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COMMISSION DECISIONS

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

Secretary of Labor, MSHA v. Peabody Coal Co., LAKE 80-25, etc. (Judge Kennedy, March 5, 1980)

Secretary of Labor, MSHA v. Sewell Coal Company, HOPE 79-6-P, etc. (Judge Lasher, March 12, 1980)

Secretary of Labor on behalf of Walter W. Karnstein v. Allis-Chalmers Corporation, LAKE 80-242-DM (Judge Broderick, March 28, 1980 Order of Temporary Reinstatement)

Secretary of Labor, MSHA v. United Castle Coal Company, VA 79-141-D (Judge Broderick, March 13, 1980; United Castle's PDR)

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

Secretary of Labor, MSHA v. Union Rock & Materials Corp., DENV 78-579-PM (Judge Fauver, March 5, 1980)

Secretary of Labor, MSHA v. Duval Corporation, WEST 79-194-M (Judge Morris, March 4, 1980)

Princess Susan Coal Company v. Secretary of Labor, MSHA, WEVA 79-423-R (Judge Melick, March 7, 1980)

Windsor Power House Coal Co. v. Secretary of Labor, MSHA, WEVA 79-193-R (Judge Melick, March 10, 1980)

Secretary of Labor, MSHA v. United Castle Coal Company, VA 79-141-D (Judge Broderick, March 13, 1980; Secretary's PDR)

The Commission vacated its Direction for Review in the following cases:

Secretary of Labor, MSHA v. Pacer Corporation, DENV 79-257-PM.

Secretary of Labor, MSHA v. Alabama By-Products Corporation, SE 80-41-R.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 10, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. PITT 79-210 thru 214
v.	:	
SUNBEAM COAL CORPORATION	:	

ORDER

The petition for discretionary review is dismissed. Section 113(d)(2)(A)(i) requires that a petition for discretionary review be filed and served within 30 days after the issuance of the judge's decision. The judge's decision was issued on January 29, 1980. The petition for discretionary review was received by the Commission on March 3, 1980, more than 30 days after the issuance of the judge's decision. Commission Rule 5(d), 29 CFR §2700.5(d), states that "filing of a petition for discretionary review is effective only upon receipt." 1/

Accordingly, the petition is dismissed as untimely filed.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

1/ Good cause to waive the statutory period is neither claimed nor shown in the petition; the certificate of service states that the petition was mailed on February 28, 1980, the 30th day after the issuance of the judge's decision. We therefore need not and do not decide whether the 30-day time period in section 113(d)(2)(A)(i) may be waived for good cause. We also do not view the additional 5-day period provided for filing responses or other documents when service of a document is by mail in 29 CFR §2700.8(b) to apply to the statutory period here.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 18, 1980

RAY MARSHALL, SECRETARY OF LABOR UNITED STATES DEPARTMENT OF LABOR	:	
v.	:	Docket No. SE 79-42-R
BURGESS MINING AND CONSTRUCTION CORPORATION	:	

ORDER

Burgess Mining and Construction Corporation has moved to vacate the direction for review. Burgess asserts that the Secretary's failure to file his brief within 20 days after our granting of his petition for discretionary review is governed by 29 CFR §2700.72. That rule requires the petitioner to file its brief within 20 days of the granting of a direction for review and provides that if the petitioner fails to do so, the direction for review may be vacated.

The Secretary filed his brief by mail 25 days after our order directing review. The Secretary argues that his brief was timely filed and cites 29 CFR §2700.8(b), which provides:

> when service of a document is by mail, 5 days shall be added to the time allowed by these rules for the filing of a response or other document.

While we are concerned with any undue delay in the proceedings before us and construe our rules so as to expedite matters wherever possible, we also are bound to interpret our rules so as to secure just determinations. 29 CFR §2700.1(c). Rule 8(b) was promulgated to ensure, as far as possible, that parties served by mail not be deprived, through the vagaries of the post, of time elsewhere allowed in our rules for the preparation and filing of responses.

80-3-16

The Secretary was served by mail with our direction for review. Under Rule 8(b), 5 days may properly be added to the 20 days allowed under Rule 72 within which to file his brief in response to our direction. 1/ His brief, which was filed by mail on the 25th day, was therefore timely.

Accordingly, the motion to vacate is denied.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

1/ Rule 8(b) does not, however, apply to the 30 day statutory period for filing a PDR after issuance of a judge's decision. See our order dismissing the PDR in Sunbeam Coal, PITT 79-210 thru 214 (March 10, 1980).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 21, 1980

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
v.	:	Docket No. PITT 79-11-P
THE HELEN MINING COMPANY	:	
KENTLAND-ELKHORN COAL CORPORATION	:	
v.	:	Docket No. PIKE 78-399
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
and	:	
UNITED MINE WORKERS OF AMERICA	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
on behalf of ARNOLD J. SPARKS, JR.,	:	
v.	:	Docket No. WEVA 79-148-D
ALLIED CHEMICAL CORPORATION	:	

ORDER

The UMWA has moved for an order staying the effect of Commission decisions in these cases pending judicial review and the matter having come before the Commission and the Commission having examined the proofs

and the motion papers and having considered the same, it is

Ordered that the motion be and hereby is denied.

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

Backley, Commissioner, concurring:

While agreeing with my colleagues in denying the motion of the UMWA to stay the effect of our decisions in these cases pending judicial review, I believe some discussion of the UMWA's motion and my basis for denial is in order. The UMWA alleges that there is a strong likelihood that it will prevail on the merits on appeal; that its members will be irreparably injured unless a stay is granted; that a stay will not substantially harm other interested parties; and that it would be in the public interest to issue a stay.

The UMWA's claim of irreparable harm to its members is general in nature. The allegations made concern the problems resulting from decreased miner participation in inspections on a nation-wide basis. No part of the UMWA's argument and none of the motion's supporting affidavits speak to the necessity of a stay of the Commission's mandates in the instant cases. Thus, I conclude that there has been no adequate showing of irreparable harm to the UMWA in these cases.

Aside from the inadequacies discussed above, I have serious concern with the nature of the relief that the UMWA has requested. As I read the stay motion and its supporting memorandum, the UMWA does not seek a stay of the Commission's mandate in these particular cases, but instead seeks a stay of the precedential value of the Commission's opinions. This I cannot do. To stay the precedential effect of our decisions would not merely result in the issuance of final Commission decisions contrary to what the Commission has found to be the intent of Congress, but it would be inconsistent with the role assigned to the Commission under the Act. 1/

1/ Section 113, Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. § 801 et seq.

This Commission was established to independently decide questions of law and policy on a uniform, national basis. To temporarily overrule our precedent pending judicial review of our final orders in these three cases would be in derogation of our function. I therefore conclude that, aside from the inadequate showing of irreparable harm in these cases, the UMWA has not established the appropriateness of the relief it seeks.

Richard V. Backley, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 14, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. WEST 79-194-M
v.	:	
DUVAL CORPORATION	:	

ORDER

The petition for discretionary review is dismissed. Section 113(d)(2)(A)(i) requires that a petition for discretionary review be filed and served within 30 days after the issuance of the judge's decision. 1/ Commission Rule 5(d), 29 CFR §2700.5(d) (1979), states that "filing of a petition for discretionary review is effective only upon receipt." The petition for discretionary review was received by the Commission on April 4, 1980, more than thirty days after the issuance of the judge's decision.

Accordingly, the petition is dismissed as untimely filed. 2/

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

1/ 30 U.S.C. §823(d)(2)(A)(i) (Supp. II 1978).
2/ See Sunbeam Coal Corporation, Docket No. PITT 79-210 through 79-214, (order dated March 10, 1980).

80-4-6

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 14, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. DENV 78-579-PM
v.	:	
UNION ROCK AND MATERIALS CORPORATION	:	

ORDER

The petition for discretionary review is dismissed. Section 113(d)(2)(A)(i) requires that a petition for discretionary review be filed and served within 30 days after the issuance of the judge's decision. 1/ Commission Rule 5(d), 29 CFR §2700.5(d) (1979), states that "filing of a petition for discretionary review is effective only upon receipt." The petition for discretionary review was received by the Commission on April 7, 1980, more than thirty days after the issuance of the judge's decision.

Accordingly, the petition is dismissed as untimely filed. 2/

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

1/ 30 U.S.C. §823(d)(2)(A)(i) (Supp. II 1978).
2/ See Sunbeam Coal Corporation, Docket No. PITT 79-210 through 79-214, (order dated March 10, 1980).

80-4-5

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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April 21, 1980

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. DENV 75-207-P DENV 76-6-P
v.	:	IBMA 77-30
CO-OP MINING COMPANY	:	

DECISION

This penalty proceeding arises under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977), and involves 15 alleged violations. On March 31, 1977, after a hearing, the administrative law judge issued his decision finding that 14 of the alleged violations occurred and assessing penalties in the total amount of $2,898. Co-Op Mining Company appealed one finding of violation and seven of the penalty assessments. 1/

Co-Op contends that the Mining Enforcement and Safety Administration (MESA) did not sustain its burden of proving a violation of 30 CFR §75.603, which was cited in Notice No. 1 TLC. We have thoroughly reviewed the record, and we conclude that the evidence supports the judge's finding of violation.

1/ On March 8, 1978, this case was pending on appeal before the Secretary of Interior's Board of Mine Operations Appeals under the 1969 Act. This appeal is before the Commission for disposition under section 301 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C.A. §961 (1978).

As to the remaining notices under appeal, Co-Op concedes that the evidence supports a finding of violation in each instance. However, Co-Op argues that the assessment of penalty made by the judge for each violation was erroneous and excessive. Co-Op concedes that the judge may determine de novo the amount of the civil penalty, but argues that the judge is bound by the formulas provided in 30 CFR §100 in assessing any civil penalty. We reject this argument. 30 CFR §100 was applicable only to MESA's Office of Assessments in initially proposing penalties. The authority of an administrative law judge to assess penalties de novo in a penalty proceeding under the 1969 Act was not governed by the method of computation utilized by MESA's Office of Assessments.

Finally, Co-Op presents no persuasive arguments why the penalties assessed by the judge are excessive. The evidence emphasized by Co-Op in support of its argument was before the judge for his consideration. After a complete review of the record, we find that the judge gave full and fair consideration to all relevant testimony and other evidence of record in considering the six statutory criteria required before assessing penalties. The record supports his determinations and his penalty assessments should not be disturbed. 2/

Accordingly, the judge's decision is affirmed.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

2/ The Commission has declined to disturb penalty amounts assessed by a judge where the record reflects his full consideration of the six statutory criteria. See, e.g., Peabody Coal Co., 1 FMSHRC 1494 (1979); Pittsburgh Coal Co., 1 FMSHRC 1468 (1979); U.S. Steel Corp., 1 FMSHRC 1306 (1979); Kaiser Steel Corp., 1 FMSHRC 984 (1979); Shamrock Coal Co., 1 FMSHRC 799 (1979); Rushton Mining Co., 1 FMSHRC 794 (1979).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 21, 1980

PITTSBURG & MIDWAY COAL MINING COMPANY	:	
v.	:	Docket No. BARB 74-666
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	IBMA 76-57

DECISION

This case arises under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977)["the 1969 Act"]. It involves an imminent danger withdrawal order that was issued on February 28, 1974, by a Mining Enforcement and Safety Administration (MESA) inspector to Pittsburg & Midway Coal Mining Company under section 104(a) of the 1969 Act. 1/ In the withdrawal order the inspector cited four conditions that he believed constituted an imminent danger. 2/ The cited conditions involved an allegedly damaged trailing cable to a roof bolting machine, an allegedly damaged trailing cable to a loading machine, alleged accumulations of loose coal and coal dust, and allegedly loose overhanging ribs. The order was terminated on March 1, 1974, after the cited conditions were abated.

1/ Section 104(a) provided:

> 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.

2/ Section 3(j) of the 1969 Act defined the term "imminent danger" as:

> the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated;

Pittsburg & Midway filed an application for review of the withdrawal order and a hearing was held. On December 16, 1975, the administrative law judge held for MESA in part and for Pittsburg & Midway in part. The judge found that the conditions created by the trailing cable to the roof bolting machine and the trailing cable to the loading machine constituted imminent dangers, but that the conditions created by the accumulations of loose coal and coal dust, and the overhanging ribs did not. The judge also modified the withdrawal order by deleting its references to the overhanging ribs and to the accumulations of loose coal and coal dust (but not the references to accumulations relating to the trailing cables to the roof bolting and the loading machines). Both parties appealed the portions of the judge's decision that were adverse to them, including the judge's modification of the withdrawal order.

After a careful review of the record, we affirm the judge's decision. We conclude that the judge's basic factual findings are correct, that the results reached by the judge are correct, and that any error he might have committed in applying a test for determining whether an imminent danger existed was not prejudicial. In this regard, we note that whether the question of imminent danger is decided with the "as probable as not" gloss upon the language of section 3(j), or with the language of section 3(j) alone, the outcome here would be the same. We therefore need not, and do not, adopt or in any way approve the "as probable as not" standard that the judge applied. With respect to cases that arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq., we will examine anew the question of what conditions or practices constitute an imminent danger. Finally, we conclude that the judge acted correctly in modifying the withdrawal order. Section 105(b) of the 1969 Act specifically permitted the modification of an imminent danger withdrawal order after a hearing. 3/

Accordingly, the judge's decision is affirmed.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

3/ Section 105(b) stated:

> Upon receiving the report of such investigation, the Secretary shall make findings of fact, and he shall issue a written decision, incorporating therein an order vacating, affirming, modifying, or terminating the order, or the modification or termination of such order, or the notice, complained of and incorporate his findings therein.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 24, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PITT 75-1-P
ACE DRILLING COAL COMPANY, INC.	:	IBMA 76-60

DECISION

This is a civil penalty proceeding arising under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976 & Supp. I 1977). The administrative law judge found that Ace Drilling Coal Company, Inc., violated 30 CFR §77.410 and 30 CFR §77.1605(d) by failing to maintain a working backup alarm and a working horn on its front-end loader. 1/ He assessed the operator civil penalties of $7,500 and $2,500, respectively. The operator appealed. 2/

The case arose out of a fatal accident which occurred at the operator's No. 2 strip mine. The company's foreman was killed when a front-end loader backed over him. Following an investigation of the accident, a Mining Enforcement and Safety Administration inspector found that the front-end loader lacked both an operable backup alarm and a horn, in violation of the subject regulations. On appeal, the company argues that it did not commit the violations.

The operator admits the backup alarm was inoperable, but argues that it should be relieved of liability because the deceased foreman knew the alarm was not working and nevertheless ordered the loader to commence operation. It asserts the foreman, not the company, committed the violation. We reject this argument. In determining liability for

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1/ Section 77.410 provides:

> 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.

Section 77.1605(d) provides in pertinent part:

> Mobile equipment shall be provided with audible warning devices * * *.

2/ The appeal was pending before the Board of Mine Operations Appeals as of March 8, 1978. Accordingly, it is before the Commission for disposition. Section 301 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. §961 (1978).

conduct regulated by the Act, the actions of the foreman cannot be separated from those of the operator. The foreman acts for the operator. Cf. Pocohontas Coal Co., 590 F.2d 95 (4th Cir. 1979). The company also argues it should not be held liable because it could not have foreseen the foreman's irresponsible action and thus could not have prevented the violation. We likewise reject this argument. As stated above, the acts of the foreman are acts of the operator. In addition, the 1969 Coal Act did not condition liability upon fault. See United States Steel Corp., 1 FMSHRC 1306, 1307 (1979); Peabody Coal Co., 1 FMSHRC 1494, 1495 (1979).

With respect to the violation of 30 CFR §77.1605(d), the operator admits the horn did not work at the time the inspector issued the notice of violation. However, it asserts that there was no proof the horn was inoperable prior to the accident, and therefore that the judge incorrectly found the violation. The operator misses the mark. The issue is whether the violation existed at the time it was cited by the inspector. It is not necessary, as Ace seems to contend, that a condition contribute to an accident before the standard is violated. The Act does not condition the existence of a violation upon the occurrence of an event it is designed to prevent.

Finally, the company argues that the penalties assessed were excessive. We have carefully reviewed the record and find that the penalties assessed by the judge reflect proper consideration of the statutory criteria set forth in the Act. They will not be disturbed.

Accordingly, the decision of the judge is affirmed.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

APR 1 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	Civil Penalty Proceeding
v.	DOCKET NO. WEST 79-251-M A/O NO. 10-00088-05003
HECLA MINING COMPANY, Respondent.	Mine: Lucky Friday

APPEARANCES:

Marshall P. Salzman, Esq.
of San Francisco, California, for petitioner,

Fred M. Gibler, Esq.
of Kellogg, Idaho, for respondent.

DECISION

Carlson, Judge:

This cause was heard under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (hereinafter the "Act"), upon the Mine Safety and Health Administration's petition for assessment of a civil penalty for a violation of the mandatory safety standard published at 30 C.F.R. §57.19-70. The standard requires that cage doors in shaft hoists be closed while men are being hoisted.

The facts are undisputed. A skiptender employed by respondent opened the cage door some 40 feet before the cage stopped, thus risking serious injury. He did so in knowing disregard of respondent's strictly enforced safety policy forbidding that practice. The inspecting officer acknowledged that respondent could not have anticipated the employee's action (Tr 5-8).

The case presents one significant issue: Whether the mine operator, despite his lack of negligence, may be found in violation and assessed a civil penalty under section 110(a) of the Act.

The Commission's jurisdiction is stipulated. Both parties presented evidence and filed post-hearing briefs.

Respondent contends that under MESA v. North American Coal Company 3 IBMA 93 (1974), a mine operator cannot be found in violation of the Act based solely upon an employee's failure to comply with a strictly enforced safety policy. Petitioner, on the other hand, contends that the North American Coal Company case does not support this proposition, and that other decisions establish that an operator can be found in violation of the Act even where the operator acted without fault.

Respondent's reliance on the North American Coal Company case is misplaced. Although North American Coal appears to allow a "due diligence" or "isolated act" defense, its applicability has since been restricted to the particular standard involved in that case. See Webster County Coal Corporation, 7 IBMA 264 (1977); United States Steel Corporation v. Secretary of Labor, Mine Safety and Health Administration (MSHA), 1 FMSHRC 1306 (1979). In United States Steel, the Commission makes clear that under the 1977 Act an operator is liable for violations of mandatory standards without regard to fault; thus, "an operator's safety program and its efforts to enforce it are irrelevant to a finding of violation." The present record supports a finding of violation.

An operator's fault, although not relevant to a determination of violation, is relevant to a determination of an appropriate penalty.[1]

1/See §110(i) of the Act.

Because the violation in this case is attributable to an employee's deliberate disregard of a strictly enforced safety policy,[2] a low penalty is warranted--despite the possibility of serious injury. I conclude that $15 is reasonable.

ORDER

Accordingly, respondent is ordered to pay a civil penalty of $15 within 30 days of this decision.

John A. Carlson
Administrative Law Judge

2/Other undisputed facts bearing on penalty show that respondent is a large company; that the imposition of a penalty would not impair its ability to continue in business; that it had no unfavorable prior history of violations; and that it demonstrated good faith in achieving compliance.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 2 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 80-145 A.O. No. 46-01433-03060
v.	:	Loveridge Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION AND ORDER

Once again the parties' insult our sensibilities and intelligence with a proposal to settle with a wrist slap three extremely serious violations that created a hazard of three or more fatalities or permanently disabling injuries. The excuse offered is so outrageous as to be mind boggling.

MSHA flouts the law by refusing to prosecute independent contractors. As a result, those contractors flout the law with immunity. OSHA, remember, cannot touch them because they are under the "protection" of MSHA.

MSHA then "prosecutes" the operator who pleads the unfairness of holding him responsible while the real culprit goes free. This plea is appealing to the ears of the assessment office, the solicitor and so far the Commission.

As a result, the operator gets off with a token assessment, the policy of non-enforcement proliferates and the death and injury rate among miners employed by independent contractors soars. This charade has got to stop.

Based on an independent evaluation and de novo review of the circumstances, I find:

1. That for the failure to provide safety belts and lines to two miners working on a high scaffold the amount of the penalty warranted for the two violations that occurred is $1,000.

2. That for the failure to provide a handrail on an elevated walkway the amount of the penalty warranted is $500.

3. That for the failure to provide the hand held grinder with an automatic deenergizer the amount of the penalty warranted is $250.

Accordingly, it is ORDERED that the parties motion to approve settlement of the three violations charged at the amounts initially assessed, $225, $240, and $122 for a total of $587, be, and hereby is, DENIED.

It is FURTHER ORDERED that for the three violations found the operator pay a penalty of $1,750.00 on or before Friday, April 25, 1980 and that, subject to payment, the captioned petition be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
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APR 2 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. UTAH INTERNATIONAL, INCORPORATED, Respondent.	Civil Penalty Proceeding DOCKET NO. WEST 79-237 MSHA CASE NO. 05-02838-03005 Mine: Trapper Strip

DECISION

APPEARANCES:

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BEFORE: Judge Jon D. Boltz

STATEMENT OF THE CASE

These proceedings arise pursuant to the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §801 et seq.). The Petitioner seeks to assess a penalty against the Respondent for its alleged violation of 30 CFR §71.108[1] by having failed to collect dust samples for two of its employees by the required date. By way of amended answer the Respondent denies it violated the standard in that it did collect the dust sample required for one employee, and that no sample was required in the instance of the other employee.

1/ ". . . the operator shall, during each succeeding 12 month period, take one respirable dust sample of the mine atmosphere to which each such miner sampled is exposed."

DISPOSITION OF CASE ON STIPULATED FACTS AND BRIEFS

After the case was set for hearing the parties agreed to submit the case for decision based upon stipulated facts and briefs.

FINDINGS OF FACT

Based upon the stipulation filed by the parties I make the following findings of fact:

1. On January 30, 1979, a respirable dust sample was taken of the mine atmosphere to which Respondent's employee, Frank Self, was exposed on that day, and Mr. Self acknowledged that such sample was taken by signing the sample card.

2. Mr. Self's social security number is 523-62-9438, whereas the mine data card completed by Respondent for Mr. Self bears the social security number 523-69-9438.

3. The data card containing the results of Mr. Self's respirable dust sample taken on January 30, 1979, was mailed to MSHA.

4. MSHA received the data on or before February 8, 1979.

5. The dust sample was required to be taken by February 28, 1979.

6. Mr. Keever was terminated August 15, 1978, as an employee of the Respondent.

7. A change of status card for Mr. Keever was mailed to MSHA on or about December 20, 1979, along with approximately 25 other change of status cards.

8. MSHA did not receive Mr. Keever's change of status card, mailed on or about December 20, 1979.

9. Citation number 9944050 was issued to Respondent April 3, 1979.

10. A second change of status card for Mr. Keever was sent to MSHA on or about April 6, 1979.

11. MSHA received the second change of status card of Mr. Keever on April 9, 1979.

12. MSHA records reflect that the change of status card received on April 9, 1979, was the first notification of change of status for Mr. Keever.

ISSUES

1. In regard to Mr. Self, was there a violation of 30 CFR §71.108 because of the error in listing the social security number on the data card submitted to MSHA?

2. In regard to Mr. Keever, was there a violation of 30 CFR §71.108 for failure to take the dust sample even though Mr. Keever no longer worked for the Respondent?

The answer to both questions is no.

DISCUSSION

The findings of fact lead to the conclusion that the Petitioner has established that its records show that there were no dust samples taken as required of the two employees of the Respondent on or before February 28, 1979; and, the Respondent has established that in the instance of one employee, the dust sample was taken timely, and in the other, that no sample was taken because the employee was no longer employed by the Respondent at the time the sample would have been required.

The Respondent has met the burden required of it pursuant to 30 CFR §71.108. Since that regulation requires, during a succeeding 12 month period, the taking of the dust sample of the mine atmosphere to which the miner was exposed, the Respondent fulfilled that requirement on January 30, 1979, well within the due date of February 28, 1979.

The Petitioner argues in its brief that inherent within 30 CFR §71.108 is a mine operator's responsibility to accurately record the data by which a miner is identified and sample. However, 30 CFR §71.111[2] and 30 CFR §71.112[3] contain requirements concerning the recording of data by the operator and transmission and analysis of the dust samples by MSHA. At most there may have been a violation of one of these regulations for failure to list the correct social security number, however, no violation of these sections is alleged.

The Respondent also did not violate the provisions of 30 CFR §71.108 by its failure to take, by the due date of February 28, 1979, a dust sample of a miner who no longer was employed by the Respondent. The Petitioner states in its brief that "an operator may properly be cited if MSHA does not receive either required dust samples or a change of status card showing that an employee has been terminated." This conclusion may be correct as far as MSHA records are concerned, however, the failure of the Respondent to collect the dust sample for someone no longer employed by the Respondent does not support a conclusion and finding that the Respondent violated 30 CFR §71.108 as alleged. To conclude otherwise would suggest an intreperation considerably broader than the requirement that is contained within that section.

2/ ". . . (b) Each sample shall be accompanied by a completed 3 x 5 inch white data card . . . and shall contain the following additional information: . . . date of sample, the social security number and occupation of the miner whose environment was sampled, tons of coal produced . . ."

3/ "Upon receipt by the Secretary of respirable dust samples taken . . . the following data is recorded: (e) The social security number of the individual miner whose atmosphere was sampled."

I conclude that the Petitioner has shown why, from its records, the Respondent was charged with the violation for failure to take the two dust samples; but the Respondent has shown, conclusively, I believe, that there was no violation of the regulation in that one required dust sample was, in fact, taken; and in the other instance, no dust sample was required to be taken.

CONCLUSIONS OF LAW

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

2. At all times relevant to this proceeding, Respondent was subject to the provisions of the Federal Mine Safety and Health Act of 1977.

3. Petitioner failed to prove a violation of 30 CFR §71.108 and Citation number 9944050 should be vacated.

ORDER

Based on the foregoing findings of fact and conclusions of law, citation 9944050 and any penalties therefor are vacated.

Jon D. Boltz
Administrative Law Judge

Distribution:

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4 APR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of: ROBERT V. BEVINS, Applicant	:	Complaint of Discrimination
	:	Docket No. VA 79-99-D
	:	CD 79-128
v.	:	
UNITED CASTLE COAL COMPANY, Respondent	:	

DECISION

Appearances: Barbara Krause Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Michael L. Lowry, Esq., Ford, Harrison, Sullivan, Lowry & Sykes, Atlanta, Georgia, for Respondent.

Before: Judge Edwin S. Bernstein

Applicant alleges and Respondent denies that in discharging Applicant from its employment on April 25, 1979, Respondent unlawfully discriminated against Applicant for engaging in actions protected by Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (the Act).

A hearing was held on January 22, 1980 in Bristol, Tennessee. Applicant, Roger Jenkins, and Arnold D. Carico testified for Applicant, and Michael Forticq testified for Respondent. Upon consideration of the evidence, the demeanor of the witnesses, and the parties' posthearing briefs, I make the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Applicant, Robert V. Bevins, began his employment with United Castle Coal Company in February 1979. He was employed as a section foreman in a preparation crew which worked the evening shift, from 3:30 to 11 p.m. The preparation crew prepared the mine for the production crew, which worked from 7 a.m. to 3 p.m. The preparation crew's duties included such tasks as cleaning up loose coal, cleaning and rock dusting the belts, doing extra roof bolting, and pumping water. His crew consisted of five men who worked inside the mine, and one who worked outside. Carl Fogarty, the mine's general foreman, was Applicant's immediate supervisor. Mr. Fogarty in turn was supervised by Jack Tiltson, the mine's general superintendent.

On March 16, 1979, an MSHA inspector issued Citation No. 0679915 to Respondent, which described the following alleged violation:

> The approved ventilation system and methane and dust control plan was not complied with in that approximately 20 permanent stoppings erected between intake and belt entries or returns and belt entry has substantial openings or were constructed partially of wood or both. The approved plan requires that the stoppings be constructed of incombustible material and constructed with sufficient strength to serve the purpose intended. Approximately 24,000 cubic feet of air of the 56,000 cubic feet. The permanent stopping lines in question were not repaired in a substantial or incombustible manner in that holes present in the stopping lines were covered by such materials as wood, paper and plastic line brattice and were then covered by a stopping sealant product. The holes were 8" x 18" in size and existed in the return stopping line between the portal and a point approximately 600 feet inby.

The MSHA inspector established April 5, 1979, as the date for abatement of this condition. This abatement period was subsequently extended to April 24, 1979.

On March 26, 1979, a rock fall occurred in the mine which caused production to stop until the condition was corrected. Production resumed on April 16, 1979. Applicant testified that he believed that he was discharged on April 25, 1979 because he did not work fast enough in cleaning up the rock fall. He stated that he could not work any faster without jeopardizing the safety of himself and his men. Therefore, he contended that he was entitled to the protection of Section 105(c)(1) of the Act. Applicant offered no evidence that he ever filed a safety or health complaint with either MSHA or his supervisors. His contention of discriminatory discharge was based upon one conversation between Mr. Tiltson and himself and the fact that he was later discharged.

Applicant testified that in the beginning of April 1979, about one week after the rock fall occurred and three weeks before his discharge, Mr. Tiltson told him that he was very unhappy with the progress of Applicant's crew in cleaning up the rock fall, and that unless there was better progress, Mr. Tiltson would discharge Applicant. Mr. Tiltson told Applicant that as far as Applicant's crew was concerned, "the tail is wagging the dog," meaning that Applicant was having difficulty supervising the crew and that the men were doing as they pleased. Applicant disagreed, and told Mr. Tiltson that he could not work faster because of the hazardous conditions involved, and that the work had to be performed with extreme caution. Applicant testified that this was the only time that Mr. Tiltson or any one of Respondent's officials threatened to fire him. On Thursday, April 12, 1979, Applicant sustained an injury on the job. He worked the next day and Monday through Thursday, April 19, the following week. On April 19, Applicant was

directed to repair the stoppings which were the subject of the MSHA citation quoted above. He worked at the mine's face area with two of his men, and left three other men to repair the stoppings in an area about three-quarters of a mile from the face. He was told that the three men repaired the stoppings, but he did not examine their work. At the end of the shift, he filed a written daily report with his supervisor which stated in part: "Worked on repairing stoppings from portal with 3 men. Repaired stoppings from portal down to where last rock fall was. Took 2 men and went to section. Scooped sump hole in No. 1. * * *"

On April 20, 1979, Applicant visited a doctor concerning his injury and, on orders of the doctor, did not return to work that month.

On April 25, 1979, Applicant met with Mr. Tiltson. The superintendent told Applicant, "I decided yesterday that I would just let you go." Applicant did not ask Mr. Tiltson why he was being discharged and Mr. Tiltson did not elaborate.

Roger Jenkins, a United Castle Coal Company employee testified that at the request of Mr. Tiltson, he observed Applicant cleaning up the roof fall in March 1979 and felt that the crew was working fast enough. He stated that this work had to be performed slowly because the miners work under unsupported roof at all times.

Arnold D. Carico, an MSHA inspector, stated that although he did not issue the original citation in connection with Respondent's defective stoppings, he visited Respondent's mine on April 24, 1979 because remedial

action was supposed to be completed by that date. He stated that MSHA had found 20 of a total of 40 or 50 stoppings in Respondent's mine to be deficient. On April 24, Mr. Carico was told by Respondent that the condition had been abated but when he inspected three of the first 10 or 12 stoppings going down into the mine from the portal or entrance, he found that the condition had not been abated, and therefore he issued a withdrawal order pursuant to Section 104(b) of the Act. The Order was terminated two days later, on April 26.

Respondent's president, Michael Forticq, stated that he visited the mine on April 24, 1979, and met with Mr. Carico after the MSHA inspector had completed his inspection. Mr. Carico told Mr. Forticq that the repair work on the stoppings was so poorly done as not to constitute a good faith effort to abate the violation. Upon inspecting the stoppings himself the following day, Mr. Forticq found pieces of cardboard, wood, and other combustible materials stuffed into the stoppings. He agreed with the inspector that the corrective work was so carelessly perfomed that the issuance of the withdrawal order was appropriate. He also stated that he was very upset about this. Mr. Forticq testified that he had attempted to build a good relationship with MSHA, and that he was very hurt that this situation had arisen. After speaking with the MSHA inspector on April 24, Mr. Forticq told Mr. Tiltson, the mine superintendent, that this was serious enough to warrant the discharge of the person responsible. It should be noted that at the time, Mr. Tiltson's job was in serious jeopardy, and he knew that he was also under consideration for possible discharge. Mr. Forticq testified that following their conversation, Mr. Tiltson determined that Applicant

was responsible for doing the work on the stoppings, and Mr. Tiltson discharged Applicant the next day. Mr. Forticq further testified that Mr. Tiltson was discharged in the end of May or early June after having been given a few weeks prior notice. Carl Fogarty, the mine's general foreman and Applicant's immediate supervisor, was also discharged because of "his apparent lack of concern for regulations and lack of diligence in seeing that they were properly adhered to."

CONCLUDING FINDINGS AND CONCLUSIONS OF LAW

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

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

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

Applicant's claim that he was discriminated against pursuant to Section 105(c)(1) of the Act rests upon a conversation with Mr. Tiltson in which the superintendent complained that Applicant was not proceeding quickly enough in cleaning up a roof fall. Applicant contends that Mr. Tiltson's complaint was an attempt to pressure him to proceed in a manner which he considered to be hazardous. There is no evidence that Applicant made any safety complaint to MSHA or to any other official. Applicant merely justified his slow progress in terms of his proceeding safely.

On the other hand, Respondent contends that Applicant was discharged because his crew repaired defective stoppings which were the subject of an MSHA citation in such a careless and faulty manner as to cause MSHA to issue a withdrawal order at the mine. Respondent thus asserts that it discharged Applicant because Applicant failed to do his job properly, and that this had nothing to do with a safety or health complaint. The testimony of Mr. Forticq, Mr. Carico, and of Applicant himself support Respondent's interpretation. Applicant was responsible for correcting defective stoppings. The men on his crew did a poor job, apparently unknown to Applicant since he did not examine the work. Applicant nevertheless reported that the work was done properly. As a result, Mr. Carico was told that the work had been done properly, and was surprised to find that the work was totally unsatisfactory. Mr. Carico's testimony substantiates the fact that the work was done poorly. I believe Mr. Forticq's testimony that

he was furious about the incident and that he directed Mr. Tiltson to discharge the person responsible. Mr. Tiltson, whose job was also in jeopardy and who was subsequently discharged himself, needed to find a responsible person and discharge him. Since Applicant's crew had performed the work, Applicant was held responsible for an incident which had resulted in a closure of the mine for two days. It seems clear to me that this incident was the cause of Applicant's discharge.

ORDER

The complaint of discrimination DISMISSED. The Solicitor's motion to assess a civil penalty is DENIED.

Edwin S. Bernstein
Administrative Law Judge

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7 APR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	:	Civil Penalty Proceedings Docket No. DENV 79-94-PM A.O. No. 39-01141-05001
v.		:	White Elephant Mine
PACER CORPORATION,	Respondent	:	Docket No. DENV 79-95-PM A.O. No. 39-00509-05001
		:	Virginia Mine

DECISION

Appearances: Steven P. Kramer, Esq., Trial Attorney, Office of the Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Mike Treloar, Safety Director, Pacer Corporation, Custer, South Dakota, for Respondent.

Before: Judge William Fauver

These cases were brought by the Secretary of Labor under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for assessment of civil penalties for alleged violations of mandatory safety standards. The cases were heard at Rapid City, South Dakota, on August 16, 1979. The Secretary was represented by counsel. Respondent was represented by its safety director. Oral arguments were heard at the conclusion of the evidence.

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

FINDINGS OF FACT

1. At all pertinent times, Respondent, Pacer Corporation, operated two pegmatite mines known as the White Elephant Mine and the Virginia Mine, in Custer County, South Dakota, which produced pegmatite ore for sales in or affecting interstate commerce.

2. Mining operations at Respondent's mines involved drilling a series of small holes near pegmatite deposits in preparation for "shooting" or blasting the rock to recover the ore. The drilling crew consisted of two drillers, a loader operator and a truck driver. Normally, the crew would work several mines at a time.

3. The White Elephant Mine's northwest wall consisted of two highwalls, one about 75 feet high with a 20-foot overhang, and another, to the left, about 25 feet high. A service road provided access to the mine and was a safe distance from the overhang. When they were working at this mine, the crew would position the drilling machinery 60 to 70 feet from the overhang.

Order No. 328209

4. On April 20, 1978, Kenneth Westphal, a federal mine inspector, accompanied by an inspector-trainee, Howard Aspindall, inspected Respondent's White Elephant Mine to investigate a complaint that men were working under an overhang and near loose, unconsolidated ground.

5. Two employees had complained to Inspector Westphal that they had been drilling under what they considered a dangerous overhang and near loose hanging rock. They drilled until about 10 a.m. when the air compressor broke down. They completed their shift at Respondent's Virginia Mine but expected to resume drilling at the White Elephant Mine once the compressor was repaired. They moved the air compressor to the Virginia Mine in the meantime.

6. Inspectors Westphal and Aspindall drove to the White Elephant Mine following the miners' complaint. No one else was there when they arrived. They inspected the northwest wall of the mine (Exh. P-1C) and observed loose rock and boulders near the overhang and on top of the taller highwall. They also observed the other highwall covered with loose rock and one large crack near the overhang.

7. On the day of the inspection, the area was neither barricaded nor posted. They observed about four freshly drilled holes underneath the overhang near the loose rock that indicated that men had been working there recently. The drilling machine was about 10-15 feet from, and slightly to the left of, the overhang. The surface between the drilling machine and the area beneath the overhang was fairly level. The machine's controls were on the side closer to the overhang so that a man operating the machine would have to stand between the machine and the overhang.

8. The hazard associated with this condition was that the vibrations from the drilling activity could cause the loose rock, and possibly the boulders and other material on top of the highwall, to roll down and crush men standing between the drilling machine and the highwall.

9. Following the inspection, they returned to Respondent's office, and phoned Respondent's safety director, Mike Treloar, to notify him of the condition. When Mr. Treloar arrived, they made a second trip to the mine. When they arrived, the air track machine was still there but the air compressor had been moved to the base of the Virginia Mine. At 11 a.m., Inspector Westphal issued an order of withdrawal to Respondent, reading in part: "Men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unstable ground conditions shall be corrected promptly, or the area shall be barricaded and posted." The cited condition was abated on May 4, 1978, by closing down the mine and barricading off the area.

Citation No. 328208

10. On April 20, 1978, Inspector Westphal also inspected Respondent's Virginia Mine and observed that the audible backup alarm on Respondent's front-end loader was inoperable or missing. Respondent was renting the loader and did not have a spare alarm. A request for a replacement had been placed before the inspector arrived.

11. The absence of a backup alarm created the danger that men working in the area (who would be outside the operator's view) would not know when the loader was backing up and would be unable to get out of its path. Normally, the only men who would be working around the loader were the operator and a truck driver.

12. At 9 a.m., Inspector Westphal issued a citation to Respondent reading in part: "The front-end loader No. 175B was not provided with an audible back-up alarm system." The cited condition was abated on May 4, 1978, by installing an audible backup alarm.

Order No. 328452

13. On July 5, 1978, Guy Carsten, a federal mine inspector, inspected Respondent's Virginia Mine to investigate an accident. He traveled to the area of the highwall on the northeast-to-southeast wall. It was about 400 feet wide with several benches or layers extending across its face. Fifty to seventy-five feet from the top of the highwall was a 10- to 12 foot wide bench. From there down to the service road was another 50 to 70 feet. The service road was 15 to 18 feet wide at its widest part and was about 9 feet wide where it passed by an overhang that extended over the inside track of the road. From the service road down to the next bench was about 30 feet.

14. The inspector observed loose hanging rock on the wall and boulders all along the 10- to 12-foot wide bench. There were no danger or warning signs in the area. He observed no one traveling the road, but there was evidence that it had been traveled recently. Both the track drill and the air compressor were also there.

15. The inspector's notes read in part:

> Southeast corner of highwall was broken up and has an overhang, road runs under or alongside the overhang. This was on the crusher feed level. Vehicles travel once a day to fuel the air compressor for drill. Drill crew have a truck to drive to drill, which also uses this road.

16. The hazard associated with this condition was that the vibrations from the drilling activity could cause the loose rock to come down off the highwall and hit people traveling the road. There was also a possibility that the overhang could fall.

17. Inspector Carsten issued an order of withdrawal to Respondent, reading in part:

> Loose rocks were observed on the highwall, northeast to southeast wall. An overhang was observed on the southeast corner of the highwall. Service road runs along this highwall. Fuel truck and drill crew truck traveled this road at least once a day when drilling operations are performed. A notice was issued under the old law and abated by barricades and signs. Barricades and signs are missing.

On July 6, 1978, his order was modified to change: "A notice was issued under the old law" to read: "An order was issued under the old law." On July 10, 1978, the order was further modified to change the section violation from section 56.3-5 to section 55.3-5. A final modification was made on July 12, 1978, to allow travel on the service road under the direct supervision of the mine superintendent or the safety director. This would enable Respondent to dress down the face and remove the track drill and air compressor from the area found to be dangerous.

18. On July 19, 1973, a notice of violation had been issued to Respondent under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., for a violation of section 55.3-5 (presence of loose rock on south bank of quarry). On April 4, 1974, an order of withdrawal was issued for failure to comply with the notice of violation requiring removal of the loose rock. On November 17, 1976, the order issued on April 4 was abated by posting the southeast bank of the quarry with a "Keep Out" sign and barricading the bank with rocks.

19. On the day of the inspection, July 5, 1978, the inspector observed that the barricade had been removed and that the loose rock was still present. He determined that loose rock was still present without climbing the bank to observe the top bench.

20. Management should have been aware of this condition because of the earlier noncompliance order and because the foreman and safety director traveled the area frequently.

DISCUSSION

Order No. 328209

On April 20, 1979, Inspector Westphal charged Respondent with a violation of 30 C.F.R. § 55.3-5, which provides: "Mandatory. Men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted." The basic issue as to this order of withdrawal is whether men were working near or under a dangerous bank.

The Secretary argues that the testimony of the two inspectors established that the Respondent was still drilling and in the process of mining operations at the White Elephant Mine at the time of the inspection. The Secretary asserts that the small pocket of ore to the left of the overhang that Respondent was going to mine was included in the order as being near or under a dangerous area. The Secretary contends that its case was not confined solely to the area under the overhang, which also posed a danger, because there was loose material in the entire area.

Respondent contends that several weeks before the inspection, management had decided to cease mining operations at the White Elephant Mine after a test blast showed the amount of recoverable ore to be minimal. The last mining activity occurred about 2 weeks before the inspection and the only activity in the cited area on the day of the inspection would have been the movement of trucks. The safety director stated that all mining equipment had been removed from the area.

Respondent states that four or five holes had been drilled in an area to the left of the overhang in preparation for blasting a small pocket of ore. This area is depicted in Exhibit P-1A and in the lefthand portion of Exhibit P-1C. Respondent states that the blast would have formed a natural barrier to prevent anyone from traveling near the overhang. Respondent denies that holes had been drilled recently under the overhang and also states that it has never received complaints from employees about dangerous banks.

I find that the Secretary failed to show by a preponderance of the evidence that Respondent had recently drilled holes in, and would soon be blasting, the rock immediately adjacent to the overhang. The Secretary states that besides the four to five holes described by Respondent, there were about five holes underneath the highwall that appeared to be freshly drilled. There was evidence, however, that blasting had already occurred in the cited area, leaving open the possibility that the overhang was created by the earlier blast. The inspector-trainee stated he observed burn marks on the wall. With the track drill located to the left of the overhang, between the two highwalls, the inspector-trainee stated that he was unable to determine if work was being performed on the rock underneath the overhang or considerably to the left.

