> )
	7-0270	75.200	Extremely serious	Gross negligence	\$5000 (See ¶4, <u>supra</u> )
	7-0306	75.200	Serious	Ordinary negligence	\$1000 (See ¶7, <u>supra</u> )
	7-0338	75.200	Extremely serious	Gross negligence	\$6000 (See ¶4, <u>supra</u> )
	7-0343	75.200	Non-serious	Minimal negligence	\$ 500 (See ¶7, <u>supra</u> )
	7-0344	75.200	Non-serious	Minimal negligence	\$ 260 (See ¶7, <u>supra</u> )
	7-0369	75.200	Very serious	Ordinary negligence	\$3500 (See ¶7, <u>supra</u> )
	7-0431	75.400	Very serious	Gross negligence	\$3000 (See ¶4, <u>supra</u> )
	7-0466	75.200	Extremely serious	Gross negligence	\$10000 (See ¶4, <u>supra</u> )
	7-0552	75.400	Extremely serious	Gross negligence	\$6000 (See ¶4, <u>supra</u> )
	7-0524	75.1722(a)	Very serious	Gross negligence	\$3000 (See ¶4, <u>supra</u> )
	7-0533	75.400	Very serious	Gross negligence	\$3000 (See ¶4, <u>supra</u> )

<u>DOCKET</u>	<u>ORDER/CITATION</u>	<u>STANDARD</u>	<u>GRAVITY</u>	<u>NEGLIGENCE</u>	<u>AMOUNT</u>
HOPE 78-662 (cont.)	7-0568	75.400	Very serious	Gross negligence	\$3000 (See ¶4, supra)
	7-0689	75.200	Extremely serious	High degree of ordinary negligence	\$9000
	7-0717	75.400	Extremely serious	Gross negligence	\$5000 (See ¶4, supra)
	7-0766	75.200	Extremely serious	High degree of ordinary negligence	\$5000 (See ¶7, supra)
78-680- (See ¶6, supra)	8-0027	75.400	Non-serious	Ordinary	\$ 100
	8-0028	75.200	Non-serious	Ordinary	\$ 100
	8-0029	75.200	Non-serious	Ordinary	\$ 100
	8-0030	75.400	Non-serious	Ordinary	\$ 115
	8-0031	75.400	Non-serious	Ordinary	\$ 100
	8-0032	75.400	Non-serious	Ordinary	\$ 110
	8-0033	75.200	Non-serious	Ordinary	\$ 130
	8-0034	75.400	Non-serious	Ordinary	\$ 110
	8-0035	75.200	Non-serious	Ordinary	\$ 130
	8-0036	75.400	Non-serious	Ordinary	\$ 115
	8-0037	75.200	Non-serious	Ordinary	\$ 130

<u>DOCKET</u>	<u>ORDER/CITATION</u>	<u>STANDARD</u>	<u>GRAVITY</u>	<u>NEGLIGENCE</u>	<u>AMOUNT</u>
79-203	044007	75.200	Serious	Gross negligence	\$1500 (See ¶4)
	044446	75.200	Serious	Gross negligence	\$1500 (See ¶4)
	044558	75.200	Serious	Gross negligence	<u>\$2500 (See ¶4)</u>
				Total	<u>\$115,000</u>

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

APR 30 1979

SECRETARY OF LABOR, : Application for Review of Acts  
MINE SAFETY AND HEALTH : of Discrimination  
ADMINISTRATION (MSHA), :  
On Behalf of LARRY J. HORN, : Docket No. PIKE 79-9  
Applicant :  
v. : Pontiki No. 1 Mine  
: :  
PONTIKI COAL CORPORATION, :  
Respondent :

DECISION

Appearances: Thomas P. Piliero, Esq., Office of the Solicitor,  
Department of Labor, for Larry J. Horn, Applicant;  
William H. Howe, Esq., Loomis, Owen, Fellman &  
Coleman, Washington, D.C., for Respondent.

Before: Administrative Law Judge Michels

This is a proceeding under section 105 of the Federal Mine Safety and Health Act of 1977 brought by the Mine Safety and Health Administration (MSHA) on behalf of the Applicant, Larry J. Horn. Mr. Horn has alleged that the Pontiki Coal Corporation, which he has named as Respondent in this proceeding, discriminated against him in connection with a safety dispute at Respondent's Pontiki No. 1 Mine.