I do find that Respondent's employees had recently drilled holes farther to the left and would be returning to blast that area after the compressor was repaired. Because the whole area, including the area farther to the left, was included in the order and was near loose overhanging rocks, I conclude that Respondent violated section 55.3-5 as alleged in the order. Although the Secretary was unable to prove men were working under the overhang, I find that men working in the other area could have wandered near the overhang without a barricade in place. I find no merit in Respondent's argument that the subsequent blast would have created a natural barrier.

Citation No. 328208

On April 20, 1978, Inspector Westphal charged Respondent with a violation of 30 C.F.R. § 55.9-87, which 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 basic issue as to this citation is whether Respondent's front-end loader had an audible backup alarm in operable condition.

I find that the Secretary proved by a preponderance of the evidence that Respondent's front-end loader did not have an operable audible backup alarm.

Order No. 328452

On July 5, 1978, Inspector Carsten charged Respondent with a violation of 30 C.F.R. § 55.3-5, which provides: "Mandatory. Men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted." The basic issue as to this order of withdrawal is whether men were working near or under dangerous banks.

The Secretary contends that the cited area had already been the subject of an order of withdrawal and had in fact been barricaded and roped off by Respondent. Subsequently, however, Respondent had removed the barrier and resumed travel through the cited area. The Secretary argues that an inference can be drawn that Respondent never actually abated the condition that was the subject of the prior order.

The Respondent argues that the prior order of withdrawal covered a different area from the one cited in the subject order and that at the time of the prior order it was performing mining operations. Respondent contends that on the day of the inspection it was not mining the highwall that was the subject of the prior order of withdrawal.

The Respondent also argues that its superintendent, Dwayne Jones, had been in the pegmatite mining business for over 20 years and based on this experience, he felt there was no hazard involved in using the service road since mining operations in the cited area had ceased. Respondent contends that any loose rock that might have created a danger to people traveling below had been scaled.

Respondent also argues that the overhang in the cited area had been present for many years and observed on several occasions by inspectors without a violation being cited.

I find that the area of the subject order covering the northeast-to-southeast wall of the Virginia mine was the same area cited in the order of withdrawal issued on July 19, 1973, and in the order of abatement issued on April 4, 1974. I find that on the day of the subject inspection, the barricades were not in place and the service road was subject to travel near or under banks with loose rock and a dangerous overhang.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and subject matter of the above proceedings.

2. Respondent violated 30 C.F.R. § 55.3-5 by allowing men to work near or under dangerous banks as alleged in Order No. 328209. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of $275 for this violation.

3. Respondent violated 30 C.F.R. § 55.9-87 by failing to provide a front-end loader with an audible backup alarm as alleged in Citation No. 328208. Based upon the statutory criteria for assessing a civil penalty for a violation of a safety standard, Respondent is assessed a penalty of $106 for this violation.

4. Respondent violated 30 C.F.R. § 55.3-5 by allowing men to work near or under dangerous banks as alleged in Order No. 328452. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of $325 for this violation.

ORDER

WHEREFORE IT IS ORDERED that Pacer Corporation shall pay the Secretary of Labor the above-assessed civil penalties, in the total amount of $706, within 30 days from the date of this decision.

William Fauver

WILLIAM FAUVER, JUDGE

Distribution:

Steven P. Kramer, Esq., Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Mike Treloar, Safety Director, Pacer Corporation, Box 912, Custer, SD 57730 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

8 APR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. SE 79-27-M
Petitioner	:	A/O No. 09-00053-05002
v.	:	
	:	Clinchfield Mine & Mill
MEDUSA CEMENT COMPANY,	:	
Respondent	:	

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner;
Tom W. Daniel, Esq., Hulbert, Daniel & Lawson, Perry, Georgia, for Respondent.

Before: Judge Cook

I. Procedural Background

On April 30, 1979, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty against Medusa Cement Company (Respondent) in the above-captioned proceeding. The petition was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) (1977 Mine Act), and alleged a violation of one provision of the Code of Federal Regulations. 1/ An answer was filed on May 17, 1979.

A notice of hearing was issued on November 7, 1979, scheduling the case for hearing on the merits on November 29, 1979, in Macon, Georgia. The hearing was held as scheduled with representatives of both parties present and participating.

A schedule for the submission of posthearing briefs was agreed upon following the presentation of the evidence. The Respondent's brief was filed

1/ The alleged violation is set forth in a combined citation and withdrawal order issued under sections 104(a) and 107(a) of the 1977 Mine Act. This document will be referred to as a citation throughout this decision.

on January 18, 1980. The Petitioner did not file a formal brief, but filed a letter on January 25, 1980, containing representations in the nature of proposed findings of fact and conclusions of law. On February 4, 1980, the Respondent filed a letter in response to the Petitioner's representations.

II. Violation Charged

Citation No.	Date	30 C.F.R. Standard
96893	11/7/78	56.9-3

III. Witnesses and Exhibits

A. Witnesses

The Petitioner called as its witness Thomas W. Hubbard, an MSHA inspector.

The Respondent called as its witnesses Billy R. Berrett, an administrative assistant; John Fowler, the general quarry supervisor; and Richard P. Kistler, the plant manager.

B. Exhibits

1. The Petitioner introduced the following exhibits into evidence:

M-1 is a copy of the first page of the proposed assessment compiled by the Office of Assessments.

M-2 is a copy of the second page of the proposed assessment compiled by the Office of Assessments.

M-3 is a copy of Citation No. 96893, November 7, 1978, 30 C.F.R. § 56.9-3.

M-4 is a copy of a portion of a miner's complaint.

M-5 is a copy of a document styled "Inspection of Off the Highway Haulage Trucks."

2. The Respondent introduced the following exhibits into evidence:

O-1 is a copy of a letter.

O-2 is a copy of "Minimum Performance Criteria for Brake Systems for Off-Highway Trucks and Wagons - SAE J166."

O-3 is a three-page document containing copies of three daily operator's reports for the Euclid No. 2 haul truck.

O-4 is a three-page document containing copies of three daily operator's reports for various other vehicles.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the 1977 Mine Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding (Tr. 4, 5, 11).

2. The Respondent operates a mine, the products of which enter commerce or the operations of which affect commerce within the meaning of the 1977 Mine Act (Tr. 4, 5, 11).

3. The Respondent's size is set forth in the notification of proposed penalty in that the mine operates 200,000 to 300,000 annual hours of work and the controlling company operates 3 to 6 million annual hours of work (Tr. 4, 5, 11).

4. The Respondent had no history of previous violations prior to the subject citation (Tr. 4, 5, 11).

5. Assessment of the $345 civil penalty proposed by the Office of Assessments will not affect the Respondent's ability to remain in business (Tr. 4, 5, 11).

B. Occurrence of Violation

On November 7, 1978, MSHA inspector Thomas W. Hubbard conducted a complaint investigation at the Respondent's Clinchfield Mine & Mill. He arrived at the mine at approximately mid-morning, accompanied by Mr. Bruce Dial, a training inspector (Tr. 19-21).

The complaint had been filed with the Occupational Safety and Health Administration and subsequently turned over to Inspector Hubbard (Tr. 23). The complaint (Exh. M-4) states, in pertinent part, as follows: "There is a large dump truck used to carry limestone from the pit to the crusher. The truck has no brakes. This is an off-road truck, used only on plant property."

While on the property, the inspector determined that the R-50 Euclid haul truck No. 2 was the truck referred to in the complaint. He made this determination on the basis of a telephone call to the complainant and a conversation with the union people involved (Tr. 62).

Billy R. Berrett, the Respondent's administrative assistant; Peter Shipes, the representative of the local union; and Mr. Dial were present when the inspector observed the truck (Tr. 25). The inspector testified that while walking toward the truck, he observed it running into both an earthen berm, described as a mound of dirt located approximately 40-50 feet in front of the primary crusher dump, and the bumper block at the primary crusher in order to stop (Tr. 25-26). Not only had the inspector noticed this, but it was also pointed out by the union official (Tr. 25). According to the inspector, the truck was loaded and coming from the pit at the time of this observation, but was not traveling very fast (Tr. 26-27).

Upon reaching the truck, the inspector asked the driver 2/ how he was "fixed for brakes" (Tr. 27). The inspector testified that the driver replied "not very well" or "not very good" or words to that effect (Tr. 27).

A test of the vehicle's braking system was thereupon conducted at the inspector's request. The test was conducted with the truck stationary, and the testing method employed was specified by the inspector. The driver placed the vehicle in third gear, placed his foot on the brake and depressed it to the lower limit of travel, and applied acceleration. The inspector testified that he noted the truck starting to "creep" when the driver started to accelerate. The inspector testified that "[i]mmediately when [the driver] started to accelerate, I asked [the driver] to try fourth gear; and the same thing happened. I asked him to apply his hand service brake and try it again. In all tests, the machine began to creep at the beginning of acceleration" (Tr. 27-28). The inspector initially requested the driver to "rev" the engine to 1,000 rpms during the test, but when the truck began to "creep" determined that such was unnecessary (Tr. 27, 37).

The subject citation (Exh. M-3) was thereupon issued alleging a violation of mandatory safety standard 30 C.F.R. § 56.9-3 as follows: "Neither of the service brakes would hold in 3rd or 4th gear on the R-50 Euclid haul truck Co. No. 2 being used to haul." The cited mandatory safety standard states as follows: "Powered mobile equipment shall be provided with adequate brakes."

The sole question presented in this case is whether the brakes were adequate within the meaning of the regulation. According to the inspector, MSHA defines "adequate" as "capable of stopping and holding a loaded haul unit on any grade on the mine property" (Tr. 33-34). This interpretation

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2/ According to Mr. Fowler, Mr. Richard Thorpe was the operator of the truck on the day in question (Tr. 84).

reflects a concise and accurate interpretation of 30 C.F.R. § 56.9-3. The inspector testified as an expert that the brakes on R-50 Euclid haul trucks will satisfy the requirements of the standard if they will hold the truck at 1,000 rpms while in third gear (Tr. 53). The test conducted by the inspector and his interpretation of the results obtained during the test are thus sufficient to establish a prima facie case for inadequate brakes.

Once this prima facie showing had been made, it was incumbent on the Respondent to produce probative evidence establishing the adequacy of the brakes in order to rebut the Petitioner's case. The Respondent failed to do this. None of the Respondent's witnesses had firsthand knowledge as relates to the condition of the brakes.

The Respondent attacks the testing method employed for two reasons: First, the Respondent notes that the inspector did not test the truck in a loaded position for stopping and holding on a grade, and argues that the Petitioner failed to establish a valid correlation between the test actually performed and the requirement that a loaded truck should stop and hold on any grade over which it had to travel at the mine (Respondent's Posthearing Brief, pp. 3-5). I disagree. The inspector's expert testimony is sufficient to establish a valid correlation between the test actually performed and the requirements of the standard.

Second, the Respondent argues that both the test taught to the inspector by MSHA (Exh. M-5) 3/ and the test actually performed are not true tests of the braking system in that they test merely the "weakest link in the chain," and, additionally, that the tests could result in damage to the equipment. According to the Respondent, Exhibit O-2 sets forth the proper method for testing brakes (Respondent's Posthearing Brief, pp. 5-7).

The evidence to which the Respondent points in support of its argument fails to establish that the test actually performed by the inspector yielded an inaccurate result. At most, it establishes a disagreement amongst experts as relates to the proper method of testing brakes. 4/

3/ The inspector was instructed at the Mine Safety and Health Academy in Beckley, West Virginia, to employ the following technique for inspecting brakes on off-the-highway haulage trucks:

"With engine at low idle ask the operator to make three (3) full foot brake applications. Observe the brake pressure gauge, note if pressure drops to -0- or in the caution area. (Air is straight air - air over hydraulic). This will indicate to the inspector (if) need for further check. Ask the operator to make and hold full foot brake application, release park and or dump brakes, engage the transmission in 1st. gear, accelerate slowly. If machine creeps, note at what speed, low idle, 1/2 - 3/4 or full throttle. This will indicate additional check is needed" (Exh. M-5).

4/ If the Respondent questions the propriety of MSHA approved testing methods or alleges unauthorized testing methods used by MSHA inspectors, then the Respondent should bring its concerns to the attention of responsible MSHA officials. Neither MSHA nor its inspectors are authorized to inflict damage on a mine operator's equipment.

Accordingly, I conclude that a violation of 30 C.F.R. § 56.9-3 has been established by a preponderance of the evidence.

C. Negligence of the Operator

It cannot be determined precisely how long the condition had existed based on the information contained in the record. The inspector testified that the complainant had alleged that the Euclid haul truck No. 2 had been involved in an accident some days or weeks prior to November 7, 1978 (Tr. 31). However, Mr. John Fowler, the general quarry supervisor, successfully rebutted this testimony by establishing that the subject truck had not been involved in an accident (Tr. 81). However, the fact that the condition had existed long enough to process a miner's complaint indicates that the Respondent should have known of the condition.

The fact that the defective brakes were not mentioned on the daily operator's reports for the 3 days preceding the inspection (Exh. O-3) is not controlling. The absence of entries in these reports cannot be deemed probative evidence of the condition of the brakes. In this regard it is significant to note that the truck's inoperative tachometer was not noted in the reports (Tr. 88-89) even though a space was provided for reporting defective instruments, an omission fatal to acceptance of the reports as accurate.

Accordingly, it is found that the Respondent demonstrated ordinary negligence.

D. Gravity of the Violation

The truck was in use and contained one occupant (Tr. 32) when it was first observed by the inspector. Other haul vehicles, service trucks, and graders used the roadway (Tr. 31). The driver of the cited truck and the drivers of the other vehicles were exposed to serious injury.

Accordingly, it is found that the violation was serious.

E. Good Faith in Attempting Rapid Abatement

The truck was immediately taken to the repair shop for a brake adjustment (Tr. 69-70). The citation was terminated 3 hours and 5 minutes after issuance (Exh. M-3).

Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement.

F. History of Previous Violations

The parties stipulated that the Respondent has no history of previous violations (Tr. 4, 5, 11).

G. Size of the Operator's Business

The size of the Medusa Cement Company is rated at 3,728,274 manhours per year. The size of the Clinchfield Mine & Mill is rated at 222,120 manhours per year (Exh. M-1).

H. Effect of a Civil Penalty on the Operator's Ability to Continue in Business

The parties stipulated that assessment of the $345 civil penalty proposed by the Office of Assessments will not affect the Respondent's ability to remain in business (Tr. 4, 5, 11). Therefore, I find that a penalty otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

1. Medusa Cement Company and its Clinchfield Mine & Mill have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. MSHA inspector Thomas W. Hubbard was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the citation which is the subject matter of this proceeding.

4. The violation charged in Citation No. 96893, November 7, 1978, 30 C.F.R. § 56.9-3, is found to have occurred as alleged.

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

VII. Proposed Findings of Fact and Conclusions of Law

The parties filed posthearing submissions as set forth in Part I, supra. Such submissions, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

Citation No.	Date	30 C.F.R. Standard	Penalty
96893	11/7/78	56.9-3	$300

ORDER

Respondent is ORDERED to pay the civil penalty in the amount of $300 assessed in this proceeding within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

Distribution:

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Administrator for Metal and Nonmetal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

8 APR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceeding Docket No. DENV 79-146-PM A/O No. 34-00028-05001
v.		
OKLAHOMA CEMENT COMPANY,	Respondent	No. 2 Quarry & Mill

DECISION APPROVING SETTLEMENT

At the hearing set for 10 a.m. on Wednesday, February 27, 1980, in Dallas, Texas, counsel for Petitioner appeared and announced that a settlement had been reached. Although the settlement agreement had not been signed, Petitioner stated that counsel for Respondent had agreed to the settlement and that the settlement agreement was to be read into the record with Respondent's acquiescence. The transcript of the settlement agreement is, in pertinent part, as follows:

> The matter is styled Ray Marshall, Secretary of Labor, U. S. Department of Labor v. Oklahoma Cement Company.
>
> Come now the parties through their respective representatives and submit the following agreement pursuant to Section 110(k) of the Federal Mine Safety and Health Act of 1977, 83 STAT 722, 30 USC 801 (et seq.) hereinafter referred to as the Act.
>
> The alleged violations in this case and the settlement are identified as follows:
>
> No. 00166802 dated 4-11-78 alleging a violation of 30 CFR 56.12-30. The assessed penalty is $84. The settlement disposition is the Respondent withdraws his notice of contest thereto.
>
> Item number 00166803 dated 4-11-78, an alleged violation of 30 CFR 56.12-34 in the assessed value of $78. The Respondent withdraws his notice of contest.
>
> Item number 00166804 dated 4-11-78, an alleged violation of 30 CFR 56.14-1, an assessed penalty of $140. The Petitioner withdraws the citation therein.

Item number 00166085 dated 4-11-78, an alleged violation of 30 CFR 56.14-1, an assessed penalty of $140. The Petitioner withdraws the citation therein.

Paragraph two: Petitioner has reconsidered and reviewed the size of the operator, previous history of violations, the gravity of the violatons and the good faith and the negligence of the operator, all of which factors are set forth in the proposed assessment issued to Respondent, which citation and proposed assessment will be attached to the settlement agreement and have already been attached to the Petitioner's petition.

Upon such review and consideration, the Petitioner and Respondent have agreed to settle this case for a total of $162, and to pay in full, withdraw or reduce the citations as hereinabove set forth.

Paragraph three: Respondent has paid the agreed proposed penalty of $162 sought by the Petitioner and, therefore, Respondent hereby withdraws the notice of contest filed in this case.

Paragraph four: Respondent's consent to an entry of a final order of the Commission pursuant to this agreement shall not constitute an admission by Respondent of violation of the Act or the facts underlying the citation proceeding.

The Respondent agrees not to assert this settlement as a defense in any governmental proceeding brought directly under the provisions of the Mine Safety and Health Act.

Paragraph five: Respondent states that Defendant will comply with the Federal Mine Safety and Health Act of 1977, 30 USC 801 et seq.

Paragraph six: Respondent certifies that a copy of any documents or pleadings required by the Federal Mine Safety and Health Review Commission to be posted have been and will be posted.

Paragraph seven: Wherefore, premises considered, the parties respectfully request that this settlement agreement be approved and that this action be dismissed.

That, Your Honor, constitutes the entire text of the settlement agreement.

* * * * * * * *

Your Honor, with regard to the settlement agreement, perhaps an allocation of the penalty amounts would be in order and would be beneficial to you as you consider that settlement agreement.

The allocation of the $162 penalty is as follows: for Citation No. 00166082, to which citation the Respondent has withdrawn his notice of contest, there is assigned a penalty of $84.

To Citation 00166083, to which Respondent has withdrawn his notice of contest, there is an assessed penalty of $78.

Those two figures together will total the $162 figure.

To Citation No. 00166084, there was an asserted penalty of $140. To that violation the Petitioner has withdrawn his citation and, hence, withdrawn the penalty assessment as well.

* * * * * * * *

When we sat down and discussed settlement, after considering all of our evidence, it was my determination that the Secretary of Labor could not prove the violations that we have sought to withdraw at this time.

The other $140 penalty was assessed in Citation 00166085; inasmuch as the Petitioner also withdrew his notice of contest to that--or withdrew the citation in that matter, then the penalty also was withdrawn.

Your Honor, actually what happened was the Respondent agreed to pay the full penalty for those items that he was withdrawing his notice of contest to, and we agreed to completely withdraw the penalty to those items that we were withdrawing.

Furthermore, the Respondent has asserted and it has been confirmed that the violation asserted, not only the one that he has withdrawn the notice of contest to, but also the ones that we have withdrawn, that all of those situations which might have been violations were immediately corrected and abated at the plant site, which we believe evidences extreme good faith on the part of that operator.

I might further add in that regard that the two citations that the Petitioner has withdrawn were matters that had previously been the subject of an Occupational Safety and Health inspection at an earlier time.

The Occupational Safety and Health people have advised the Respondent in this case that the particular situations in question were safe situations and did not constitute a violation of the Occupational Safety and Health Act.

It was at a time subsequent to that that this plant became subject to the Mine Safety and Health Act as opposed to OSHA. And at that time they mistakenly believed that the same standards would apply.

We believe again that exhibits their good faith and their willingness to immediately correct those situations. It suggests that they're very much interested in the safety and the health of their employees.

We further determined that this company is a relatively small operator. It's based upon those facts that the settlement has been entered.

As further support of that settlement, Your Honor, I do have certain notes from the mine inspector that I would be more than happy to submit for the Court's consideration (Exhs. 1 and 2).

* * * * * * * *

Your Honor, the records that I have before me reflect that there are no prior violations under the Mine Safety and Health Act in this matter.

Now, again, I would remind you--the Commission, that this case arose shortly after this particular plant came within the jurisdiction of Mine Safety as opposed to Occupational Safety and Health.

* * * * * * * *

The negotiated settlement was approved at the hearing.

ORDER

The approval of the negotiated settlement at the hearing is AFFIRMED. Respondent is ORDERED to pay the sum of $162 to MSHA within 20 days of the date of this decision.

Forrest E. Stewart

Forrest E. Stewart
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

8 APR 1980

U.S. STEEL CORPORATION, Contestant	:	Contests of Citation and Order
v.	:	Docket No. WEVA 80-54-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Citation No. 657116 October 3, 1979
	:	Docket No. WEVA 80-55-R
UNITED MINE WORKERS OF AMERICA, Respondents	:	Order No. 657117 October 4, 1979
	:	No. 50 Mine

DECISIONS

Appearances: Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for the contestant;
John H. O'Donnell, Trial Attorney, U.S. Department of Labor, Arlington, Virginia, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern contests filed by United States Steel Corporation (contestant) challenging the propriety and legality of a section 104(a) citation and a 104(b) withdrawal order issued by MSHA Mine inspector David L. Pack pursuant to the Federal Mine Safety and Health Act of 1977. Respondent filed timely answers in the proceedings, and pursuant to notice, a hearing was held in Charleston, West Virginia, on January 8, 1980, and the parties appeared and participated therein. Posthearing proposed findings and conclusions, with supporting arguments, were filed by the parties and I have considered the arguments presented in the course of these decisions.

Issues Presented

1. Whether the conditions cited in the citation constitute a violation of cited standard 30 C.F.R. § 75.400, and if so, is the violation significant and substantial as alleged by the inspector?

2. Was the time fixed for abatement of the conditions cited reasonable, and if so, was the issuance of the order proper?

Additional issues raised by the parties are discussed in the course of these decisions.

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

2. Section 104(a) of the Act provides as follows:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a violation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

3. Section 104(b) of the Act provides as follows:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issue pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

4. Section 104(d) provides in pertinent part as follows:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created

by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. * * *

Discussion

Section 104(a) Citation No. 0657116, issued October 3, 1979, citing a violation of 30 C.F.R. § 75.400, states as follows: "Float coal dust was permitted to accumulate along the South Mains mother belt and crosscuts left and right starting at the belt conveyor drive and extending inby the stopping No. 69, a distance of approximately 2800 lineal feet."

The inspector fixed the abatement time as 8 a.m., October 4, 1979.

Section 104(b) Withdrawal Order No. 0657117, issued at 10 a.m., October 4, 1979, states as follows:

> It is the opinion of the writer that not enough effort and attention has been given to inerting the float coal dust which was permitted to accumulate along the South Mains mother belt in that no attention or work had been done (rock dusting) from the belt conveyor drive to No. 40 stopping.

The inspector ordered withdrawal from the South Mains mother belt from the belt conveyor drive inby.

Testimony and Evidence Adduced by the Parties

Respondent's Testimony

MSHA inspector David L. Pack testified as to his mining background and experience, and he described the mine in question as a large bituminous coal mine which liberates a great amount of methane gas. The mine employs approximately 650 to 700 miners, has five shafts and 11 sections, and the mining height ranges from 42 to 60 inches (Tr. 4-10). He confirmed that he issued Citation No. 657116 on October 3, 1979, citing a violation of 30 C.F.R. § 75.400 after walking the area described in the citation and observing that 90 percent of it was blanketed with float coal dust. He looked into every crosscut, and while he did not measure the accumulations, he estimated the depth as between a 32nd to a 64th of an inch, and he described the float coal as a "thin sheet." He believed the accumulations of float coal came from the belt dumping points on the section, and indicated that the float coal is put in suspension at these points as the coal is moved and dumped from feeder belt to feeder belt. The extent of the accumulations is indicated on the citation as 2,800 lineal feet, and he computed this distance

by reference to a mine map kept on the surface, and he used a scale of 100 feet to an inch and did not actually measure the distance underground. The width of the accumulations extended from rib to rib in the crosscuts, and in the crosscuts where there were stoppings, the accumulations extended from stopping to stopping and rib to rib in the 20-foot entries. The accumulations of float coal dust he observed were black in color, but he did observe some rock dust, and he considered the accumulations to be combustible material because float coal dust is combustible and highly explosive when it is deposited over a large area (Tr. 10-14).

Inspector Pack testified that he considered the conditions cited to be a significant and substantial violation and that he considered all of the circumstances which were present in making that finding. He considered the area involved, possible ignition sources, the thickness of the accumulations, the time that they were left unattended, and the time required for abatement. Some of the area within the 2,800 feet was damp in about three locations and if the accumulations were confined to those areas the gravity would not be as great as the accumulations in dry areas. However, in this case, the accumulations were deposited on all surface areas, such as belt ropes and structures. The equipment in use was nonpermissible, and permissible equipment is not required. The belt conveyor motors, transformers, and various electrical and power cables would "interrelate" with the float coal dust. Miners pass through the area, and one individual walks the belt daily while others may be stationed at the belt discharge points. The mine operates three shifts a day, 5 days a week, and one shift is a maintenance shift. The area in question is not preshifted (Tr. 14-17).

Inspector Pack stated that he issued the citation at 12:15 p.m., on October 3, 1979, and fixed the abatement time as 8 a.m., the next morning. In fixing the abatement time, he took into consideration the area involved, the availability of rock-dusting materials, the work involved, and the available manpower required to do the job. The respondent has the option of rock dusting by hand or machine, and while the mine has a "fantastic rock dust machine," the respondent chose to rock dust by hand (Tr. 18).

Inspector Pack testified that float coal dust does not present an ignition problem unless it is suspended in the upper atmosphere from the mine floor. He determined that the accumulations did not present an imminent danger and he did so on the basis of the fact that the mine is very well kept and there is good ventilation which adequately takes care of the liberated methane. The area where he found the accumulations in question is by no means typical of the No. 50 Mine. He believed that 20 hours was adequate time within which to hand-rock dust the area cited (Tr. 35). Regarding any "interrelation" between methane and float coal dust, he indicated that a "potential" for an explosion existed, but also stated that "[t]his is not to say that this is the case here, which it was not." He explained that the ventilation was adequate and would reduce any methane present down to "the tenths of percent." If an ignition were to occur, it would pick up the deposited float coal dust from the surface areas in the entry, and the mine has experienced prior ignitions (Tr. 18-21).

Inspector Pack confirmed that he issued Withdrawal Order No. 657117 on October 4, 1979, and that he first issued it verbally to safety inspector Grover Roland at 10 a.m., and later reduced it to writing. He decided to issue the order after finding that the rock dusting had not been completed, and he was informed by the belt foreman that five men were used to rock dust on one shift, and the prior second shift worked four men. The foreman advised him that enough men were not available because he had to send some of his crew to other mine areas where coal production was taking place. Mr. Pack indicated that had the 10 or 12 men who were inby the area on the section producing coal been utilized to rock dust to abate the conditions cited, he would not have issued the withdrawal order. No explanation was offered as to why the men had to be sent to another mine area and he did not ask. Approximately half of the cited area had been rock dusted at the time he issued the order, and he observed four men working on abatement. There was no doubt in his mind that the area cited could have been rock dusted and abatement achieved within the time fixed (Tr. 22-25). Abatement was finally achieved by 1:30 p.m., and he remained on the scene while abatement was going on (Tr. 26). Although the men were sent to another mine area to produce coal, when the general mine foreman heard about the withdrawal order, he promptly sent them back to work on abating the cited conditions, and 10 to 12 men were put to work on the abatement (Tr. 27).

Inspector Pack described the procedures used for hand-dusting the mine. Bags of rock dust are unloaded at the mandoor stoppings adjacent to the belt entry, hand-carried into the belt entry, and then transported on the belt to the areas where needed and off-loaded at those points (Tr. 28). He did not believe that using nine men over two shifts to achieve abatement was an adequate effort to abate the accumulations, particularly when coal was being mined at the time the order issued. Mine management offered no explanation as to why abatement had not been achieved earlier and no one protested the time fixed for abatement (Tr. 29-30). The area cited was not an active working section, but it was an "active workings" (Tr. 31).

On cross-examination, Inspector Pack confirmed that mine management is usually very cooperative in abating citations. He observed that rock dusting had been accomplished in the areas in the past and that in all probability this had been done many times. However, he had no idea when it was last rock dusted prior to his inspection. The cited area was clean of any loose coal and all that was required was the rock dusting in order to cover the blanket of float coal dust. He confirmed that he used a map located on the surface and a scale on the map to determine the extent of the area cited, but he had no idea how many stoppings or crosscuts were involved, but he did walk the area from the drive pulley to the other end. He indicated that there were approximately 60 to 70 crosscuts in the area cited, and that when he fixed the abatement time he took into consideration these crosscut areas (Tr. 31-35).

Inspector Pack indicated that while the area cited was not a "high risk" area, he nonetheless considered the violation to be "significant and substantial" because the layer of float coal dust presented a potential for

it to become suspended and ignition sources were present. In addition, he considered the fact that the accumulations were there for some time because they were black, but he had no way of determining precisely how long the accumulations were present. Regarding the prior ignition, it was not in the area which he cited, but rather, in the face area and no one was hurt. Further, he was not aware of any of the details of other mine ignitions, and indicated there were "not many." In addition to the citation in question, he also issued another float coal dust citation covering another area inby the South Mains section belt conveyor drive (Tr. 36-40).

Inspector Pack stated that 50-pound bags of rock dust are stored in a surface supply area and transported into the mine on flat cars, and he described the procedures for making it available on the section. At the time the citation issued, he did not go to all 11 sections of the mine, had no idea of any operational problems, did not know whether the rock-dusting machine was operative, and he did not ask. He contemplated that rock dusting would be achieved by hand rather than by the machine (Tr. 40-43). He walked to the point where rock dusting had begun from the No. 69 stopping before issuing his order and a closure sign was hung at the belt conveyor drive. He did not walk the entire belt length from the drive to the tailpiece before issuing the closure order (Tr. 46-47). Less than half of the belt had been dusted, and he spoke with Belt Foreman Bishop and Mr. Roland about the situation. Mr. Pack did not know whether coal had been produced on the second shift, but speculated that it was. The third shift was a maintenance shift, and his concern was over the fact that the first shift at 8 a.m., on October 4, was used for production rather than rock dusting (Tr. 50-51).

On redirect, Inspector Pack testified that the belts in the areas cited were equipped with water sprays and that the sprays are intended to keep the dust down. The float coal dust was present on the surface areas of the belt components, and the normal procedure in the mine to take care of the problem is to rock dust. He estimated it would take four persons 15 to 16 hours to rock dust 2,800 feet (Tr. 53).

In response to bench questions, Inspector Pack testified that while he could have cited the same belt for insufficient rock dusting, he did not do so because he could not accurately sample float coal dust. He determined the existence of float coal dust by picking it up and observing the air currents carrying it away, and when he brushed it, it was placed in suspension. He indicated that he walked the entire 2,800 feet of belt before issuing the citation and his observations concerning the existence of float coal dust indicated a consistent black area along the entire 2,800 feet. Mr. Roland was with him and expressed no disagreement with his observations. Mr. Pack made one methane check at the belt conveyor drive and it was less than one-tenth of 1 percent. Under the mine cleanup plan, the areas in question are cleaned on an "as needed" basis, but the belt must be walked every shift by a belt examiner who must record his observations, including violations, in a book kept on the surface. He did not review the books before citing the conditions on October 3. Although Mr. Roland expressed surprise at the extent of the accumulations of float coal dust, he offered no explanation.

Mr. Pack did not know for a fact that coal had been produced for the two production shifts subsequent to the issuance of the citation, and since Mr. Roland expressed no disagreement with the time that he fixed for abatement, he assumed that the time was sufficient. Prior to issuing the order, he was told that some of the men were doing other work and he concluded that management was not putting enough effort into abating the conditions, but once the order issued they did, and the order "increased the movement" in this regard. None of the float coal dust was heavy enough to sample with a sieve, and he speculated that the accumulations were caused by an inoperative belt spray system which may have been down for some time. However, he checked the water sprays and since he found them working properly, he could only speculate that they were down and then repaired. He confirmed that the accumulations he found were unusual and that the mine does not normally have float coal dust problems (Tr. 54-73).

Contestant's Testimony

Grover C. Roland, health and safety engineer, U.S. Steel Corporation, testified that he accompanied Inspector Pack during his inspection on October 3, and he identified a mine map and indicated thereon the area inspected on that day (Exh. A-1). He indicated that he walked the entire area, which included the mother belt at the South Mains section, and the South Mains section belt. The distance between the mother belt drive at the No. 7 stopping and the tail pulley at the No. 72 stopping, as shown on the map is 5,800 feet. At the time the citation issued on October 3, the belt was not running because the belt conveyor mother belt bull gear was being repaired. After the citation issued, the section crew began dusting on the South Mains section belt, and the fact that the belt was down for repairs affected the transportation of rock dust since it would have to be hand-carried down the belt from the No. 7 stopping, but if it were brought in at the No. 72 stopping, it could be transported by the belt. The first shift after the citation issued rock dusted about 550 feet of the South Mains belt and nothing was done to bring rock dust to the area during that shift. On the second shift, it took 5 hours to repair the bull gear, and after the belt was able to run, eight men were assigned to the belt; four for rock dusting, two carrying rock dust, and two were delivering the rock dust to the section or the belt. Four flats of rock dust, or approximately 1,920 bags of rock dust, were delivered to the section (Tr. 75-80).

On voir dire, Mr. Roland indicated that he was not present during the abatement efforts on the first two shifts after the citation issued, but that the belt foreman advised him of these efforts and he is required to document those efforts in the belt book. He did, however, go back to the area with Inspector Pack after he returned and before he issued his order on October 4, and he observed the area which had been rock dusted (Tr. 80-82).

Mr. Roland indicated that the citation was issued halfway into the first shift on October 3, and since men were working on the belt it would not have been practical to reassign them to abatement work since not very much could be done before the rock dust was actually delivered to the area. The

second shift had rock dusted from the No. 73 stopping to the No. 59 stopping. The third shift had seven men working, and three additional men were sent in to help distribute some of the rock dust. One of them got sick and left the section, and the other two were called out to repair another belt. The third shift dusted from stopping No. 59 to stopping No. 40. During the first shift on October 4, four men were in the general area rock dusting, and two more were reportedly coming to the section. He confirmed the fact that Inspector Pack had spoken with Shift Foreman Rose about the situation at the South Mains mother belt on October 4. Mr. Pack subsequently informed him that he was shutting the belt down because not enough work had been done to abate the conditions cited, and Mr. Pack discussed the matter underground with the belt foreman and the mine superintendent (Tr. 83-86).

Mr. Roland reiterated that the belt distance from the conveyor to the junction point is 5,800 feet, but that Mr. Pack did not mention the fact that he had underestimated the belt distance. Mr. Roland testified further that he went back to the area on October 4 and took three dust samples from the mine floor, and the samples were taken before the area was rock dusted. He sent them to the laboratory for analysis and the results indicated the incombustible amount of rock dust materials present and the moisture content. The test results indicated 80 percent incombustibility before the area was re-rock dusted (Exh. A-2; Tr. 89-90). At the time the citation issued, Mr. Roland did not believe the conditions cited presented a high probability of serious injuries, and he did not recall that the inspector made any inquiry as to what method would be used to rock dust. The rock-dusting machine could not have been used on October 3 or 4, because it was down for maintenance (Tr. 91). In addition to the 5,800 feet of belt line required to be rock dusted, an additional 3,780 feet of crosscuts had to be covered, and this made a total of 9,580 feet of area that required to be rock dusted in order to achieve abatement (Tr. 92).

On cross-examination, Mr. Roland testified that on previous occasions when citations were issued to him by Mr. Pack, they discussed the amount of time required to achieved abatement. Although he knew at the time the citation in question was issued that the belt bull gear was down for maintenance and needed to be replaced, he did not discuss that fact with Mr. Pack, even after Mr. Pack fixed the abatement time as 8 a.m., the next morning. Mr. Roland indicated further that he believed the abatement time initially fixed by Mr. Pack was adequate and that abatement could have been achieved within that time frame. In explanation as to why only 50 percent of the area had been rock dusted when Mr. Pack returned on October 4, when it only took 3-1/2 hours to complete the remaining 50 percent, Mr. Roland stated that it took some time to deliver the rock dust during the second and third shifts, and additional help was obtained from the day shift to complete the rock dusting (Tr. 94).

Mr. Roland testified that he observed the area described by Inspector Pack as "black," could offer no explanation as to why it was black, and indicated that this was not a common occurrence. He indicated further that he made no inquiries as to what caused the black conditions on the belt, and

he did not know when the area had been previously rock dusted (Tr. 94, 97). He was not aware of any written rock-dusting program for the cited belt areas, and the replacement of a belt bull gear is not a common occurrence (Tr. 98). He indicated that rock dust is transported to the belt areas in question by track-mounted flatcars and then hand-carried to the belt itself for a distance of some 90 feet through the stoppings. Scoops cannot be used to transport the rock dust because the area is confined and the belts are isolated, and he is not aware of any other equipment which could be used to transport the rock dust to the area (Tr. 99-100). Although there is methane in the mine, the ventilation is maintained so that there is no methane problem (Tr. 100).

Mr. Roland stated that it was his opinion that Inspector Pack should not have issued a withdrawal order because men were working to achieve abatement during the second and third shifts subsequent to the issuance of the citation, and during the first shift the next day. He confirmed the fact that he said nothing to Mr. Pack about the belt being down on October 3, nor did he discuss the matter with him when he verbally advised him that he was issuing the order. Mr. Roland admitted that he was surprised that more work had not been done to achieve abatement prior to the issuance of the order (Tr. 101-102).

In response to bench questions, Mr. Roland stated that he could not explain why the inspector indicated on the citation that the distance required to be rock dusted was 2,800, when in fact it was 5,800 feet, and he did not ask the inspector about it. He also testified that he and the inspector walked the entire distance described in the citation, from the belt conveyor drive inby to stopping No. 69, and he did not dispute the inspector's findings with respect to the existence of the float coal dust as described in the citation (Tr. 108-109). At the time the citation issued, the belt was down, and it was down during the subsequent shift (Tr. 110). The other dust citation for the section belt was issued during the same inspection, and work was begun to abate that citation first, and then continued to abate the citation at issue here (Tr. 112). He could offer no explanation as to how such an extensive area could accumulate so much float coal dust without being detected earlier (Tr. 114).

John Bodner, general mine foreman, testified that he first learned about the order being issued by Mr. Pack while conducting a safety meeting on the mine surface on October 4. He left the meeting, and accompanied by the mine superintendent and the belt foreman, they proceeded to the area underground. While walking the area, he stirred up the mine dust on the floor and observed rock dust as well as the "blackness." He did not consider the area to be a "high probability of serious injury." He observed mine personnel rock dusting, met Mr. Pack at the No. 73 stopping, and discussed the situation with him, and the belt did not move while he was there (Tr. 115-119).

On cross-examination, Mr. Bodner stated that he discussed the fact that there was dampness in the area, including a water hole along the belt line, and that he advised Mr. Pack that he did not believe the conditions were

"that bad," but that Mr. Pack had already made up his mind to issue the order (Tr. 120). Although conceding that there were quite a few black spots, Mr. Bodner stated there was also "a lot of white showing" (Tr. 121).

In response to bench questions, Mr. Bodner stated that the conversation with Mr. Pack underground took place after he had closed the belt down, and that he (Bodner) was aware of the fact that Mr. Pack had issued the citation the day before, but did not discuss the citation with him (Tr. 124-125). Mr. Bodner indicated further that he was not aware of the belt bull gear problem until the day the order issued, and he conceded that on prior occasions Inspector Pack has extended the time for abatement of citations he has issued (Tr. 126).

Inspector Pack was called in rebuttal, and he explained the circumstances surrounding the calculations he made to determine the belt distances described in his citation. He indicated that he calculated the distances from a mine map on file in the mine safety department and apparently used a scale of 1 inch-to-100 feet when in fact the scale is 1 inch-to-200 feet, and he conceded that he had made a mistake when he described the affected area as 2,800 feet (Tr. 128). In view of the fact that mine management was aware of the belt area in question and had walked the distances with him, he believed that the increased actual distance of 5,800 made no difference in terms of the time fixed by him for abatement of the conditions cited. He would still have fixed the time for abatement as 8 a.m., the next morning since he believed that was ample time to abate, and on previous occasions, mine management always abated conditions cited by him within the time fixed (Tr. 129). He first learned that the belt was down by observation at the time the closure sign was hung on the belt line. At that time, he did observe two or three people working on it, and the fact that the belt was down would not influence him in giving additional time to abate because he believed that the rock dust could be dropped off at places parallel to the mandoors and carried through to the belt entry. There was no doubt in his mind that abatement could have been achieved within the time fixed if enough men had been assigned to the abatement work (Tr. 129-131). He confirmed the conversation with Mr. Bodner and refused to rewalk the area with him as requested by Mr. Bodner because he had already walked it once or twice (Tr. 132).

On cross-examination, Mr. Pack confirmed that using the belt would make it easier to distribute the rock-dust bags and affect the time required to finish the abatement job, but he had no idea how much longer it would take to hand-carry the rock dust to the belt areas. He believed that mine management did it the best and easiest way available (Tr. 134).

In response to bench questions, Mr. Pack stated that he believed 12 men working on the belts could have achieved abatement within the time fixed by him, and this was true even if the belt were down during the entire abatement process. He indicated further that he was very familiar with the area in question and had traveled it many times, and in his judgment abatement could have been achieved within the time given if the men who were assigned at the

face producing coal had been assigned to abate the conditions (Tr. 139, 141). Similar mine areas have been cited by him for float coal dust violations and the same amount of time was given for abatement, and abatement was achieved within that time (Tr. 143). However, these prior incidents did not influence him in fixing the abatement time in question and he fixed the time after considering all of the circumstances presented (Tr. 143). In the final analysis, he issued the order because he did not feel that enough people were assigned to abate the conditions cited (Tr. 145).

Findings and Conclusions

Fact of Violation--104(a) Citation No. 0657116, October 3, 1979, 30 C.F.R. § 75.400

Citation No. 0657116 charges the contestant with a violation of the provisions of 30 C.F.R. § 75.400, for an accumulation of float coal dust along the underground South Mains mother belt. The extent of the accumulations is described on the face of the citation and the inspector testified as to the conditions he found at the time the citation issued. Although the inspector miscalculated the distances involved when he apparently used the wrong map scale, the fact remains that both he and contestant's Safety Engineer Roland both walked the entire area in question and contestant had fair notice as to the area which concerned the inspector. Under the circumstances, I conclude that the fact that the inspector misstated the extent of the accumulations in terms of distances on the face of the citation, does not render the citation void.

With regard to the existence of the float coal dust as cited and described by the inspector, I find that the evidence and testimony adduced in these proceedings establishes the existence of the float coal dust as found by the inspector, and contestant's evidence does not rebut this fact. As a matter of fact, Mr. Roland conceded the presence of the float coal dust and could offer no explanation for it. Mine Foreman Bodner also confirmed the observations of the inspector with respect to the "blackness" of the area cited, and his observation that it "was not that bad," is in itself to some extent an admission of the existence of the conditions cited. The fact that Mr. Bodner may have observed some patches of rock dust showing through the black, thin layer of float coal dust deposited on top of the rock dust, and the fact that he may have observed some wet areas, does not in my view rebut the overwhelming evidence as to the existence of the float coal dust as described by the inspector. I find that the inspector adequately described the accumulations of black, "thin sheet" of combustible float coal dust deposited in the areas described by him in the citation and during his testimony, that the accumulations were present in active workings, and I conclude that MSHA has established a violation of section 75.400 as charged. The citation is AFFIRMED.

Significant and Substantial

On January 29, 1980, I decided five cases in which I made findings and conclusions concerning the application of the "significant and substantial"

violation provision found in section 104(d) of the 1977 Act, and I refer the parties to those prior decisions for my interpretation of that section, Sunbeam Coal Corporation v. MSHA, Dockets PITT 79-210 through 79-214, decided January 29, 1980. Further, I incorporate by reference my prior conclusions as to the meaning and application of the term "significant and substantial" as my conclusions in the instant proceedings, and attached hereto and incorporated by reference herein are copies of pages 21-24 of my decision in Sunbeam, wherein I discuss my conclusion as to the construction and application of that term.

In the instant proceedings, the parties have not submitted any detailed arguments concerning the statutory application and interpretation of the term "significant and substantial," but merely cite the testimony by the inspector to support his conclusion that the violation was in fact a significant and substantial one. Contestant merely sets out proposed findings of fact based on references to the transcript of the testimony presented, and MSHA does elaborate somewhat in its discussion of the possible ignition sources, the extent of the float coal accumulations found by the inspector, the length of time the accumulations had been unattended, and the time required for abatement (pp. 6-8, MSHA posthearing brief, filed February 21, 1980). Based on these factors, MSHA concludes that the violation was significant and substanial. After careful review and consideration of the arguments presented, I agree with MSHA's proposed findings and conclusions on this issue and find that the violation cited was significant and substantial, and my reasons for reaching this conclusion follow.

Following the court decision in International Union, United Mine Workers of America (UMWA) v. Kleppe, 532 F.2d 1403 (1976), cert. denied, sub nom. Bituminous Coal Operators' Association, Inc. v. Kleppe, 429 U.S. 858 (1976), and the decision in Alabama By-Products Corporation, 7 IBMA 85 (1976), I conclude and find that practically all or most violations occurring at a mine are of a "nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard," except in the following two categories:

> 1. Those violations which pose no risk of injury at all, such as the so-called "purely technical violations"; and
>
> 2. Those violations which pose a source of injury which has only a remote or speculative change of happening.

For the reasons set out at pages 6 through 8 of MSHA's posthearing brief, which I accept and adopt as my findings and conclusions, I find that the violation in question was not technical. To the contrary, I find that the extent of the accumulations of float coal dust in the active workings of the mine where production is going on and along a belt line where coal is being transported and men are present, presents a serious hazard to the safety and health of the miners in the area cited. I am not persuaded by

the fact that the belt may have been down for repairs at the time the citation issued. On the facts presented in these proceedings, coal production was going on in the face areas, and apparently resumed once the repairs to the belt bull gear were completed. However, abatement had not been totally achieved at that point in time, and potential ignition sources were present in the areas where the float coal dust was deposited on the belt structure itself, as well as in the other areas described.

Citation No. 0657117, 104(b) Withdrawal Order, Issued October 4, 1979

Upon issuance of the citation at approximately 12 p.m., on October 3, 1979, the inspector fixed the abatement time as 8 a.m., the following morning. Upon his return to the mine on October 4, at approximately 10 a.m., he found that only approximately half the area cited by him had been rock dusted. Since he believed that abatement could have been achieved within the 20-hour period initial fixed for this, he issued his withdrawal order. Once issued, mine management assigned additional men to the abatement, and the remaining area initially cited was rock dusted, and complete abatement was finally achieved by approximately 1:30 p.m., on October 4. In short, it seems obvious to me that the inspector believed that mine management could have abated the citation within the 20-hour period initially fixed for this task, but mine management apparently decided to utilize part of the work crew for other chores. However, once the closure order issued, mine management reassigned the crew to abatement duties and the area cited was ultimately rock dusted and the order abated.

Contestant takes the position that the extent of the area cited by the inspector, coupled with the fact that the crew on duty were either needed elsewhere to perform routine maintenance chores, precluded the completion of the abatement, and that since abatement was in progress when the inspector arrived on the scene on the morning of October 4, it was arbitrary for him to issue a closure order. This defense is rejected. I find that in the circumstances presented, the inspector acted reasonably in finding that mine management was less than diligent in achieving abatement. Taking into consideration the logistical problems involved in transporting the rock dust to the area cited, I believe that the record supports a finding that abatement could have been achieved within the 20-hour period fixed by the inspector. Once the order issued, the crew which was present on the section was taken off its assigned other duties and concentrated on abatement. Within 3 hours or so, the remaining area was rock dusted to the inspector's satisfaction and the order was terminated. Had these people been initially assigned to abatement duties, rather than to routine additional duties, I am convinced that abatement would have been accomplished in a timely fashion and the order probably would not have been issued. Further, after listening to the testimony of Mr. Roland and viewing him on the stand, I was impressed with his candor and honesty, particularly with respect to his candid admission that he too was surprised that more work was not done to complete the rock dusting at the time the inspector returned to the area the day after the citation issued. Coupled with his opinion that abatement could have been achieved within the time frame initially fixed by the inspector, I can

only conclude that the inspector acted reasonably in the circumstances when he issued the closure order.

With regard to the question of whether the inspector acted unreasonably or arbitrarily by not extending the abatement time further, as correctly pointed out by MSHA's counsel at pages 17-20 of his posthearing brief, this issue was never raised by the contestant, and its posthearing arguments do not specifically address this question. However, on the basis of the record adduced in these proceedings, and considering the fact that I have concluded that the inspector fixed a reasonable time for abatement of the cited conditions, I find and conclude further that his failure to further extend the abatement time was not arbitrary or unreasonable. Under the circumstances, I conclude and find that the issuance of the order was proper and reasonable and it is AFFIRMED.

ORDER

In view of the foregoing findings and conclusions, Citation No. 067116, issued on October 3, 1979, and Citation No. 067117, issued on October 4, 1979, are AFFIRMED, and contestant's request for any relief with respect to the citation and order are DENIED, and the contests are DISMISSED.

George A. Koutras
Administrative Law Judge

Attachment
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 29, 1980

SUNBEAM COAL CORPORATION, Contestant	:	Contests of Citations
v.	:	Docket No. PITT 79-210
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 229432 February 22, 1979
	:	Docket No. PITT 79-211
	:	Citation No. 229433 February 22, 1979
	:	Docket No. PITT 79-212
	:	Citation No. 229434 February 22, 1979
	:	Docket No. PITT 79-213
	:	Citation No. 229362 February 22, 1979
	:	Docket No. PITT 79-214
	:	Citation No. 229363 February 22, 1979
	:	Sunbeam Mine

DECISIONS

Appearances: Bruno A. Muscatello, Esquire, Butler, Pennsylvania, for the contestant;
Eddie Jenkins, Esquire, Arlington, Virginia, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern notices of contests filed by the contestant (Sunbeam) on March 21, 1979, pursuant to section 105 of the Federal Mine

Significant and Substantial

The "significant and substantial" provision found in section 104(d) of the 1977 Act is identical to that found in section 104(c) of the 1969 Act. In interpreting the meaning of this provision under the 1969 Act, the former Interior Board of Mine Operations Appeals in Eastern Associated Coal Corporation, 3 IBMA 331 (1974), took a rather restrictive view of the test of "significant and substantial" when it held that a violation could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if the evidence shows that the condition or practice cited as a violation posed a probable risk of serious bodily harm or death, 3 IBMA 355. The Board noted that "if we thought that the hazard in question had only a speculative possibility of occurring, we would of course conclude otherwise." (Emphasis added.)

In Zeigler Coal Company, 4 IBMA 139 (1975), the Board reexamined its prior interpretation of the term "significant and substantial" and characterized it as a "phrase of art," 4 IBMA 154; and at 4 IBMA 156 stated as follows:

> If we were to give each of the words of that clause an ordinary meaning, it would become a superfluous truism; by definition, the violation of any mandatory standard could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. However, since it is plain that the Congress intended by these words to enact one of several discriminating criteria designed to separate those violations that merit 104(c) treatment from those that do not, such a literal interpretation would be squarely at odds with the apparent congressional intent. Such interpretation would render the phrase nugatory when the Board is obliged under the usual norms of statutory construction to give meaning to all the terms of a statute. Sutherland, Statutes and Statutory Construction, § 46.06 (4th ed. 1973).

Commenting on its prior Eastern Associated Coal Corporation decision, the Board stated further at 4 IBMA 160, 161:

> Against this background and in order to give effect to all the statutory terms, we held and still believe that the clause "* * * could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *" is a phrase of art. The key word of that clause is "hazard" which in our view refers not to just any violation, but rather to violations posing a risk of serious bodily harm or death. The part of the clause which reads "* * * could significantly and substantially contribute to the cause and effect * * *" states a probability requirement, designed in our opinion, to prevent application of section 104(c) to largely speculative "hazards."

In Alabama By-Products Corporation, 6 IBMA 168 (1976), the Board affirmed a judge's decision vacating two section 104(c)(1) withdrawal orders issued pursuant to the 1969 Act. The judge held that the underlying notice was improperly issued because the violation cited did not pose a "probable risk of serious bodily harm or death" and therefore did not meet the "significant and substantial" test previously laid down in Eastern and Zeigler. In affirming the judge's decision, the Board rejected the UMWA arguments that the definition of "significantly and substantially" should be given its ordinary meaning which needs no definition and that the Board's construction of the term only deters the violation of a few of the mandatory health and safety standards while the UMWA's "ordinary meaning" construction of the term would deter violations of many more mandatory standards.

In Alabama By-Products Corporation, 7 IBMA 85, November 23, 1976, the Board reconsidered its prior determinations and construction of the term "significant and substantial," and it did so on the basis of the D.C. Circuit Court of Appeals' decision in International Union, United Mine Workers of America (UMWA) v. Kleppe, 532 F.2d 1403 (1976), cert. denied, sub nom. Bituminous Coal Operators' Association, Inc. v. Kleppe, 429 U.S. 858 (1976), reversing Zeigler Coal Company, supra, and holding that there was no implied gravity prerequisite for the issuance of a section 104(c)(1) withdrawal order. Noting the asserted narrowness of the court's holding and its silence on the Board's construction of "significant and substantial," the Board nevertheless held that the court's opinion had broader implications and compelled a change in the Board's prior construction, and it stated as follows at 7 IBMA 92:

> The reason that the appellate court's holding and supporting reasoning is important here is quite simply that our construction of the "significant and substantial" language in section 104(c)(1) was the product of virtually the same reasoning that the Court rejected in reversing Zeigler. When we construed that language to mean "probable risk of serious bodily harm or death," we disregarded the plain semantical meaning of that phrase in favor of a more restrictive reading of the statutory words which fitted in with our overall concept of the enforcement scheme. The emphasis of the D.C. Circuit on literalism which promotes wider operator liability and its rejection of our holding and the underlying reasoning in support thereof have undermined the "probable risk" test completely. An honest reading of the Court's opinion thus compels us to overrule Eastern Associated Coal Corp. * * *, and Zeigler Coal Company, * * * insofar as they validate the "probable risk" test. [Footnote omitted.]

The Board's reconstructed interpretation of the term "significant and substantial," as enunciated in its second Alabama By-Products' decision, is set forth at 7 IBMA 94 as follows:

> Section 104(c)(1), it should be recalled, mandates the issuance of a notice when an inspector finds that "* * * a

> violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *." Our position now is that these words, when applied with due regard to their literal meanings, appear to bar issuance of notices under section 104(c)(1) in two categories of violations, namely, violations posing no risk of injury at all, that is to say, purely technical violations, and violations posing a source of any injury which has only a remote or speculative chance of coming to fruition. A corollary of this proposition is that a notice of violation may be issued under section 104(c)(1) without regard for the seriousness or gravity of the injury likely to result from the hazard posed by the violation, that is, an inspector need not find a risk of serious bodily harm, let alone of death. [Emphasis in original.]

Commenting on the enforcement ramifications of its new interpretation, the Board stated as follows at 7 IBMA 95:

> The inspector's judgment as to whether a given violation is "* * * of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *" must be reasonable. The reasonableness of such a judgment is dependent upon the peculiar facts and circumstances of each case, and it is up to an Administrative Law Judge initially, and the Board ultimately, to determine whether an inspector was reasonable in so finding in any given case.
>
> We recognize that our interpretation today means that federal coal mine inspectors have a very wide area of discretion to issue section 104(c) notices with all the attendant liability to summary withdrawal orders which necessarily follows upon even the most trivial of violations after issuance of such a notice. However, with the present controversy is viewed in the reflected light cast by the D.C. Circuit on section 104(c) in UMWA v. Kleppe, supra, no other conclusion can sensibly be drawn.

Considering the foregoing judicial evolution of the construction of the term "significant and substantial," I conclude and find that practically all or most violations occurring at a mine are of a "nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard," except in two categories:

1. Those violations which pose no risk of injury at all, such as the so-called "purely technical violations"; and

2. Those violations which pose a source of injury which has only a remote or speculative chance of happening.

Further, it also seems clear that the term can apply to a violation without regard to the seriousness or gravity of any injury for which the violation poses a risk of occurrence, that is, there need not be a finding that the violation poses a risk of serious bodily injury or death for the term to apply.

The present construction of the term "significant and substantial" as it evolved in the aforementioned cases is favorably reflected in the legislative history of the 1977 Act as follows:

> The Interior Board of Mine Operations Appeals has until recently taken an unnecessarily and improperly strict view of the "gravity test" and has required that the violation be so serious as to very closely approach a situation of "imminent danger", Eastern Associated Coal Corporation, 3 IBMA 331 (1974).
>
> The Committee notes with approval that the Board of Mine Operations Appeals has reinterpreted the "significant and substantial" language in Alabama By-Products Corp., 7 IBMA 85, and ruled that only notices for purely technical violations could not be issued under Sec. 104(c)(1).
>
> The Board there held that "an inspector need not find a risk of serious bodily harm, let alone death" in order to issue a notice under Section 104(c)(1).
>
> The Board's holding in Alabama By-Products Corporation is consistent with the Committee's intention that the unwarranted failure citation is appropriately used for all violations, whether or not they create a hazard which poses a danger to miners as long as they are not of a purely technical nature. The Committee assumes, however, that when "technical" violations do pose a health or safety danger to miners, and are the result of an "unwarranted failure" the unwarranted failure notice will be issued.

S. Rep. No. 181, 95th Cong., 1st Sess., 31 (1977).

Docket No. PITT 79-210

Citation No. 229432, 30 CFR 77.1607(cc)

30 CFR 77.1607(cc) states as follows: "Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length."

The citation issued in this case charges that the No. 1 wash belt was not provided with emergency stop devices or cords along the belt walkway. The inspector testified that he issued the citation because the conveyor

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

8 APR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
Petitioner	:	Docket No. DENV 79-575-PM
	:	A.O. No. 41-02733-05003 F
v.	:	
	:	Docket No. DENV 79-576-PM
HELDENFELS BROTHERS, INC.,	:	A.O. No. 41-02733-05004
Respondent	:	
	:	Felder Uranium Operation

DECISION

Appearances: Robert A. Fitz, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner; H. C. Heldenfels, Jr., Esq., Corpus Christi, Texas, for Respondent.

Before: Judge Stewart

Procedural Background

The above-captioned cases are civil penalty proceedings brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), hereinafter referred to as the Act.

On July 2, 1979, Petitioner filed with the Mine Safety and Health Review Commission petitions for assessment of civil penalty in these cases. Respondent filed its answers to these petitions on July 26, 1979. The hearing in these matters was held on September 14 and 15, 1979, in Corpus Christi, Texas.

Before the conclusion of the hearing, the parties were informed of their right to submit proposed findings of fact and conclusions of law. A timetable for submission of these briefs was also established. Petitioner was given 30 days after receipt of the transcript to file its brief. Respondent was given 20 days after receipt of Petitioner's brief to file a rebuttal brief. Petitioner was then to have 15 days from receipt of Respondent's rebuttal to file its rebuttal brief. A letter was filed by Petitioner on October 22, 1979, explaining why it was felt that MSHA should prevail. This letter was intended to be Petitioner's posthearing brief, although it did not bear a heading or label to specifically designate it as such. Counsel for Respondent filed a letter in reply on October 26, 1979.

On December 13, 1979, Respondent filed a motion to dismiss the above-captioned proceedings on the grounds that Petitioner had failed to comply with an order of the Judge to file posthearing briefs. The motion was denied since it was evident at that time that Petitioner either chose not to submit a posthearing brief or intended for the letter of October 22, 1979, to serve as such a brief. The briefing schedule set forth time periods within which briefs must be filed if the parties desired to file briefs. The setting of these time periods was in the nature of an agreement between the parties rather than an order of the Judge. The failure of Petitioner to submit a brief or file a document specifically designated as a brief within the aforementioned time period was, therefore, insufficient grounds for dismissal of the above-captioned proceedings. However, in view of the confusion which may have arisen on the part of Respondent, the parties were afforded additional time to file concurrent posthearing briefs if they desired to do so. It was ordered that if a party desired to submit a posthearing brief, it must be filed within 20 days of the date of the order which was issued on January 7, 1980.

On January 21, 1980, Petitioner asserted that "the Secretary of Labor does not desire to supplement his letter brief dated October 19, 1979." Respondent has not filed an additional posthearing brief.

Findings of Fact and Conclusions of Law

The parties entered into the following stipulations at the hearing: (1) that the Felder Uranium Operation is covered by the Act of 1977, (2) that Joseph Allen Blair was fatally injured on July 25, 1978, while employed as a mobile equipment operator by Heldenfels Brothers, Inc., at the Felder Uranium Operation, (3) Citation Nos. 169501, 169213, and 170074 and the modifications thereto were served upon Heldenfels Brothers, Inc., by MSHA and may be received into evidence with the purpose of establishing their issuance but not for the truthfulness of any statements therein, and not for showing that citations were issued within a reasonable time after the alleged violations occurred, (4) if a civil penalty is assessed in these proceedings it will not affect the ability of Heldenfels Brothers, Inc., to continue in business, (5) employees of Heldenfels Brothers, Inc., worked approximately 9,386 hours at the Felder Uranium Operation in 1978, (6) employees of Heldenfels worked approximately 218,983 hours at all of the operations in 1978, and (7) prior to July 25, 1978, Heldenfels did not have a history of previous violations at the Felder Uranium Operation.

Citation No. 169501

Citation No. 169501 was issued by inspector Robert W. White on September 20, 1979, pursuant to section 104(a) of the Act. The inspector cited a violation of 30 C.F.R. § 56.9-24 (which was timely amended to read 30 C.F.R. § 55.9-24) and described the pertinent condition or practice as follows: "According to the witness interviewed, the 631D fatally injured scraper operator did not have full control of the equipment while in motion."

Joseph Allen Blair, the operator of a 631D scraper, was killed when his vehicle collided with a second scraper on July 25, 1978. The collision occurred on Respondent's haul road, 20 to 30 feet beyond a "Y" intersection. The haul road was curved at the point of impact and its surface was on a slight incline to Mr. Blair's right. The road was composed of hard-packed sand. It was sprayed with water on a regular basis to keep the road surface hard and to minimize dust problems. The area in which the accident had occurred had been properly sprayed with water a short time before the accident.

Mr. Blair was hauling material from one of Respondent's pits to a stockpiling site. Mr. Young, the operator of the second scraper, was returning to the pit after having deposited his load at the stockpile. In failing to negotiate the curve to his right, Mr. Blair's vehicle crossed onto Mr. Young's side of the road and collided there with Mr. Young's scraper. The cab in which Mr. Blair sat was completely severed from the body of the scraper. The scraper thereafter caught fire.

Section 55.9-24 requires that the operators of mobile equipment shall have full control of the equipment while it is in motion. In failing to negotiate a turn to his right, it is clear that Mr. Blair did not maintain the control over his vehicle that this section requires. The haul road was wide--approximately 250 feet--and there is no indication that Mr. Blair tried to turn, brake, or drop the pan. Dropping the pan would have stopped the scraper immediately. Both Maria Cortez and Domingo Rodriquez, operators of other equipment at the mine who witnessed the accident, testified that Mr. Blair's vehicle skidded "a little bit" as it failed to negotiate the turn prior to the impact. Although physical evidence which might have substantiated these observations was obliterated by the use of a great amount of water to extinguish the scraper fire, the record clearly establishes that the vehicle skidded slightly prior to impact. The testimony of these time witnesses who are bilingual is clear as to all relevant matters about which they testified. It was obvious that they understood the pertinent questions in English and that they were capable of answering accurately in English. Their testimony that a skid occurred was not rebutted. Mr. Rodriquez added that he believed Mr. Blair had been traveling too fast but he did not state the speed of the vehicle in miles per hour. Respondent's superintendent, Mr. Marvin Holcombe, who did not see the collision occur, testified that on that particular haul road a normal speed for a loader scraper was between 18 and 20 miles an hour and that Mr. Blair's speed "had to be" somewhere between 18 and 20 miles an hour.

Mr. Holcombe based his conclusions as to the speed of Mr. Blair's scraper on his post-accident wreckage and information later obtained during an investigation rather than on direct observation. The accident happened 8 or 9 minutes after Mr. Holcombe drove up the hill to the dump area. Mr. Blair had been pulling onto the haul road from a ramp as Mr. Holcombe passed by and Mr. Blair came in behind Mr. Holcombe's truck. Mr. Holcombe, who went to the scene immediately after the accident, was about 300 yards away and his head was turned when he heard the impact.

Although four marijuana cigarettes were found in the pocket of the scraper operator after the removal of his body from the mine area, it was not established that he had been smoking them or that he was under the influence of any substance that might have caused him to collide with the other scraper.

No plausible cause for the accident exists other than the failure of Mr. Blair to control his vehicle. The scraper was disassembled and examined after the accident. No mechanical defects which might have contributed to the accident were discovered. Moreover, there is no evidence that road conditions contributed to the accident. Shortly before the accident, the road had been wet down to minimize dust and keep the surface hard. The road had been sprayed properly with no puddles of water left standing and it had been cleaned. The record does not support a finding that the surface was slick in the area where the scraper skidded or where the collision occurred. A number of the witnesses noted that there were some spots of blue clay in the roadway that became slippery when wet but it was not established that these spots were in the roadway at the site of the accident. Mr. Holcombe, who sometimes drove the haul road 15 to 20 times a day, testified more specifically that the blue clay near the accident site was located to the right of the roadway. He noted that some clay could be found in the roadway at a location beyond that site. This clay fell from haulage vehicles at times, but it was cleaned from the roadway. The blade used to clean the haul road followed the water truck which had sprayed the roadway and it had cleaned the road prior to the accident. Mr. Blair failed to maintain control of his vehicle as required in violation of section 55.9-24.

Although the record clearly establishes a violation by Heldenfels, Inc., the accident was solely the result of fault on the part of the operator of the scraper. As acknowledged by Petitioner's assessment officer prior to the filing of the Petition for Assessment of a Civil Penalty "* * * absolute control of this equipment is only governed by the operator himself * * *." Although it is the responsibility of management to instruct and enforce safe working practices and procedures that will ensure the safety of all of the employees, there must be adequate proof that Respondent failed in its responsibility in order to support a finding of negligence on the part of Respondent.

The record does not establish that Respondent knew or should have known of any condition that might have caused the scraper operator to fail to maintain control of his equipment or that Respondent failed to exercise reasonable care to correct any condition or practice which might have caused the violation. Since Respondent could not reasonably have known of any condition or practice which might have caused the violation and had taken reasonable precautions to prevent such violations the record does not support a finding of negligence on the part of Respondent. Mr. Blair was an experienced scraper operator with a good record. Mr. Holcombe's testimony that Respondent disciplined those operators who did not operate the scrapers properly was unrebutted. Respondent instructed its operators, including Mr. Blair, on the use of the scraper. The operators were apprised of speed limits, speed control, traffic control and traffic patterns every morning. Finally, the

investigation of the accident revealed no equipment defects or dangerous road conditions attributable to the negligence of Respondent.

Citation No. 169213

Citation No. 169213 was issued by inspector Alex Baca on July 25, 1978, pursuant to section 104(a) of the Act. He cited 30 C.F.R. § 55.9-22 and described the condition or practice as follows: "The outer berm on the roadway on east and south side of Felder No. 3 was not high enough to contain the equipment using the travel road." The inspector estimated that additional berms were necessary along 50 yards of roadway adjacent to Respondent's Felder No. 3 pit. The pit was at least 75 feet deep in this area. The distance between the roadway and the pit wall was from 10 to 15 feet. The berm in question was comprised of a sandstone-like material and clay, and had a width of 3 feet at its base. Its height ranged to a maximum of just over 2 feet. The berm was entirely absent for a distance of 3 or 4 yards where a ramp proceeded into the Felder No. 3 pit.

Section 55.9-22 requires that berms or guards shall be provided on the outer bank of elevated roadways. The regulations do not provide criteria by which the minimum height of these berms might be determined. Inspector Baca testified that he applied a "rule of thumb" to the effect that a berm must be as high as the axle of the largest vehicle using the road. The largest vehicles using this section of roadway were Respondent's scrapers. These scrapers had a wheel height of approximately 6 feet and, therefore, an axle height of approximately 3 feet. Although the height of the berm varied, it was generally 2 feet high--1 foot lower than the height which would be required if the rule of thumb applied.

The inspector, in relating experiences with scrapers similar to those used by Respondent and with ridge rows of different heights, stated that the scrapers would go over "a two foot deal all the time." Although the ridge rows were not of exactly the same material, consistency, and size of the berms, the inspector obviously was knowledgeable concerning the type of berm that would contain equipment used at the mine.

The conclusion of the inspector is accepted. The maintenance of the berm at heights generally of 2 feet was in violation of section 55.9-22 as alleged.

The Respondent was negligent in that the condition was visually obvious but steps were not taken to correct it prior to the issuance of the citation.

An accident was probable. The berms were located alongside a regularly used roadway and they were not high enough to restrain the scrapers. If an accident were to occur, fatal or serious injury would be anticipated.

The condition was abated with a normal degree of good faith.

Citation No. 170074

Inspector Robert White issued Citation No. 170074 on July 25, 1978, pursuant to section 104(a) of the Act. He cited 30 C.F.R. § 55.9-71 and described the pertinent condition or practice as follows: "Traffic rules including speed and warning signs had not been posted in the pit area where the mining equipment is being operated."

The inspector testified that the citation referred to an area extending from the shop to the pit, a distance of approximately one-half mile. No speed limit or traffic warning signs were posted in this area. Although there was a speed limit sign at the gate, there was none posted in the mine area proper. Section 55.9-71 requires that traffic rules, including speed signals, and warning signs shall be posted. The failure on the part of Respondent to post speed and traffic control signs in this area was in violation of the mandatory standard, as alleged.

Respondent was negligent in its failure to comply with section 55.9-71. The absence of the required signs was obvious, yet Respondent failed to correct the situation prior to the issuance of the citation.

Although an accident in the area could cause a fatal or serious injury, it was improbable that an accident or injury would occur because of the violation. Mine personnel who operated vehicles were instructed every morning where to haul and which haul road to take. It is unlikely that they would be unaware of the traffic rules in effect. There was also little likelihood that non-mine personnel would travel beyond the shop area and onto the length of roadway affected by the citation.

This condition was abated with a normal degree of good faith.

Respondent's Motion to Dismiss

On July 26, 1979, Respondent filed a motion to dismiss these proceedings. As grounds for this motion, it was asserted that an unreasonable length of time was taken by MSHA to propose a civil penalty. Respondent cited section 105(a) of the Act which reads in pertinent part as follows:

> 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 * * *.

This motion to dismiss was denied on August 15, 1979, subject to reconsideration upon the presentation of additional evidence at the hearing. The motion was renewed by Respondent at the hearing and again denied.

At the hearing, Petitioner introduced into evidence two documents entitled "Results of Initial Review." These documents were dated March 2,

1979, and had been prepared by MSHA pursuant to 30 C.F.R. § 100.5. By the terms of these documents, Respondent was given an opportunity either to pay the suggested penalties, to submit additional evidence for consideration or to request a conference with MSHA's Office of Assessments.

Two hundred twenty days had elapsed from the date of issuance of Citations No. 169213 and 170074, and the date of issuance of the Results of Initial Review. Approximately 165 days had elapsed from the date of issuance of Citation No. 169501 to the date of issuance of the corresponding Results of Initial Review.

Each of the three citations alleged violations relating to events which occurred and conditions which existed on July 25, 1978. Citation No. 169213 (berms) and Citation No. 170074 (traffic signs) were issued by the inspector on July 25, 1978, the same date as the alleged violations. These citations alleged violations by Heldenfels Brothers (an independent contractor). In subsequent actions on July 27, 1978, and July 28, 1978, citations were issued modifying the original citations to allege violations by Exxon Minerals Company, USA (the operator). In subsequent actions on October 6, 1978, citations were issued to correct the modification and again allege that the violations were by Heldenfels Brothers.

Citation No. 169501 (failure to have full control of equipment on July 25, 1978), was not issued until September 20, 1978. This citation which alleged a violation by Exxon Minerals Company, USA, was modified by subsequent action in the form of an additional citation, issued on October 8, 1978. The operator's name was changed on this citation to read Heldenfels Brothers. The initial citation alleged a violation of Part 56.9-24. A subsequent action citation issued on November 15, 1978, corrected the part number to allege a violation of Part 55.9-24.

At the hearing, Petitioner also introduced a document entitled "Results of Initial Review" on Form 1000-178 (MSHA) which listed a penalty of $56 for Citation No. 169213 and a penalty of $48 for Citation No. 170074. The date of this document (Exh. P-6) was October 3, 1978. 1/ The company name listed on the form was Exxon Minerals Company, USA. The mine name listed was Felder Uranium Operation. A handwritten notation dated October 6, 1978, on this document indicated that a request had been made to recall the violations listed for reassessment because they were "fatal related." In its motion to dismiss, filed July 26, 1979, counsel for Respondent stated that he had received this document but had been informed upon inquiry that it had been

1/ Respondent stated that in its memorandum submitted on August 17, 1979, that it would have filed a motion to dismiss had the Original Results of Initial Review and Citation not been withdrawn, on the basis that the period of time that elapsed since July 25, 1978, was not a reasonable time under section 105 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815).

withdrawn and would be reissued at a later time. 2/ The record shows that the penalties in subsequently issued "Results of Initial Review" and in the "Proposed Assessment" were increased slightly, from $56 to $78 for one violation and from $48 to $56 for the other.

In its "Memorandum in Opposition to Respondent's Motion to Dismiss" filed on August 8, 1979, Petitioner argued that its inspection and investigation did not end with the issuance of the citations. Petitioner's rationale was that "such inspection and investigation continued through the consideration of additional evidence submitted in response to the notification of the Results of Initial Review which was dated March 2, 1979." Respondent in its "Memorandum in Opposition to Petitioner's Memorandum" filed on August 17, 1979, replied that there was no further investigation or inspection by MSHA after the original Results of Initial Review and the citations were issued on September 20, 1978.

The record indicates that Respondent's investigation, which included dismantling and inspection of the scraper, continued until the month of September, 1979. There is no indication that any actual investigation or inspection by either Petitioner or Respondent occurred after that time. Although the record does not support a finding that MSHA performed any actual investigation or inspection after September 20, 1978, MSHA regulations prescribe procedural steps in the assessment process that must be taken after the issuance of citations. These assessment procedures which normally require considerable time set forth each procedural step, set time limits for some of the steps, and authorize the submission of additional evidence for consideration as well as a conference with the Office of Assessments to provide information relating to the violations.

The reasonableness of the alleged delays about which Respondent complains must be determined in light of the provisions of 30 C.F.R. § 100, as

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2/ Heldenfels Brothers, Inc.'s Original Motion to Dismiss filed in Docket No. DENV 79-576-PM on July 26, 1979, contained the following statement:

"The investigation made on the basis of the above styled and numbered cause, occurred on Tuesday, July 25, 1978, as shown by the copy of the citation which was attached to the original RESULTS OF INITIAL REVIEW which was originally issued on September 20, 1978, copies of which are attached hereto as exhibits."

Contrary to Respondent's statement in its motion, no Results of Initial review, issued on September 20, 1978, were attached to the motion filed and none with that date were offered in evidence at the hearing. The only attachment to the motion was a "Proposed Assessment" issued on Form 1000-179 (MSHA) on March 15, 1979, listing a penalty of $78 for Citation No. 169213 and a penalty of $56 for Citation No. 170074. This "proposed assessment" (dated March 15, 1979), was the same as that attached to the Secretary of Labor's Petition for Assessment of Civil Penalties filed on July 2, 1979, in Docket No. DENV 79-576-PM.

well as the unusual factual aspects of this case. Part 100 sets forth the criteria and procedures for the proposed assesment of civil penalties under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977. It is the purpose of those rules to provide for the prompt and efficient proposal and collection of penalties in order to insure maximum compliance by the coal and metal/nonmetal mining industries with the requirements of the Act and the standards and regulations promulgated pursuant to the Act.

The guidelines given in Part 100 provide some indication of the normal timetable for notifying operators of a proposed penalty. These provisions set forth a formula for determining the proposed penalty, prescribe circumstances under which the formula need not be used, and state in detail the steps that may be taken in the assessment procedure.

Some of these procedural steps prescribed by Part 100 are in general, as follows: Referral by MSHA to the Office of Assessments, initial review of citation (including formula computations), service of results of initial review on party and miners, request for conference or submission of additional evidence for consideration, conference, determination of proposed penalty, service of notice of proposed penalty, payment of uncontested proposed penalty by party charged, notification of contest of proposed assessment, referral of case to solicitor and notification of commission.

As to the first step listed, subpart 100.5(a) provides that "All citations which have been abated and all closure orders, regardless of termination or abatement, will be promptly referred by MSHA to the Office of Assessments for a determination of the fact of the violation and the amount, if any, of the penalty to be proposed." The time for abatement of a citation allowed by the inspector must be reasonable and it is dependent upon what must be done to correct the condition found.

Some of the steps listed must be taken immediately, or immediately by regular mail. For others, no time limit is specifically prescribed. Examples of the lengths of time specifically prescribed for some steps are 10 days, 33 days, 20 days, and 30 days. The 33-day limit is that prescribed for the conference. Additional time is allowed for this step under certain conditions. After completion of the assessment procedures under Part 100, the Secretary must file a proposal for a penalty with the Commission within 45 days of receipt of a timely notice of contest of a notification of proposed assessment of penalty. 29 C.F.R. § 2700.27.

The procedures prescribed by Part 100 are consistent with the provisions of the Administration Procedural Act which state that "The agency shall give all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and (2) to the extent that the parties are unable to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title." 5 U.S.C. § 554(c).

There is no indication in the record that time, the nature of the proceeding, or the public interest did not permit the exercise of the orderly assessment procedures prescribed by Part 100.

While the procedures prescribed by those rules may delay the date of a hearing, they provide additional due process to operators, especially small operators without in-house counsel. They may also result in a saving of time in the long run by resolving issues prior to a hearing. In many instances, the need for taking testimony and conducting a hearing is eliminated.

The fact that Respondent did not submit additional evidence for consideration by the assessment officer or request a conference saved little time. A conference in this particular case might have actually shortened the prehearing process or eliminated the need for a hearing. The fact that no mechanical defects were found when the scraper was dismantled by Respondent was relevant information that did not become available until some time after the accident and may not have been considered by the assessment officer. It also appears from the narrative statement attached to the Results of Initial Review, March 2, 1979, that the assessment officer was unaware of Respondent's efforts to instruct and enforce safe working practices and procedures. Specifically, Respondent's practice of instructing drivers on the use of particular vehicles, of disciplining drivers for improper operation of their vehicles and of notifying drivers of the traffic rules on a daily basis may not have been considered. Information of this type which might have been furnished at a conference would undoubtedly have been useful to the Assessment Officer in expediting the case in the event that it had not been obtained from other sources.

The state of law in regard to whether the operator or the independent contractor should be cited was somewhat unsettled during the relevant times. The law on this subject was not clarified until October 29, 1979, when the Federal Mine Safety and Health Review Commission issued its decision in Secretary of Labor, Mine Safety and Health v. Old Ben Coal Company, Docket No. VINC 79-119. MSHA's vacillation and apparent indecision in modifying and remodifying the citations and Results of Initial Review in the case-at-hand are more understandable in view of the confused state of the law prevailing at that time. Had MSHA proceeded with the issuance of a notice of proposed penalty to the wrong party and caused a hearing to be held before the Old Ben decision in October of 1979, that action might have resulted in appeals, remands, and additional hearings, and in greater delays.

It has not been shown that the time complained of was unreasonable, that Respondent was misled, or that Respondent suffered any actual harm as a result of Petititioner's alleged delay. If there had been a need for review of the citations prior to completion of the assessment procedures, Respondent was not without a remedy. It could have filed a Notice of Contest of those citations under the provisions of 29 C.F.R. § 2700.20 (Rules of Procedure) at any time within 30 days after the issuance of the citations. If Respondent was able to establish exigent circumstances warranting expedition, an expedited hearing could have been held within a few days after

the citation was issued. 29 C.F.R. § 2700.52. The only apparent consequence of the delay established by the record is that Respondent was, in effect, given that much additional time before it was required to pay penalties for the violations.

Respondent did not demonstrate that MSHA failed to provide notification of the proposed asssessment within a reasonable time as required by Section 105(a) of the Act or that Heldenfels Brothers, Inc., was adversely affected because of the time taken by MSHA to do so. The denial at the hearing of Respondent's motion is hereby affirmed.

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

Assessments

In consideration of the findings of fact and conclusions of law contained in this decision, the following assessments are appropriate under the criteria of section 110 of the Act.

Citation No.	Penalty
169501	$100
169213	78
170074	56

ORDER

It is hereby ORDERED that Respondent pay the sum of $234 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

Distribution:

Robert A. Fitz, Attorney, Office of the Solicitor, U.S. Department of Labor, Suite 501, 555 Griffin Square Building, Griffin and Young Streets, Dallas, TX 75202 (Certified Mail)

H. C. Heldenfels, Jr., Attorney for Respondent, P.O. Box 4957, Corpus Christi, TX 78408 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

11 APR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. WILK 78-322-PM
	:	A.O. No. 28-00526-05001
v.	:	
	:	Docket No. WILK 78-323-PM
JESSE S. MORIE & SON, INC., Respondent	:	A.O. No. 28-00526-05002
	:	
	:	Morie Division

DECISIONS

Appearances: David E. Street, Esquire, Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the petitioner;
Edward C. Laird, Esquire, Haddonfield, New Jersey, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated civil penalty proceedings were initiated by the petitioner on September 21, 1978, through the filing of civil penalty proposals against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for 29 violations of certain mandatory safety standards promulgated pursuant to the Act. All of the citations were issued pursuant to section 104(a) of the Act, and copies are included as part of the pleadings filed in the proceedings.

Respondent filed answers contesting the citations on October 24, 1978, and the cases were assigned to Judge Moore who issued prehearing orders concerning the scheduling of hearings, possible settlements, and the scheduling of a prehearing conference. MSHA's Arlington, Virginia, Solicitor's Office advised Judge Moore that the parties were unable to settle the cases and that they should be scheduled for hearings.

The cases were subsequently reassigned to me, and by notice of hearing issued on December 20, 1979, they were scheduled for hearing in Philadelphia,

Pennsylvania, on February 13, 1980. MSHA's Philadelphia regional counsel entered his appearance in the cases on January 18, 1980, and the parties appeared at the hearing pursuant to notice. However, upon calling the dockets, the parties informed me for the first time that they proposed to settle the citations and requested an opportunity to present their proposals for my approval. Counsel were permitted to state their positions (Tr. 1-12), including an explanation as to why the proposed settlements were not communicated to me in advance of the hearing, and after due consideration they were permitted to present their settlement proposals on the record.

Discussion

The citations in question, the initial assessments, and the proposed settlement amounts are as follows:

Docket No. WILK 78-322-PM

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
204502	3/22/78	56.14-1	$ 72	$ 38
204503	3/22/78	56.11-2	72	38
204504	3/22/78	56.11-27	60	34
204505	3/22/78	56.14-1	106	106
204506	3/22/78	56.12-20	78	40
204507	3/22/78	56.16-6	60	36
204508	3/22/78	56.4-2	48	34
204509	3/23/78	56.11-1	84	48
204510	3/23/78	56.14-1	84	40
204511	3/23/78	56.9-2	84	48
204512	3/23/78	56.9-54	78	40
204513	3/23/78	56.11-1	90	48
204514	3/23/78	56.14-1	106	60
204515	3/23/78	56.14-1	122	60
204516	3/23/78	56.20-3	78	44
204517	3/23/78	56.14-1	90	52
204518	3/23/78	56.11-27	90	48
204519	3/23/78	56.11-27	90	44
204520	3/23/78	56.14-1	90	56
204521	3/23/78	56.11-1	90	44
			$1,672	$958

Docket No. WILK 78-323-PM

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
204522	3/23/78	56.14-1	$ 90	$ 50
204523	3/23/78	56.11-27	90	44
204524	3/23/78	56.11-1	98	44

204525	3/23/78	56.11-12	90	44
204526	3/23/78	56.11-27	90	44
204528	3/23/78	56.4-9	72	40
204529	3/23/78	56.4-2	40	30
204530	3/23/78	56.12-25	72	38
			$642	$334

On motion by the petitioner made on the record, petitioner's proposal for assessment of a civil penalty for Citation No. 204527, March 23, 1978, citing 30 C.F.R. § 56.12-18, in Docket No. WILK 78-323-PM, is DISMISSED (Tr. 14, 28).

Stipulations

The parties stipulated that the respondent is a medium-sized sand and gravel mine operator; that respondent has no prior history of violations; and that the penalties assessed in these proceedings will not adversely affect respondent's ability to remain in business (Tr. 16).

With regard to the factors of gravity, negligence, and good faith compliance, the parties presented information and arguments on the record with respect to each of the citations in issue, and a summary of this information follows below.

Negligence

Although MSHA's counsel asserted that some of the citations resulted from "low negligence," the parties were in agreement with my conclusions that they all resulted from ordinary negligence, that is, they all resulted from the failure by the respondent to exercise reasonable care to prevent the conditions or practices which caused the violations and which the respondent knew or should have known existed (Tr. 24-28).

Gravity

The parties agreed that with the exception of those citations characterized by MSHA's counsel on the record as nonserious, that the remaining citations were serious (Tr. 23).

With respect to Citation Nos. 204502, 204504, 204508, 204510 (Docket No. WILK 78-322-PM), and Citation Nos. 204528, 204529, and 204530 (Docket No. WILK 78-323-PM), MSHA's counsel asserted that the inspector, who was present in the courtroom, does not now believe that they were "significant and substantial" and that the inspector would modify his citations to reflect this fact (Tr. 14).