On October 24, 1978, MSHA filed an application for temporary reinstatement of Mr. Horn in his employment with Respondent. The application included a finding by MSHA on behalf of the Secretary of Labor that the complaint filed by Mr. Horn alleging discrimination was not frivolously brought. Thereafter, Acting Chief Administrative Law Judge Broderick ordered that the Pontiki Coal Corporation reinstate Mr. Horn to a comparable position at the Pontiki No. 1 Mine at the rate of pay and the same or equivalent work duties assigned him immediately prior to his discharge.

Respondent, in answer to that order, disputed the factual basis of the application, alleged that the case was frivolously brought, and generally took issue with the appropriateness of the reinstatement.

A hearing was held in Prestonsburg, Kentucky, on April 10, 1979, at which both sides were represented by counsel.

At the outset of the hearing, Applicant's counsel advised that the parties had reached a mutually acceptable settlement agreement (Tr. 2). The terms of this agreement were then placed on record:

\* \* \* Both parties agree to mutual exchange and general release of any and all claims whatsoever arising out of Mr. Horn's employment with Pontiki Coal Corporation. Pontiki Coal Corporation agrees to, one, tender the amount of \$14,000, payable to Larry J. Horn on this day, April 10, 1979. Two, to expunge from Mr. Horn's employment record all references to the circumstances surrounding his discharge of May 9, 1978. Three, to tender payment pursuant to the order of temporary reinstatement dated October 26, 1978, in full satisfaction of said order. The tender will be up to and including April 10, 1979.

Larry J. Horn agrees, one, to withdraw his allegation of discrimination and complaint filed with MSHA on June 1, 1978. Two, to authorize the Secretary of Labor to withdraw the complaint of discrimination filed with the Federal Mine Safety and Health Review Commission on January 8, 1979. Three, to authorize the Secretary of Labor to move for the vacation of the order of temporary reinstatement dated October 26, 1978, and four, that he has no further employment rights with Pontiki Coal Corporation.

(Tr. 3). Counsel for both parties advised the court that these terms represent the totality of the settlement agreement (Tr. 3-4).

Thereafter, Mr. Horn was called as a witness and gave the following testimony in response to the court's questioning:

Q. You did hear the terms read, Mr. Horn, and I assume that with your attorney you have discussed this, and I ask you, do you understand fully the terms of this settlement?

A. Yes, Your Honor, I do.

Q. You do understand that you are giving up and will not have employment rights as a result of this settlement -- re-employment rights?

A. Yes, sir, I do.

Q. You understand that. Do you have any comment, or are you fully satisfied with this settlement?

A. Fully satisfied, sir.

(Tr. 6).

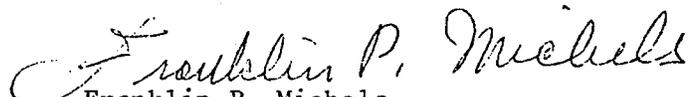
On the basis of the terms of the settlement offered, and on the basis of Mr. Horn's understanding of and agreement with the terms of the agreement, the court approved the settlement.

I find that this settlement is in accord with the remedial purposes of the Federal Mine Safety and Health Act of 1977. Accordingly, I hereby AFFIRM the settlement, as set out above.

As specifically provided for in the settlement, Applicant's counsel then moved for permission to (1) withdraw Mr. Horn's complaint, and (2) for the court to vacate the order of temporary reinstatement. Both motions were granted at the hearing (Tr. 7). I hereby AFFIRM these rulings. Accordingly,

It is ORDERED that the parties, to the extent they have not already done so, comply with the terms of the settlement within 30 days from the date of this decision.

This proceeding is hereby DISMISSED.

  
Franklin P. Michels  
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 30, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. HOPE 78-433-P
Petitioner	:	A/O No. 46-01412-02002F
v.	:	
	:	No. 7 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT  
AND  
ORDERING PAYMENT OF CIVIL PENALTY

Appearances: Robert S. Bass, Esq., Office of the Solicitor, Department of Labor, for Petitioner;  
Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Cook

The Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalty pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (Act) in the above-captioned proceeding. Subsequent thereto, the proceeding was set for hearing. At the time of the hearing, counsel for both parties proposed a settlement concerning the penalty assessment to be paid by Respondent as to the alleged violations involved.

During the hearing, counsel for MSHA explained the basis for the settlement and stated that he would file a motion for approval of the settlement which would embody such explanation.