Good Faith Compliance

The parties are in agreement that all of the citations were timely abated in good faith, and with regard to Citation Nos. 204502, 204503,

204507, 204509, 204510, 204512, 204515, 204519, 204520, and 204523, petitioner's counsel asserted that respondent exhibited exceptional good faith compliance by achieving rapid compliance (Tr. 15-22; 29-31).

Conclusion

After careful consideration of the arguments presented by the parties in support of the proposed settlement, and taking into account the six statutory criteria set forth in section 110(i) of the Act, including the fact that the respondent has no prior history of violations, and that all of the citations were issued a week or two after the effective date of the 1977 Act, I conclude and find that the proposed settlement should be approved.

ORDER

Pursuant to 29 C.F.R. § 2700.30, the proposed settlement of these dockets is APPROVED, and respondent IS ORDERED to pay civil penalties totaling $1,292 in satisfaction of the citations noted above, payment to be made to MSHA within thirty (30) days of the date of these decisions.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

11 APR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 79-362
	:	A.O. No. 46-01436-03048I
v.	:	Shoemaker Mine
CONSOLIDATION COAL CO., Respondent	:	

DECISION AND ORDER

Appearances: Barbara K. Kaufmann, Esq., U.S. Department of Labor, Office of the Regional Solicitor, Philadelphia, Pennsylvania, for Petitioner;
Michel Nardi, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Kennedy

The captioned proposal for the assessment of a civil penalty for an alleged violation of the mandatory safety standard that requires troubleshooting of electric power circuits and electric equipment with the power off except where necessary to correct the trouble encountered (30 C.F.R. 75.509) came on for an evidentiary hearing in Pittsburgh, Pennsylvania on April 9, 1980. After hearing the parties at length and carefully considering the evidence and testimony adduced, the trial judge made the following bench decision:

> Based on a preponderance of the reliable, probative and substantial evidence, and after observing the demeanor of the witnesses, I find:
>
> 1. The violation charged did not, in fact, occur because Mr. Harrigan and Mr. Shaw were properly engaged in troubleshooting the circuit breaker in question at the time it exploded for reasons not disclosed by the record.
>
> 2. The opinion testimony of Inspector Kinser as to the limited meaning assigned by him, and presumably MSHA, to the term troubleshooting is not in accord with the common understanding of the term or any persuasive evidence as to a more limited trade usage.

3. Furthermore, the more limited meaning is contrary to the exception which permits troubleshooting with the power on where the evidence shows, as it does here, that without the power on the trouble found was not reasonably susceptible of correction.

4. As presently written, the standard prohibits troubleshooting with the power on only where it can be shown that the trouble encountered is reasonably susceptible of a fix or repair without the power on.

5. That the exception largely swallows what appears to be a salutary rule is the reason why the Act provides for the issuance of improved safety standards. 1/

6. The rule of liberal interpretation cannot be expanded beyond the limits of its logic, especially where the result may impose a stigma on miners and the operator for conduct not clearly prohibited.

7. Most significant to my determination was Mr. Kinser's statement that he did not believe that what Mr. Harrigan did was a deliberate by-pass of a safety device (the undervoltage regulator) but merely an effort to make the electromagnetic coil resume its normal function without the necessity for extensive repairs.

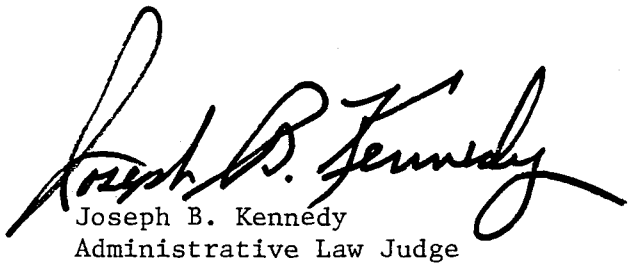
8. Nothing said here is to be taken as a condonation or approval of Mr. Harrigan's "short-cut" or of the obvious and serious hazard it created.

9. I urge the parties, and especially MSHA, to take immediate action to preclude this type of accident by clarifying the conduct prohibited under the guise of troubleshooting with the power on.

The premises considered, it is ORDERED that the petition for assessment of a civil penalty be, and hereby is, DISMISSED.

1/ Over two years ago, Judge Lasher dismissed a stronger case for enforcement on the ground that the standard in question is too vague and ambiguous to be enforceable. Secretary v. Peabody Coal Company, Dkt. No. DENV 77-67-P, Nov. 13, 1978. Despite the fact that neither the Secretary nor the Commission questioned the correctness of Judge Lasher's analysis of the infirmities of the standard from the standpoint of due process, his suggestion for clarifying amendments under the rulemaking process was ignored. The policy of attempting to achieve amendment of defective standards through endless and fruitless litigation while miners continue to be killed or seriously injured because the standards in effect do not guarantee the level of protection contemplated is not in accord with the fundamental purposes and policy of the Act.

With the addition of the footnote, which merely summarizes a discussion in the record, the foregoing is a true and correct copy of the bench decision entered in this matter. Accordingly, it is ORDERED that the same be, and hereby is, ADOPTED AND CONFIRMED as the trial judge's final decision in this matter.



Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

14 APR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceedings Docket No. DENV 79-163-PM A/O No. 41-00010-05001
v.		
CAPITOL AGGREGATES, INC.,	Respondent	Capitol Cement Quarry & Plant Docket No. DENV 79-240-PM A/O No. 41-01792-05001 Pit & Plant No. 4

DECISION

Appearances: Sandra D. Henderson, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Robert W. Wachsmuth, Richard L. Reed, Esqs., San Antonio, Texas, for Respondent.

Before: Judge Charles C. Moore, Jr.

The above cases came on for trial in San Antonio, Texas, on January 8, 1980. In both cases, as soon as the Government had rested its case, Respondent moved for dismissal on the grounds that no showing of an effect on interstate commerce had been made. Both motions were denied principally on the rationale of Wickard v. Filburn, 317 U.S. 111 (1942). That case involved home grown wheat which was used for the grower's own consumption, and the court said at page 91 "but if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home grown wheat in this sense competes with wheat in commerce." Subsequent cases have held that Respondent's activities need not be considered alone in order to measure their effect on commerce but may be combined with others engaged in similar activities.

> Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations. See Heart of Atlanta Motel, Inc. v. U.S. 379 U.S. 241, 255 (1964); Wickard v. Filburn, 317 U.S. 111, 127-128 (1942). [Fry v. U.S., 421 U.S. 542 at 547 (1974).]

Thus, Respondent can be regulated by Congress, i.e., subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 ("the Act") if its

activities, though purely intrastate, have a substantial affect on interstate commerce when combined with those of the entire industry. That this is true here is beyond dispute.

Turning to the record, Mr. Wesley Bonifay, vice president of Respondent, testified that Respondent's products were shipped chiefly by truck (Tr. II-239). The commerce power extends to instrumentalities of commerce, Hammer v. Dagenhart, 247 U.S. 251 (1917); ICC v. Ill. C.R. Co., 215 U.S. 452 (1909); ICC v. Chi. A.R. Co., 215 U.S. 479 (1909); Welton v. Missouri, 91 U.S. 275 (1875); Sherlock v. Alling, 93 U.S. 99 (1876); Simpson v. Shepard, 230 U.S. 352 (1912); and Carter v. Carter Coal Co., 298 U.S. 238 (1935), so that Respondent becomes subject to Congressional regulation as soon as its products enter the stream of commerce.

The Act applies to "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce * * *" [30 U.S.C.A. § 803], and defines commerce as, "trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof * * * or between points in the same State but through a point outside thereof * * *" [30 U.S.C.A. § 802]. Respondent's activities in using the telephone, in shipping its product, or as a member of the cement industry have the effect of bringing Respondent into the mainstream of commerce and subject Respondent to Congressional regulation. Also, in its answers, Respondent admits that it does sell its products in the State of Texas. In my opinion, that alone would be sufficient.

DENV 79-163-PM

The first case involved Respondent's cement operation wherein it mines limestone and makes it into cement. Respondent employs about 140 men in this operation, but is still the smallest cement company in the United States. It has no prior history of violation and I find that all citations were abated promptly and in good faith.

Citation No. 169703. The allegation is that the Respondent violated 30 C.F.R. § 56.9-24 in that the 930 Caterpillar front-end loader operator did not have full control of his loader when idling. The standard in question requires that an operator have full control of his vehicle when it is moving. In this type of front-end loader, steering is accomplished by hydraulically articulating the machine. If the hydraulic pressure is too low an excessive number of turns of the steering wheel is required in order to make the machine articulate. There was testimony by the inspector that at low idle the machine stopped articulating even while the wheel was being turned, but the same inspector also testified that when the articulation had gone far enough to reach the stops the steering wheel would still turn. I cannot see how both statements could be accurate. At higher rpms than low idle however, (low idle was around 500 rpms) the steering was normal according to the operator of the equipment. The equipment operator, Mr. Aiken, said that he had no trouble steering the machine until the inspector had him stop the equipment and attempt to articulate it at the low idle speed. Mr. Aiken did admit that when the test was being made at low idle an excessive number of

turns were required to articulate the machine from one stop to the other. The front-end loader was defective in that there was some wear on a small cartridge (part of a hydraulic pump) but the mechanic who has worked on many of this type of tractor said that it is perfectly normal for the wheel to continue to turn after the stop has been reached. He said the effect of this worn cartridge would be loss of some steering at idle power. In view of the fact that the inspector's test was made while the equipment was not moving, and the testimony of the machine operator that he had no trouble steering the machine, I cannot find as a fact that the machine operator did not have full control of the equipment while it was in motion. I therefore vacate the citation.

Citation No. 169261. The allegation is that the elevated walkway at the Nos. 3 and 4 belt conveyors had excess material accumulated on it which prevented safe access for employees and thus violated 30 C.F.R. § 56.11-1. The inspector stated that the material on the belt was marl, a combination of limestone and clay, and that at one point it was 1-1/2 feet deep. The inspector could not remember whether he had walked on the walkway, but he did state that marl is slippery if on an angle and while some spillage is normal, this was excessive in his opinion. Respondent's Exhibit 4 is a sketch of the two walkways involved and the black areas marked thereon show where the spillage occurred. The Nos. 2 and 3 conveyors were not running at the time of the inspection, and when they are not running there is no reason for anyone to be on the walkways. When they are running, however, the walkways are used to inspect the belt and every morning and every afternoon all of the larger chunks of marl on the walkway are removed and thrown on the belt. Smaller material is cleaned up by the labor crew whenever cleaning is needed or whenever a crew is idle. The pieces on the walkway at the time of the inspection were less than 5 inches in diameter, were scattered and there was no problem in stepping in between the pieces. The transfer point where the spillage occurred is 30 feet in the air but the spilled material was caught in the metal grating floor and would not roll or move when stepped on. After hearing the testimony, I am not convinced that such spillage as existed constituted a hazard to the extent that Respondent failed to provide safe access to a working place. Convincing me of that fact was the Petitioner's burden in this case, and in the absence of the satisfaction of that burden, the citation is vacated.

Citation Nos. 169262 and 169263 alleged that the elevated walkway next to the C-24 clinker conveyor and the platform at the top of that walkway contained accumulations of material which prevented safe access to the area and thus violated 30 C.F.R. § 56.11-1. The material accumulated on both the walkway and the platform was clinker which is a product that is created during the process of converting limestone into cement. On the walkway, the clinker had become powdery after having been walked on and had then become moist due to the fact that it was exposed to the rain. Thereafter, it became hard like cement or mortar and could be walked on without a slipping hazard. When in powdery form and not wet, the clinker will fall through the gratings of the walkway. Again, I am unconvinced that this created a hazard amounting to the failure to provide safe access. A picture might have convinced me otherwise, but the oral testimony that I heard was not sufficient to sustain

the Secretary's burden of proof regarding the walkway. Citation No. 169262 is vacated. As to the accumulation on the platform, inasmuch as the platform was covered by some type of canopy, the clinker had not hardened into a cement-like mass. The pile of clinker on the platform was 3 feet high but covered only about 12 square feet out of a platform area of 60 square feet. The pile was readily visible. There was plenty of room to walk around it since it constituted only one-fifth of the platform area and while I think it would have been better mining practice to clean it up, I do not see how it could be any more hazardous than a tool box or some piece of equipment bolted down in the same area. I find that the Secretary has not carried his burden of establishing that respondent failed to provide safe access to a working area. The citation is vacated.

Citation No. 169698. The citation alleges a violation of 30 C.F.R. § 56.14-1 in that a pinch point on the conveyor belt feeder drive pulley was not guarded. There is no question but that the drive pulley for the conveyor belt alongside the walkway was unguarded. But the standard requires that only such pulleys be guarded that "may be contacted by persons, and which may cause injury to persons * * *." Because of the direction of the drive pulley in question, the pinch point was at the bottom of the pulley and that pinch point was 3 feet from the middle of the walkway. The frame of the feeder is channel iron and extends along the walkway between that walkway and the conveyor and is 4 inches above the walkway. The belt moves at about 4 to 5 feet per minute which is slower than the movement of the outer edge of the second hand on a standard issue 13-inch diameter Government electric clock. Anybody could reach down under this conveyor and try to remove something and perhaps get caught in the pinch point. If a person wanted to do that, however, he would have to first remove any guard that was installed; so a guard would not prevent that type of injury. Respondent's Exhibits 7, 8 and 9 are photographs of the area and the pinch point is not even visible in those photographs. I think it highly unlikely that anyone could accidentally get caught in the pinch point of this slow-moving drive pulley. The citation is vacated.

Citation No. 169699. This citation alleges a violation of 30 C.F.R. § 56.11-1 (safe access) in that a slipping hazard was created on the floor on the ball mill side of the ring drive because a portion of the floor was covered with crater gear lube. Respondent produced a small bottle of crater gear lube that had been labeled as Respondent's Exhibit 10. Crater gear lube has a thinning agent when it is first taken out of the can so that it can be spread on the gears. After a short bit of use, this thinning agent is disbursed and the gear lube becomes thick and sticky like tar. Respondent's Exhibit 10 was thick and sticky at the time of the trial 1/ and could not in my opinion have created a slipping hazard. The citation is vacated.

1/ The exhibit was given to the reporter and it was returned to me with the transcript. It was wrapped in plastic when I received it and the texture appears to have been altered by virtue of its having been wrapped in the plastic. Also, I cannot find in the transcript any notation that it was received in evidence. It was treated as an exhibit, however, and I am relying on its texture in reaching a decision.

Citation No. 169700. The charge here is that the 25-foot high coke stockpile was becoming undermined at one point in violation of 30 C.F.R. § 56.9-61. The mandatory standard states "stock pile and muck pile faces shall be trimmed to prevent hazards to personnel." I interpret this to mean that a stockpile shall not be undermined or kept at any angle which would present a falling or landslide type hazard. While Respondent's witness stated coke was not subject to sliding and was stable, it was nevertheless the inspector's opinion that the angle which he saw on the face did present a material slide hazard. The front-end loader was equipped with a cab and although the stockpile was 25 feet in height, there was no evidence as to the height of the top of the cab on the front-end loader. I find a violation existed but I find very little hazard and only slight negligence. A penalty of $25 is assessed.

Citation No. 169705. The citation alleges a violation of 30 C.F.R. § 56.17-1 in that lights over the coke storage bin and the walkways were not burning which prevented sufficient light for safe working conditions. The inspector did not testify that he used a light meter and in the absence of such testimony, I will presume that he did not. He was not questioned either on direct or cross-examination concerning the extent of light that was in the area. The mere fact that some lights are not burning does not establish a violation but when the inspector testified that in his judgment there was insufficient light, it was then the duty of Respondent, if it thought that there was sufficient light, to come forward with evidence to that effect. The lights failed because of the failure of a photo-electric cell but there is no evidence as to just when that cell failed. If the photo-electric cell failed immediately before the inspector noticed the lights, I would say that no violation was established. On the other hand, if it had failed several weeks before I would say there was not only a violation but that the negligence was high. As the evidence stands, I will find that a violation existed but that no negligence was proved. In the absence of any evidence as to how dark it really was, I will find that the hazard was not great. A penalty of $25 will be assessed.

Citation No. 169697. The charge here is that the company did not have standardized traffic rules including speed and warning signs posted for the quarry roadway in violation of 30 C.F.R. § 56.9-71. The only traffic sign on the property was at the entrance to the mine. It displayed a 13 mile an hour speed limit and had arrows pointing towards the receiving and dumping areas. There were no signs in the quarry and it was Respondent's position that it could post rules orally by telling the drivers what to do. There were only three drivers, they had been with the company for a number of years, and had operated safely during that time. The fact remains, however, that Respondent did not post signs and standardize its traffic despite the clear requirements of the safety standard that it do so. The violation is clear, and Respondent's negligence is clear but I cannot find a high degree of hazard in view of the experience that these drivers had and the supervision exercised over them by the foreman. A penalty of $40 will be assessed.

Citation No. 169706. This citation alleges a violation of 30 C.F.R. § 56.17-1 in that there were no lights under the coke impact crusher around the tail pulley of the C-58 conveyor belt and the tail section of the apron feeder under the coke hopper. The inspector testified that there were numerous hazards in walking in such a dark area including the chance of a rattle snake bite. Inasmuch as miners might have to travel in the area at night, this condition did constitute a violation, but since all workers carried flashlights and since all repair work that had to be done was done with the benefit of a plug-in type auxiliary lamp, the hazard was not high, nor was the negligence, and a penalty of $25 will be assessed.

DENV 79-240-PM

At the outset of the hearing on this case, the Solicitor vacated Citation No. 170011 and the parties agreed on a settlement of $40 for Citation No. 170009. The original assessment on Citation No. 170009 was $56 and I accepted the settlement on the record.

Citation No. 170007. The charge is that a 40-foot long Euclid haulage truck was not equipped with an operating backup warning device in violation of 30 C.F.R. § 56.9-87. The inspector testified that the truck driver's vision to the rear was obscured by the high bed behind the cab and that he had observed haulage trucks backing up in the vicinity of the dragline where they sometimes had to reposition their trucks in order to receive material from the dragline. He thought they might also back up at the hopper but did not observe any doing so. Nor did he observe any spotters assisting the truck driver when he was backing up near the dragline. There is some possibility that signals between the dragline operator and truck driver might have served the same purposes as a spotter, but the evidence was not sufficiently persuasive for me to make a finding that there was "an observer to signal when it is safe to back up." The backup alarm was therefore required by the standard and failure to have that backup alarm operating did constitute a violation. The drivers of the trucks are supposed to report any defect such as a failure of the backup warning horn, but the driver of this particular truck did not realize that his horn had failed. The cause of the failure was a broken wire. I cannot find a high degree of negligence and in view of the fact that there was no one in the hopper area to be injured and no one in the dragline area except the dragline operator sitting in his machine, I cannot find that this was a very hazardous operation. A penalty of $30 will be assessed.

Citation No. 170010. This citation alleges that the bull gear on the dragline was not guarded in violation of 30 C.F.R. § 56.14-1. The bull gear is inside the cab and in order to get to it, the operator has to exit the machine on the righthand side, walk around to the lefthand side and enter through a pair of double doors. Respondent's Exhibit No. 3 depicts the side of the dragline that the operator would have to enter in order to approach the bull gear. Respondent's Exhibit No. 4 is a picture of the area of the citation after a guard has been attached. The inspector stated that the

operator of the machine informed him that there had been a guard which he had removed for some reason and failed to replace. Respondent's witness Mr. Hawthorne explained that there is a lockout device near the bull gear and when that switch is pulled, none of the parts in that section of the cab move even though the engine is running. The witness contradicted himself five times when testifying as to whether the bull gear would be moving when the machine operator went into the area of the cab through the double doors. Whenever I would ask him if there were moving parts in that area, he would say no, but whenever the Solicitor's attorney asked the same question, he would either say yes or there might be. I am going to have to disregard his entire testimony concerning this aspect of the case. I find that this was a gear which could be moving and could cause injury in the absence of a guard. I find very little negligence on Respondent's part but as any unguarded moving gear of this type can be hazardous, a penalty of $30 is assessed.

ORDER

It is ORDERED that Respondent, within 30 days, pay to MSHA penalties in the total amount of $215.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

14 APR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	: Civil Penalty Proceeding : Docket No. KENT 79-112 : A.O. No. 15-06823-03007I
v.		: Mine No. 3
LEECO, INCORPORATED,	Respondent	:

DECISION

Appearances: George Drumming, Jr., Attorney, U.S. Department of Labor, Nashville, Tennessee, for the petitioner;
Al Douglas Reece, Esquire, Manchester, Kentucky, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), on June 22, 1979, charging the respondent with one alleged violation of the provisions of 30 C.F.R. § 75.200. Respondent filed a timely answer contesting the proposed civil penalty and requested a hearing. A hearing was held in London, Kentucky, on December 13, 1979, and the parties appeared and were represented by counsel. The parties waived the filing of post-hearing proposed findings and conclusions, were afforded an opportunity to present oral arguments in support of their respective positions at the hearing, and pursuant to notice, respondent was afforded an opportunity to take the deposition of a witness in London, Kentucky, on March 13, 1980. The deposition has been filed and is a matter of record in this proceeding.

Issues

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

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

Applicable Statutory and Regulatory Provisions

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

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

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

Discussion

At the hearing, the parties stipulated to the following (Tr. 5-12):

1. Respondent is subject to the provisions of the Act by virtue of the fact that it is the operator of the mine where the alleged violation took place.

2. The mine in question is a small mining operation, employing approximately 31 people, and at the time the citation issued it employed approximately 40 miners.

3. The administrative law judge has jurisdiction of the proceeding, and the inspector who issued the citation is an authorized mine inspector who validly issued the citation alleging a violation.

4. Respondent's ability to remain in business will not be adversely affected by any civil penalty assessment made in this proceeding.

5. Respondent's history of prior violations before August 29, 1978, consists of 144 citations.

6. Annual coal mine production for the No. 3 Mine in 1978 was 101,720 tons, and in 1979, mine production was 74,825 tons. Annual mine production for Leeco, Incorporated for 1978 was 460,918 tons, and for 1979, the annual production was 489,679 tons.

Section 104(a) Citation No. 127294, issued on August 29, 1978, citing a violation of 30 C.F.R. § 75.200, states: "Evidence indicated that the approved roof control plan was not being followed in that two employees were injured while mining coal inby roof supports in the left break of the No. 1 room on the 002 working section."

The inspector fixed the abatement time as 8 a.m., August 30, 1978, and he terminated the citation on August 29, 1978, at 10:10 a.m., and the termination notice gives the following explanation for this action: "The approved roof control plan was discussed with all the employees by mine management concerning the requirements of the plan."

Testimony and Evidence Adduced by the Parties

Petitioner

MSHA inspector Lawrence Spurlock testified as to his background and mining experience, and indicated that he is familiar with respondent's mining operations through prior inspections of their mines. He confirmed that he conducted a non-fatal roof fall accident investigation at the mine in question in August 1978, and he identified a copy of the accident report (Exh. P-2) which he wrote. In compiling his report, he spoke to certain people who witnessed the accident and who had information pertaining to it, reduced the interviews to notes, and then compiled his report from this data. Mr. Spurlock stated that he did not visit the actual scene of the accident and began his investigation a day after the accident occurred together with the inspector who issued the citation (Tr. 14-21). MSHA inspector Helton had previously issued the citation in question, and the accident report was in part compiled from information supplied by Mr. Helton (Tr. 27). During the course of the investigation, section foreman Dewey Brock was interviewed and stated that approximately 20 minutes before the roof fall he examined the roof visually and by the sound and vibration method and that the miners were under supported roof when he left the scene. Mr. Brock said nothing about any unsupported roof and indicated that he knew nothing about the roof-control requirement that the roof had to be supported before side-cuts were made (Tr. 28).

In compiling his accident report, Mr. Spurlock stated that company management furnished a sketch of an area identical to the accident scene (Exh. P-11) and it indicates where the roof fell on the two victims (Tr. 29). In addition, the company submitted the required MSHA accident reporting forms, 7000-1, and he identified copies of the reports filed by the company (Exhs. P-12 and P-13; Tr. 30). The accident reporting forms were received before he compiled his accident report (Tr. 34), and he also received information from the two injured miners, as well as the observations of the MSHA inspectors at the scene of the accident.

On cross-examination, Inspector Spurlock testified that he was not in the mine when he conducted his investigation, that Inspector Helton had already issued the citation prior to the start of the accident investigation, and he did not know what evidence was available to Inspector Helton to support his citation (Tr. 38-41). Mr. Spurlock stated that his review of the roof-control plan indicated that persons were not to venture out from under the second row of roof supports, and that when side cuts were turned the roof area had to be supported. He identified the roof-control plan (Exh. P-3) and

stated that safety precaution No. 13 at page six of the plan is the provision applicable to the area cited, and he conceded that it is more or less a "boiler plate" provision that appears in most mine roof-control plans. Precaution No. 13 provides that "before side cuts are started, the roof in the area from which it is turned, shall be supported with permanent supports according to the plan" (Tr. 42). However, he also alluded to another specific roof-control provision dealing with the belt section in question. He identified this roof-control plan provision as "sketch Number 3, entitled -Cut Sequence for Room Panels" (Tr. 44). That provision provides that "the miner operator shall remain outby the second row of support from the face during mining," but it does not denominate permanent support or the type of support required (Tr. 44). He also testified that there is one main belt entry for the section in question and that it was his understanding that it was bolted all the way up (Tr. 45).

In response to bench questions, Mr. Spurlock stated that he learned of the accident on the day it occurred, that Mr. Helton issued his citation that same day, and that the accident investigation took place after the citation issued (Tr. 47). In further response to questions from respondent's counsel, Mr. Spurlock indicated that the accident occurred off a crosscut of one of the rooms of the belt entry and not in the belt entry itself (Tr. 50).

MSHA inspector Everett R. Helton testified as to his mining experience and background, indicated that he has conducted numerous roof fall accident inspections, and confirmed that he conducted an inspection at the mine in question on August 29, 1978. Prior to going underground that day, he issued a section 103(k) order in order to close the section so that the investigation could be conducted. He went directly to the roof fall area and found the state inspectors, section foreman Dewey Brock, and respondent's safety inspector Steve Adams on the scene. He examined the roof fall area and found an offset in the roof line where the rock had "tailed out over about halfway of the room." The entire area had been bolted, but there were offsets in the bolts where the rock had fallen, and a board covered the area where the rock had fallen. This indicated to him that the roof area which fell had not been bolted and the roof bolts in the fall area were higher up in the roof than the other area where no rock had fallen. He identified Exhibit P-11 as a sketch of the fall area (Tr. 51-57). Respondent's counsel stipulated that the roof area which fell was not roof bolted at the time of the fall (Tr. 57). The area was bolted after the fall (Tr. 58).

Inspector Helton stated that he discussed the roof fall with the section foreman and safety inspector and advised them that it was his belief that the two men who were injured by the fall were working inby roof supports and that the roof had fallen because it was unsupported (Tr. 59). He also discussed the roof-control plan, and Mr. Adams assembled the men together and reviewed the roof-control plan with them. Neither Mr. Brock nor Mr. Adams objected to his conclusions as to how the injuries were caused and they did not discuss the roof fall further. He discussed the citation with Mr. Adams, and since the roof had already been bolted, he followed MSHA policy by informing mine management that the roof-control plan would have to be discussed

with the employees. He was informed that some of the employees understood the plan, while others did not, and he believed that Mr. Brock and Mr. Adams understood it (Tr. 58-63).

Inspector Helton testified that he was at the mine for 2 or 3 days after the accident gathering information for Mr. Spurlock's accident report and meeting with company and state officials for the purpose of upgrading the roof-control plan so that it could be made simpler and understandable, and it was later modified and changed (Tr. 65). The citation was issued because the roof was not supported by permanent roof supports as required by the plan and miners worked inby unsupported roof. Had the roof been supported by temporary supports on 5-foot centers, he believed the rock would not have fallen (Tr. 65). He also believed that mine management should have been aware of the potential danger of the unsupported roof, but he did not know whether the injured miners had returned to work (Tr. 66). Mine management exercised good faith abatement and cooperated with him in taking corrective action. Although Leeco, Incorporated operates other mines which he has inspected and is a large mine operator, the No. 3 Mine in question is a small mining operation (Tr. 67-69).

Inspector Helton stated that he discussed the fact that respondent did not comply with the requirement for permanent roof support at the fall area with the safety director and section foreman, and as far as he can recall they made no responses (Tr. 69). He did not assist Mr. Spurlock in writing his accident report, and the notes that were made during his accident investigation and from which the report was prepared were lost after they were given to Mr. Spurlock (Tr. 70).

On cross-examination, Inspector Helton testified that while he was in the mine after the accident, he observed wooden timbers in place and they were being used. Aside from the immediate roof fall area which had been bolted after the fall, the remaining area had not been cleaned up or disturbed. He confirmed that he issued the citation because there was no roof support of any kind where the rock fell and he is sure that he asked mine management about this but received no response (Tr. 72-73). He has in the past observed roof falls which had been timbered or bolted, and it is possible for a roof to fall even if bolted or supported (Tr. 74). He did not interview the two injured miners, but a state inspector advised him that he had and that he was told that two timbers had been installed at the fall area but were knocked out by the miner. Mr. Helton indicated that he may have observed some timbers lying in the area during his investigation, but he was not sure, and he did not know for a fact that two timbers were installed at the time the roof fell (Tr. 75-77). The roof-control plan requires permanent supports when a side-cut is made and that timbers constitute temporary support (Tr. 78).

Inspector Helton stated that when he arrived at the mine to begin his investigation the day after the roof fall, the mining machine had been removed, but he could not recall whether the debris had been cleaned up. However, in order to remove the miner and the injured men, some of the

debris had to be removed, but he could not recall whether he observed any timbers at the scene of the fall, and indicated that the roof was approximately 35 or 36 inches above the floor at the place where it fell (Tr. 114-116).

Respondent's Testimony

David Johnson, safety director, Leeco, Incorporated, testified that his duties include conducting underground inspections, safety training, complying with MSHA's paperwork requirements, and attending MSHA close-out conferences. He was the company safety director in August 1978, and while he did not go underground to the scene of the accident, he conducted an inquiry of the accident of August 28, 1978, in his capacity as safety director, and he did so through Mr. Adams, a safety inspector who worked for him, reviewing the roof-control plan requirements, interviewing the injured miners, and attending the MSHA assessment conference. All of this was done in an effort to determine the cause of the accident (Tr. 120-127).

Mr. Johnson stated that the roof-control plan at the mine had been approved by MSHA on December 3, 1976, and MSHA inspectors had previously observed the mining cycle and raised no questions about it. He indicated that roof-control provision No. 13 at page 6 of the plan is a "stock" paragraph approved by MSHA in all plans, but that sketch No. 3, in the second paragraph on page 14 is the specific roof-control provision specifically applicable to the mine cutting sequence. That provision provides that the "[b]elt room entry shall be bolted before sidecuts are started. The miner shall not hole through into an unsupported area." The mine rooms have five entries, numbered consecutively from left to right, and the belt entry is located in the No. 3 entry. The side-cuts in question are in fact the breaks going to either the right or the left off the belt entry, and after the breaks are through and the adjacent entries advanced, the entry becomes the No. 2 entry and is no longer considered part of the belt entry. The accident in question occurred in the No. 1 entry at the break from the No. 1 to the No. 2 and it did not occur off the belt entry. The roof-control plan only requires that side-cuts off a belt entry be permanently supported (Tr. 127-129).

Referring to the sketch of the accident scene, and relying on interviews with one of the injured miners (D. D. Smith), and Section Foreman Brock, Mr. Johnson reconstructed the accident and indicated that the continuous miner was operating in the No. 1 entry, and after taking out a 10-foot lift, the area was timbered and roof bolted and the miner continued on its cycle across the section so as to allow the roof-bolting crew time to come in and support the lift area which had been mined. The miner would then come back and timbers would be installed at the face of the coal before the miner continued mining in that area. Once the area is bolted, the timbers are removed so as not to impede the travel of the miner. In this case, timbers were installed at the break in question, and once bolted, they are removed, and this is why none were observed there after the fall (Tr. 130-133). When Mr. D. D. Smith came into the area to continue mining, timbers were erected, and he was operating the mining machine by remote control while standing

under the timbered roof, and while observing the machine in operation, the roof fell. Mr. Teddy Smith, the miner helper, was standing behind Mr. D. D. Smith when the roof fell (Tr. 130-137).

Mr. Johnson testified that according to roof-plan provision sketch No. 3, page 14, in the first paragraph, it was permissible to use timbers as roof support at the location where the rock fell, and this is exactly what is done on the right side of the section under the MSHA approved roof-control plan. Under the plan, timbers were acceptable as permanent roof support on the right side of the section because it was an airway and men and equipment did not travel through the area. He conceded that timbers are not acceptable as permanent roof support on the left side of the section where the accident occurred, but they were installed in this case so that the operator could operate the miner from in between the timbers. After completion of the mining cycle, the miner is removed from the area, and the roof is bolted and the timbers are removed (Tr. 137-139).

On cross-examination, Mr. Johnson stated that roof-control provision No. 13 provides for permanent roof supports before side cuts are started. Further, the face area of the side-cut must be supported by permanent supports before a side-cut is started. Paragraph No. 2, page 14 of the plan (Sketch No. 3), requires that belt room entries be roof bolted before side-cuts are started, and that was done (Tr. 147-151). Under the mining cycle in effect at the mine, after the roof bolts were installed, the miner returned and commenced mining the area where timbers were set, and once it is mined, it too is roof bolted and the timbers are removed. The roof fell because the timbers which were installed did not hold the roof draw slate (Tr. 161-162).

In response to bench questions, Mr. Johnson explained that the miners who were injured were under timbered or bolted roof when the roof fell. The miner operator was manuevering and controlling the mining machine with an "umbilical cord" type cable and a "black-box" which controlled the machine. The machine itself was cutting virgin coal at the face under unsupported roof, and the roof where the cutting was taking place was not required to be supported (Tr. 170-174). At the time of the accident, the roof plan required the miner operator to be outby the second row of roof supports, and in his view the miner operator was in fact outby the second row of roof supports because he was under timber supported roof as provided by the plan provision at page 14. While the plan requires a room to be roof bolted, the area where the accident occurred was not a side-cut off the belt entry (Tr. 176-180).

Mine foreman Dewey Brock testified that at the time of the accident on August 28, 1978, he was employed at the mine as a section foreman, and he recalled the roof fall. He examined the area where the fall occurred about 20 minutes before the fall, took a gas test, sounded the roof, and he observed both Mr. D. D. Smith and Teddy Smith engaged in their mining duties. Referring to Exhibit P-11, the sketch of the accident scene, he explained the mining sequence which had occurred. Two cuts of coal had been mined, and one had been roof bolted and the other timbered. The new cut begun at the break

was not timbered or bolted where the miner started in. The last time he saw the two Mr. Smiths they were behind and under a roof-bolted area installing bits in the miner in preparation for starting the last cut of coal. Neither he nor anyone else suggested that they proceed inby any unsupported roof, and he did know that they were timbering around the miner because it was normal procedure to bolt the left run and timber the right one, and to take out enough timbers to permit the miner to go in and take out the last cut. He believed that this was permissible under the roof-control plan as he understood it. He saw the two men later when he helped remove them from the fallen rock. Some of the fall debris was cleaned up and removed after the fall in order to rebolt and make the area safe. He observed timbers in the area after the fall, and two timbers were still in front of the area after the rock fell and timbers were also found under the fallen rock.

Mr. Brock stated that the mining method used at the time of the fall had been used for 2 years in the mine and the roof-control plan was regularly reviewed with the two men. Mr. D. D. Smith was an experienced miner and was not the type to take risks or venture under unsupported roof. The rock which fell was about 4 to 5 inches thick, about 3 feet wide, and about 6 to 8 feet long. It fell in one piece, and had it not been for the fact that timbers were holding most of the rock weight, Teddy Smith would have been killed rather than injured. The rock did not burst the timbers, but "just creeled them over" (Tr. 193-205).

On cross-examination, Mr. Brock testified that the roof area he examined prior to the fall was at the location where the miner was going to start mining and it was about 10 feet wide. The spacing between the timbers which were installed was 4 feet. Once the miner starts in, timbers are taken out so that it can maneuver about. The miner is 20 feet long and 10 feet wide and the roof area immediately above it is not supported. After it finishes the cut, the miner is backed out, and two timbermen go in and timber the area, and the miner operator and his helper may also help in the timbering if additional timbers are needed. He had supervised Mr. D. D. Smith for 5 years prior to the accident in question and he has never known him to take short cuts. After installing the miner bits, Mr. Smith and his helper would then have proceeded to mine coal by moving forward into the cut taken by the machine and the area was timbered. Timbers, bolts, and cribs have been used to support the roof and he believed the roof fall was a "freak thing," and the timbers supporting the roof 4 feet from the rib "wasn't enough to really hold it up" (Tr. 205-215).

Mike Eslinger testified that he is a member of respondent's safety department and indicated that he prepared the accident reports submitted to MSHA. He could not recall how he determined that the miners were 12 feet inby roof support as stated in the reports (Tr 235-236). In preparing the report, he relied on the citation which was issued and did not speak with the MSHA inspector, the section foreman, or the injured employees (Tr. 238).

Inspector Spurlock was recalled and in response to a question as to the source of MSHA's Assessment Office finding that "the continuous miner operator and his helper were inby the last row of roof bolts under loose

unsupported roof and were caught by falling materials," he answered "I would say that he got it from that report right there. From reading this accident report" (Tr. 240). The inspector went on to explain his interpretation of the roof-control plan in question and explained the mining cycle in use in the section at the time of the accident. Referring to sketch No. 3 of the roof-control plan, Exhibit P-3, he identified the cut labeled "11" as the location of the roof fall in question and described the location as a room off the belt entry, and that cut No. 11 was a side-cut into the adjacent room. Under the plan, the roof area to the right as shown on the sketch is permitted to be supported by timbers while the area to the left is under a full roof-bolting plan. In other words, there are two roof support plans in use for the same pillar on the same room section. Anytime a side-cut is turned off a room neck, whether it be a turn off the belt entry or whether it is a side-cut into a room off the belt entry, the roof must be permanently supported by roof bolts.

Inspector Spurlock disagreed with the respondent's interpretation that sketch No. 3 only applies to belt entries and indicated that MSHA does not take that position insofar as the plan is concerned (Tr. 241-251). He indicated, however, that the use of timbers as temporary roof support is permitted in the area where the roof fall occurred and explained how they are used before the side-cut is actually mined (Tr. 253-255). He also indicated that the roof-control plan was revised 2 or 3 days after the accident so as to clear up the question of what constitutes a "belt room" (Tr. 276-277).

Deposition of Mr. D. D. Smith

On March 13, 1980, the deposition of one of the miners injured in the roof fall in question was taken by respondent's counsel, and MSHA's counsel was present and participated therein. Mr. Smith testified that at the time of the roof fall on August 29, 1978, he was operating a Jeffrey 101 continuous mining machine, and while turning to the right and backing up, a rock approximately "nine by ten by two to eight inches thick" fell. He stated that he was familiar with the roof-control plan in effect at the time and had received instructions with respect to that plan. At the time of the fall, timbers were set, and he personally installed two timbers, and the timbermen had also timbered the area in accordance with the plan. He was under the fall when it occurred and stated that the fall occurred under supported roof (Tr. 3-5).

On cross-examination, Mr. Smith explained the remote-control operation of the continuous miner, and stated that the two timbers which he set were approximately 4 feet apart. The break which was being mined at the time of the fall was 22 feet wide, and he was turning the heading off the break, and except for the space where the 10-foot miner was operating in, the area was timbered, but not roof bolted. Mr. Smith stated further that he has 14 years of mining experience, and that the fall occurred when he encountered a roof area where slate and sandstone came together on the left side of the break being mined and "it just dropped loose" (Tr. 7). In his view, had the

roof been permanently supported the fall would not have occurred, and while he did not know whether the placement of the timbers had anything to do with the fall, he indicated that it was possible that the miner may have come in contact with the timbers causing a release of pressure on the roof (Tr. 8, 11). He could not recall discussing the roof fall with any state or MSHA mine officials, but did discuss it with company official Dave Johnson (Tr. 8).

Mr. Smith stated that prior to installing the temporary timbers he sounded the roof, and also sounded it after the timbers were installed. While operating the continuous miner, he was positioned on his knees in 30-inch coal, and he was installing two safety timbers in front of him, timbers were behind him some 3 feet away, and Teddy Smith was behind him. The roof-control plan required temporary timbers for the area being mined but did not require roof bolts (Tr. 11-12).

Findings and Conclusions

Fact of Violation

In this case respondent is charged with one alleged violation of the provisions of 30 C.F.R. § 75.200, which provides as follows:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1980. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives. [Emphasis added.]

The citation issued by Inspector Helton charges the respondent with a violation of section 75.200 because "the approved roof control plan was not being followed in that two employees were injured while mining coal inby roof supports." During the course of the hearing, the inspector stated that the essence of the alleged violation is the fact that respondent failed to

install any permanent roof supports at the roof area which fell as required by the roof-control plan (Tr. 77), and respondent has stipulated that the roof area which fell was not roof bolted at the time of the fall (Tr. 57).

Section 75.200 requires a mine operator to adopt and maintain a roof-control plan suitable for its mine and it is well settled that any violation of the approved plan is also a violation of section 75.200. In addition, section 75.200 specifically prohibits anyone from proceeding beyond the last permanent roof support unless adequate temporary support is provided or unless such temporary support is not required by the plan and the absence of such temporary support will not pose a hazard to the miners. My initial interpretation of the citation issued by Inspector Helton led me to believe that the theory of the alleged violation of section 75.200 rested on the fact that two miners ventured out from under a supported roof area inby to an area which was not supported, and while mining coal were injured when the unsupported roof under which they were working fell in on them. If this is in fact the case then a violation of section 75.200 occurred when the two miners proceeded out from under roof support inby to an area which was not supported.

During the course of the hearing and the testimony presented by Inspector Helton in support of the citation, it became obvious to me that he believed a violation of section 75.200 occurred because the respondent failed to install permanent roof supports in the roof area which fell, and that since he believed the roof-control plan required the installation of such permanent supports, the failure to do so constituted a violation of the roof-control plan and section 75.200. In other words, although the narrative condition cited by the inspector, on its face, states that the roof-control plan was violated because two men were injured while working inby roof supports, thus leading me to believe that they ventured out beyond a supported roof area, the inspector's emphasis is placed on the allegation that failure to provide permanent supports for the roof area which fell as required by the roof-control plan constitutes a violation of section 75.200. When viewed in light of the conditions cited on the face of the citation, I believe these distinctions become critical to a determination of whether MSHA has carried its burden of proof in establishing the alleged violation as charged in the citation by a preponderance of the evidence. These distinctions also are critical to any determination of the question of negligence.

In support of my initial interpretation of the citation, I relied on (a) the finding made by Inspector Spurlock at page 2 of his accident report (Exh. P-2), which states that "the roof control plan was not being complied with in that miners were allowed to work inby permanent support. A violation of 75.200"; (b) the narrative findings of the MSHA assessment officer who "specially assessed" this, citation (Exh. P-4), wherein he concludes that "The operator was cited for a violation of 75.200 because the roof-control plan was not complied with. Two employees were inby permanent roof support"; (c) the accident reports submitted by the respondent (Exhs. P-12 and P-13), indicating that the two injured miners failed to comply with the roof-control plan by being 12 feet inby the last row of roof bolts at the time of the

accident; and (d) the fact that as part of the abatement, employees were cautioned not to proceed beyond supported roof (Tr. 92).