MSHA filed motions requesting approval of a settlement and for dismissal of the proceeding. The last motion, filed on April 9, 1979, provided, in part, as follows:

The Secretary moves to withdraw Notice No. 6-0021, dated July 6, 1976, and the assessed penalty of \$10,000 therefor. In support of this motion the Secretary states:

1. That Notice No. 6-0021 citing a violation of 30 CFR 75.200 was issued in error as the result of observations

made by the inspector after a roof fall on July 6, 1976. As a result of a thorough inspection on the following day, July 7, 1976, inspector Filipek determined that Respondent was not removing the last pushout at the time of the roof fall and therefore was not in violation of Drawing No. 8 of its roof control plan governing extraction of twin pushouts.

With respect to Notice No. 6-0022, citing a violation of 30 CFR 75.201, dated July 6, 1976, with an assessed penalty of \$160, the Secretary and Respondent moved to have the following settlement approved:

1. Respondent has agreed to pay a penalty of \$1350. At any hearing into the alleged violation of 30 CFR 75.201, there would be conflicting testimony as to the danger presented to the miners by Respondent's pillar recovery methods. There would be conflicting testimony as to whether or not the operator was following his established pillar recovery plan, and whether or not following that plan would have resulted in a sufficiently supported roof which would have prevented the roof fall which did occur on July 6, 1976.

2. In the opinion of the Secretary a violation of 30 CFR 75.201 existed, and gravity and negligence were greater than first evaluated. At any hearing, the Secretary would have put on evidence in an attempt to persuade the administrative law judge that the assessed penalty was unreasonably low. It is the parties' belief and conviction that approval of this settlement is in the public interest and will further the intent and purpose of the Federal Mine Safety and Health Act of 1977.

3. In view of the Secretary's withdrawal of 30 CFR 75.200, Respondent agrees that the Secretary could have reason for requesting a greater penalty than assessed for Notice No. 6-0022.

4. Respondent did demonstrate good faith in attempting to achieve rapid compliance.

This information, along with the information provided as to the statutory criteria contained in section 110 of the 1977 Act which is attached to the first motion filed, has provided a full disclosure of the nature of the settlement and the basis for the original determinations. Thus, the parties have complied with the intent of the law that settlements be a matter of public record.

In view of the reasons given above by counsel for MSHA for the proposed settlement, and in view of the disclosure as to the elements

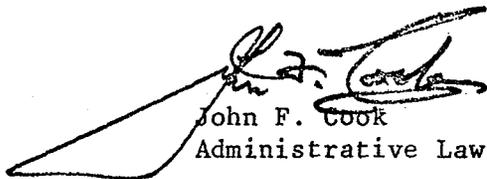
constituting the foundation for the statutory criteria, it appears that a disposition approving the settlement will adequately protect the public interest.

ORDER

Accordingly, IT IS ORDERED that the proposed settlement, as outlined above, be, and it hereby is, APPROVED.

IT IS FURTHER ORDERED that the motion of Petitioner to withdraw the petition as relates to Notice No. 6-0021, July 6, 1976, be, and it hereby is, GRANTED.

IT IS FURTHER ORDERED that Respondent, within 30 days of the date of this decision, pay the agreed-upon penalty of \$1,350 assessed in this proceeding.

  
John F. Cook  
Administrative Law Judge

Issued: April 30, 1979

Distribution:

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Administrator for Coal Mine Safety and Health

Standard Distribution



As grounds for the settlement the Secretary states.

1. The reduction of violation on 00233461 was because of the decision in North American, 3 IMBA [sic] 93 at 107. (See PITT 79-150-P)

2. There was good faith compliance.

3. The settlements other than 00232471 are for 100% of the assessed penalties.

4. The violations did not pose a significant and substantial hazard to the health and safety of the miners. 1/

b. As to Docket No. PITT 79-149-P:

The alleged violations in this case and settlement are identified as follows:

<u>Number</u>	<u>Date</u>	<u>30 CFR</u>	<u>Assessment</u>	<u>Settlement</u>
00233471	7/13/78	75.1720A	\$ 140	\$ 0
00233472	7/13/78	75.1704	180	180
00233887	7/24/78	75.1707	150	150

As ground [sic] for the Settlement the Secretary states:

1. The reduction of notice 00233471 was because of the decision in North American Coal Corporation, [sic] 3 IBMA 93 at 107. (See PITT 79-150-P)

2. There was good faith compliance.

3. The settlements other than 00233471 are for 100% of assessed penalties.

1/ In Docket No. PITT 79-150-P, MSHA filed a motion to withdraw its petition and to dismiss, which stated, in part, as follows:

"1. The operator did not violate 30 CFR 75.1720A. The operator took the necessary precautions to advise the miners to wear protective eye gear. Therefore, in accordance with the reasoning of North American Coal Corporation, 3 IBMA 93, which held if 'the failure to wear glasses is entirely the result of the employees disobedience or negligence rather than a lack of a requirement by the operator to wear them then a violation has not occurred'. at 107." [Emphasis in original.]

4. The violations did not pose a significant and substantial hazard to the health and safety of the miners.

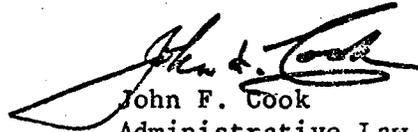
This information, along with the information as to the statutory criteria referred to above and attached to the motions, has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

In view of the reasons given above by counsel for MSHA for the proposed settlement, and in view of the disclosure as to the elements constituting the foundation for the statutory criteria, it appears that a disposition approving the settlement will adequately protect the public interest.

ORDER

Accordingly, IT IS ORDERED that the proposed settlements, as outlined above, be, and hereby are, APPROVED.

IT IS FURTHER ORDERED that Respondent, within 30 days of the date of this decision, pay the agreed-upon penalty of \$895 assessed in these proceedings.



John F. Cook  
Administrative Law Judge

Issued: April 30, 1979

Distribution:

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Administrator for Coal Mine Safety and Health

Standard Distribution

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 30, 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. BARB 79-117-P  
Petitioner : A/O No. 15-08104-03003  
v. :  
: No. 1 Mine  
SUE-JAN COAL COMPANY, :  
Respondent :

DECISION APPROVING SETTLEMENT  
AND  
ORDERING PAYMENT OF CIVIL PENALTY

Appearances: David F. Barbour, Esq., Office of the Solicitor, Department of Labor, for Petitioner;  
Jack McPeck, Sue-Jan Coal Company, St. Charles, Kentucky, for Respondent.

Before: Judge Cook

The Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalty pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (Act) in the above-captioned proceeding. An answer was filed and a notice of hearing was issued. Subsequent thereto, MSHA filed a motion requesting approval of a settlement and for dismissal of the proceeding.

MSHA's motion stated, in part, as follows:

Section 104(a) Citation No. 396847, 7/18/78,  
30 CFR 75.523 originally assessed at \$90.00  
to be settled for \$30.00

Gravity and Negligence

The inspector found the panic bar on the Galis 300 roof bolter to be broken and inoperative. This was a serious violation because in the event of a miner being caught between the rib and the energized machine the roof bolter could not be instantly stopped. The inability to use the panic bar thus created the possibility of serious injury or death (see Exhibit A).

Sue-Jan Coal Company (Sue-Jan) should have known of this violation. The broken panic bar was visually obvious and its condition should have been observed and corrected during the required electrical inspection (see Exhibit A). It was not. Failure to repair the panic bar was the result of Sue-Jan's ordinary negligence.

#### Good Faith

Sue-Jan exhibited its good faith in attempting to rapidly abate the violation by repairing the panic bar within the time set by the inspectors.

#### Size

At the time the violation was written Sue-Jan was a small company. It operated only the No. 1 Mine. That mine employed approximately 13 miners and produced approximately 300 tons of coal per day during one production shift (see Exhibit B). During the last full year prior to the subject violation its total production was only 7,602 tons of coal (see Exhibit C, page 1).

#### Previous History

Sue-Jan had no history of previous violations (see Exhibit C, page 2).

#### Settlement Amount

The settlement represents a substantial reduction in the proposed penalty. However, MSHA believes that reduction is full [sic] justified by the small size of the operator, by its lack of a prior history of violations and by following mitigating circumstances.

1. Sue-Jan is no longer in business. The company ceased operation during November 1978. MSHA inspector Larry Cunningham (MSHA's Madisonville Kentucky Office) has confirmed this.

2. Sue-Jan leased the No. 1 Mine. That lease was terminated in November 1978. The company has no other leases and plans to acquire none.

3. The company has two stockholders, Jack McPeck and Dwight Rogers. Neither, they nor the company intend to resume mining activity.

4. Mr. McPeek claims the company's liabilities exceed its assets. He has agreed to pay the settlement amount from his personal resources.

This information, along with the information as to the statutory criteria referred to above, has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

In view of the reasons given above by counsel for MSHA for the proposed settlement, and in view of the disclosure as to the elements constituting the foundation for the statutory criteria, it appears that a disposition approving the settlement will adequately protect the public interest.