In order to clarify MSHA's position as to the condition which it believes constitutes a violation of section 75.200, I asked the inspector and counsel questions concerning the theory of their case (Tr. 87-103). Counsel conceded that the citation can be interpreted to charge the respondent with a violation for permitting two men to walk out from under unsupported roof, and it may also be interpreted to charge a violation of the roof-control plan for failure to support the roof area which fell (Tr. 96).

Counsel stated further that the theory of his case is that two miners went into an area of unsupported roof, that mine management allowed them to proceed into that area, and that mine management failed to insure that the area was supported by failing to install permanent roof supports as required by the mine plan (Tr. 89-90).

Inspector Helton testified that the unsupported roof which fell was required to be supported by permanent supports and that this should have been done at that point in time when mining was deep enough to allow the miner operator to go inby permanent supports. In the instant case, he indicated that the roof fall occurred inby the last row of permanent roof supports and that mining had proceeded approximately 43 feet inby, or one cut, and that the distance was such as to require the installation of permanent supports before continuing mining. When asked why he did not include this information as part of the narrative description on the face of the citation, he answered "that never entered my mind" (Tr. 91-93). He also indicated that the miner being used to cut coal was operated by remote control, but as long as the operator was under roof support, the miner could advance as far as the operator wanted it to as long as ventilation is maintained (Tr. 95).

MSHA's counsel conceded that had mining stopped at the point where permanent roof supports were installed, there would be no violation. He believed the violation occurred when the two miners went out under unsupported roof, and it is his position that the presence of the section foreman in the area of unsupported roof shortly before the fall supports a finding that mine management was aware of the situation and should have taken steps to install permanent roof support before permitting mining to continue. In short, counsel stated that a prima facie case has been presented to establish that two miners were working under unsupported roof, and that Inspector Spurlock's accident report supports the conclusion that the "mine foreman was aware of the area and didn't know that the requirement, or wasn't aware of the requirement, didn't remember the requirement of having permanent supports before he allowed someone to go under there" (Tr. 101).

MSHA's position is that the roof which fell was not supported at all, either by timbers or roof bolts, and Inspector Helton reached that conclusion on the basis of the fact that he observed no timbers in the area when he

arrived on the scene the next day, and the fact that the roof bolts which were installed at the fall area was different from the ones installed to make the roof area safe to move into, thus leading him to conclude that the roof fall area was bolted after the fall occurred. Based on these facts, the inspector concluded further, that at the time of the fall, the two injured men were in fact working under unsupported roof. Respondent's position is that at the time of the roof fall the injured men were in fact positioned under roof which was supported by timbers, rather than roof bolts, and that based on its interpretation of the approved roof-control plan, that was permissible. MSHA takes the further position that the roof which fell was not supported by permanent roof supports; that is, it was not roof bolted as required by the roof-control plan. Respondent takes the position that MSHA has not charged it with a violation of the roof-control plan for failing to install permanent roof support at the area which fell (Tr. 188-191). Respondent maintains that it is charged with failing to support the entire roof area which fell, which is not the case, and that the roof-control provision relied on by MSHA only requires permanent roof support by means of roof bolts before a side cut is made in a belt entry (Tr. 222-225).

In closing arguments, MSHA's counsel took the position that the citation issued by Inspector Helton specifically charges the respondent with a violation of its roof-control plan in that respondent performed mining in the area where the roof fell before installing the required permanent roof supports, and that this is supported by the testimony of Inspector Spurlock (Tr. 280-281).

In his closing arguments, respondent's counsel took the position that the respondent is only charged with failing to follow its roof-control plan by permitting two employees to mine coal inby roof supports, and he maintains that respondent is not charged with a violation of its plan for failure to install permanent roof supports when mining a break or taking a cut in the area in question. Even assuming the fact that the citation can be interpreted as charging the latter, counsel argued further that the record adduced here indicates that the roof-control plan was subject to interpretation, that mine management made a reasonable interpretation that only belt entries where the belt was actually present were required to be permanently roof bolted, and that assuming a violation is found to have occurred, the confusion in interpreting the plan should be taken into account in mitigation of any penalty assessed (Tr. 279-280).

Based on the testimony and evidence adduced, I find that petitioner has not established its contention that the roof area which fell was completely unsupported. While it may be true that the inspector did not observe any timbers in the fall area the day after the accident, the fact is that most of the area had been cleaned up, rebolted, and debris removed. This was done to facilitate the removal of the injured men and to secure the area from further falls. Thus, the only evidence that MSHA could produce to prove its contention that the roof was completely unsupported at the time of the fall is the after-the-fact observations of the inspector after the area had been cleaned up.

Although respondent conceded that the roof area which fell was not permanently supported by roof bolts, its contention that it was supported by timbers is supported by the testimony of Section Foreman Brock who testified that while a new cut which had just begun was not supported, the roof area above the previous two cuts were roof bolted and timbered, that when he last observed the two injured miners they were under roof which was permanently supported by roof bolts, and that he sounded the roof area some 20 minutes before it fell. He also testified that he was at the scene assisting the injured men and observed timbers among the debris, as well as timbers still standing in front of the fall area. The deposition of injured miner D. D. Smith reflects that he and his helper were under timber-supported roof when the fall occurred. As a matter of fact, Mr. Smith testified that he personally installed two additional safety timber supports in front of where he was working at the time of the fall, that he sounded the roof after installing those timers, and that the area behind him was also timbered.

On the face of the citation, Inspector Helton indicates that the injured men were "inby roof supports". However, he does not further clarify this conclusion so as to make it clear whether the supports were permanent or temporary. In contrast, the conclusion make by Inspector Spurlock on page 2 of his accident report, Exhibit P-2, is that injuries resulted from a fall of "unsupported roof inby permanent supports", and he further concludes at page 3 that the injured men were performing work in an unsafe manner when they advanced "inby permanent supports to perform work other than installing supports". Compounding the confusion even further, is the accident report submitted by the respondent, Exhibit P-12, which on its face states that Mr. D. D. Smith "was not in compliance with roof control plan in that he was 12 feet inby the last row of bolts." Mr. Eslinger, the person who prepared the report, could offer no further explanation or clarification of his prior statement as shown in the report.

Considering all of the testimony adduced in this proceeding, including the exhibits previously discussed, I cannot conclude that at the time of the fall the injured miners were in fact under totally unsupported roof. I find Mr. Brock's testimony to be credible and have no reason to disbelieve Mr. Smith's testimony as reflected in his deposition. Under the circumstances, I conclude that respondent has established the fact that at the time of the fall, the two injured men were working under supported roof, and petitioner's contention to the contrary is rejected. I find further that the preponderance of the testimony and evidence adduced supports the conclusions that at the time of the fall (1) the roof area which fell was not roof bolted, but was supported by timbers; (2) the face of the cut which was being taken at the time of the fall was totally unsupported; (3) the previous cut which was taken immediately before the one being mined at the time of the fall was supported by timbers; (4) the previous cut taken before the one which was timbered was roof bolted; (5) all roof areas immediately outby the fall area were either roof bolted or timbered; and finally, (6) there is no credible evidence to support the conclusion that at the time the roof area in question fell, the two injured miners were working under a totally unsupported roof, or that respondent in any way allowed, instructed, or otherwise condoned the practice of miners working under unsupported roof.

Although I find the citation issued by Inspector Helton to be less than a model of clarity, I believe the testimony and arguments presented by the parties supports the conclusion that from MSHA's point of view, the thrust of the alleged violation is the assertion by MSHA that the applicable approved roof-control plan required the roof area which fell to be permanently supported by roof bolts, and the failure to do so exposed the miners working under that roof area to serious injuries from a fall which in fact occurred in this case. On the other hand, the respondent, while conceding that the roof area which fell was not permanently supported by roof bolts, nonetheless takes the position that the roof area in question was not required to be permanently supported by roof bolts, and that under the applicable roof-control provisions and mining procedures in effect at the time in question the roof area in question was not required to be permanently supported, and since it was in fact timbered as required by the plan, no violation occurred.

The approved roof-control plan of December 2, 1976 (Exh. P-3), which is the plan in effect at the time the citation in question was issued, contains, in pertinent part, the following roof support requirements:

> (1) Page 6, numbered paragraph 13, under the section entitled "Safety Precautions for Full Bolting and Combination Plans," states as follows:
>
> > Before side cuts are started, the roof in the area from which it is turned shall be supported with permanent supports according to the approved plan.
>
> (2) Sketch No. 3, entitled "Cut Sequence for Room Panels," provides as follows:
>
> > Miner operator shall remain outby the second row of support from the face during mining. No person shall advance inby the miner operator during mining. Belt (room)(entry) shall be bolted before side cuts are started. The miner shall not hole through to an unsupported area.
> >
> > All places are to be bolted on not more than 5-foot centers except for the area shown above (extreme right place).

As indicated earlier, the citation issued in this case charges the respondent with a violation of section 75.200, because two miners violated the roof-control plan by working inby roof supports. It is clear that the failure by a mine operator to comply with a provision of an approved roof-control plan constitutes a violation of section 75.200, Peabody Coal Company, 8 IBMA 121 (1977); Affinity Mining Company, 6 IBMA 100 (1976); Dixie Fuel Company, Grays Knob Coal Company, 7 IBMA 71 (1976). It is also clear that section 75.200 is violated if persons proceed beyond the last permanent roof support without providing adequate temporary support.

On the facts presented in this case, the inspector who issued the citation did not specifically set out the specific roof-control plan which he believed was violated. The citation simply states that the plan was not being followed "in that two employees were injured while mining coal inby roof supports." By failing to designate the specific roof-control plan provision allegedly violated, it is somewhat difficult to ascertain from a reading of the condition cited the precise theory of MSHA's case. As indicated above, MSHA has failed to establish that the employees were in fact working under unsupported roof when the rock fell. I have found that respondent has established that at the time of the fall, the injured miners were located under supported roof. The critical question presented, however, is whether they were under a roof area supported permanently by roof bolts. If they were, then no violation has been established. If they were not, then a violation has been established, notwithstanding the inarticulate description of the condition on the face of the citation. The answer to this question is dependent on an interpretation of the applicable roof-control plan provision, and since respondent concedes that the roof which fell was not roof bolted, one must turn to the roof-control plan for further guidance.

I have reviewed the applicable roof-control provisions in question, and while the witnesses expressed some confusion as to which provision is applicable, their asserted confusion lies in their attempts to differentiate certain distinctions in the use of such terms as "belt entry", "breaks", "rooms", "necks", and "cuts". One would think that in dealing with such an important subject as a roof control plan on a day-to-day basis, that MSHA, as the enforcing authority, and mine management, who have the primary responsibility for insuring the safety of miners who are expected to follow the plan, understand the plan and are able to communicate with each other as to precisely what the plan means and where it applies. After listening to the testimony of the witnesses in this proceeding, it seems obvious to me that at the time the citation issued, neither MSHA nor mine management was clear as to the precise meaning or application of the plan. My conclusion in this regard is further supported by the fact that the parties indicated that the roof-control plan has since been amended and clarified to clear up any confusion which existed at the time the citation issued.

Upon review of paragraph No. 13 and sketch No. 3 of the roof-control plan, which the parties agree are the applicable plan provisions, I conclude that both provisions envision permanent roof bolting before side-cuts are mined in any room off a belt entry. While the exception stated in sketch No. 13 does permit timbering in certain areas to the right of any belt entry, it is clear to me that since the area where the fall occurred was to the left, the exception is clearly inapplicable. Further, when read together, both plan provisions require that the roof be supported permanently with roof bolts before any side-cuts are taken. On the facts presented in this case, it seems clear to me that at the time the cut in question was started, the roof was not permanently supported by roof bolts. Respondent conceded this was the case, and Foreman Brock indicated that the cut was totally unsupported, and that the previous cut was only timbered.

Further, Mr. Smith indicated that the area from which he was beginning the new cut was only timbered and not roof bolted, and while Mr. Johnson alluded to the requirements of the plan, which permitted timbering on the right side of the entry, he obviously, and apparently erroneously, believed that the same requirements were permissible for the left side. However, it seems clear to me that while timbering was permissible on the right side, it was not so on the left, and he finally conceded this fact. What obviously occurred in this case is that timbers were installed, the miner moved out and went to another area of the mine, and upon returning to the area in question proceeded to begin a new cut before removing the timbers and installing permanent roof support by means of roof bolting. In these circumstances, I conclude and find that by failing to permanently support the roof area immediately outby the roof fall area where the miners were working respondent violated its roof-control plan, and the citation is AFFIRMED.

Negligence

I find that the evidence and testimony adduced in this proceeding supports a finding that the violation resulted from a condition or practice which the respondent should have been aware of, and that the respondent failed to exercise reasonable care in the circumstances. A mine operator is expected to know the provisions of his own roof-control plan and to insure that his work force is aware of it. Here, the testimony of the witnesses reflects much confusion as to the precise meaning of the plan. However, this fact does not excuse the violation nor can it serve as an absolute defense, and the fact that prior MSHA inspections did not result in any violations for the same practice is no excuse. On the facts here presented, it took a roof fall to alert the parties to the fact that the approved plan was obviously not a model of clarity, since the plan was changed to clear up the apparent ambiguity. This is not the best method to devise such changes, and it is hoped that this episode will impress the parties in this regard.

As indicated earlier in this decision, I find no basis for finding that the respondent deliberately or recklessly disregarded its plan by permitting or condoning miners working under unsupported roof. In the circumstances here presented, I find that the violation resulted from ordinary negligence.

Gravity

The roof fall in question injured two miners. As stated by Mr. Smith in his deposition, had the roof been permanently supported, the fall would probably not have occurred. I find that the violation was serious.

Good Faith Compliance

The citation in question was timely abated and I find that the respondent exercised good faith in achieving compliance.

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

The parties stipulated that the mining operation in question was small in size and that respondent will not be adversely affected by any civil penalty assessed by me in this matter, and I adopt these stipulations as my findings in this regard.

Prior History of Violations

The parties stipulated that respondent's history of violations before August 29, 1978, consists of 144 citations. Since the petitioner failed to introduce any further information concerning those prior violations, and in particular, whether respondent has had previous violations of section 75.200, or the time frame within which they were issued, I cannot conclude that respondent's prior history is such as to warrant an increase in any civil penalty assessed on the basis of that prior history.

Penalty Assessment

I take note of the fact that the initial assessment made in this case by MSHA was on the basis of a "special assessment" and that MSHA's Assessment Office waived the use of the formula contained in 30 C.F.R. § 100.3, in making that initial assessment. I also take note that the initial assessment obviously took into account the allegations that the two employees were inby roof supports, and based on the Assessment Office findings, Exhibit P-4, it is further obvious that the initial assessment took into account the allegations that mine management somehow permitted or condoned this action. However, these assertions have not been established, and I am not bound by the Assessment Office evaluation of the citation, and after taking into account all of the evidence adduced in this de novo proceeding, including the circumstances surrounding the confused interpretation of the roof-control plan, and the criteria found in section 110(i) of the Act, I find that a civil penalty of $3,500 is warranted in this case.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of $3,500 for a violation of 30 C.F.R. § 75.200, as noted in Citation No. 127294, issued on August 29, 1978, and payment is to be made within thirty (30) days of the date of this decision and order.

George A. Koutras

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 15 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. WEST 79-97-M
	:	A/O No. 04-00010-05004
v.	:	
	:	Docket No. WEST 79-319-M
RIVERSIDE CEMENT COMPANY, Respondent	:	A/O No. 04-00010-05010
	:	Docket No. WEST 79-320-M
	:	A/O No. 04-00010-05011
	:	
	:	Docket No. WEST 79-324-M
	:	A/O No. 04-00010-05012
	:	
	:	Docket No. WEST 79-95-M
	:	A/O No. 04-00010-05002
	:	
	:	Crestmore Mine & Mill

DECISION

ORDER TO PAY

Appearances: Malcolm Trifon, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner, MSHA; Jerry Hines, Esq., Gifford-Hill and Co., Inc., Dallas, Texas, for Respondent, Riverside Cement Company.

Before: Judge Merlin

The above-captioned cases are petitions for the assessment of civil penalties filed by the Mine Safety and Health Administration against Riverside Cement Company. A hearing was held on March 18, 1980.

At the hearing, the parties agreed to the following stipulations:

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

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

(3) I have jurisdiction of these cases.

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

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

(6) Copies of the subject citations and terminations at issue in these proceedings are authentic and may be admitted into evidence for purposes of establishing their issuance but not for the purpose of establishing the truthfulness or relevancy of any of the statements asserted therein.

(7) The imposition of any penalty in these proceedings will not affect the operator's ability to continue in business.

(8) All the alleged violations were abated in timely fashion.

(9) The operator is large in size.

(10) With respect to history of prior violations, the operator had no history at the time the violations in Docket No. WEST 79-95-M were issued.

The operator had nine violations issued against it at the time the first ten violations were issued in Docket No. WEST 79-97-M and sixty violations at the time the last two violations in that docket number were issued. The parties agree and I find that with respect to Docket No. WEST 79-97-M, the foregoing statistics constitute a moderate history.

At the time the citations in Docket No. WEST 79-319-M were issued, ten violations had been issued against the operator which the parties agree and which I find constituted a low history.

At the time the citations in Docket No. WEST 79-320-M were issued, there had been 116 violations issued against the operator. These violations in this docket number were issued sometime later than those set forth in the previous docket numbers. The parties agree and which I find that for the purposes of Docket No. WEST 79-320-M, the operator has a moderate history.

At the time the citation in Docket No. WEST 79-324-M was issued, a total of 118 violations had been issued

against the operator which again the parties agree and I find constituted a moderate history of prior violations.

(11) The parties agree that the witnesses who will testify are experts in mine safety and health (Tr. 4-5).

Citation Nos. 376289, 376292, 376295, 375274, 376335, 376337, 375290, 376343, 376345, 376346, 376349, 379053

The Solicitor moved to have settlements approved for these citations for the originally assessed amounts, which total $1,010. The Solicitor stated that ordinary negligence and ordinary gravity were involved in each of these citations. From the bench, I approved these recommended settlements after having reviewed typewritten summaries of all of these violations (Tr. 7-18, 126). Approval of these settlements from the bench is hereby affirmed.

Citation Nos. 375275, 376316, 375256

The Solicitor moved to vacate these citations, stating that he did not believe there was sufficient evidence to prove the violations. From the bench, I granted these motions, stating that such a determination is within the Secretary's discretion (Tr. 9, 17-18). The granting of the Solicitor's motions to vacate is hereby affirmed.

Citation Nos. 376334, 376351, 376352, 371402, 379067

The Solicitor moved to have penalties approved for these citations for the originally assessed amounts, which total $942. In its answer to the complaint, the operator had stated it did not contest these penalty assessments. After stating that the operator's agreement not to contest a penalty does not mean automatic approval for that penalty, I approved these recommended settlements after having reviewed typewritten summaries of these violations (Tr. 10-11, 14-15, 19). Approval of these penalties from the bench is hereby affirmed.

Citation No. 376287

This citation involved a failure to guard the drive shaft motor on two fans, a violation of 30 C.F.R. 57.14-1. The Solicitor moved to have a settlement approved in the amount of $74, reduced from the original assessment of $84. As grounds for the settlement, the Solicitor stated that gravity was less than originally determined, due to the fans being located at such a height that there was less chance of employee contact with the fans than had been originally determined. From the bench, I approved the settlement (Tr. 6-7). Approval of this settlement from the bench is hereby affirmed.

Citation No. 375273

This citation involved a buildup of materials around the electric motor located below the No. 3 bulk-loading station, a violation of 30 C.F.R. 57.12-30. The Solicitor moved to have a settlement approved in the amount of $62, reduced from the original assessment of $72. As grounds for the settlement, the Solicitor stated that gravity was less than originally determined since the area was used mainly by maintenance personnel rather than regular personnel. From the bench, I approved the settlement (Tr. 8-9). Approval of this settlement from the bench is hereby affirmed.

Citation No. 375559

This citation involved a failure to guard a rachet-type brake on an inclined conveyor, a violation of 30 C.F.R. 57.14-1. The Solicitor moved to have a settlement approved in the amount of $300, reduced from the original assessment of $345. As grounds for the settlement, the Solicitor stated that gravity was less than originally determined since this piece of machinery is in a more remote location than originally determined, and there would therefore be less employee exposure to any potential danger. From the bench, I approved the settlement (Tr. 16-17). Approval of this settlement from the bench is hereby affirmed.

Citation No. 376317

This citation was issued when large amounts of material spills were observed on the screw conveyor floor at the No. 1 bag house, a violation of 30 C.F.R. 57.20-3(b). The Solicitor moved to have a settlement approved in the amount of $100, reduced from the original assessment of $130. As grounds for the settlement, the Solicitor stated that gravity was less than originally determined since there was an adjacent walkway area which could be used by employees. From the bench, I approved the settlement (Tr. 17). Approval of this settlement from the bench is hereby affirmed.

Citation No. 379059

This citation was issued when the walkway along an elevated conveyor belt was found not to be not equipped with emergency stop devices or guards, a violation of 30 C.F.R. 57.9-7. The Solicitor moved to have a settlement approved in the amount of $300, reduced from the original assessment of $325. As grounds for the settlement, the Solicitor stated that there was less gravity than originally determined as there was less employee use of this walkway than was originally thought. From the bench, I approved the settlement (Tr. 18). Approval of this settlement from the bench is hereby affirmed.

Citation No. 379054

This citation was issued when the cab and surrounding areas of the underground hydraulic scaler were not kept free of extraneous materials, a

violation of 30 C.F.R. 57.9-12. The Solicitor moved to have a settlement approved in the amount of $300, reduced from the original assessment of $325. As grounds for the settlement, the Solicitor stated that gravity was less than originally determined, since only one employee was exposed to this hazard. From the bench, I approved the settlement (Tr. 19). Approval of this settlement from the bench is hereby affirmed.

Citation No. 376296

At the hearing, counsel introduced documentary exhibits and testimony with respect to this citation (Tr. 20-72). Upon conclusion of the taking of evidence, counsel for both parties waived the filing of written briefs, proposed findings of fact and conclusions of law. Instead, they agreed to present oral argument and have a decision rendered from the bench (Tr. 73). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. 81-84).

Bench Decision

The bench decision is as follows:

> This case is a petition for the assessment of a civil penalty. The alleged violation is of 30 C.F.R. 57.9-7 which provides as follows: "Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length."
>
> The facts are not in dispute. No stop cord or device was present along the belt conveyor of the operator's secondary primary crusher.
>
> Respondent's Exhibit 1 is a photograph of the belt conveyor and walkway in issue. The circumstances set forth in the picture and the description based upon the picture given by the operator's plant manager are not challenged.
>
> The issue presented for resolution is whether the belt conveyor was guarded. If it was unguarded, then a stop device or cord was required. If, on the other hand, the belt conveyor was guarded, then no stop cord or device was necessary and no violation existed.
>
> Alongside the bottom edge of the belt itself was an angle iron labeled "D" on respondent's Exhibit No. 1. The operator's plant manager expressed the opinion that "D" served as a guard or handrail when the cover over the belt was lifted. The MSHA inspector first stated that the belt conveyor had no guards, but upon final recall to the stand stated that "D" would serve as a guard for the top portion of the belt conveyor.

Based upon the foregoing, I conclude that the angle iron "D" constituted a guard and that that part of the belt conveyor affected by "D" was in fact guarded so that to this extent no stop cord or device was necessary and no violation existed.

Directly under the belt conveyor are the troughing rolls which serve as supports and guides for the belt conveyor. Each troughing roll rotates on its own axis. The operator's plant manager who was a persuasive witness testified that troughing rolls are part of the belt conveyor. I conclude that the troughing rolls were not guarded. As the plant manager stated, the vertical angle irons described on respondent's Exhibit No. 1 as "A" were only for support and not for guarding. Therefore, this portion of the belt conveyor system was unguarded and a violation existed because there was no stop device or cord.

I am most certainly not unaware of the hazards that result from unguarded or inadequately guarded moving parts. However, it must be stated that the Solicitor's evidence was a welter of confusion with respect to whether MSHA's guarding requirements have ever been reduced to writing. From all that has been given me at this hearing, it appears that no such writing exists. What is clear from the testimony is that MSHA has failed to advise the operator what guarding is required and what guarding would be acceptable. It is no answer to say, as has been suggested here today, that "common sense" supplies the answer. The Act and the mandatory standards are far too complicated for such a simplistic approach. The inspector's testimony clearly sets forth what type of guarding MSHA would accept. Why then does not MSHA tell the operator?

From the testimony I have heard, it appears that MSHA has no written requirements regarding guarding and that operators are left to figure out for themselves what they should do. This approach to enforcement in a newly affected industry can only breed resentment and resistance. Certainly the Secretary can do better.

In addition, I would point out that I am not deciding that with respect to the top portion of the conveyor where I have found no violation, the angle iron "D" constitutes the most desirable form of guarding. However, if MSHA wants more, it should say so in writing and in a manner calculated to come to the attention of the operators.

Because a violation exists, a penalty must be assessed. In accordance with the stipulations entered into by the

parties which I have accepted, I find the operator large in size; the violation was abated in good faith; there is no history of previous violations; and the imposition of a penalty will not affect the operator's ability to continue in business. As already stated, I recognize that injury could result from lack of guarding for the trough rolls. Nevertheless, in determining the appropriate amount of a penalty, I must take into account the circumstances of this case already set forth herein, which indicate to me a very, very low level of negligence. The penalty amount which I have determined is calculated hopefully to bring about on the part of MSHA a change in the situation which presently exists.

A penalty of $1 is assessed.

The bench decision is hereby affirmed.

Citation No. 376298

At the hearing, counsel introduced documentary exhibits and testimony with respect to this citation (Tr. 84-116). Upon conclusion of the taking of evidence, the parties agreed to present oral argument and have a decision rendered from the bench (Tr. 116). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violations (Tr. 122-124).

Bench Decision

The bench decision is as follows:

This case also is a petition for the assessment of a civil penalty. The alleged violation here also is of 30 C.F.R. 57.9-7. Thus, the issue presented is whether the cited portion of the belt conveyor was guarded. If it was unguarded, then a stop cord was required, but if it was guarded, then no such device was necessary and no violation existed.

Unlike the prior citation, the facts in this matter are in some dispute. There is a conflict over whether mesh screening existed except for the areas cited. The inspector testified that there was mesh screening which constituted adequate guarding, except for three portions where it was missing. According to the inspector, the missing portions were what he cited. However, the plant manager emphatically stated there was no such mesh at the time in issue. I find the plant manager more credible on this point and I accept his testimony.

An angle iron labeled "A" on respondent's Exhibit 2 was present just above the trough rollers. The inspector testified that this angle iron guarded the small portion of the trough roller which was behind the angle iron. The rest of the trough roller was exposed and in my opinion was unguarded. Moreover, as the plant manager admitted, a person could be injured if he struck himself on the area above the angle iron. For this reason also, I find the belt conveyor cited was unguarded and that therefore a violation existed.

The operator's counsel has argued that a walkway was not present here. I reject that argument. I accept the definition of "walkway" given by Judge Moore in Acme Concrete Company, Docket No. DENV 79-123-PM dated December 18, 1979, wherein he stated that a walkway meant a place where a miner could reasonably be expected to walk, even if he had no job-related reason for going to the area in question.

The stipulations regarding the statutory criteria of size, good faith abatement, ability to continue in business and history already have been set forth and apply here as well.

I recognize that injury could result from the situation presented. However, in this instance, as in the prior citation, it appears that the operator did not know at the time exactly what was required of it. Certainly, the testimony of the plant manager graphically demonstrates this. Indeed, I accept the plant manager's testimony that in the past the angle iron had been accepted as adequate guarding. This, of course, does not mean that MSHA could not require or indeed should not have required additional guarding. However, the circumstances do demonstrate to me that the level of negligence was very, very low. Under the circumstances, I find this absence of any significant negligence a most significant factor.

A penalty of $1 is assessed.

The bench decision is hereby affirmed.

Citation No. 376300

The parties stipulated that the facts in this citation were the same or similar to the facts presented in Citation No. 376296. I therefore adopted the findings and conclusions I made with respect to Citation No. 376296 to this citation, and imposed a penalty of $1 (Tr. 124-125). Approval of this assessment is hereby affirmed.

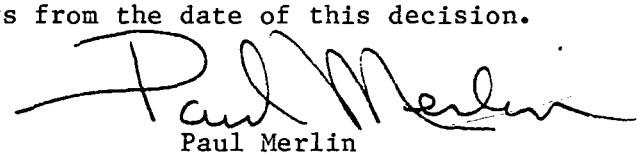
Citation Nos. 376303, 376307

The parties stipulated that the facts in these citations were the same or similar to the facts presented in Citation No. 376298. I therefore adopted the findings and conclusions I made with respect to Citation No. 376298 to these citations, and imposed a penalty of $1 for each violation (Tr. 125). Approval of these assessments is hereby affirmed.

ORDER

It is hereby ORDERED that as set forth herein, the vacation of certain citations from the bench be AFFIRMED and that the imposition of penalties from the bench with respect to other citations, also as set forth herein, be AFFIRMED.

In accordance with the foregoing determinations, the operator is ORDERED to pay $3,093 within 30 days from the date of this decision.



Paul Merlin
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 15 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: Civil Penalty Proceeding	
	: Docket Nos.	Assessment Control Nos.
	: PIKE 79-41-P	15-07371-03001
v.	: PIKE 79-107-P	15-07371-03003
JOHNSON BROTHERS COAL COMPANY, INC., Respondent	: No. 1 Mine	

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Gregory Johnson, Virgie, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to written notices of hearing dated June 19, 1979, and August 14, 1979, a hearing in the above-entitled consolidated hearing was held on August 8, 1979, and October 2, 1979, respectively, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

This proceeding involves two Petitions for Assessment of Civil Penalty filed by MSHA. The Petition in Docket No. PIKE 79-41-P was filed on November 20, 1978, and seeks to have civil penalties assessed for 20 alleged violations of the mandatory health and safety standards by respondent Johnson Brothers Coal Company. The Petition in Docket No. PIKE 79-107-P was filed on March 6, 1979, and seeks to have civil penalties assessed for three alleged violations of the respirable-dust standards. MSHA and respondent agreed to settle all issues in Docket No. PIKE 79-107-P as hereinafter described. Evidence was presented by MSHA and respondent with respect to the remaining 20 violations involved in Docket No. PIKE 79-41-P.

Issues

The issues raised by MSHA's Petition in Docket No. PIKE 79-41-P are whether Respondent violated any mandatory health and safety standards and, if so, what civil penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. Three of those criteria may be given a general evaluation in this proceeding, while the remaining three will hereinafter be considered individually when the parties' evidence

concerning those three criteria is considered in detail. The three criteria which may be given a general evaluation, namely, the size of respondent's business, the question of whether the payment of penalties would cause respondent to discontinue in business, and the question of whether respondent demonstrated a good faith effort to correct the violations after being advised that they existed, will be considered first.

Size of Respondent's Business

Respondent is a corporation owned by four brothers: Gregory, Gwendell, Garney, and George Johnson. The corporation operates an underground coal mine which produces coal under a contract entered into with Bethlehem Steel Corporation. The coal is sold to Bethlehem at a fixed price and Johnson Brothers' sales do not fluctuate with changes in the market price of coal. When the brothers began mining coal, they used a hand-held drill operated from a roof-bolting machine and transported the coal out of the mine in battery-powered scoops. Their equipment was at first borrowed, but they now make payments on their own equipment which was purchased by money loaned to them by the Pikeville Bank.

When they first started mining in 1976, they employed only 12 miners and produced about 250 tons of coal per day. They now use a cutting machine and battery-powered scoops to haul coal to a conveyor belt. By 1979 they were employing about 23 miners and were producing about 400 or 500 tons per day from the Elkhorn No. 2 coal seam which measures about 40 inches in thickness at the place they are now mining. They produce coal on two production shifts and employ a maintenance crew on the third shift (Tr. 5-10; 190).

On the basis of the facts given above, I find that respondent operates a small mine and that any civil penalties assessed in this proceeding should be in a low range of magnitude insofar as they are determined under the criterion of the size of respondent's business.

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

Respondent did not present any evidence at the hearing regarding its financial condition. The former Board of Mine Operations Appeals held in Buffalo Mining Co., 2 IBMA 226 (1973), and in Associated Drilling, Inc., 3 IBMA 164 (1974), that when a respondent fails to introduce evidence regarding its financial condition, a judge may presume that payment of penalties would not cause it to discontinue in business. In the absence of any evidence to the contrary, I find that payment of penalties will not cause respondent in this proceeding to discontinue in business.

Good Faith Effort To Achieve Rapid Compliance

The inspectors testified with respect to each of the 20 violations alleged in this proceeding that respondent had demonstrated a normal good faith effort to achieve rapid compliance (Tr. 25; 38; 108; 124; 137; 171;

198; 221; 235; 285; 304; 315; 325; 337; 349; 376; 388). Therefore, I find that respondent demonstrated a good faith effort to achieve rapid compliance with respect to all alleged violations and respondent will be given full credit for that mitigating factor when each penalty is hereinafter assessed.

Consideration of Remaining Criteria

The remaining three criteria, namely, the gravity of each alleged violation, respondent's negligence, if any, and respondent's history of previous violations, if any, will be considered below in connection with a detailed evaluation of the evidence presented by both MSHA and respondent.

The Contested Case
Docket No. PIKE 79-41-P

Notice No. 1 RDM (6-4) 1/7/76 § 75.1710 (Exhibit 2)
Notice No. 2 RDM (6-5) 1/7/76 § 75.1710 (Exhibit 12)
Notice No. 1 RDM (6-10) 4/16/76 § 75.1710 (Exhibit 22)

Findings. Depending upon the height of the mine in which the equipment is being operated, section 75.1710 requires that electric face equipment, including shuttle cars, be equipped with cabs or canopies to protect the miners operating such equipment from roof falls and rib rolls. The inspector stated that MSHA added 12 inches to the height referred to in the regulations in order to allow the canopies to pass under roof-supporting facilities such as crossbars, headers, and roof bolts. On January 7, 1976, and April 16, 1976, when the notices of violation listed above were written, canopies were required to be installed on equipment used in mines which were 36 inches or more than 36 inches in height (Tr. 36; 54; 62). Since the actual mining height in respondent's No. 1 Mine was 45 inches, respondent violated section 75.1710 by failing to install canopies on two Kersey scoops and an Acme roof-bolting machine which were being used in the face area of its mine (Tr. 16-17; 27-28; 32-33). The violations were moderately serious because a usable canopy would have provided some protection, but roof conditions were good and the miners were not exposed to a strong likelihood of injury by the absence of canopies (Tr. 17).

The violations were associated with a low degree of negligence because respondent made some effort to obtain canopies and it is extremely doubtful if the technology existed in January or April of 1976 to provide usable canopies for the Kersey scoops and Acme roof-bolting machine which respondent was operating in actual mining heights averaging 45 inches (Tr. 95-97). Actual mining heights in respondent's mine had dropped to 42 inches or less by the time the Secretary had issued an amendment suspending the requirement that canopies be used in mines whose actual height was 42 inches or less (42 Fed. Reg. 34876). Therefore, the notices of violation here involved were terminated because canopies ceased to be required in respondent's 42-inch mine (Tr. 72).

Conclusions. The former Board of Mine Operations Appeals held in Buffalo Mining Co., 2 IBMA 226, 259 (1973), Associated Drilling, Inc., 3 IBMA 164, 173 (1974), and Itmann Coal Co., 4 IBMA 61 (1975), that if the

materials needed for abatement of a given violation are not available, no notice of violation should be written. Additionally, the Board held in P & P Coal Company, 6 IBMA 86 (1976), that the defense of impossibility to obtain equipment is an affirmative defense which can be considered only if respondent raises that issue itself. In this proceeding, respondent's witness testified that he had tried unsuccessfully to acquire a canopy for his Acme roof-bolting machine, but canopies were not being made for that machine in 1976 (Tr. 95). Although Kersey began to make canopies for its scoop in 1976, respondent's miners were unable to use that canopy in the coal height in respondent's mine and its miners resented even being asked to try using it (Tr. 97-98).

I am very much inclined to believe that respondent should be found not to have violated section 75.1710 under the Board's holdings in the cases cited above. It is a fact, however, that the Board also held in the P & P case, supra, that MSHA is not required to prove availability of equipment as a part of its case. I have found violations of section 75.1710 primarily because respondent's witness stated on cross-examination that he had not tried to obtain canopies until after the notices of violation were written (Tr. 91). Respondent's witness also stated that he had filed petitions for modification after the notices were written (Tr. 90).

The evidence shows that if respondent had insisted on its miners using the ill-fitting canopies which were available for Kersey scoops in 1976, the miners would have been exposed to at least as much chance of injury from trying to see out from under the canopies as they would have been exposed to injury by a possible roof fall by failure to use canopies (Tr. 97-98).

Because of the extenuating circumstances discussed above and shown in the hundred pages of transcript relating to the difficulties of obtaining and using canopies in 1976, a penalty of $1 will be assessed for each violation of section 75.1710. There is no history of previous violations to be considered.

Citation No. 69245 4/17/78 § 75.316 (Exhibit 29)

Findings. Section 75.316 requires each operator of a coal mine to adopt and follow a ventilation system and methane and dust control plan approved by the Secretary. Respondent violated section 75.316 by failing to install and maintain permanent stoppings to and including the third connecting crosscut outby the face as required by respondent's ventilation plan. On the intake side of the beltway, the last permanent stopping was five crosscuts from the face and on the return side of the beltway, the last permanent stopping was six crosscuts from the face (Tr. 103-105). The violation was only moderately serious because the inspector found a volume of 10,200 cubic feet of air per minute in the last open crosscut which was 1,200 cubic feet in excess of the required 9,000 cubic feet. Therefore, the miners were being supplied with an adequate amount of oxygen and sufficient air velocity to carry away any noxious fumes which might have accumulated (Tr. 107). Besides assuring adequate ventilation, the permanent stoppings

prevent smoke from a possible fire on the beltline from being carried to the working face (Tr. 115). Since respondent's No. 1 Mine has never been known to release any measurable amount of methane (Tr. 10; 105), there was little chance that air would come into the beltline from the return and cause an explosion (Tr. 113-114). Respondent was negligent in failing to erect the permanent stoppings as required by its ventilation plan.

Conclusions. Since the inspector believed that the violation was relatively nonserious in the circumstances prevailing at the time the citation was written, the penalty should be assessed primarily under the criterion of negligence. Respondent's witness failed to describe any extenuating circumstances in this instance. Considering that a small mine is involved, a penalty of $50 will be assessed for this violation of section 75.316. The penalty will be increased by $10 to $60 under the criterion of history of previous violations because respondent has violated section 75.316 on two prior occasions (Exh. 1).

Citation No. 69246 4/17/78 (Exhibit 31)

Findings. Respondent violated section 75.316 a second time on April 17, 1978, by failing to install and maintain line curtains to within 10 feet of the point of deepest penetration in all entries from which coal was being produced as required by respondent's ventilation plan. Respondent was producing coal from eight entries and the line brattices were installed to within 10 feet of the face in only one of the eight entries (Tr. 121-122). The inspector believed the violation to be nonserious because he found that there was adequate ventilation in the working faces without maintenance of the curtains to within 10 feet of the faces (Tr. 122). Respondent was negligent in failing to follow the provisions of its ventilation plan (Tr. 128).

Conclusions. The inspector's belief that adequate ventilation was being provided again requires that the penalty be assessed primarily under the criterion of negligence. The inspector stated that the instant citation was written during the first inspection to be made after respondent's ventilation plan had been changed to require that line curtains be maintained to within 10 feet of deepest penetration in all eight entries regardless of whether coal was actually being cut, mined, or loaded in those entries. The inspector said that the above-described requirement was an unusually strict provision and that MSHA subsequently retracted that provision (Tr. 125-128). Respondent should have been aware of the provisions in its own ventilation plan, but the fact that MSHA later changed the provision to a less demanding requirement shows that an honest misunderstanding could have caused respondent to maintain only the number of curtains which would have been required under the plan as it existed prior to the short-lived amendment (Tr. 128). Therefore, a penalty of only $25 will be assessed for this violation of section 75.316. The penalty will be increased by $10 to $35 because respondent has previously violated section 75.316 on two occasions (Exh. 1).

Citation No. 69247 4/17/78 § 75.316 (Exhibit 32)

Findings. Respondent violated section 75.316 again on April 17, 1978, because a curtain had been torn down where the battery-charging station was located. The gravity of respondent's failure to maintain the curtain, as required by the diagram shown on the mine map which is a part of respondent's ventilation plan, is that any toxic fumes from the battery-charging station could be carried to the working face if other curtains near the working face were also down. The violation was nonserious because no curtains at the face were down at the time the citation was written. Respondent was negligent for failing to maintain the curtain at the battery-charging station (Tr. 134-137; Exh. 61).

Conclusions. A great deal of testimony (28 pages) was given with respect to the gravity of this violation of section 75.316, but since the inspector had stated at the very outset of his direct testimony (Tr. 135), that he did not consider the violation to be serious, the extensive testimony established nothing constructive. In view of the nonserious nature of the violation, the penalty should primarily be assessed under the criterion of negligence. It appears that a scoop operator may have torn down the curtain without rehanging it and without reporting it to the section foreman (Tr. 141). It is respondent's obligation to maintain the ventilation curtains at all times, but the inspector did not know how long the curtain had been down, so there may have been a low degree of negligence in respondent's failure to have replaced the curtain before its absence was detected by the inspector. In view of the nonserious nature of the violation and the low degree of negligence, a penalty of $15 will be assessed for this violation of section 75.316. The penalty will be increased by $10 to $25 because respondent has previously violated section 75.316 on two occasions (Exh. 1).

Citation No. 69248 4/17/78 § 75.400 (Exhibit 33)

Findings. Section 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. Respondent violated section 75.400 because loose coal ranging from 1 inch to 12 inches in depth had accumulated at a point beginning 40 feet outby spad No. 1233 for a distance of 240 feet in the No. 3 entry. Two dust samples taken in the area of the accumulations had an incombustible content of from 36 to 37.4 percent instead of the required 65 percent incombustible. The accumulations were up to 4 feet wide and had been caused by spillage from the scoops used to haul coal to the conveyor belt (Tr. 162-168; Exh. 34). The violation was serious because there were trailing cables in the vicinity of the accumulations and they were a potential source of an explosion or fire (Tr. 170). Respondent was negligent in failing to keep the loose coal cleaned up (Tr. 170).

Conclusions. Respondent's witness claimed that their cleanup program requires them to stop about a half hour before the end of each shift for the purpose of cleaning up any loose coal which might have accumulated during the shift (Tr. 178). Respondent's witness, however, could not recall what the

appearance of the mine was on April 17, 1978, when the citation was written and respondent's witness conceded that it was possible that the cleaning program may not have been followed on that day (Tr. 181-182). Since the violation was serious and respondent was negligent, a penalty of $125 would have been assessed for this violation, but since respondent has previously violated section 75.400 on 5 prior occasions, the penalty will be increased by $25 to $150 under the criterion of respondent's history of previous violations (Exh. 1).

Citation No. 69249 4/17/78 § 75.400 (Exhibit 35)

Findings. Respondent violated section 75.400 again on April 17, 1978, by allowing loose coal to accumulate on each side of the belt line to a depth of from 1 to 12 inches and to a width of about 2 feet on the left side and to a width of about 6 feet on the right side of the belt. The violation was only moderately serious at the time it was observed by the inspector but the accumulations could have become serious if they had not been cleaned up at the time they were observed by the inspector. Respondent was negligent in failing to prevent the spillage at the belt tailpiece from accumulating (Tr. 194-198).

Conclusions. Respondent's witness objected to the inspector's having cited respondent for two violations of section 75.400 in view of the fact that the coal accumulations described in the preceding citation ended only about one crosscut from those described in the instant citation (Tr. 200-202). The former Board of Mine Operations Appeals held in Old Ben Coal Co., 4 IBMA 198 (1975), and Clinchfield Coal Co., 6 IBMA 319 (1976), that an operator may be assessed penalties for several violations of the same section of the regulations so long as the respondent has been made aware of the separate citations and so long as MSHA's Petition for Assessment of Civil Penalty gives the operator notice that separate penalties would be sought for the different violations. The Petition for Assessment of Civil Penalty in Docket No. PIKE 79-41-P specifically requested that penalties be assessed for the separate violations of section 75.400 alleged in Citation Nos. 69248 and 69249. Therefore, I conclude that the existence of two separate violations were proven by MSHA and that respondent received notice prior to the hearing that a separate penalty would be sought for each violation of section 75.400. The second violation was considered to be less serious than the first violation, so a penalty of $75 would have been assessed for the second violation, but since respondent has violated section 75.400 on five prior occasions, the penalty will be increased by $25 to $100 because of respondent's history of previous violations.

Citation No. 69250 4/17/78 § 75.503 (Exhibit 36)

Findings. Section 75.503 requires that all electric equipment taken into or used inby the last open crosscut be maintained in a permissible condition. Respondent violated section 75.503 because there was an opening of .005 of an inch between the cover and the contactor box on the Acme roof-bolting machine being used inby the last open crosscut. Although no methane has ever been detected in respondent's mine, the inspector believed

the violation to be potentially serious because it is always possible for methane to be encountered in mines believed to be nongassy. Respondent was negligent for failing to make certain that the roof-bolting machine was permissible (Tr. 219-221).

Conclusions. The inspector believed that there was only a remote possibility that the violation could have produced an explosion. The violation was abated in a few minutes by the tightening of the bolts on the cover of the contactor box. Considering that a small operator is involved, a penalty of $35 would have been assessed for this violation of section 75.503, but Exhibit 1 shows that respondent has violated section 75.503 on three prior occasions. Therefore the penalty will be increased by $15 to $50 because of respondent's history of previous violations.

Citation No. 69251 4/18/78 § 75.316 (Exhibit 37)

Findings. Respondent violated section 75.316 by using a temporary stopping inby spad No. 2063 to separate the intake entry from the neutral entry at a point where a permanent stopping should have been constructed (Tr. 228-232; 253-254). The violation was potentially serious because production activities turned to the right off the main entries at the point where the temporary stopping was located (Tr. 232). Failure to use a permanent stopping could have prevented an adequate amount of air from going to the working faces (Tr. 233). Neither the inspector nor respondent's witness had checked the air velocity on the day Citation No. 69251 was written and no finding can be made as to whether any lack of air resulted from respondent's use of a temporary stopping (Tr. 267-268). There was considerable confusion in the testimony of both the inspector and respondent's witness as to whether respondent was negligent in using a temporary stopping while respondent was in the process of installing two airlock doors at the place where the temporary stopping existed (Tr. 250; 266). Two airlock doors were installed to abate the violation (Tr. 272-276).

Conclusions. The testimony regarding this violation extends for 49 pages (Tr. 227 to 276) and seems never to be conclusive as to exactly what respondent's witness was trying to explain. About the only conclusion which I can make for certain is that a violation occurred, but the generalized and conflicting statements of both the inspector and respondent's witness do not show that the violation was actually serious or that respondent was negligent in having a temporary stopping at the time changes were being made in the mine map and ventilation procedures when Citation No. 69251 was written. Therefore, I would assess a penalty of $10 for this violation, but since Exhibit 1 shows that respondent has violated section 75.316 on two prior occasions, the penalty will be increased by $10 to $20 because of respondent's history of previous violations.

Citation No. 69252 4/18/78 § 75.503 (Exhibit 38)

Findings. Respondent violated section 75.503 because there was an opening of .005 of an inch between the panel board and its cover and because there was a loose clamp on the conduit which covers the battery lead wires. The inspector did not consider the violation to be serious

because an explosion was unlikely in view of the fact that no methane has ever been detected in respondent's No. 1 Mine, but the inspector believed that it was important that equipment be kept permissible because it is never possible to be sure that methane will not be released. Respondent was negligent in failing to maintain the scoop in a permissible condition. The inspector believed that the required weekly inspection of electrical equipment ought to be made more frequently than once a week if permissibility violations are occurring between weekly inspections (Tr. 278-285).

Conclusions. Respondent's witness resented being cited for his failure to make certain that the clamp was tightly fixed on the conduit because he said that the scoop was delivered from the factory with the clamp loose and that the only way the clamp can be made to stay on the soft conduit is to wrap the conduit with electrical tape to make the conduit large enough in circumference for the clamp to adhere to the conduit (Tr. 289-298). The regulations require all electrical equipment used inby the last open crosscut to be maintained in a permissible condition. Exceptions to the regulations cannot be made just because the factory produces an inferior product. Respondent's complaints regarding the delivery of defective equipment from the factory should be directed to the manufacturer of the equipment. Miners' lives may not be put in jeopardy just because a manufacturer is careless in the way its new equipment is designed or assembled. Inasmuch as the inspector considered the violation to be nonserious, the penalty should be assessed primarily under the criterion of negligence. Since respondent knowingly took the equipment underground without tightening the clamp (Tr. 291-292), there was a high degree of negligence. Therefore a penalty of $80 would have been assessed for this violation, but Exhibit 1 shows that respondent has violated section 75.503 on three prior occasions. Therefore the penalty will be increased by $15 to $95 because of respondent's history of previous violations.

Citation No. 69253 4/18/78 § 75.1713 (Exhibit 39)

Findings. Section 75.1713 provides that each operator shall have an adequate supply of first-aid equipment underground. Section 75.1713-7 lists 12 items which must be included in the first-aid equipment. Respondent's first-aid equipment lacked three of the 12 items, namely, eight 4-inch bandage compresses, eight 2-inch bandage compresses, and one cloth blanket. The violation was serious because the compresses would have been needed if a miner had been badly cut in an accident. Respondent was negligent in failing to maintain the first-aid equipment (Tr. 301-306).

Conclusions. Respondent's witness conceded that the three items were missing and stated in defense of his oversight that miners sometimes took first-aid supplies without advising the section foreman that the supplies had been taken (Tr. 310). Inasmuch as the violation was serious and was associated with ordinary negligence, a penalty of $50 would have been assessed for this violation of section 75.1713. The inspector stated that respondent had a complete supply of first-aid equipment when he previously inspected the mine (Tr. 303). Nevertheless, Exhibit 1 reflects that respondent has violated section 75.1713-7 on a prior occasion. Therefore the penalty of $50 will be increased by $5 to $55 because of respondent's history of previous violations.

Citation No. 69254 4/18/78 § 75.1718 (Exhibit 40)

Findings. Section 75.1718 requires each operator to provide an adequate amount of drinking water in active workings of his mine and requires that the water be stored and protected in sanitary containers. Respondent violated section 75.1718 by failing to provide any drinking water in the working section. The inspector considered the violation to be moderately serious because he thought water might be needed if someone were to get choked or need water to wash dirt out of one's eyes. Respondent was negligent for failing to provide drinking water (Tr. 314).

Conclusions. Respondent's witness stated that he had eye wash in the first-aid kit and claimed water was not needed for preventing a person from choking. Respondent said water was kept on the section in a cooler until concrete mix was found in it one day. Respondent's witness said he concluded from that experience that the men did not want to be supplied with water as they brought their own water into the mine with them. After the instant citation was written, respondent resumed providing drinking water. Respondent's witness also claimed that water would not be needed in case the men should be trapped by an explosion because the miners would run out of oxygen before they ran out of water (Tr. 315-318). Respondent's excuses for not providing water have little merit. Since the violation was moderately serious and respondent deliberately declined to provide drinking water in the working section, a penalty of $50 will be assessed for this violation. There is no history of previous violations to be considered.

Citation No. 69255 4/18/78 § 77.410 (Exhibit 41)

Citation No. 69256 4/18/78 § 77.410 (Exhibit 42)

Citation No. 69257 4/18/78 § 77.410 (Exhibit 43)

Findings. Section 77.410 requires trucks, front-end loaders and other mobile equipment to be provided with alarms which will sound a warning when such equipment is put in reverse. Citation No. 69255 was written for failure of a Ford truck to have any back-up alarm at all. Citation No. 69256 was written for failure of a GMC truck to have an operable back-up alarm. Citation No. 69257 was written for failure of a front-end loader to have an operable back-up alarm. All three violations occurred (Tr. 320-324). The two trucks belonged to independent contractors hired by respondent to haul its coal to its purchaser's tipple, but the front-end loader was owned by respondent. The Commission has held that an operator may be cited for violations of independent contractors (Secretary of Labor (MSHA) v. Republic Steel Corp., 79-4-4, 1 FMSHRC 5, and MSHA v. Old Ben Coal Co., 79-10-7, 1 FMSHRC 1480). Therefore, it is appropriate to assess a penalty against respondent for all three violations. All three violations were only moderately serious because there is room for only one truck at a time at respondent's loading area and each truck driver operates the end loader to dump coal in his own truck so that there is no reason for a person to walk behind the trucks or end loader when they are backing up (Tr. 328). Respondent was negligent in failing to assure that the trucks and end loader were equipped with operable back-up alarms.

Conclusions. There is no evidence to show how long the end loader and GMC truck had been used with inoperable back-up devices, so there is less reason to find a high degree of negligence for the GMC truck and end loader than for the Ford truck which had no back-up alarm at all. Respondent's witness complained that the back-up alarms made so much noise that they were a psychological hazard for the truck drivers and that he had had at least 20 requests by drivers seeking permission to disconnect the back-up alarms (Tr. 327-328). Only 4 or 5 minutes are required to load a truck with a front-end loader. The time required to back out of the loading area is also short. In such circumstances, the time that any operator is exposed to the noise of the back-up alarm is short. Therefore, I find little merit in respondent's defense. The same is true with respect to his claim that the diesel engines in the equipment make so much noise that anyone who would fail to hear the engines would also fail to hear the back-up devices (Tr. 328). It is the difference in sound of the back-up alarm, as contrasted with the roar of diesel engines, which gives a person warning that equipment is backing up. Consequently, there is no merit to respondent's claim that a person who can not hear a diesel engine would ignore the sound given off by a back-up alarm.

Although the violations were only moderately serious, there was a high degree of negligence in each case because respondent's attitude about seeing that the alarms are operative amounts to indifference about providing the safety such alarms are intended to afford persons who may be exposed to the hazard of vehicles which are backing up. A penalty of $100 would have been assessed for the Ford truck which had no back-up alarm at all and a penalty of $75 each would have been assessed for the GMC truck and front-end loader which had inoperable back-up devices. Exhibit 1, however, shows that respondent has violated section 77.410 on one prior occasion. Therefore each penalty will be increased by $5 to $105 and to $80, respectively, because of respondent's history of a previous violation.

Citation No. 69258 4/18/78 § 77.1109 (Exhibit 44)

Findings. Section 77.1109(c)(1) provides that trucks, front-end loaders and other mobile equipment shall be provided with at least one portable fire extinguisher. Respondent violated section 77.1109 because its front-end loader was not equipped with a fire extinguisher. The violation was moderately serious because the end loader was used outside the mine where a fire would not endanger miners by destroying their oxygen supply or creating noxious fumes which could asphyxiate them. There was ordinary negligence in respondent's failure to provide a fire extinguisher (Tr. 336-340; 344).

Conclusions. The inspector believed that the primary hazard created by lack of a fire extinguisher would be that a miner might try to put out any fire with his hand or some inadequate object and burn himself or might be injured by a fuel-tank explosion (Tr. 336). There may be some validity to the inspector's claim, but he did not cite any cases in which that had happened. Clearly respondent's witness was correct in pointing out that a person's life is not nearly as much endangered by a fire which occurs

on a piece of equipment above ground as one is by a fire which occurs underground where one's oxygen supply may be destroyed or one may be exposed to noxious fumes (Tr. 344). In any event, the violation was moderately serious. Respondent's witness stated that they made a strong effort to see that fire extinguishers were maintained on all equipment, but that equipment is left unattended over weekends and fire extinguishers are sometimes stolen (Tr. 344). The inspector said that there was a fire extinguisher on the end loader when he previously inspected it (Tr. 337). In such circumstances, the evidence shows that the violation was associated with a low degree of negligence. A penalty of $15 would have been assessed for this violation, but Exhibit 1 shows that respondent has violated section 77.1109 on a prior occasion, so the penalty will be increased by $5 to $20 because of respondent's history of a previous violation.

Citation No. 69259 4/18/78 § 77.1301(c)(8) (Exhibit 45)

Findings. Section 77.1301(c)(8) requires that explosives magazines be kept locked securely when the magazines are unattended. Respondent violated section 77.1301(c)(8) because both the magazine for storing detonators and the magazine for storing explosives were unlocked. The padlocks were in place on the doors and the doors to the magazines were closed, but the padlocks had not been locked and it would have been possible for an unauthorized person to take explosives and be injured by failing to handle them properly. A high degree of negligence was associated with the violation because the inspector had warned the operator on a previous occasion that the magazines should be kept locked (Tr. 346-352).

Conclusions. Respondent's witness claimed that the magazines were within 100 feet of the mine office and that someone was always at the mine office to see any unauthorized person who might venture close to the magazines (Tr. 355-366). Respondent's witness conceded, however, that no person was specifically given the responsibility of standing watch over the magazines when they are left unlocked (Tr. 360-361). The proximity of the magazines makes the likelihood of theft somewhat unlikely, but clearly it is serious to fail to keep the magazines locked when they are not being used by persons putting explosives in or taking them out. Respondent had been reminded by the inspector on a prior occasion to keep the magazines locked. In such circumstances, a penalty of $100 will be assessed for this violation of section 77.1301(c)(8). There is no history of previous violations to be considered.

Citation No. 69260 4/18/78 § 75.1306 (Exhibit 46)

Findings. Section 75.1306 provides, among other things, that no exposed metal may exist on the inside of the boxes or magazines used underground to store explosives and detonators on the working section. Respondent violated section 75.1306 because bare nails existed on the inside of the boxes used for storage of explosives and detonators. The boxes contained explosives and detonators and the inspector considered the violation to be serious because a spark from the exposed metal could have caused an explosion. Respondent was negligent for not having made certain that all nails on the inside of the box were covered by nonmetallic materials (Tr. 369-381).

Conclusions. Respondent's witness stated that the magazines are dragged toward the face as production progresses. During a movement preceding the inspection the hinges on the box had been damaged. When the box was repaired, the employee making the repairs failed to inspect the interior of the box for exposed nails (Tr. 380). Respondent's witness stressed the fact that no metal was ever placed inside the magazines and that there was nothing in the magazines to produce a spark (Tr. 381). The fact remains that a metal object may strike an exposed nail when explosives are being put in or taken out of the magazines and an explosion could result. Respondent's defense did not show that the violation was less than serious or that there was a low degree of negligence associated with the violation. Therefore, a penalty of $100 will be assessed for this violation of section 75.1306. There is no history of previous violations to be considered.

Citation No. 69621 4/19/78 § 75.1701 (Exhibit 47)

Findings. Section 75.1701 provides, among other things, that 20-foot boreholes shall be drilled in advance of the working face and boreholes are also required to be drilled in the rib of such working face when the working section is within 200 feet of an adjacent mine. Respondent violated section 75.1701 because 20-foot boreholes were not being drilled in advance of the working face at a time when respondent's mine was within 100 to 150 feet of an adjacent mine. The violation was serious because it is possible to cut into an abandoned mine and be drowned by water or noxious gases which have accumulated in the abandoned mine. Respondent was grossly negligent for failing to drill the test holes because it was aware of the existence of the abandoned mine inasmuch as respondent had already cut into the adjacent mine on a prior occasion (Tr. 383-386; 398).

Conclusions. Respondent's witness was somewhat critical of the inspector because the inspector could not pinpoint the exact place in the mine where the miners were working on the day Citation No. 69621 was written (Tr. 392). That contention has no merit because the inspector clearly designated the area as being near spad No. 630 and any mining in that area would have required 20-foot test holes to be drilled (Tr. 393). Respondent's other defense was that the miners had been drilling test holes and he believed they may have been drilling them on the day the violation was cited, but respondent's witness could not be certain of that claim (Tr. 402). The fact that the 20-foot drill stem was broken on the day of the inspection and had to be repaired before the test holes could be drilled is a strong indication that test holes were not being drilled at the time Citation No. 69621 was written (Tr. 398).

The preponderance of the evidence shows that the violation occurred, that it was serious, and that the violation was accompanied by a high degree of negligence. Therefore, a penalty of $225 will be assessed for this violation of section 75.1701. There is no history of previous violations to be considered.

The Settlement Agreement

Docket No. PIKE 79-107-P

MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-107-P seeks assessment of civil penalties for three alleged violations of the respirable-dust standards. The parties agreed to settle the issues raised in Docket No. PIKE 79-107-P pursuant to an agreement under which respondent will pay a penalty of $9.00 for two violations and a penalty of $52.00 for the third violation. The Assessment Office had proposed penalties of $48.00 for one violation and $52.00 for each of the other two violations.

MSHA's counsel agreed to accept a reduced penalty of $9.00 with respect to two of the violations because they were cited prior to the amendments contained in the 1977 Act which had the effect of eliminating the cloud cast upon alleged violations of the respirable-dust standards by the Board of Mine Operations Appeals' opinions in Eastern Associated Coal Corp., 7 IBMA 14 (1976), aff'd on reconsideration, Eastern Associated Coal Corp., 7 IBMA 133 (1976). Large numbers of cases which arose during the period when the Board's Eastern Associated opinions were in effect were subsequently settled on a basis which amounted to an average payment by the coal operators of $9.00 per alleged respirable-dust violation. See, e.g., Judge Joseph B. Kennedy's Order Approving Consent Settlement and To Pay Civil Penalties issued May 10, 1978, in Secretary of Labor (MSHA) v. Consolidation Coal Company, et al., Docket Nos. VINC 76-76-P, et al. I believe that fairness to other operators justifies allowance of the settlement figure of $9.00 for all civil penalty cases involving alleged respirable-dust violations occurring prior to the amendment of the definition of "respirable dust" in the 1977 Act.

Respondent's agreement to pay the full penalty of $52.00 proposed by the Assessment Office for the third respirable-dust violation is appropriate because the Assessment Office considered that violation of section 70.100(b) to be moderately serious and to involve ordinary negligence. The Assessment Office's proposed penalty of $52.00 is in line with the penalties which have been assessed in the contested portion of this proceeding in situations in which the violations were found to be moderately serious and to involve ordinary negligence in view of the fact that a small operator is involved.

Based on the discussion above, I find that the parties' settlement agreement in Docket No. PIKE 79-107-P should be approved as hereinafter provided.

Summary of Assessments and Conclusions of Law

(1) Pursuant to the settlement agreement, respondent should be ordered to pay civil penalties totaling $70 which are allocated to the respective alleged violations as follows:

Docket No. PIKE 79-107-P

Notice No. 1 BPS (7-1) 1/7/77 § 71.108	$ 9.00
Notice No. 1 BC (7-13) 5/3/77 § 70.250	9.00
Citation No. 9926003 4/18/78 § 70.100(b)	52.00
Total Settlement Penalties in This Proceeding	$ 70.00

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

Docket No. PIKE 79-41-P

Notice No. 1 RDM (6-4) 1/7/76 § 75.1710	$ 1.00
Notice No. 2 RDM (6-5) 1/7/76 § 75.1710	1.00
Notice No. 1 RDM (6-10) 4/16/76 § 75.1710	1.00
Citation No. 69245 4/17/78 § 75.316	60.00
Citation No. 69246 4/17/78 § 75.316	35.00
Citation No. 69247 4/17/78 § 75.316	25.00
Citation No. 69248 4/17/78 § 75.400	$ 150.00
Citation No. 69249 4/17/78 § 75.400	100.00
Citation No. 69250 4/17/78 § 75.503	50.00
Citation No. 69251 4/18/78 § 75.316	20.00
Citation No. 69252 4/18/78 § 75.503	95.00
Citation No. 69253 4/18/78 § 75.1713	55.00
Citation No. 69254 4/18/78 § 75.1718	50.00
Citation No. 69255 4/18/78 § 77.410	105.00
Citation No. 69256 4/18/78 § 77.410	80.00
Citation No. 69257 4/18/78 § 77.410	80.00
Citation No. 69258 4/18/78 § 77.1109(c)(1)	20.00
Citation No. 69259 4/18/78 § 77.1301(c)(8)	100.00
Citation No. 69260 4/18/78 § 75.1306	100.00
Citation No. 69261 4/19/78 § 75.1701	225.00
Total Civil Penalties in Docket No. PIKE 79-41-P	$1,353.00
Total Settlement and Contested Penalties	$1,423.00

(3) Respondent was the operator of the No. 1 Mine at all pertinent times and as such is subject to the provisions of the Act and to the regulations promulgated thereunder.

WHEREFORE, it is ordered:

(A) The settlement agreement reached by the parties during the hearing is approved.

(B) Respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $1,423.00 of which $70.00 are assessed pursuant to the parties' settlement agreement summarized in paragraph (1) above and the remaining $1,353.00 are assessed pursuant to my decision on the contested aspects of the proceeding as summarized in paragraph (2) above.

Richard C. Steffey

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

Distribution:

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Johnson Brothers Coal Company, Inc., Attention: Gregory Johnson, Superintendent, Box 166, Virgie, KY 41572 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

APR 15 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. ASARCO INCORPORATED, Respondent.	CIVIL PENALTY ACTION DOCKET NO. DENV 79-473-PM ASSESSMENT CONTROL NO. 05-00516-05006 V MINE: LEADVILLE UNIT

DECISION

APPEARANCES:

Phyllis K. Caldwell, Esq., Ann M. Noble, Esq., and James H. Barkley, Esq., Office of Henry C. Mahlman, Associate Regional Solicitor, United States Department of Labor, Denver, Colorado
for Petitioner,

Earl K. Madsen, Esq., Bradley, Campbell and Carney, Golden, Colorado,
for Respondent.

Before: Judge John J. Morris

STATEMENT OF THE CASE

Petitioner charges that respondent exposed its miners to unstable rock conditions. It is asserted that the conditions in the ASARCO underground mine violated a standard promulgated under the authority of the Federal Mine Safety and Health Amendments Act of 1977, amending 30 U.S.C. §801 et seq. (1969) (amended 1977).

ISSUES

The issues are whether there were unstable rock conditions in the 12-6-3 stope on March 30, 1978, and whether abatement would require the miners to climb on the muck pile to bar or bolt down the back. 1/

1/ Back - The roof or upper part of any underground mining cavity. A Dictionary of Mining, Mineral, and Related Terms, United States Department of Interior (1968).

The cited standard provides as follows:

> 57.3-22 Mandatory. Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

FINDINGS OF FACT

Based on the record I find the following credible facts:

1. A stope is an underground cavity from which ore is extracted (Tr 10-11).

2. The mining cycle in stope 12-6-3 was to bar, drill, blast, bar, and muck (Tr 68).

3. The barring process is accomplished with the use of a scaling bar to knock down any loose materials from the back and sides (ribs) of the stope. In the drilling process 16 to 18 holes are drilled in a 10 to 12 foot face. The dynamite blast that follows creates a muck pile approximately 15 to 20 feet along its base. A mechanical machine, called a mucker, removes the debris (muck) after blasting (Tr 110, 162, Exhibits P2, R4).

4. Roof bolting may occur, after barring down, if warranted by the conditions (Tr 68, 68).

5. On March 30, 1978, in close proximity to the face being mined, the roof was highly fractured; it consisted of loose ground described as being mud-like [2/] in texture.

6. When the mucker pulled back, the inspector, with a 6 to 8 foot bar, caved in a portion of the back. It was dribbling. The pieces he barred down were from a foot to sandlike pieces in size (Tr 17).

2/ "Mud" is a mining term meaning softer rock (Tr 16).

7. To abate this condition, the miners would have had to climb on the muck pile to bar down the loose material from the back; the miners should not follow such an unsafe practice (Tr 85-86, 181).

DISCUSSION

The initial pivotal issue in this case is whether the ground was loose and unconsolidated.

ASARCO contends [3/] that the ground in the North 3 Heading of 12-6-3 stope was neither loose nor unconsolidated. In support of its view ASARCO points to the testimony of witnesses Hustrulid, Traft, Howard, Mosher, and to the cross examination of witness King. Inasmuch as this issue focuses on a central credibility determination it will be necessary to review the above evidence in detail.

Expert witness Hustrulid was not present on the day of the inspection. The closest rock he was able to inspect was 60 to 70 feet laterally and 67 feet vertically from the point of the citation (Tr 272). The thrust of witness Hustrulid's testimony was directed at the condition of the rock throughout stope 12-6-3 but the citation related to a very limited area within 15 to 20 feet of the blasting face.

During the mining cycle this area had been blasted and the muck pile debris was being removed. Witnesses Hustrulid and the ASARCO miners agree that blasting will fracture rock. They also agree that roof bolts can be torn out as a result of a blast (Tr 73-74, 165, 271-272).

Miner Traft did not contradict petitioner's evidence. He stated the "ground seemed pretty good" (Tr 163). Furthermore, he didn't "believe" the rock was "mud" but it "seemed" like solid rock (Tr 165). I don't consider the foregoing

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3/ Brief, Page 5-19

testimony to be contradictory to MSHA's evidence. Furthermore, the fact that the inspector barred down two to three wheelbarrows full is not refuted by ASARCO. Two to three wheelbarrows full is persuasive evidence indicating an unstable roof condition, as compared to merely some loose rock, existed.

The testimony of witness Howard does not address the issue of the rock condition at the place of the citation, but it generally centers on the lack of karst, a white unstable rock in the area. Superintendant Mosher follows this same track.

ASARCO's review of the testimony of the inspector consists of its re-argument that there was not loose and unconsolidated ground in the North 3 Heading of the 12-6-3 stope.

For the reasons stated I reject ASARCO's proposed findings of fact No. 1. 4/

The second pivotal issue concerns the exposure of the miners to the unstable back conditions. Otherwise stated, this issue centers on the location of the muck pile in relation to the unstable back and whether the miners would have to stand on the muck pile to abate the condition. 5/

MSHA's evidence could support a finding that there was loose material over the heads of the miners. 6/ However, such a finding would ignore the evidence that the unstable condition could only be abated by having the miners stand on the muck pile (Tr 86 - 87, 91). If the miners would be required to do so then they were not exposed to the loose and unconsolidated ground.

4/ Brief, Page 5.

5/ ASARCO Brief, Pages 39 - 42.

6/ MSHA's evidence and the mathematical calculations that can be made in the case are at best confusing. I give Exhibit P-2 zero weight since the exhibit, an illustration, is not supported by the testimony.

In cross examination the inspector indicated that the miners would have to climb on the muck pile to bar down the back (Tr 85). Further support for the lack of exposure to the miners was the method of abatement agreed to between the inspector and the miners. They abated the condition by mucking out two feet and inserting roof bolts and repeating this process until completion (Tr 181).

CONCLUSION OF LAW

Under the circumstances here ASARCO did not violate 30 CFR 57.3-22. The miners had not reached that portion of the mining cycle requiring them to bar down or otherwise support the back. In short, miners are not required to bar down while standing on a muck pile.

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

ORDER

Citation 331584 and the proposed penalty are VACATED.

John J. Morris
Administrative Law Judge

Distribution:

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Phyllis K. Caldwell, Esq., Ann M. Noble, Esq., James H. Barkley, Esq., Office of the Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

18 APR 1980

QUARTO MINING COMPANY, Applicant	:	Contest of Order
v.	:	Docket No. LAKE 80-44-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 0824549 September 20, 1979 Powhatan No. 4 Mine
UNITED MINE WORKERS OF AMERICA, Respondent	:	

DECISION

Appearances: David R. Case, Esq., John T. Scott, Esq., Crowell & Moring, Washington, D.C., for Applicant;
Linda Leasure, Esq., Office of the Solicitor, Department of Labor, for Respondent, MSHA.

Before: Administrative Law Judge Melick

This case is before me under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 801 et seq., upon the application of the Quarto Mining Company (Quarto) to contest an order of withdrawal issued by the Mine Safety and Health Administration (MSHA) under section 104(d)(2) of the Act. A hearing was held in Wheeling, West Virginia, on January 22, 1980, at which the parties appeared and presented evidence.

MSHA inspector William A. McGilton issued the withdrawal order at bar on September 20, 1979, charging Quarto under 30 C.F.R. § 75.200, with failing to comply with its approved roof control plan.

Section 104(d)(2) of the Act, under which this order was issued, provides in relevant part as follows:

> If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secetary who finds upon any subsequent inspection the existence in such mine of violations similar

to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations.

There is no dispute that a valid precedent section 104(d)(1) order existed, that the violation underlying the order at bar did in fact occur and that the violation was "significant and substantial" and did not constitute an "imminent danger." The specific issue then is whether the violation cited in the section 104(d)(2) order was the result of an "unwarrantable failure." If it was then the violation was "similar" to that resulting in the issuance of the precedent section 104(d)(1) order and the order at bar is valid. Eastern Associated Coal Corp., 3 IBMA 331 (1974).

Unwarrantable failure has been defined as the failure by an operator to abate a condition that he knew or should have known existed, or the failure to abate because of indifference or lack of due diligence or reasonable care. A high degree of negligence need not be found to support the issuance of an unwarrantable failure order but the issuance must be reasonable and made pursuant to a thorough investigation by the inspector. Ziegler Coal Company, 7 IBMA 280 (1977).

I find, for the reasons that follow, that Quarto failed to abate the admitted violation which it should have known existed. The essential facts of the case are not in dispute. The violation occurred in the 9 right off 1 north-No. 67 room where nine temporary roof supports (metal jacks) were installed in violation of the roof-control plan. All nine were set with more than the allowable number of capblocks (also known as header blocks) and several were also set on centers in excess of 5 feet and on loose footing. When foreman Henry Wiley conducted his preshift inspection of the No. 67 room at 5:26 a.m. the violations did not exist. Wiley admitted that he did not return to the No. 67 room during the remainder of the shift, which ended at 7 a.m., explaining that he was busy cleaning up an accumulation of combustible material elsewhere in the mine. He complained that he was short on workers and thus felt compelled to personally shovel away the accumulation.

The two miners, who set the improper roof supports, Edward Richards and Keith Jones, testified that they began looking for Wiley sometime after 6 a.m. When they found him two entries back they told him they had finished mining and reported that the roof was too high in the No. 67 room to set jacks. Wiley told them to used header blocks. Jones admitted that it was not common practice to ask the foreman for permission to use only two blocks with the jacks (which was permissible under the roof-control plan) and implied that Wiley should have known that more than two capblocks would have to be used by the nature of his unusual inquiry. The two miners thereafter returned to the No. 67 room and, using an excessive number of blocks, proceeded to improperly set the temporary supports.

I find that when Wiley was told by Jones and Richards of the unusually high roof in the No. 67 room he was placed on sufficient notice to obligate him as a reasonably prudent mine foreman to personally check that area before the end of his shift. I find that he failed to exercise reasonable care in not doing so. This constitutes "unwarrantable failure". The notice here was especially clear because of the unusual nature of two miners requesting permission to perform a procedure they would ordinarily follow without permission if it were done properly.

I also find that Wiley failed to exercise reasonable care in failing to have conducted required methane tests in the vicinity of the No. 67 room. Wiley should have known, even if he did not actually know, that such tests had to be conducted every 20 minutes during the shift (30 C.F.R. § 75.307) and that he was the only one in that section who had the approved methane detector to conduce such tests. Wiley in fact took no methane readings in that area after 5:26 a.m. If he had not acted negligently in this regard I find that he would have been in a position to have seen the excessively high roof and improper roof supports in the No. 67 room. For this additional reason then Wiley should have known of the violations.

The negligence of foreman Wiley is imputed to Quarto. The Valley Camp Coal Co., 3 IBMA 463 (1974). Under the circumstances I find that the failure to abate the roof-control violation which Quarto should have known existed was the result of "unwarrantable failure." Order of Withdrawal No. 824549 is therefore valid and this case is dismissed.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 18 1980

RONALD H. McCRACKEN,	:	Complaint of Discharge,
Complainant	:	Discrimination or
	:	Interference
v.	:	
	:	Docket No. WEVA 79-116-D
VALLEY CAMP COAL COMPANY,	:	
Respondent	:	Valley Camp No. 1 Mine

DECISION

Appearances: John W. Cooper, Esq., and Abraham Pinsky, Esq., Wellsburg, West Virginia, for the Complainant;
Arthur M. Recht, Esq., Wheeling, West Virginia, for the Respondent;
Thomas P. Piliero, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Mine Safety and Health Administration.

Before: Judge Melick

This case is before me upon the complaint by Ronald H. McCracken (McCracken) under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., hereinafter referred to as the "Act"), alleging an unlawful discharge of him by the Valley Camp Coal Company (Valley Camp). A hearing was held on December 4 and 5, 1979, in Wheeling, West Virginia, at which both parties, represented by counsel, appeared and presented evidence.

The issue in this case is whether McCracken was unlawfully discharged by Valley Camp in violation of section 105(c)(1) of the Act because of his safety complaints regarding Valley Camp's No. 1 Mine. Section 105(c)(1) provides in part that:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against * * * a miner [or] representative of miners * * * in any coal * * * mine subject to this Act because such miner [or] representative of miners * * * has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of miners at the coal * * * mine of an alleged danger or safety or health violation in a coal

> * * * mine, * * * or because such miner [or] representative of miners * * * has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner [or] representative of miners * * * on behalf of himself or others of any statutory right afforded by this Act.

There is no dispute in this case that McCracken had made safety complaints within the scope of section 105(c)(1), that these complaints were made to the Federal Mining Enforcement and Safety Administration and that Valley Camp knew that McCracken had made the complaints. The record shows that from December 15, 1975, through July 8, 1976, McCracken was involved in making or filing complaints resulting in the creation of 17 investigative reports by the Federal agency. There is, in addition, no dispute that McCracken was discharged by Valley Camp on August 28, 1978, in a general reduction of force in which 137 other employees and 14 supervisors at the Valley Camp No. 1 Mine were also discharged. McCracken does not question the legitimacy of that reduction in force. I find, for the reasons that follow, that McCracken's discharge was not because of any safety or health complaint or complaints made by him, but rather was caused by a legitimate reduction in force and that McCracken's release was dictated by the terms of the union-operator contract then in effect, the National Bituminous Coal Wage Agreement of 1978 (Wage Agreement).

Article XVII, Section (b) of the Wage Agreement provides that "[i]n all cases where the working force is to be reduced, employees with the greatest seniority at the mine shall be retained provided that they have the ability to perform available work." McCracken argues that at the time of the lay-off, he was in fact a qualified underground coal miner and that upon the decision by management to discontinue his job classification (as greaser--preparation plant) he should have been given the opportunity to bid upon a job in the underground workings of the coal mine and, if necessary in order to obtain such a job, to displace persons with less seniority. He claims that he then had "the ability to perform available work" in the underground workings. Windsor disagrees and maintains that McCracken did not have any experience in underground workings that would qualify him for such work. 1/

1/ In McCracken's grievance proceeding under the Wage Agreement, an arbitrator found that McCracken had not been reassigned to work in a classification of the underground facility which involved the mining of coal because he had in fact never performed work in such a classification and therefore had not demonstrated that he possessed the present ability to perform the duties of that classification. That determination is not however binding in this case. Phillips v. Interior Board of Mine Operations Appeal, 163 U.S. App. D.C. 104, 500 F.2d 772 (1974).

McCracken began employment with the Valley Camp Coal Company in 1967 as a deckhand on a riverboat for 3 or 4 months and then worked as a coal analyst. Around May 1968, he was classified as a "general laborer, surface," primarily working as a mechanic's helper in the coal preparation plant with additional overtime and substitute work in what is known as the Souttell Run Tunnel. McCracken testified that he became a "greaser" on February 14, 1973, and retained that position until laid off on August 28, 1978. Documents maintained by Valley Camp show that his job title was "greaser (preparation plant)" and I find that this was his position. He admits that he has performed no work in areas of an underground mine where coal is extracted, that he has in fact only twice visited such areas briefly and that during those visits the mine was not operating.

McCracken's experience in the Souttell Run Tunnel, from which he claims he obtained his "underground" qualifications, apparently began in May 1968, when he spent 3 to 5 months inserting grease fittings. Since then he reportedly spent 30 to 40 hours a week in the tunnel (estimated by him to account for 85 percent of his total work time) as a greaser performing such duties as pumping water, repairing pipe and changing rollers on the conveyor. McCracken explained that although his regularly assigned duties were performed in the preparation plant he worked as a tunnel greaser on an overtime basis or when the primary tunnel greaser, John Coffield, was on vacation. He did not work in the Souttell Run Tunnel while it was being constructed.

Valley Camp maintains that McCracken did not have "the ability to perform available work" in the underground workings where coal was being extracted. It contends that he had no working experience in such areas and that it was against long-standing company policy to permit such inexperienced personnel to work there without first completing a 6-month apprenticeship or "red hat" training program in the underground workings. McCracken contends that his work in the Souttell Run Tunnel provided him with such experience and qualified him to transfer immediately to the underground workings. Valley Camp disagrees and cites what it calls significant differences between the tunnel environment and the underground workings as the basis for its disagreement.

James Litman, Valley Camp's Vice President for Operations, described the tunnel and its distinctive features particularly with respect to the haulage and track systems, traffic patterns, roof control, ventilation, and the conveyor systems. This testimony in significant respects is not disputed. According to Litman the tunnel is essentially only a conduit for the transfer of coal from the preparation plant to transportation on the Ohio River. It contains a conveyor belt for coal and a track for transportation of personnel, equipment and coal. The tunnel consists of two parallel entries running about 9,000 feet in a straight line and contains no active workings. There is, in fact, no coal exposed in the tunnel and there is a 250-foot barrier separating it from the working sections of the mine. The overburden varies from 0 to over 120 feet. According to Litman, the roof-support system in the tunnel was maximized to prolong the life of the tunnel. Wherever overburden exists, it consists of 7- and 10-foot conventional roof bolts, 3 to 4 inches of gunite encasing No. 10-gauge steel mesh and, at 10-foot intervals, horizontal "H" beams resting on braces embedded into the ribs.

Vertical beams centered at 10-foot intervals lend further support to the "H" beams. Some locust posts also remain and these and the ribs have also been covered with steel mesh and gunite. In the sections where there is no overburden, the tunnel is encased in steel liners. The tunnel is open at both ends and has no mechanically induced ventilation.

Only a small portion of the underground workings (estimated at .49 percent) on the other hand are gunited and various methods of roof control are employed in the remaining areas. Mechanical ventilation is required in all of the working sections. Also, in contrast to the tunnel, the underground workings contain a multitude of entries, some of which have been abandoned, have improper roof support and have inadequate ventilation. Litman emphasized that the underground miner must be able to identify these areas for the safety of himself and others. The miner must also learn the location of the ventilated escapeways through which safe exit can be made in an emergency. He must learn which doors to pass through and which doors not to pass through and must gain the experience to know whether roof support is adequate in a particular location. He must also learn to work safely around heavy mobile equipment that does not exist in the tunnel. The haulage and track system in the underground workings also differs from the tunnel. According to Litman, it involves complex interconnections as opposed to a single track in the tunnel. In summary, a number of serious hazards exist in the underground workings of the mine to which McCracken had never been exposed in the Southell Run Tunnel.

Litman explained that in order to enable a person unfamiliar with the hazards unique to the underground working sections of the mine to learn to work safely in that environment, it has been the company policy since at least 1974 that underground experience in areas where coal is being extracted is a prerequisite to immediate employment in such areas. Such employees are first required to work with an experienced miner in the underground workings for 6 months as an apprentice or "red hat" to learn of the mine hazards. Grant King, an inspector for the West Virginia Department of Mines, testified that West Virginia had a similar training requirement in order to safely expose the unfamiliar miner to the hazards and dangers inherent in underground coal mining. According to Litman, company policy in this regard was even more stringent than that of West Virginia. I find that this long-standing and non-discriminatory policy is clearly justifiable and establishes a legitimate basis for McCracken's discharge. He did not in fact have the present ability to perform available work in the underground working sections of the mine because he did not have the requisite experience.

In reaching my conclusion herein, I have not disregarded the evidence of many similarities between the Southell Run Tunnel and the underground working sections of the mine, that McCracken does, in fact, have many work-related skills, that he possesses what has been found to be a valid West Virginia miner's certificate, and that the Federal Mine Safety and Health Administration and the West Virginia Department of Mines consider the Southell Run Tunnel to be an "underground" facility for their enforcement

purposes. See also, Valley Camp Coal Company, Docket No. WEVA 79-111 (March 28, 1980). Under the circumstances of this particular case, however, these factors are immaterial.

Once the operator establishes a legitimate cause for discharge, the Applicant, to sustain his case, must then show by affirmative and persuasive evidence that the invocation of such cause was merely a pretext for an unlawful motive. Shapiro v. Bishop Coal Company, 6 IBMA 28 (1976). McCracken alleges three incidents as evidence of such an unlawful motive. In the first, he claims that the company manager for industrial relations, John Gotses, had, after the layoff of McCracken and several other miners who later filed grievances, once said that the company had once thought about "cutting a deal" in which the four other miners would be rehired if the union would withdraw McCracken's grievance. Gotses denied making any such statement and I am not at all convinced that it was made. Even assuming, arguendo, that such a statement was made, it is vague and imprecise, the identity of the person(s) suggesting such a "deal" was not disclosed, the reasons for the proposal were not revealed and there is no evidence that any such "deal" was ever proposed. Without some clarification of these details the statement has no probative value. It is apparent moreover that the four other miners in question were actually senior to McCracken and would in any event have been entitled under the Wage Agreement to have been rehired before McCracken.

McCracken next claims that company Vice President Litman once referred to McCracken and several others as "radicals" in connection with their union activities in a strike at the mine and reportedly said that if they ever quit, he would see that they would never get another union job in the valley. In light of Litman's denials, I am again unconvinced that any such statements were made. Even assuming, arguendo, that the statements were made, it is not at all clear that they would have involved a retaliatory motive on any basis protected by section 105(c)(1) of the Act. The alleged statements apparently were also made years before McCracken's layoff, too remote in time to bear any real causal connection. I note moreover that contrary to the import of the allegations Valley Camp has in fact recommended McCracken to other employers.

Finally, McCracken alleges that a former mine superintendent named Wilson had once called McCracken "a thorn in their side and that he cost them a lot of money." Even assuming that such a statement was made, and regardless of Wilson's personal feelings toward McCracken, it is clear that Wilson was no longer employed by Valley Camp when McCracken was laid off. There is no evidence that Wilson (who in fact may have left the employ of Valley Camp years before the layoff) had anything to do with the alleged discriminatory act, and therefore the comments attributed to him are immaterial to this case.