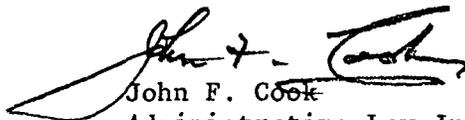
Of major significance, are the factors:

1. That Sue-Jan had no history of prior violations.
2. That Sue-Jan was a small company which is no longer in business.
3. That a co-owner of the former coal mine operator claims that the company's liabilities exceeded its assets and such co-owner has agreed to pay the settlement from his personal resources.

ORDER

Accordingly, IT IS ORDERED that the proposed settlement, as outlined above, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that Respondent, within 30 days of the date of this decision, pay the agreed-upon penalty of \$30 assessed in this proceeding.

  
John F. Cook  
Administrative Law Judge

Issued: April 30, 1979

Distribution:

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Administrator for Coal Mine Safety and Health

Standard Distribution

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
4015 WILSON BOULEVARD  
ARLINGTON, VIRGINIA 22203

April 30, 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. DENV 79-79-P  
Petitioner : A/O No. 02-00533-02014  
v. :  
: Black Mesa Strip Mine  
PEABODY COAL COMPANY, :  
Respondent :

DECISION APPROVING SETTLEMENT  
AND  
ORDERING PAYMENT OF CIVIL PENALTIES

Appearances: David F. Barbour, Esq., Office of the Solicitor, Department of Labor, for Petitioner;  
Thomas F. Linn, Esq., Peabody Coal Company, St. Louis, Missouri, for Respondent.

Before: Judge Cook

The Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalty pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (Act) in the above-captioned proceeding. An answer was filed and a notice of hearing was issued. Subsequent thereto, MSHA filed a motion requesting approval of a settlement and for dismissal of the proceeding.

Pursuant to an order of the Administrative Law Judge, information as to the six statutory criteria contained in section 110 of the Act was submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

In its motion, MSHA stated, in part, as follows:

Section 104(b) Notice No. 1 CET (8-0002), 1/17/78,  
30 CFR 71.100 originally assessed at \$98.00 to be  
settled for \$90.00

### The Violation

Based upon the results of five respirable dust samples submitted by Peabody Coal Company (Peabody), the inspector found that the average concentration of respirable dust for a surface work position exceeded the applicable limit by 2.3 milligrams.

### Gravity and Negligence

The violation was serious in that excessive concentration of respirable dust could lead to the contraction of pneumoconiosis. Peabody is under a statutory duty to maintain the concentration of respirable dust within the prescribed limits. Its failure to do so is prima facie evidence of a lack of compliance with that duty and accordingly of its ordinary negligence.

### Good Faith

Peabody was given until February 16, 1978, to abate the violation. It submitted its samples (which were in compliance) by February 5, 1978. In so doing it exhibited more than ordinary good faith in attempting to achieve rapid compliance.

### Size

Peabody Coal Company has a yearly production of approximately 61,707,236 tons per year. (See Exhibit A). The Black Mesa Strip Mine produces approximately 3,900,364 tons per year and employs approximately 299 miners (see Exhibits A and B). Peabody is large in size, as is the Black Mesa Strip Mine.

### Previous History

In the 24 months prior to February 14, 1978, 30 assessable violations were cited in the Black Mesa Strip Mine during 28 inspection days (see Exhibit A). Given the size of the mine this represents a small history of previous violations.

### Settlement Amount

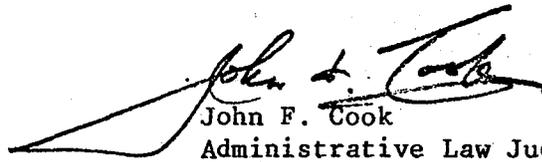
MSHA believes the proposed settlement, although modest for an operator of Peabody's size, accurately reflects the criteria set forth in the Coal Mine Health and Safety Act of 1969 and in its successor, the Federal Mine Safety and Health Act of 1977, particularly in light of Peabody's rapid compliance and favorable past history of violations.

In view of the reasons given above by counsel for MSHA for the proposed settlement, and in view of the disclosure as to the elements constituting the foundation for the statutory criteria, it appears that a disposition approving the settlement will adequately protect the public interest.

ORDER

Accordingly, IT IS ORDERED that the proposed settlement, as outlined above, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that Respondent, within 30 days of the date of this decision, pay the agreed-upon penalty of \$90 assessed in this proceeding.

  
John F. Cook  
Administrative Law Judge

Issued: April 30, 1979

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Administrator for Coal Mine Safety and Health

Standard Distribution