Under the circumstances, I cannot find any credible affirmative and persuasive evidence to show that the legitimate cause for McCracken's discharge was a pretext for an unlawful motive. To the contrary, the

evidence shows that more than 2 years elapsed between McCracken's last safety complaint and his layoff. This in itself is persuasive evidence that no connection existed between the two events. McCracken has failed to show that his discharge was the result of any discrimination proscribed by the Act and the complaint herein is therefore dismissed.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

22 APR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. PHOENIX REDI-MIX COMPANY, INCORPORATED, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-13-M A/O 02-01070-05002 Mine: Phoenix Redi-Mix Pit

DECISION

APPEARANCES:

Mildred L. Wheeler, Esq., Office of the Solicitor, United States Department of Labor, San Francisco, California, for Petitioner;

Steven H. Williams, Esq., Norling, Rolle, Osser, and Williams, Phoenix, Arizona, for Respondent.

Before: Administrative Law Judge Vail

Statement of the Case

The proceeding arose upon the filing of a petition for the assessment of civil penalty (now called a proposal for a penalty, 29 CFR 2700.27) for 3 alleged violations of Mandatory Safety Standards contained in 30 CFR Part 56. The violations were charged in citations issued to respondent following an inspection of the Phoenix Redi-Mix Pit on November 28 and 29, 1978.

Pursuant to notice, a hearing on the merits was held in Phoenix, Arizona, on February 5, 1980. Federal Mine inspector Jack Sepulveda testified on behalf of petitioner. Robert Strom and Robert Prickard testified on behalf of respondent. Respondent filed a posthearing brief.

To the extent that the contentions are not incorporated into this decision, they are rejected.

The parties stipulated that the annual man hours of employment at respondent's facility was 45,744. Testimony established that there were between 15 to 18 employees present at the time of inspection. On the basis of these facts, I find that respondent is a medium-sized operator for the purposes of determining the appropriateness of the penalties to the size of the operator's business. There is no evidence that the penalties will effect respondent's ability to continue in business.

The record establishes that respondent, in the case of each violation found herein to have occurred, made a good faith effort to achieve rapid compliance after notification of the violation.

A review of respondent's history of previous violations shows that no increase of the penalties is warranted on that basis.

Findings are hereafter made with respect to the occurrence, gravity and attendant negligence of each violation.

Findings of Fact

1. Citation No. 378444 and 378447, issued on November 28, 1978, alleged violations of mandatory standard 30 CFR 56.12-32 which requires that inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Citations 378444 and 378447 will be treated here together as the uncontroverted evidence at the hearing established that the alleged violations involved the same tunnel and the same electrical wire but at the opposite ends thereof.

Citation No. 378444 alleged the following condition or practice existed:

> Electrical covers were not in place at the crusher electrical shack and electrical wires were exposed.

Citation No. 378447 alleged that the following condition or practice existed:

> The 6 inch duct cover for the electrical switches by the tunnel was not in place, and electrical wires were exposed.

The issue here is whether, at the time the electrical and duct covers were not in place, the respondent was in the process of making repairs to the said electrical wire?

I find a violation existed. Section 56.12-32 requires that inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs. The evidence shows, and is not in dispute, that the electrical covers were not in place at the crusher electric shack and a 6 inch duct cover for the electrical switches by the tunnel was not in place. The respondent argues that at the time of inspection, the electrical covers and 6 inch duct cover were not in place for the reason that repairs were in the process of being made of a short in the underground wiring to these two locations. In accomplishing the repair of this shorted wire, the respondent's employees had attached a temporary wire at the crusher shack by opening the door to the electrical box and connecting the wire to the terminals inside the box. The respondent's plant manager, Robert Strom, testified that the temporary set-up, referring to the wiring involved herein, was used in order to keep the plant operating. In the process of accomplishing these repairs, employees were digging a trench in the area for laying a new conduit for the shorted wire.

I find that the operator was negligent. The repair work being done at the time of the inspection involved digging a trench for the new wire and conduit and there was no actual work being done on the electrical boxes at the crusher shack or the electrical switches by the tunnel. In fact, temporary wiring connections were made to facilitate the plant's continued operation until the trench was completed for receiving the new wire. Until this trench was completed, a dangerous condition existed involving the two locations described in the citations which exposed employees to possible serious injury. I find the respondent abated in good faith.

2. Citation No. 378449 and Order of Withdrawal was issued November 29, 1978, which alleged a violation of 30 CFR 56.3-5 in that the front-end loader at the south pit was mining material under a dangerous bank. Respondent abated the dangerous bank and high wall by having a D-8 Dozer push the material from the high wall to a safe angle of repose and building a working bench for the front-end loader to work from.

The issue here is whether the front-end pit loader was operating under a dangerous bank?

30 CFR 56.3-5 provides that men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted.

The respondent argues that the conditions existing were neither dangerous nor unsafe and that the mine inspector failed to advise the respondent as to what is a safe height of a bank as involved herein.

The citation in this matter was written on November 29, 1978 as an Order of Withdrawal due to a front-end loader at the south pit mining

material under what the inspector termed a dangerous bank which was described in the Order to be about 45 feet high. The loader was stated to be 14 feet high with a maximum reach of about 25 feet. The inspector testified that he observed the loader on the day before, which would be November 28, 1978, working in the south pit under what he considered to be a dangerous bank. He advised the superintendent of the mine, later on in the day, that he thought they should bring the bank down to get a better angle of repose. The following day, November 29, 1978, while accompanied by his supervisor, a Mr. Day, the inspector again looked at the bank in the respondent's south pit and decided to issue the withdrawal order and citation involved herein. After the issuance of the Order, the respondent abated the condition by building a working pan at the bottom of the bank and pushing the side to what was considered a good angle of repose. The inspector testified that after the change in the condition of this bank, he measured it and found it was still over 45 feet. The respondent's mine superintendent, Robert Strom, testified that in his opinion the operation near the bank was being performed in a safe and non-dangerous manner.

I find a violation existed. Section 30 CFR 56.3-5 requires that men shall not work near or under dangerous banks. The thrust of the respondent's arguments relating to this citation appears to rest on their attempt to have the applicable standard or the inspector set a definite height which a bank could be before it became dangerous. This argument does not overcome the practical factors involved in various types of mining conditions. As testified to by the inspector in this case, and an obvious factor, would be the type of material or condition of the bank under which the man or men were working. If it were solid rock, the danger of it

falling would be less than loose or unstable sand or gravel. There was testimony, unrebutted by the respondent, that the front-end loader operator, a Mr. Young, had experienced some material coming down while digging there. Although the respondent's plant manager, Mr. Strom, and safety director, Robert Pickard, indicated that some sluffing was a common occurrence in such an operation, they opined that an experienced front-end loader operator would be able to recognize when the height of the bank became dangerous.

I am more persuaded by the fact that the inspector first recognized the danger at respondent's south pit on the 28th of November, 1978, and then on the following day, while accompanied by his supervisor, issued the Order of Withdrawal and Citation, which did not appear to be a snap judgement but rather a thought-out decision. Although his initial estimate of the height of the bank was 45 feet, it was later determined by actual measurement to have been considerably higher than that before abated. He testified that after the 10 foot working pan was created at the base of the bank, the bank was still over 45 feet high but had a good angle of repose and that he estimated the bank, before correction, had been 75 to 80 feet.

I find that a violation of the mandatory standard contained in 30 CFR 56-3 did occur. The violation was serious because of the possibility of injury and was due to respondent's negligence. The evidence shows that the condition was known or should have been known to the respondent. Respondent did, however, abate quickly and in good faith, after the issuance of the withdrawal order.

Section 110(i) of the Act directs that in assessing a penalty, I consider six criteria: the operator's history of previous violations, the size of the operation, 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 in attempting to achieve rapid compliance. The petitioner's Exhibit Number 1 received in evidence shows that the respondent had a total of 15 violations assessed for a period from November 29, 1976 to November 28, 1978, covering a two year period. I do not consider this to warrant that the penalties should be increased. The operator's business is medium in size. There is no evidence that the penalties will have any effect on the operator's ability to continue in business and therefore, I conclude that they will not.

The violations involved herein with the electrical wiring, Citation No. 378444 and 378447, did occur. Respondent argues that it was in the process of repairs to the wiring involved and therefore not in violation. This argument is rejected as the facts show the repair work involved digging a trench to subsequently receive the new wire to replace the temporary wire in place at time of the inspection. The condition as it existed created a danger to employees and the respondent was negligent. However, the respondent abated in good faith in this matter. I find that the two citations relate to the same general area, that is both ends of the same wiring hookup and that the penalty assessed should consider this. I assess a penalty of $50.00 for Citation No. 37844 and a penalty of $50.00 for Citation No. 378447 for the violations found.

As to Citation No. 378449 alleging a violation of 30 CFR 56.3-5, there is apparently considerable difference of opinion as to what constitutes a violation here, particularly as to the height of a dangerous bank. The weight of the evidence persuades me that the violation occurred. However, in view of the stipulations regarding four of the six statutory criteria,

and the fact that there was good faith abatement and little negligence on the respondent's part, I assess a penalty of $250.00 for the violation found.

ORDER

It is therefore ORDERED that respondent pay to MSHA a civil penalty in the total sum of $350.00 within 30 days of the entry of this order.

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
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22 APR 1980

ISLAND CREEK COAL COMPANY, Applicant	:	Application for Review
v.	:	Docket No. WEVA 79-242-R
	:	Citation No. 636033
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	June 4, 1979
	:	Donegan 10-A Mine
UNITED MINE WORKERS OF AMERICA (UMWA), Respondent	:	

ORDER DENYING FURTHER STAY AND
GRANTING APPLICANT'S MOTION FOR SUMMARY DECISION

I. Procedural Background

On June 28, 1979, Island Creek Coal Company (Applicant) filed an application for review in the above-captioned case pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) (1977 Mine Act) stating, in part, as follows:

> 1. At 9:50 a.m. on June 4, 1979, George E. Wills, an authorized representative of the Secretary, issued a Citation pursuant to Section 104(a) of the Act at the Donegan 10-A Mine, alleging that Island Creek violated Section 103(f) of the Act for not paying an employee, one Wendell F. Seabolt, for his activities in accompanying a MSHA inspector, said George E. Wills, during a 103(i) spot inspection on May 7, 1979. The inspection conducted by Mr. Wills on May 7, 1979, was not a "physical inspection ... made pursuant to the provisions of subsection (a)" of Section 103 of the Act, and was, therefore, not a "regular" inspection of the subject mine under the Act. The Citation required payment of the employee no later than 2:00 p.m. on June 14, 1979, in order to terminate the Citation.
>
> 2. The inspector was informed that Island Creek did not agree with the issuance of the Citation or the fact that a violation of Section 103(f) of the Act had occurred,

especially in view of the March 8, 1979, decisions of Administrative Law Judge Lasher in Magma Copper Company, Docket No. Denv 78-533-M, and Kentland-Elkhorn Coal Corporation, Docket No. Pike 78-399. However, in order to comply with the inspector's order and to avoid the issuance of a withdrawal order, Island Creek issued a check in the amount allegedly owed to the employee and stated that the payment was being made under protest due to the fact that the inspector had erroneously interpreted the Act. The inspector then issued a Termination Notice at 9:53 a.m., three minutes after issuance of the Citation.

3. The inspector's issuance of the instant Citation was invalid, improper, illegal and in direct contravention of Judge Lasher's two decisions hereinabove cited. The operator is not required under Section 103(f) of the Act to compensate representatives of miners who accompany MSHA inspectors on so called "non-regular" inspections, such as a 103(i) spot inspection.

Answers were filed by the United Mine Workers of America (UMWA) and the Mine Safety and Health Administration (MSHA) on July 12, 1979, and July 23, 1979, respectively. On October 5, 1979, an order was issued granting the Applicant's motion to stay the proceedings pending the issuance of decisions by the Federal Mine Safety and Health Review Commission (Commission) in Magma Copper Company, Docket No. DENV 78-533-M, and Kentland-Elkhorn Coal Corporation, Docket No. PIKE 78-399. Decisions were issued by the Commission in Kentland-Elkhorn Coal Corporation, and Magma Copper Company, on November 30, 1979, and December 10, 1979, respectively. 1/ Additionally, on November 21, 1979, the Commission issued a decision in Helen Mining Company, 1 FMSHRC 1796, 1979 OSHD par. 24,045 (1979), holding that a mine operator is not required to pay a miners' representative for the time he spends accompanying a mine inspector during a "spot" inspection required by section 103(i) of the 1977 Mine Act.

The UMWA and MSHA filed motions for a further stay on January 25, 1980, and January 28, 1980, respectively. On February 4, 1980, the Applicant filed a motion for summary decision and a supporting affidavit. On February 27, 1980, an order was issued denying the motions for a further stay and according MSHA and the UMWA 15 days in which to file responses in opposition to the motion for summary decision. The subsequent filings by MSHA and the UMWA are set forth and discussed in the following section.

II. Requests for Reconsideration

MSHA and the UMWA filed documents styled "Response to Order Denying Continued Stay of Proceeding and Applicant's Motion for Summary Decision" on March 7, 1980, and March 12, 1980, respectively. Both MSHA and the

1/ Magma Copper Company, 1 FMSHRC 1948, 1979 OSHD par. 24,075 (1979); Kentland-Elkhorn Coal Corporation, 1 FMSHRC 1833, 1979 OSHD par. 24,071 (1979).

UMWA move for reconsideration of the above-noted February 27, 1980, ruling and for the reissuance of a stay, setting forth similar reasons in support thereof. MSHA's reasons are set forth as follows:

> For the reasons previously stated by both the Secretary and the United Mine Workers of America (UMWA), this proceeding should be stayed as requested and reconsideration of the ruling of February 27, 1980, is therefore requested.
>
> There is indeed no issue in this matter which needs to be tried. The Federal Mine Safety and Health Review Commission's decisions in Kentland-Elkhorn and Helen Mining are controlling, however, those cases are pending review as the record reflects. Granting Applicant's Motion for Summary Decision would prejudice the Secretary, whereas a renewed stay would allow the case to lie dormant pending the final resolution of the aforementioned cases and no parties will be prejudiced by such an action in this matter.
>
> 29 CFR 2700.64(b) provides that summary decision can be granted only when there is no genuine issue as to any material fact and the moving party is entitled to summary decision as a matter of law. True, there is no factual difference between the parties, but there is a serious difference as a matter of law which can only be settled by a final resolution of the proceedings now in D. C. Circuit Court concerning Kentland-Eklhorn (Nos. CA 79-2503 and CA 79-2536) and Helen Mining Company (Nos. CA 79-2518 and CA 79-2537). Until a final decision is rendered on these proceedings summary decision cannot be granted without doing violence to 29 CFR 2700.64(b).
>
> WHEREFORE, the Secretary requests that the Motion for Summary Decision be held in abeyance and a stay reissued in this matter.

The UMWA also concedes that "no factual difference [exists] between the parties."

For the reasons set forth in the above-noted order of February 27, 1980, MSHA's and the UMWA's request that the motion for summary decision be held in abeyance and a stay reissued are DENIED.

III. Motion for Summary Decision

The Applicant's February 4, 1980, motion for summary decision states, in part, as follows:

> 1. That the central and controlling issue in the subject case is whether or not Applicant is required under the provisions of Section 103(f) of the Federal Mine Safety and Health Act of 1977 (the "Act") to compensate miner's

representatives for time spent accompanying federal inspectors during spot, electrical and ventilation impact inspections, which are not "regular inspections" of the mine conducted pursuant to Section 103(a) of the Act;

2. That MSHA issued the citation and/or order which are the subject of the above-styled proceeding as a result of Applicant's assertion that it was not required by Section 103(f) of the Act to compensate miner's representatives for time spent accompanying federal inspectors on "nonregular inspections" and its failure to take such action in compliance with the "interpretive bulletin" issued by MSHA, all as stated in the Application for Review filed by Applicant in the instant proceeding and the subject citation and/or order issued by MSHA;

3. That Applicant, after and as a direct result of issuance of the instant citation and/or order, made the payments mandated by MSHA's representative under protest and solely in order to avoid the issuance of further sanctions by MSHA, even though Applicant rejected MSHA's interpretation of the requirements of Section 103(f) of the Act and informed MSHA's representative of that position;

4. That MSHA's interpretation of the requirements of Section 103(f) of the Act which resulted in the issuance of the subject citation and/or order by MSHA's representative was and is invalid, illegal and contrary to the requirements of Section 103(f) of the Act, as determined by the Federal Mine Safety & Health Review Commission (the "Commission) in its decisions in MSHA v. Helen Mining Company, Docket No. PITT 79-11-P and MSHA v. Kentland-Elkhorn Coal Corporation Docket No. PIKE 78-399;

5. That Applicant, against its will and under protest, has been improperly and illegally required and forced by MSHA to pay $37.04 in wages to miner's representatives directly as a result of MSHA's erroneous interpretation of the Act and the improper, invalid and illegal exercise of its onerous enforcement powers by the issuance of the instant citation and/or order;

6. That, based upon the pleadings, the subject citation and/or order and the affidavit of James Vilseck, which is attached hereto as Exhibit A and made a part hereof, there is no genuine issue as to any material fact in the instant proceeding; and Applicant is entitled, as a matter of law based upon the Commission's decisions in Helen Mining and Kentland-Elkhorn cited above, to a summary decision in this proceeding.

WHEREFORE, Applicant hereby moves that a summary decision be entered by the Commission granting the instant Application for Review, vacating ab initio and holding for naught the instant citation and/or order and awarding Applicant, as a setoff and credit against any future civil penalties which may be properly assessed by MSHA against Applicant in other administrative proceedings before the Commission, damages in the amount of $37.04 being an amount equal to the wages which MSHA illegally forced Applicant to pay as a result of the unwarranted enforcement actions taken by MSHA.

Summary decision may be granted only if the entire record shows: "(1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.64(b), reported at 44 Fed. Reg. 38232 (1979) (Rules of Procedure of the Federal Mine Safety and Health Review Commission; effective date: July 30, 1979). For purposes of summary decision, the record consists of the pleadings, depositions, answers to interrogatories, admissions, and affidavits or other verified documents. 29 C.F.R. § 2700.64(b) and (c), supra. Affidavits must be made on the affiant's personal knowledge and must show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. "Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to the affidavit or be incorporated if not otherwise a matter of record." 29 C.F.R. § 2700.64(c), supra.

No genuine issue as to any material fact exists. The subject citation alleges a violation of section 103(f) of the 1977 Mine Act based upon the Applicant's refusal to pay a representative of the miners for the time spent accompanying a Federal mine inspector during a "spot" inspection conducted pursuant to section 103(i) of the 1977 Mine Act.

The Commission's decision in Helen Mining Company, supra, is dispositive of the issue presented. The Applicant was not required to pay the representative of the miners for the time spent accompanying the inspector during the "spot" inspection. 2/ Accordingly, the Applicant is entitled to summary decision as a matter of law on this issue. An order will be issued granting the application for review and vacating the citation.

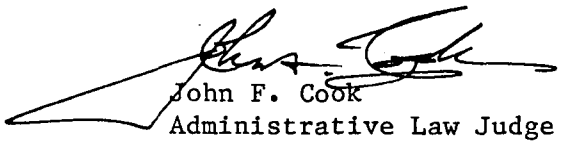
The Applicant requests additional relief in the form of a $37.04 "setoff and credit against any future civil penalties which may be properly assessed by MSHA against Applicant in other administrative proceedings before the Commission." The Applicant cites no authority for the requested remedy, and, indeed, precedent dictates a result contrary to the one advanced by the Applicant.

2/ In Kentland-Elkhorn Coal Corporation, 1 FMSHRC 1833, 1979 OSHD par. 24,071 (1979), the Commission held that a mine operator is not required to pay a miner's representative for the time he spends accompanying a mine inspector during a special electrical inspection of a mine. The Kentland-Elkhorn and

In North American Coal Corporation, 3 IBMA 93, 81 I.D. 204, 1973-1974 OSHD par. 17,658 (1974), the Commission's predecessor, the Interior Board of Mine Operations Appeals (Board), concluded "that a Judge may take into account the economic losses suffered by an operator as a consequence of a closure order, which is subsequently vacated, as a mitigating factor in assessing a penalty for a violation arising out of a condition or practice cited in such order." 3 IBMA at 119 (Footnotes omitted). However, the Board held "that there is no dollar-for-dollar offset permitted an operator against assessments in a penalty proceeding for economic losses sustained as a result of a vacated withdrawal order." 3 IBMA at 120 (Footnote omitted). The Board sought to impress upon operators the limited extent of its ruling by emphasizing that "economic losses resulting from [vacated] orders may be considered only with respect to assessments for violations arising from the conditions or practices cited in such order." 3 IBMA 121 (Emphasis in original). Therefore, it must be concluded that no authority exists for the award of monetary credits to be used as setoffs against future civil penalties. The requested additional relief will be denied.

Accordingly, IT IS ORDERED that the Applicant's motion for summary decision be, and hereby is GRANTED. IT IS THEREFORE ORDERED that the application for review be, and hereby is, GRANTED and Citation No. 636033 is herewith VACATED.

IT IS FURTHER ORDERED that the Applicant's request for a $37.04 credit to be used as a setoff against future civil penalty assessments be, and hereby is, DENIED.



John F. Cook
Administrative Law Judge

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fn. 2/ continued
Helen Mining decisions are founded on a common basic premise: The right to walkaround pay accorded a miners' representative under section 103(f) of the 1977 Mine Act is limited to the time spent accompanying a federal mine inspector during a "regular" inspection of the mine conducted pursuant to section 103(a).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 22, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. DENV 79-163-PM
	:	A/O No. 41-00010-05001
v.	:	Capitol Cement Quarry & Plant
	:	
CAPITOL AGGREGATES, INC., Respondent	:	Docket No. DENV 79-240-PM
	:	A/O No. 41-01792-05001
	:	Pit & Plant No. 4

STAY OF DECISION

On January 9, 1980, at the conclusion of the trial in the above cases I allowed the parties 30 days from receipt of the transcripts to file proposed findings and briefs if they so desired. The transcripts were received in my office on February 8, 1980. More than 2 months later on April 14, 1980, having received no briefs or proposed findings, I issued my decision in this matter. On April 21, 1980, I was informed that neither the Government nor the Respondent had received transcripts although both had ordered them.

I am mindful of the fact that on April 11, 1979, in Secretary ex rel. Pasula v. Consolidation Coal Company (1 FMSHRC 25), the Commission ruled that neither the Interim Procedural Rules nor the Act provide for a stay of a decision or a reconsideration thereof once a judge's decision has been issued. The parties are therefore put on notice that I may not have jurisdiction to stay the effective date of the decision. I am also aware, however, that on July 9, 1979, in Secretary of Labor v. Valley Camp Coal Company, 1 FMSHRC 791, the Commission held that Judge Kennedy should have granted a motion for reconsideration of his default decision even though Judge Kennedy was operating under the same interim rules that were in effect when the Pasula case was decided. Also, in at least one case, acting under the interim rules, Judge Broderick reinstated a proceeding after he had issued a default decision and the Commission took no action. I am therefore of the opinion that the Commission no longer considers the Pasula ruling as valid.

There is the further fact that the new procedural rules which became effective July 30, 1979, give the judge wider latitude after he has issued a decision. While the provisions of 29 C.F.R. § 2700.65(c) do not exactly fit the instant situation, if interpreted in the light of 29 C.F.R. §2700.1(c) in order to "secure the just * * * determination of all proceedings * * *" it must be interpreted so as to allow me to give the parties an opportunity to file briefs and proposed findings.

It is therefore ORDERED that the effective date of the above decision be stayed pending receipt of affidavits of the parties stating that they ordered but did not receive transcripts and a statement from the reporting company, and a possible consideration of briefs and proposed findings.

IT IS FURTHER ORDERED that the parties file, within 20 days, the affidavits referred to above and that Eagleston Stenotype Reporters file a statement as to whether the parties ordered transcripts and, if so, why they were not delivered. After receipt of this information a further ORDER will be issued as to whether the parties will be allowed to file briefs and proposed findings and, if so, the dates when they will be due.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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24 APR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. WILK 79-109-PM
	:	A/O No. 30-01291-05002
v.	:	
	:	Boonville Quarry Mine
ALLIED CHEMICAL CORPORATION, Respondent	:	
	:	Docket No. WILK 79-110-PM
	:	A/O No. 30-00060-05002
	:	
	:	Jamesville Quarry & Mill Mine
	:	
	:	Docket No. WILK 79-125-PM
	:	A/O No. 30-00009-05002
	:	
	:	Norwood Plant Mine

DECISION

Appearances: Jonathan M. Kay, Esq., U.S. Department of Labor, New York, New York, for Petitioner;
David M. Cohen, Esq., Allied Chemical Corporation, Morristown, New Jersey, for Respondent.

Before: Judge Stewart

PROCEDURAL BACKGROUND

The above-captioned cases are civil penalty proceedings brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), hereinafter referred to as the Act.

A total of 12 violations was alleged within these proceedings. All but one of these alleged violations were settled by the parties or withdrawn by Petitioner because they had been issued in error.

In a decision issued on October 17, 1979, the proceedings with respect to the following citations were dismissed:

Docket No.	Citation No.	Date	30 C.F.R.
WILK 79-109-PM	210217	09/26/78	56.9-2
WILK 79-125-PM	210153	08/30/78	56.9-11

In the same decision, settlement was approved in three additional citations. These citations and settlement amounts were as follows:

Citation No.	Date	30 C.F.R.	Proposed Penalty	Settlement
210164	09/13/78	56.9-3	$122	$ 84
210129	08/29/78	56.3-5	305	305
210140	08/29/78	56.3-8	98	98

Counsel for Petitioner asserted at the hearing that six additional citations should be withdrawn because they had been issued erroneously. Petitioner thereafter submitted notices of subsequent action which stated that the respective citations had been withdrawn. These citations and the mandatory standard which was allegedly violated in each instance are as follows:

Citation No.	Date	30 C.F.R.
210210	09/26/78	56.9-2
210212	09/26/78	56.4-23
210215	09/26/78	56.4-23
210162	09/12/78	56.19-75
210166	09/03/78	56.14-29
210154	08/30/78	56.4-23

In issuing Citation No. 210210, the inspector cited 30 C.F.R. § 56.9-2 and wrote that the backup alarm on a Trojan loader was disconnected. In its answer, Respondent admitted that the backup alarm was disconnected, but asserted that the vehicle was being repaired and could not be operated at the time of the inspection.

Citation Nos. 210212, 210215 and 210154 were issued because two loaders and a truck were not equipped with a fire extinguisher. The standard cited, however, requires in pertinent part that firefighting equipment which is provided on the mine property shall be strategically located, readily accessible, plainly marked, properly maintained, and inspected periodically. There is no requirement therein that each of the vehicles in question be equipped with a fire extinguisher. Respondent asserted that other firefighting equipment was maintained at the cite.

Citation No. 210162 was issued because the hook on a crane in Respondent's crushing plant did not have any type of safety latch to prevent the accidental discharge of an object being moved or hoisted. On the other hand, the mandatory standard cited, 30 C.F.R. § 56.19-75, requires only that open hooks not be used to hoist buckets or other conveyances. The crane cited in this instance was used to hoist castings, not buckets or other conveyances.

Citation No. 210166 was issued because the inspector observed the operator of a Caterpillar standing outside of the cab of the vehicle while its engine was running. The inspector cited 30 C.F.R. § 56.14-29 which

requires that repairs or maintenance shall not be performed on machinery until the power is off and the machinery has been blocked. In its answer, the Respondent asserted that the operator of the vehicle stepped out onto the track when the inspector arrived. No repairs or maintenance were being performed at the time.

In view of the above, Petitioner's motion to withdraw, Citation Nos. 210210, 210212, 210215, 210162, 210166, and 210154 is granted.

Citation No. 210224

Citation No. 210224 was issued by inspector Steve Mitchell on September 27, 1978, pursuant to section 104(a) of the Act. He cited 30 C.F.R. § 56.11-1 which requires that safe means of access shall be provided and maintained to all working places.

The inspector issued the citation after observing a cone-shaped accumulation of "muck" on a platform. He did not actually go into the platform, but observed the accumulation from the ground. The "muck" was comprised of broken rock and other finely-ground material which had spilled from a feeder at the point where it dumped into a crusher. The material was dry at the time, and firmly packed. It ranged in height to a maximum of 12 inches. The inspector estimated that it had taken at least a week to accumulate.

The platform in question was located alongside a feeder. It was 15 feet long, approximately 24 inches wide and 7-1/2 to 10 feet above the ground. At the time the citation was issued, the platform had been provided with a 3-foot high handrail of light angle iron. The only means of access to the platform was provided by a ladder.

The platform was used when Respondent found it necessary to adjust the speed of the feeder to the size of the rock being conveyed. To effect this adjustment in speed, certain sheaves on the feeder had to be changed. Because orders for different sizes of rock were placed at irregular intervals, the sheaves were changed only at irregular intervals. Winston Henson, Respondent's safety supervisor, testified that the platform might be used three times in one week and not again for 6 weeks thereafter.

Mr. Henson testified that he had no knowledge of any use of the platform other than for changing sheaves. The inspector believed, however, that the platform was used for general maintenance of the feeder. This belief was inferred from the fact that the platform provided the only means of access to the feeder. This inference is supported by the location of the sheaves--some 18 inches from the access ladder. There would be little point to constructing 15 feet of platform if its only use was to allow the changing of sheaves. The inspector testified that he had no idea how frequently the feeder required maintenance but that such maintenance was necessary "at least seasonally."

Mr. Henson also testified that the feeder operator was responsible for changing the sheaves and that he cleaned the platform before doing so.

Petitioner did not establish that the cited condition was in violation of section 56.11-1. As noted above, the mandatory standard requires that a safe means of access be provided and maintained to all working places. "Working place" is defined in section 56.2 to mean "any place in or about a mine where work is being performed." The record does not support a finding that work was being performed, had ever been performed in the past or would be performed in the future, while the accumulation was present. At best, the record establishes only that the platform was used on an irregular basis for changing of sheaves and seasonally for general maintenance. The inspector did not observe anybody on the platform. Petitioner presented no evidence which would support an inference that the platform had been used or would be used by any of Respondent's employees while the accumulation existed. Rather, the uncontradicted testimony of Mr. Henson established that the feeder operator cleaned the platform before using it to change the sheaves. This use was infrequent and no showing was made that work was performed on the platform or on the feeder at a time when the accumulation was present. The regulation is not a housekeeping standard, but one requiring safe access to places where work is being performed. The condition, therefore, did not violate section 56.11-1.

ORDER

It is ORDERED that the above-captioned civil penalty proceedings are hereby DISMISSED.

Forrest E. Stewart
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

25 APR 1980

SECRETARY OF LABOR,		:	Complaint of Discharge
MINE SAFETY AND HEALTH		:	and Discrimination
ADMINISTRATION (MSHA),		:	
On behalf of		:	Docket No. VA 79-102-DM
E. BRUCE NOLAND,		:	
	Applicant	:	MD 79-41
v.		:	
		:	Leesburg Stone Co.
LUCK QUARRIES, INC.,		:	
	Respondent	:	

DECISION

Appearances: James Swain, Esq., and Sidney Salkin, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Applicant;
Henry Wickham, Esq., Mays, Valentine, Davenport and Moore, Richmond, Virginia, for Respondent, Luck Quarries, Inc.

Before: Judge Merlin

The above-captioned case is a complaint of discharge and discrimination filed by the Secretary of Labor on behalf of E. Bruce Noland against Luck Quarries, Inc.

A hearing on the merits was held April 8-9, 1980. Prior to the hearing, both parties filed preliminary statements and respondent filed a trial memorandum. At the hearing, documentary exhibits were received and witnesses testified on behalf of both parties (Tr. 8-210). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench (Tr. 211). A decision was rendered setting forth findings, conclusions, and determinations with respect to the alleged discriminatory discharge (Tr. 244-259).

A supplemental hearing concerning relief was held on April 17, 1980. At the close of this hearing, a second bench decision was rendered amending the first bench decision on a few matters and setting forth the relief granted.

Bench Decision Dated April 9, 1980

This is a complaint under section 105(c) of the Federal Mine Safety and Health Act of 1977, filed by the Secretary of Labor on behalf of the applicant, E. Bruce Noland, alleging a discriminatory discharge of Mr. Noland by the respondent, Luck Quarries, Inc.

Section 105(c) of the Act provides:

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

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission with service upon the alleged violator and the

miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing; (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

* * *

Jurisdiction under the Act was admitted by both parties. I will, therefore, proceed to consider the evidence.

Several witnesses testified on behalf of both parties. Many conflicts exist in the evidence which are necessary to resolve in order to decide this case. It is undisputed that from March 1978 until April 18, 1979, applicant was a trucker who with his own truck hauled rock from the respondent's quarry to its customers at construction sites. In addition, by all accounts applicant and respondent had had a stormy relationship for a number of months over several matters including proper haul rates to be paid by respondent to the truckers. During the week of April 17th, applicant was the representative for the owner-operator truckers who hauled stone for the respondent.

The process for hauling stone is as follows: usually a Euclid truck receives stone from bins and deposits the stone in storage piles and thereafter, a front-end loader takes the stone from the storage piles and puts it on trucks such as the applicant's.

The Euclid truck is larger and heavier than the trucks of the owner-operator haulers. On April 17, a front-end loader was broken and because of this the applicant was ordered to move his truck under a bin so as to receive stone directly from a bin.

Applicant testified that he refused to load under the bin because he felt it was unsafe due to dust coming from the bins and due to rocks falling off the conveyor belt which runs along the top of and alongside the bins. I recognize that many conflicts exist in the evidence. However, after carefully listening to all the witnesses, and considering the matter, I accept as most credible applicant's testimony as to why he refused to load from the bin. I note that the applicant's testimony in this respect is corroborated by the fact that on the evening of April 17, 1979, he telephoned a Virginia State mine inspector to complain about the danger from the bins. The inspector testified to the same effect. I also accept testimony which shows that the truck operator has to leave his truck in order to press the button which opens the bin. I further accept the applicant's testimony that on April 17 he received a dusting when he went under the bin and that he then told the operator's superintendent that he did not want to load under the bin due to dust and falling rock, but that when the superintendent told him to load or leave, the applicant in fact loaded his truck.

After loading the stone directly from the bin, applicant returned to the weighing office and had an argument with both the superintendent and the foreman. The superintendent testified that on April 17, 1979, the applicant merely stated that he did not want to be a Euclid driver but that he gave no reason. I find this version inherently improbable and I reject it. The applicant was an intelligent and articulate witness. I find more credible applicant's testimony that in protesting about loading from the bin he referred to the danger from dust and falling rocks; that is, he gave specific reasons why he did not want to be like a Euclid driver. Also in this connection, I accept the testimony of two other truckers who stated at the hearing that the problem of dust and falling rocks previously had been discussed with management and that at the subsequent meeting of April 18, 1979, the truckers agreed they did not want to load directly from the bins because of the dust. Finally, the written statement of respondent's foreman, 1/ whom the respondent did not call to testify, expressly sets forth that on April 17, 1979, the applicant told the superintendent and him (the foreman) that loading from the bins

1/ Admission of this exhibit was agreed to at the pre-hearing conference. However, it appears from the administrative transcript that the exhibit was inadvertently not admitted into the record. It is hereby admitted as Government Exhibit No. 1.

was injurious to his (the applicant's) health. Based upon the foregoing, I find that on April 17, 1979, the applicant made a health and safety complaint to the operator.

As already noted, the applicant and the Virginia State mine inspector testified that on the evening of April 17, 1979, the applicant telephoned the inspector to register a health and safety complaint. According to the inspector, the applicant complained about (1) loading under the bins which exposed the truckers to silica dust, (2) lack of safety glasses and (3) lack of hard hats. I accept the testimony which shows that on the morning of April 18, 1979, at a meeting of the truckers, the truckers told the applicant who, as already noted, was their representative for that week, that they did not want to load under the bins. Applicant then returned to the office where he was fired by the superintendent. In accordance with the foregoing, I again conclude that applicant made a safety complaint notifying the operator of an alleged health and safety danger, in accordance with section 105(c) of the Act.

I further conclude that the applicant's safety complaint was made in good faith. The applicant's testimony regarding his fears from silica dust is accepted as sincere. However, I note that it has been held under the 1969 Mine Act that a miner does not have to demonstrate his state of mind at the time he makes the complaint. The Court of Appeals for the District of Columbia Circuit specifically declined to impose either a "good faith" or "not frivolous" test upon such complaints or to inquire into the merits of these complaints. Munsey v. Federal Mine Safety and Health Review Commission, 595 F.2d 735 (1978). Other interpretations of the 1969 Act by the Court of Appeals for the District of Columbia Circuit issued before the adoption of the 1977 Act were expressly accepted by Congress when it enacted the 1977 Act. S. Rep. No. 95-181, 95th Cong., 1st Sess. 36. I have no reason to believe that the rule in Munsey also would not be accepted since it comports with the broad interpretation of the 1977 Act Congress repeatedly said it wanted. The safety complaint in this case, therefore, more than satisfies applicable law.

I acknowledge evidence which indicates dust is adequately controlled at this quarry. However, as the Court of Appeals' decision cited above demonstrates, the issue here is not whether there was a dust violation or an actual or potential threat to health or safety but only whether a protected safety complaint was made.

Congress wanted to encourage the making of safety complaints and it has therefore extended very great protection to the making of those complaints. That is what this law and in particular, this section of this law is all about.

We now turn to the question of motivation for the discharge. Why was the applicant discharged? The operator has contended that the applicant was discharged because of his disputes with management over pay and a myriad of other issues unrelated to safety. A review of the decisions of the administrative law judges of this Commission in discrimination cases reveals that applicants in these cases more often than not are, to put it mildly, not management's favorites. Admittedly, there were many matters of contention, including rates of pay, between this applicant and this operator. However, the evidence convinces me that the motivating and precipitating cause for the discharge of the applicant on April 18, 1979, was the safety complaint he made the day before on April 17, 1979. As already noted, I accept the applicant's testimony regarding what happened on April 17 and 18, 1979.

In addition, the operator's superintendent testified that the operator had decided to get rid of the applicant and that when on April 17, 1979, applicant refused to load under the bin, the superintendent told the office manager this was their chance to get rid of the applicant. So too, the office manager testified they had been looking for anything to let the applicant go. The testimony of the operator's sales manager was to the same effect. It is not for me in this proceeding to decide how respondent could have properly dispensed with applicant's services. For present purposes, what is clear is that respondent's overwhelming desire to rid itself of an individual it considered troublesome overrode its judgment to such an extent that the circumstances under which it discharged the applicant, i.e., when he was making a safety complaint, were the very ones proscribed and prohibited by the Federal Mine Safety and Health Act of 1977.

I have carefully reviewed the case law respondent's counsel has so ably brought to my attention in his trial memorandum. However, the substantive principles as well as the rules regarding burden of proof in the cited cases are not, and never have been applicable to mine safety cases. Moreover, under the evidence as already set forth, the applicant here would prevail under many of these tests even if they were relevant, which they are not. See, e.g., Marshall v. Commonwealth Acquarium, 611 F.2d 1 (1st Cir. 1979).

Finally, and most importantly, I must point out that the proof of discriminatory discharge in this case goes far beyond what is required by the Federal Mine Safety and Health Act. The legislative history of this Act states that, "Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." (Emphasis supplied.) S. Rep. No. 95-181, 95th Cong., 1st Sess., 36. The Conference Committee adopted the Senate version of this section of the law. S. Rep. No. 95-461, 95th Cong., 1st Sess. 51-53. The foregoing quotation from Senate Report 95-181 is a plain explanation of the mandate of this statute. I am bound by it. The evidence in this case goes far beyond the requirements of this Act. The applicant must prevail.

Accordingly, I conclude the applicant's claim of discriminatory discharge is well founded and that relief should be granted in accordance with the statute.

Applicant testified that because his services with Luck Quarries were terminated he could not keep up the payments on his truck and so was forced to sell it in late May or early June. According to the applicant he lost all his equity since he sold the truck for the amount he owed on it.

As set forth above, section 105(c)(2) provides in pertinent part: "The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest."

With respect to relief, the legislative history also is instructive. The pertinent Senate Report states as follows: "It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to, reinstatement with full seniority rights, back pay with interest, and recompense for any special damages sustained as a result of the discrimination." S. Rep. No. 95-181, 95th Cong., 1st. Sess. 37.

In this case, the applicant was temporarily reinstated on August 8, 1979, pursuant to my order. However, the order of temporary reinstatement was not truly effective because applicant had lost his truck and could not resume his former status without a truck to haul stone.

The statutory directive with respect to relief is clear. The respondent has the duty to make the applicant whole, that is, put him in the position he would be in if there had been no discriminatory discharge. The relief awarded must effectuate this purpose. The statute is too clear to admit of any other approach.

First, the respondent's responsibility to make the applicant whole requires replacement of the lost equity in the truck. The applicant testified regarding the cost of the truck, his down payment, refinancing, repairs and sale price. All these figures are easily verifiable. I order counsel for both parties to confer and advise me one week from today in this hearing room as to the amount representing the applicant's equity in the truck which they have agreed upon.

I have not overlooked respondent's argument that the loss of the truck is attributable to the Secretary of Labor because the Secretary's investigation did not proceed promptly. It may be that in some instances the Secretary does not move fast enough in these cases. However, in this case, the applicant's uncontradicted testimony is that he lost his truck in late May or early June. The Secretary could not be expected to complete his investigation in that short span of time. The responsibility for this applicant's loss of his truck is wholly the respondent's, not the Secretary's.

Secondly, the respondent must pay the applicant for the net income he lost as an owner-operator hauling stone from April 18, 1979, until the date such payment is made. It should be possible for the parties to agree upon the gross income respondent reasonably could have expected to receive during the period in question. I recognize that at the hearing the parties offered evidence which gave widely varying estimates as to the expenses of an owner-operator hauling stone. Both estimates appear to me to be extreme. It should be possible for the parties to arrive at a mutually agreeable figure as to expenses without the necessity of an expensive and time-consuming hearing on the matter. Accordingly, I order counsel for both parties to confer and advise me one week from today in this hearing room as to the net income figure they have agreed upon. Of course, a deduction from the net income applicant reasonably could have been expected to receive as a trucker must be made in the amount of applicant's actual earnings. The amount of applicant's actual earnings also should be easily ascertainable. In this connection, I conclude from applicant's testimony yesterday that he did all he could to mitigate

damages. In particular, I conclude that applicant was not bound to accept a job at a quarry near his home which he believed would not have been profitable.

Interest on all past due amounts will run at the rate of 9 percent until the date of payment.

All references to the discharge must be removed from the applicant's file.

In light of the foregoing it is ORDERED that:

1. Respondent pay applicant for the equity in the truck which he was forced to sell due to the discriminatory discharge.

2. Respondent pay applicant the net income he would reasonably have been expected to earn from April 18, 1979, to the date of payment, less applicant's actual earnings for this period.

3. Respondent pay interest at the rate of 9 percent on the foregoing amounts.

4. All references to the discriminatory discharge be removed from applicant's file.

5. Respondent reinstate applicant as an owner-operator hauling stone as soon as applicant has a truck and requests such reinstatement.

Bench Decision Dated April 17, 1980

On Wednesday last, April 9, 1980, I rendered a bench decision, holding that applicant had proved his case under section 105(c) of the Federal Mine Safety and Health Act of 1977, and was entitled to relief.

As part of the relief due applicant, I held respondent had the responsibility to replace applicant's equity in the truck. Secondly, I held that respondent must pay applicant for the net income he lost as an owner-operator truck hauler from April 18, 1979, and that from this amount, applicant's actual earnings should be deducted.

I ordered counsel for both parties to confer and advise me with respect to the net income figure they agreed upon and as to the figure regarding the equity in the truck which they agreed upon.

After conferring at length this morning, counsel for both parties advise me that they have agreed to the following amounts:

1. $4,770 is the equity in the truck.

2. $40,000 is the lost gross income, less $20,000 for expenses, for a lost net income from trucking of $20,000.

3. Applicant's actual earnings for the period were $4,647.

I accept the foregoing amounts.

In accordance with the bench decision, the amount of $4,647 must, of course, be deducted from the net lost income of $20,000, resulting in a total lost net income of $15,353.

Accordingly, applicant is entitled to $15,353 plus $4,770, which is $20,123.

It is hereby ORDERED that respondent pay $20,123 within 30 days.

In the bench decision last week, I ordered 9 percent interest on the amount due. The bench decision award of interest is amended as follows: inasmuch as exactly a year has elapsed since the discriminatory discharge on April 18, 1979, in order to achieve an approximate average, the interest due will run beginning October 18, 1979, until the date respondent mails the check for the above-stated amount to the Solicitor on behalf of applicant. The parties have agreed to this change in the award of interest.

The bench decision ordered respondent to reinstate the applicant. The bench decision in this respect is amended as follows: the right to reinstatement shall exist for 45 days from the date respondent mails the check, in accordance with the relief granted. This should give applicant sufficient time to obtain a truck and decide whether he wishes to resume his relationship with respondent.

The parties have agreed respondent should make the check payable to the applicant and mail it to him in care of the Solicitor.

The remainder of the bench decision issued on April 9, 1980, remains in effect, as issued.

ORDER

The bench decision dated April 9, 1980, as amended and supplemented by the bench decision dated April 17, 1980, is hereby AFFIRMED.

The bench decision dated April 17, 1980, is hereby AFFIRMED.

The respondent is ORDERED to pay applicant $20,123 plus interest as set forth herein on or before May 17, 1980.

Paul Merlin
Assistant Chief Administrative Law Judge

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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28 APR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Contest of Citation
	:	Docket No. WEVA 79-440-R
v.	:	Civil Penalty Proceeding
CONSOLIDATION COAL COMPANY, Respondent	:	Docket No. WEVA 80-183
	:	Ireland Mine

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Michel Nardi, Esq., Consolidation Coal Company, for Respondent.

Before: Judge Lasher

These proceedings arose under section 105(b) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Wheeling, West Virginia, on March 18, 1980, at which both parties were represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proferred by counsel during closing argument, I entered an opinion on the record. 1/ My oral decision containing findings, conclusions and rationale appears below as it appears in the record, other than for minor corrections in grammar, punctuation and the excision of dicta.

> This proceeding which involves two dockets, Civil Penalty Docket No. WEVA 80-183 and Contest of Citation Docket No. WEVA 79-440-R, both of which have been consolidated by my order earlier in this hearing, involve a single citation, No. 0807767, which was issued on August 27, 1979, and which alleges a violative condition as follows: "Repairs were being performed on the No. 26 mining machine by Glen Strohanyber, [2/] mechanic, and the power was on, in No. 2 entry of 2 Mains East, ID 001, supervised by Ray Franklin."

1/ Tr. 108-117.
2/ The correct name is Emerson Strohsnider.

The hearing in this matter was conducted pursuant to section 105(b) of the Federal Mine Safety and Health Act of 1977 and both parties were very well represented by counsel at the hearing. Counsel have complied with the requirements of the Administrative Procedure Act by presenting argument at the close of hearing, thus making it possible for me to give my decision at this time on the record, which oral decision will subsequently be incorporated in a written decision and served upon the parties.

The citation (Exhibit M-1) charges the Respondent coal operator with a violation of 30 C.F.R. § 75.1725(c) which provides: "Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments."

The heading of 75.1725 is "Machinery and Equipment; Operation and Maintenance." As pointed out by counsel for Respondent during cross-examination of MSHA witness, inspector Kenneth Williams, a statutory provision related to 75.1725, namely, 30 C.F.R. § 75.509, covering "Electric Power Circuit and Electric Equipment; De-energization," provides, "All power circuits and electric equipment shall be de-energized before work is done on such circuits and equipment, except when necessary for troubleshooting or testing."

I note initially that we have a statutory provision and and implementing regulation which appear to apply to the factual situation which I am about to describe. First of all, I find that the condition described in the citation did occur since there is no specific or general dispute concerning the general allegations thereof. In addition, it appears that on August 27, 1979, Inspector Williams, while engaged in a Triple A inspection of Respondent's Ireland Mine observed the mechanic, Strohsnider, changing a hose on a Joy Manufacturing Company continuous miner. According to Inspector Williams, and I so find, the trailing cable attached to the continuous miner which is approximately 600 feet long, was plugged into a power center. The trailing cable was therefore energized. I also find that Strohsnider advised the inspector that he had cut the breaker off, or words to that effect, and when asked by the inspector if he knew that the power was supposed to be off the trailing cable too, that Strohsnider said, "No." When Inspector Williams posed the same question or a similar question to the foreman who was present, the foreman replied, "I thought it was de-energized."

I find that the trailing cable was attached to the continuous miner--at the time observed by Inspector Williams--at two points, the first point being where it is attached to the outside of the miner but not "plugged in" to the miner, and that it ran a distance of approximately 8 to 12 feet to the junction box where it became joined to the continuous miner and where it ran for approximately 2 more feet while energized. I find that the mechanic, Strohsnider, was engaged in replacing a hydraulic hose on the continuous miner in question at the time the citation was issued by the inspector and that the process of changing such a hose could be either simple or lengthy, according to the testimony on this record, and could range from a matter of minutes to much longer to complete.

I find that MSHA had a policy of enforcement ranging back to approximately 1973 or 1974 which constituted an administrative interpretation of the regulation by the administering agency to the effect that turning the power off meant unplugging the trailing cable to the continuous miner at the power center and did not include within the definition of turning the power off the act of turning off the circuit breaker on the continuous miner--which I note was the second point of connection of the trailing cable and the terminal point of the trailing cable.

I find, based upon the inspector's testimony, that the Respondent was aware of the MSHA interpretation to this effect and that the Respondent's general policy was to follow the MSHA interpretation.

I also find that part of MSHA's enforcement policy was to permit a mine operator in at least two situations to perform two types of repairs without unplugging the trailing cable from the power center; namely, when bits on the continuous miner were changed and when water sprays were cleaned. Both of these procedures take only a few seconds and have the incidental health and safety effect of keeping down dust. The Respondent's contention is that by turning off the circuit breaker on the continuous miner, it complies with section 75.1725(c), since such act constitutes putting the piece of machinery in such a state that the "power is off." The Government contends that for the power to be off of the piece of machinery the trailing cable must be unplugged at the power center.

I am constrained to reject the Respondent's view for two reasons even though there are certain equities involved in the instant fact situation which serve to bolster the interpretation urged by the Respondent. To begin with, I

believe that regulation 75.1725(c) must be read in light of the statutory provision, section 75.509. I find specifically that the continuous miner involved is a piece of electric equipment, as that term is used in 75.509, and is also "machinery" as that term is used in 75.1725(c). Also preliminarily, I find that none of the exceptional circumstances mentioned in the two regulations are applicable here, i.e., that there was troubleshooting or testing going on or that machinery motion was necessary to make the repairs which Strohsnider was engaged in.

The record is clear based both on the testimony of the inspector and also of the Respondent's witness, Mr. Allen Newcome, that the circuit breakers can malfunction and become defective. Testimony and evidence in the record is also clear that at least to some extent for a minimum of 2 feet electric current does flow into the continuous miner and that should a malfunction occur electric current would flow beyond the 2-foot distance into the piece of machinery involved. So to that technical--and I would say very technical standpoint--I conclude that the two regulations should be construed to indicate that the continuous miner is energized in the sense of section 75.509, and that the power is on the continuous miner within the meaning of section 75.1725 even though the circuit breaker is turned off--when the trailing cable is plugged into the power center. The cases are legion to the effect that the Federal Coal Mine Health and Safety Act is to be interpreted liberally to the effect to protect the safety of the miners. I therefore do follow a liberal interpretation of these two regulations in so finding.

A second basis for this conclusion, which is the resolution of the critical issue posed in this case, is that I also find the trailing cable to be part of the machinery. I must confess that my original inclination as the hearing started out was to the contrary. The evidence, however, does indicate that the trailing cable, although not part of the original equipment of the Joy continuous miner, is permanently attached to the continuous miner at two points. Particularly, it becomes permanently attached to the junction box. As Mr. Newcome, who I recognize as a master mechanic and electrical expert, pointed out, the trailing cable, once it is connected to the junction box, becomes part of the box to the extent that the total connection, that box, must be certified as permissible.

There is also evidence that the trailing cable can thus remain on the continuous miner for as long as a year, although I do have in mind Mr. Newcome's testimony that sometimes it has to be changed in the same shift that it is connected. I analogize this generally to a lamp, where the cord at one end has a plug in it and at the other end it is connected to the lamp. I think once the cord is attached to the lamp permanently or in that manner it become part of the lamp and thus, as in the case of the continuous miner, the power is shut off by unplugging it at the point where it connects to a flow of electricity, in this case the power center. Turning off the switch on the lamp turns the light out but does not render the lamp safe to work on as long as it is plugged in.

Mr. Newcome, as counsel for the Government points out, did concede that the safest means of deenergizing the continuous miner was to unplug it at the power center.

I find therefore that the trailing cable is part of the continous miner and that the trailing cable was not deenergized, or in the terms of section 75.1725, had not had the "power cut off" at the time the condition was observed by the inspector. Accordingly, a violation of section 75.1725(c) did occur and I find that the citation was properly issued in those circumstances.

Turning now to the statutory criteria, I find, based upon stipulation, that in the 2-year period prior to the issuance of the citation that the Respondent had 922 previous violations; that the Respondent is a large operator; that following the issuance of the citation Respondent proceeded in good faith to achieve rapid compliance with the violated safety standard; and that any penalty I assess in these proceedings will not be beyond the economic ability of the Respondent to pay and simultaneously remain in business.

The Government has not made any contention of gross negligence or ordinary negligence and there is no need for me to belabor the point other than to note that Respondent's basic bone of contention is, in my opinion, justified. I believe that we are in this hearing today because of Respondent's difficulty in dealing with the enforcement policy of the Government and possibly even more specifically the lack of precision of the wordsmiths which the Government employs to draft these regulations.

* * * * * * *

I think the ambiguities can be easily catalogued by one or two people which would save a tremendous amount of problems in the everyday operation of the mines as well as in the administration of the administrative justice system in trying to clarify these things on the basis of fact situations which I believe like this one many times are not typical of those which arise in the mines. I find the Respondent's proceeding to try to obtain a clarification in this case is in good faith and I do consider that in my evaluation of the negligence factor although I also believe the violation was probably one which occurred through some negligence based upon the inspector's account of the foreman's reply, to wit: "I thought it was de-energized." In any event, the amount of the penalty will be significantly decreased on the basis of the negligence factor--and the seriousness factor.

Briefly, the inspector's testimony (with respect to gravity) does indicate that the possibility of any hazard coming to fruition was very remote and his description of possible injuries was devoid of any medical precision. Therefore, I am inclined to fully credit the evidence presented by Respondent, which was well analyzed and thorough with respect to seriousness, indicating: that no coal was being mined; that the machine was not being operated at the time; that the hose is separate from the electrical circuit; that the breaker on the machine was knocked to the off position; that there are several motors, I think four, on the continuous miner; that the main motor, the pump motor, has to be energized before the other motors can be engaged; that the Ireland Mine is an open mine in the sense that the visibility is good; and that the mechanic, Strohsnider, was standing up and visible to anyone standing on the other side of the machine.

Finally, I note that there is no contention of any serious degree of gravity from the Government. I find that this was not a serious violation. Considering the six statutory criteria, a penalty of $100 is assessed in this case.

ORDER

Respondent, if it has not previously done so, is ORDERED to pay to the Secretary of Labor the sum of $100 within 30 days of the issuance date of this decision.

Michael A. Lasher, Jr., Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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28 APR 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 79-161-M
Petitioner	:	A.O. No. 26-00265-05009I
	:	
v.	:	Cedar Hollow Plant and Quarry
	:	
WARNER COMPANY,	:	
Respondent	:	

DECISION AND ORDER

Appearances: Barbara Kaufmann, Esq., Covette Rooney, Esq., U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner; Thomas McGoldrick, Esq., Bala Cynwyd, Pensylvania, for the Respondent.

Before: Judge Kennedy

This matter came on for an evidentiary hearing in Reading, Pennsylvania on April 24, 1980. The gravamen of the charge was that the operator failed to ensure strict compliance with the mandatory safety standard that requires electrically powered equipment be deenergized and locked out before mechanical work is done on such equipment, 30 CFR 56.12-16. As a result of this dereliction, it was charged the Lime Plant Foreman lost his right hand when he attempted to remove a blockage in a chute feeding the screw conveyor with the power on. For the extremely serious violation charged and for the foreman's failure to exercise the high degree of care imposed by the Act, the Assessment Office proposed a penalty of $5,000. Upon contest, the solicitor recommended the penalty be increased to $10,000.

The operator admitted the fact of violation but claimed its foreman's misconduct and negligence was so unforeseeable and unpreventable as to make it unjust to impute his actions to the operator for the purpose of determining the amount of the penalty warranted. The operator further claimed the contributory negligence of its nonsupervisory personnel (rank-and-file miners) was not attributable to it as a matter of law.

In response to the trial judge's pretrial order the parties briefed the issues of strict liability and imputed negligence. On April 18, 1980 the trial judge issued an order establishing as the law of the case (1) that the Mine Safety Act is a strict liability statute, (2) an operator is vicariously liable under the doctrine of respondeat superior for both the violations and the negligence of its employees and officers of whatever rank, (3) the negligence of an operator's agents and employees of whatever degree is imputable to the operator for the purpose of assessing an appropriate civil penalty, and (4) the operator may show in mitigation that the conduct of an agent was so aberrational in nature as to be substantially or totally unforeseeable or unpreventable.

After hearing the parties at length and carefully considering the evidence adduced, the trial judge entered the following bench decision:

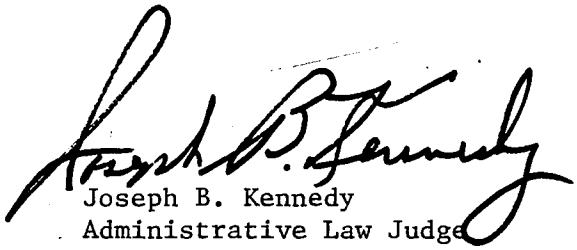
> Based on a preponderance of the reliable, probative and substantial evidence, and after carefully observing the demeanor of the witnesses and probing their veracity, I find:
>
> 1. The violation charged did, in fact, occur.
>
> 2. That it was extremely serious and created a hazard of a fatal or disabling injury.
>
> 3. That the violation occurred as a result of the Lime Plant Foreman's (Mr. Martyniuk's) thoughtless, if not reckless, disregard for compliance with the mandatory safety standard cited.
>
> 4. That the operator's defense in mitigation of the penalty, namely unforeseeable and unpreventable employee misconduct is unpersuasive. It is unpersuasive because the operator knew or should have known that before the accident its lock-out procedure was inadequate and widely disregarded. There has been much improvement since then. The operator's defense is also unpersuasive because under the circumstances Mr. Martyniuk's conduct as well as that of Mr. Thompson and Mr. Richardson was not aberrational or unforeseeable but ordinary human error that stemmed from a lack of safety consciousness. Only conduct that is willfully reckless or obviously inexplicable, demented or suicidal can reduce imputable conduct amounting to gross negligence to that of slight negligence.
>
> 5. The operator's defense is also unacceptable as a matter of law. The Mine Safety Law is a strict liability statute under which an operator is liable without fault for the failure of its employees to exercise the high degree of care imposed by the Act. Here, no basis is shown for refusing to impute, without diminution, the gross negligence of Messrs. Martyniuk, Thompson and Richardson to the operator.

6. That to insure a change in the widespread attitude of disregard for safe practices that previously existed on the part of management and labor in this facility, the Secretary should announce his intention to invoke the authority of section 110(c) of the Act to prosecute any individual civilly or criminally for any future violations of 30 CFR 56.12-16.

7. That the premises considered and after a careful balancing of the equities, the amount of the penalty warranted and that best calculated to deter future violations and insure voluntary compliance is $7,500.

Accordingly, it is ORDERED that the operator pay a penalty of $7,500 on or before May 15, 1980.

The foregoing is a true and correct copy of the decision entered on the record in this matter on April 24, 1980. It is ORDERED, therefore, that the same be, and hereby is, ADOPTED AND CONFIRMED as the trial judge's final decision in this matter.



Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

29 APR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING DOCKET NOS. WEST 79-278-M WEST 79-334-M
v.	A/O CONTROL NOS. 02-01915-05001 02-01915-05002
SUN LANDSCAPING AND SUPPLY COMPANY, Respondent.	WHITE MARBLE MINE

DECISION

Appearances:

Mildred L. Wheeler, Esq., Office of the Solicitor, United States Department of Labor, 450 Golden Gate Avenue, Box 36017, Room 11071, Federal Building, San Francisco, California 94102
for Petitioner

W. T. Elsing, Esq., 34 West Monroe, Suite 102, Phoenix, Arizona 85003
for Respondent.

Before: Judge John J. Morris

STATEMENT OF THE CASE

In two cases petitioner, the Secrectary of Labor, on behalf of the Mine Safety and Health Administration, charges that respondent, Sun Landscaping and Supply Company, violated various mandatory safety regulations promulgated under the Federal Mine Safety Act of 1969, 30 U.S.C. § 801 et seq., (amended 1977).

Pursuant to notice, a hearing on the merits was held on March 19, 1980 in Phoenix, Arizona.

Glenn R. Peaton testified for MSHA. Al Leon testified for Sun Landscaping and Supply Company. MSHA waived its right to file a post trial brief. SUN filed a brief.

ISSUES

The issues are whether MSHA has jurisdiction over SUN, and if jurisdiction exists, did the alleged violations occur.

JURISDICTION

MSHA argues SUN was in "full operation" crushing white marble on the day of the inspection and is therefore subject to the Act (Tr 44).

I reject MSHA's contention since the statutory test is not whether a mine is in "full operation" but whether its products enter commerce or affect commerce, 30 U.S.C. § 803. Commerce is defined as interstate commerce, 30 U.S.C. § 802 § 3(b).

SUN's position is that jurisdiction can only be based on a finding that SUN is involved in interstate commerce.

To review SUN's argument, it is necessary to consider the uncontroverted facts. On the day of the inspection SUN, with 7 employees, had been in operation for three days. SUN intended to mine white marble, crush it, and sell it for landscaping supplies (Tr 21, 55, 58).

The issue is whether the described activity and SUN's future intentions establish coverage under the Act.

A case similar to the factual situation here can be found in Godwin v. OSHRC 540 F2d 1013 (9th Cir. 1976). In that case merely engaging in the activity of clearing land for later intended grape production was held to affect commerce. The Court observed that clearing land is an integral part of the manufacture of wine and therefore commerce is "affected" by the activity. The same reasoning applies here. The setting up of its mining facilities by SUN, with an intent to sell minerals in the future, affects commerce.

In Godwin the Court of Appeals was considering the coverage of the Occupational Safety and Health Act of 1970 (29 U.S.C.§651 et seq.). In the OSHA Act an employer is subject to the Act if his activities "affect commerce" 29 U.S.C. § 652(6). This exact terminology appears in Section 4 of the Federal Mine Act, 30 U.S.C. § 803.

Since there is no language to restrict the broad coverage implied in the Federal Mine Act and in view of the declared intent of the Congress in relation to the safety and health of miners, I conclude that jurisdiction extends to new operations as here where there is an intent by a mine operator to sell products in the future.

An example of the size of enterprises which have been determined to have an affect on commerce may be found in Wickard v. Filburn, 317 U.S. 111, 63 S. Ct. 82 (1942). In Wickard a farmer exceeded his wheat allotment of 11.1 acres by an additional 11.9 acres. The farmer's contribution to the wheat market was obviously microscopic in relation to the total market. Nevertheless, the farmer was held to come within the regulatory scheme of the Agricultural Adjustment Act of 1938 (as amended).

Katzenbach v. McClung, 379 U.S. 294, 85 S. Ct. 377, 13 L. Ed, 2d 290 (1964) a civil rights case, cited by SUN does not support its view. In Katzenbach, the Court declined to overturn a Congressional Act when the legislators have a rational basis for following a chosen regulatory scheme necessary for the protection of interstate commerce.

The power of Congress in the field of protecting the safety and health of the miners is broad and sweeping. Congress has determined that the disruption of production and loss of income to operators and miners as a result of mining accidents unduly impedes and burdens commerce. Marshall v. Bosack 463 F. Supp. 800 (E. D., Pa. 1978).

Martin v. Bloom 373 F. Supp. 797 (W. D., Pa. 1973), a District Court decision involving a one man company, relied on by SUN is not binding on the Commission nor does it, in the writer's view, correctly state the law. For three District Court cases holding a directly contrary view see Marshall v. Kilgore 478 F. Supp. 4

(E. D. Tennessee, 1979); Marshall v. Bosack, supra, and Secretary of Interior. United States Department of Interior v. Shingara, 418 F. Supp. 693 (M. D. Pa., 1976). Also, compare the United States Court of Appeals decision in Marshall v. Kraynak 604 F.2d 231 (3rd Cir, 1979).

SUN's motion to dismiss for lack of jurisdiction is DENIED.

ALLEGED VIOLATIONS

The facts pertaining to the alleged violations are enumerated in the hereafter numbered paragraphs. The facts are essentially uncontroverted and they are set forth after each of the contested regulations.

WEST 79-278-M

Citation 381350 alleges a violation of 30 C.F.R. 55.9-12.

The cited standard provides:

> 55.9-12 Mandatory. Cabs of mobile equipment shall be kept free of extraneous materials.

1. The federal inspector observed fluid leaking from under the dash of SUN's loader (Tr 18).

2. If the loader caught fire, the operator could be burned (Tr 18, 19).

3. From its size the leak appeared a week or more old (Tr 19).

Citation 381353 alleges a violation of 30 C.F.R. 55.4-22. The cited standard provides:

> 55.4-22 Mandatory. Each mine shall have available or be provided with suitable fire-fighting equipment adequate for the size of the mine.

4. The SUN office manager said there were no fire extinguishers on the property (Tr 20).

5. SUN should have three fire extinguishers for its shop which featured welding, cutting and grinding (Tr 21, 22).

6. Oil and grease were stored in the shop (Tr 22).

Citation 381354 alleges a violation of 30 C.F.R. 55.14-1. The cited standard provides:

> 55.14-1 Mandatory. Gears; sprockets; chains, drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

7. Pinch points 3 feet above the ground on 10 conveyors were unguarded. (Tr 23, 24)

8. A maintenance person could be cut or lose a limb if he was caught by the pinch points (Tr 23).

9. The pinch point of the skirt board of each conveyor should be guarded (Tr 22-23).

Citation 381355 alleges a violation of 30 C.F.R. 55.9-7. The cited standard provides:

> 55.9-7 Mandatory. Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length.

10. In lieu of emergency stop devices, MSHA accepts a handrail guard (Tr 25).

11. Two workers were affected (Tr 26).

12. The employer by observing the conveyor could have known there were no rails or emergency stop cords available (Tr 26).

Citation 381356 alleges a violation of 30 C.F.R. 55.4-2. The standard provides:

> 55.4-2 Mandatory. Signs warning against smoking and open flames shall be posted so they can be readily seen in areas or places where fire or explosion hazards exist.

13. Diesel tanks or the oil storage areas had no signs on them (Tr 26, 27).

14. The hazard of fires affected seven workers (Tr 27).

Citation 381357 alleges a violation of 30 C.F.R. 55.11-27. The cited standard provides:

> 55.11-27 Mandatory. Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floor boards shall be laid properly and the scaffolds and working platform shall not be overloaded. Working platforms shall be provided with toeboards when necessary.

15. There was a generator plant on a 4 foot high flat bed trailer (Tr 28).

16. The trailer had a 2 to 3 foot walkway without a railing (Tr 28, 29).

17. The hazard of slipping with resulting fractures or bruises was present here (Tr 29).

Citation 381358 alleges a violation of 30 C.F.R. 55.7-2. The cited standard provides:

> 55.7-2 Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

18. A Chicago pneumatic air track drill had two missing bolts and nuts; this could permit the hose to come off at its connection (Tr 30).

19. The hazard occurs from the whipping action caused by the 100 psi if the hose comes off (Tr 30).

20. Two employees were affected (Tr 31).

Citation 381359 alleges a violation of 30 C.F.R. 55.13-21. The cited standard provides:

> 55.13-21 Mandatory. Except where automatic shutoff valves are used, safety chains or other suitable locking devices shall be used at connections to machines of high-pressure hose lines of 3/4-inch inside diameter or larger, and between high-pressure hose lines of 3/4-inch inside diameter or larger, where a connection failure would create a hazard.

21. A bull hose requires a safety chain (Tr 32).

22. A coupling could come loose and the hose could strike a worker (Tr 32, 33).

Citation 381360 alleges a violation of 55.9-22. The cited standard provides:

> 55.9-22 Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways.

24. Part of the roadway leading from the plant to the pit and used by company trucks lacked a berm to support a vehicle (Tr 34, 35).

25. The hazardous portion was one quarter of a mile from the pit along the 15 to 20 foot wide road (Tr 34).

26. If a vehicle went over the edge it would drop 60 to 70 feet (Tr 34).

Citation 381383 alleges a violation of 55.6-20(i). The cited standard provides:

> 55.6-20 Mandatory. Magazines shall be:
>
> (i) Posted with suitable danger signs so located that a bullet passing through the face of a sign will not strike the magazine.

27. There were explosives (12 cases of dynamite) in the SUN ten foot square magazine (Tr 37, 38, 51).

28. Hunters in this open range country could shoot at the warning signs which were attached to the magazine itself (Tr 37, 38).

Citation 381384 alleges a violation of 55.6-20(j). The cited standard provides:

> 55.6-20 Mandatory. Magazines shall be:
>
> (j) Used exclusively for storage of explosives or detonators and kept free of all extraneous materials.

29. The magazine contained 3 drill steel, 3 hoses, and a drill machine (Tr 40).

30. This equipment can cause sparks which could result in an explosion.

Citation 381385 alleges a violation of 55.6-20(k). The cited standard provides:

55.6-20(k) Mandatory. Magazines shall be:

(k) Kept clean and dry in the interior, and in good repair.

31. There was a lot of rat litter on the floor of the magazine (Tr 41).

32. The hazard arises from the natural bleeding of nitro from dynamite (Tr 42, 49).

33. Sparks from shoes could create a fire hazard (Tr 42).

WEST 79-334-M

Citation 381349 alleges a violation of 30 C.F.R. 55.15-1. The cited standard reads:

55.15-1 Mandatory. Adequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas. Water or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled, or used.

34. The SUN manager said there were no stretchers or blankets on the site (Tr 10-11).

35. The nearest hospital was 40 to 50 miles away (Tr 11).

36. Seven workers were affected (Tr 11).

Citation 381351 alleges a violation of 55.11-1. The cited standard reads:

55.11-1 Mandatory Safe means of access shall be provided and maintained to all working places.

37. Workers had to climb the conveyors and the shaker itself to service it (Tr 13-16).

38. The 15 foot high shaker had to be serviced daily (Tr 15).

39. A fall from this height could be fatal (Tr 15).

Citation 381352 alleges a violation of 55.11-1. The standard is the same as in preceding citation.

40. The shaker at this location is about the same as Citation 381351 (Tr 17).

41. Three workers were affected (Tr 17).

CONCLUSIONS OF LAW

Respondent violated all of the citations in contest herein. In considering the statutory criteria for the assessment of civil penalties, I deem the proposed penalties to be appropriate. The uncontroverted factual basis supporting each citation is set forth after each citation number.

WEST 79-278-M

1. Citation 381350 (Facts 1, 2, 3)
2. Citation 381353 (Facts 4, 5, 6)
3. Citation 381354 (Facts 7, 8, 9)
4. Citation 381355 (Facts 10, 11, 12)
5. Citation 381356 (Facts 13, 14)
6. Citation 381357 (Facts 15, 16, 17)
7. Citation 381358 (Facts 18, 19, 20)
8. Citation 381359 (Facts 21, 22, 23)
9. Citation 381360 (Facts 24, 25, 26)
10. Citation 381383 (Facts 27, 28)
11. Citation 381384 (Facts 29, 30)
12. Citation 381385 (Facts 31, 32, 33)

WEST 79-334-M

13. Citation 381349 (Facts 34, 35, 36)
14. Citation 381351 (Facts 37, 38, 39)
15. Citation 381352 (Facts 40,41)

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

ORDER

All citations herein and the proposed civil penalties therefor are AFFIRMED.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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29 APR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 80-121
	:	A.O. No. 46-04581-03020
v.	:	Beckley No. 2 Mine
RANGER FUEL CORPORATION, Respondent	:	

ORDER OF DISMISSAL

On February 12, 1980, I issued a Denial of Motions for Summary Decision, Denial of Motion for Stay, and Prehearing Order. I denied the parties' motion for summary decision on the ground that there was a genuine dispute between the parties as to the type of inspection which was involved in this case. The question presented is the entitlement of a certain miner to "walkaround compensation" under Section 103(f) of the Federal Mine Safety and Health Act of 1977 (the Act).

In a response to my Prehearing Order filed on April 3, 1980, Petitioner resolved this dispute stating, "The parties have agreed that the inspection involved was an accident investigation inspection, that it was not a 103(i) inspection and that it was not part of a regular quarterly inspection."

Petitioner then argued that the inspection in this case is "factually and legally distinguishable" from the types of inspections involved in Secretary of Labor, Mine Safety and Health Administration (MSHA) v. The Helen Mining Company, Docket No. PITT 79-11-P, 1 FMSHRC Decs. 1796 (1979), appeal docketed, No. 79-2537 (D.C. Cir., Dec. 21, 1979) and Kentland-Elkhorn Coal Corporation v. Secretary of Labor, Mine Safety and Health Administration (MSHA), Docket No. PIKE 78-399, 1 FMSHRC Decs. 1833 (1979), appeal docketed, No. 79-2536 (D.C. Cir., Dec. 21, 1979)

I do not agree. In Helen Mining, the Commission held that Section 103(f) does not require operators to pay a miners' representative for the time he spends accompanying a mine inspector during a "spot" inspection required by Section 103(i) of the Act. In Kentland-Elkhorn, the Commission made a similar holding with respect to time spent accompanying a mine inspector during a special electrical inspection. In both cases, the Commission relied upon a statement made by Congressman Perkins during Congress' consideration of what was to become the Act. Congressman Perkins stated in part that, "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 to be made by MSHA personnel at least four times a year in the case of underground mines, and two times per year in the

case of surface mines. The inspections in Helen Mining and Kentland-Elkhorn did not fall into this category, and accordingly the Commission denied walkaround compensation. While an accident investigation inspection has apparently not been specifically ruled on by the Commission in a walkaround case, I believe that Congressman Perkins' statement, upon which the Commission relied, mandates denial of compensation in this situation as well.

Finally, although Helen Mining and Kentland-Elkhorn have been appealed to the United States Court of Appeals for the District of Columaia Circuit, I do not believe this case should be held in abeyance while the court cases are pending. See: my comments in the February 12 Order in this case.

ORDER

This case is DISMISSED without prejudice.

Edwin S. Bernstein
Administrative Law Judge

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29 APR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
Petitioner	:	Docket No. KENT 80-124
v.	:	Assessment Control No. 15-05120-03022 H
PEABODY COAL COMPANY,	:	Ken No. 4 North Mine
Respondent	:	

DECISION

Appearances: Joseph M. Walsh, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Thomas R. Gallagher, Esq., St. Louis, Missouri, for Respondent;
Joyce A. Hanula, Attorney, Washington, D.C., for United Mine Workers of America. 1/

Before: Administrative Law Judge Steffey

In my decision issued October 29, 1979, in Peabody Coal Company v. Secretary of Labor (MSHA) and UMWA, Docket No. KENT 79-107-R, I stated that I would decide the civil penalty issues raised by Withdrawal Order No. 795972, which was under review in that docket, when and if MSHA thereafter filed a Petition for Assessment of Civil Penalty seeking assessment of a civil penalty for the violation of 30 C.F.R. § 75.200 alleged by Order No. 795972 as modified on June 1, 1979 (Exhs. 1 and 11). 2/

Counsel for MSHA filed a Petition for Assessment of Civil Penalty in Docket No. KENT 80-124 on January 31, 1980, and the existence of that Petition was called to my attention on February 15, 1980, by a letter to me from MSHA's counsel. On February 11, 1980, respondent's counsel filed an answer

1/ The names of counsel listed above were those who represented the parties at the hearing held with respect to the application for review which had been filed in Docket No. KENT 79-107-R.
2/ All references in this decision to transcript pages and exhibit Nos. are to the record in Docket No. KENT 79-107-R. It was stipulated at the hearing that respondent is subject to the Federal Mine Safety and Health Act of 1977 (Tr. 6-7).

to the Petition in Docket No. KENT 80-124. The answer notes that evidence concerning the civil penalty issues raised by the Petition filed in Docket No. KENT 80-124 was received at the hearing held in Docket No. KENT 79-107-R.

Issues

The issues raised by the Petition filed in Docket No. KENT 80-124 are whether a violation of section 75.200 occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

Occurrence of Violation

Findings of Fact

1. Order No. 795972 alleged that a violation of section 30 C.F.R. § 75.202 had occurred, but the order was modified on June 15, 1979, to allege a violation of 30 C.F.R. § 75.200. The modification order (Exh. 11) states that the conditions described in Order No. 795972 constituted a violation of section 75.200 because there was inadequately supported roof in respondent's mine and because respondent had violated its roof-control plan (Exh. A).

2. Section 75.200 requires that the roof in each coal mine shall be adequately supported and also requires each operator to submit a suitable roof-control plan whose provisions will assure that a safe roof is maintained in each operator's coal mine.

3. Respondent violated section 75.200 because inadequately supported roof, as hereinafter described, existed in the No. 1 Unit ID 004 and respondent's top managerial staff had declined to take action to provide supplemental support, as required by respondent's roof-control plan, even though the dangerous roof conditions had been reported to managerial personnel by several operators of roof-bolting machines prior to issuance of Order No. 795972 (Tr. 34; 88; 106; 149-150; 168; 428-429).

The above findings support my conclusion that a violation of section 75.200 occurred. The six criteria will be evaluated below for the purpose of assessing a penalty.

Size of Respondent's Business

The parties stipulated that respondent is a large operator (Tr. 7). I find, therefore, that the penalty should be in an upper range of magnitude insofar as it is determined under the criterion of the size of respondent's business.

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

It was also stipulated that payment of penalties will not cause respondent to discontinue in business (Tr. 7-9).

History of Previous Violations

The computer printout submitted by MSHA's counsel shows that respondent violated section 75.200 at its Ken No. 4 North Mine on two occasions in 1977, six occasions in 1978, and one occasion in 1979 by February 15, 1979 (Exh. 10). I would have liked to see the trend of violations over a longer period than was shown by Exhibit 10, but I consider that nine violations of section 75.200 in a period of a little over 2 years show an adverse history of previous violations. Consequently, the penalty hereinafter assessed will be increased by $150 under the criterion of history of previous violations.

Respondent's Effort To Achieve Rapid Compliance

It was the inspector's opinion that the hazardous roof conditions he found could have been abated by the installation of crossbars and timbers in all areas in which he found separations in the roof strata to exist (Tr. 109). Respondent's management declined to install supplemental roof support in the No. 1 Unit because all of the top managerial personnel inspected the No. 1 Unit on the day after Order No. 795972 was issued and concluded that no imminent danger existed (Tr. 195). It was the position of mine management that if they had ordered the installation of supplemental roof support, they would have been conceding that hazardous conditions existed (Tr. 222; 255). Therefore, all miners were withdrawn from the area covered by the withdrawal order and all further effort to extract coal in that area was abandoned (Tr. 255-257).

Since all miners were withdrawn from the area covered by Order No. 795972 and the miners were never required to go back into that area to work, respondent's failure to install supplemental support did not expose the miners to any danger after the order was written. Respondent's decision to contest the validity of Order No. 795972 caused a delay in production which made it uneconomical to return to that area after the results of contesting the order became known. Respondent claims that its failure to produce the coal in the area cited by the order caused respondent to lose 22,280.5 tons of coal at a loss in income of $103,379 (Tr. 332; 341).

The order required that respondent withdraw miners from the hazardous area described in the order. Such orders do not provide a time within which alleged violations must be corrected. An operator has the option of abandoning the area or of making it safe for reentry. If the operator abandons the dangerous area, as was done in this instance, the order is terminated on the basis of abandonment.

In such circumstances, I find that the criterion of respondent's good faith effort to achieve rapid compliance is not applicable and that the penalty to be assessed should neither be increased nor decreased under the criterion of whether respondent demonstrated good faith effort to achieve rapid compliance.

Gravity of the Violation

The violation was very serious as is shown by the findings of fact set forth below:

1. When the inspector arrived in the No. 1 Unit of the Ken No. 4 North Mine on May 21, 1979, the day Order No. 795972 was issued, all of the men stopped at the dinner hole for a while except for Mr. Brock, the unit foreman, who made an inspection of the face area. The inspector and his companion, Mr. Inman, a roof bolter, began examining conditions in the unit by walking up the No. 4 entry toward the face. When they reached the second crosscut outby the face, the inspector noticed a broken place in the mine roof near the outby rib and water was coming through the roof in steady drops. The broken place extended the entire length of the crosscut between the Nos. 4 and 5 entries. The crack was about an inch or less in width, but it extended along the bottom of a V-shaped ridge which projected downward from the roof for a distance of about 3 inches. The legs of the V-shaped ridge were about 10 or 12 inches apart at the roof, or point of origin (Tr. 20-24; 56; 93). The inspector considered water dripping from the roof at the site of the cracked roof to be a further sign of a weakened roof because water displaces material comprising roof strata and creates voids in the roof (Tr. 39).

2. The inspector believed that the V-shaped broken place in the roof of the crosscut constituted an imminent danger which he defined as a condition which might cause injury or death before it could be corrected (Tr. 31; 57; 107). The inspector thereafter orally issued an imminent-danger order under section 107(a) of the Federal Mine Safety and Health Act of 1977 and advised Mr. Brock, the unit foreman, that he would determine the extent of the area covered by his order as soon as he could complete his examination of the unit (Tr. 23-24; 108).

3. The inspector then found another V-shaped crack in the roof of the second crosscut from the face between the Nos. 5 and 6 entries and still other cracks in the same crosscut between the Nos. 6 and 7 entries (Tr. 31; Exh. 2). The inspector could not divorce the cracks in the roof from the separations he had heard described by the miners before he began his underground examination (Tr. 32). Mr. Brock granted the inspector's request that the operator of the roof-bolting machine be permitted to drill test holes to determine whether separations still existed in the roof strata of the No. 1 Unit (Tr. 24-25). The inspector had the operator of the roof-bolting machine to drill about 35 test holes. The inspector concluded that actual separations in the roof strata existed because, when the test holes were made, the drill on the roof-bolting machine would suddenly jump about 2 inches after the drill had penetrated the roof for a distance of from 36 to 38 inches (Tr. 25-26; 74; 90-91). Resin-grouted roof bolts were being used and the inspector believed that the roof bolts were pushing the resin into the separations which existed near the ends of the bolts. The passage of the resin into the separations was seriously eroding the effectiveness of the resin bolts by preventing the resin from hardening along the full length of the bolts so as to pin the roof strata together and provide a secure beam (Tr. 73; 76; 85-86; 98; 105).

4. The inspector ultimately determined that the left side of the No. 1 Unit was the place where the roof was unsafe and Order No. 795972 delineated the territory covered, namely, an area extending 175 feet outby the face in No. 7 entry, an area extending 130 feet outby the face in the No. 6 entry, an area extending 110 feet outby the face in the No. 5 entry, an area extending 80 feet outby the face in the No. 4 entry, and an area in the No. 3 entry at the second open crosscut (Tr. 141-142; Exh. 1).

5. The inspector stated that Mr. Shemwell, the roof bolter who drilled the test holes, drilled the holes while exerting a steady pressure on the upthrust lever and the inspector said that he would have detected it if Mr. Shemwell had tried to manipulate the lever so as to fabricate the appearance of jumping. The inspector firmly believed that authentic jumping was occurring and that the jumping was caused by actual separations in the roof strata (Tr. 61-64). The inspector also stated that hitting extremely hard rocks with the drill stem would have slowed the drill stem and that the speed of the drill would have been restored to normal after the drill had passed through such rocks, but the inspector said that operators of roof-bolting machines are familiar with variations in types of roof strata and would not interpret reactions of the machine when rocks are encountered to be separations in roof strata (Tr. 62-64; 68-69; 81).

Negligence Associated with Violation

A determination as to whether respondent was negligent in violating section 75.200 involves consideration of several findings which are set forth below:

1. About a week before imminent-danger Order No. 795972 was issued, Mr. Inman, a roof bolter, told Mr. Brock, the unit foreman, about the jumping of the drill on the roof-bolting machine (Tr. 357), but Mr. Brock did not think the roof was bad enough to need extra support--that is, support in addition to the 42-inch resin bolts which were being installed at the time the order was issued (Tr. 34; 149-150). Mr. Brock took his hammer and pulled down some pieces of shale and decided that he would take no further precautions until such time as the roof appeared to become more adverse than it was when Mr. Inman warned him about it (Tr. 162).

2. Mr. Charles Ford, the unit foreman in the No. 1 Unit on the day shift, stated that he had worked the day shift immediately preceding the issuance of the imminent-danger order (Tr. 167). Mr. Ford had also known about the jumps of 1 to 2 inches in the drill for about a week before the imminent-danger order was issued, but he had concluded that the drill was hitting soft places in the roof strata because the jumps occurred to within 10 inches of the working face and he felt that there would have had to have been a visible break in the roof in order for separations to have occurred that close to the face (Tr. 168).

3. Order No. 795972 was orally issued at about 3:30 p.m., on the evening shift of May 21, 1979 (Tr. 59-60). Toward the end of Mr. Ford's day

shift of May 21, 1979, an operator of a roof-bolting machine, Mr. Charles Howard, called Mr. Ford's attention to some bad roof at a breakthrough near the face of the No. 5 entry. Mr. Ford thought that the roof was too hazardous for bolts to be installed until such time as crossbars could first be erected. Since it was then close to the end of Mr. Ford's day shift, Mr. Ford told Mr. Howard that he would report the bad top to the mine manager. Mr. Ford also made an entry in the preshift book stating "All left side of unit--bad top and water" (Tr. 164; 175). When Mr. Ford reported to work on the following day, May 22, 1979, he was surprised to hear that the imminent-danger order had been issued on the evening shift because the mine superintendent, Mr. Clyde Miller, had given instructions for the men to withdraw from the No. 1 Unit and work in some rooms to the left of the No. 1 Unit. Mr. Ford said that he had expected to move back into the No. 1 Unit after the miners had "* * * made it safe to go back in there" (Tr. 171). Mr. Miller's decision to withdraw from the No. 1 Unit had been made after Mr. Ford had reported the jumping of the roof-bolting machine and the existence of bad top in the No. 5 entry. Mr. Ford expected to go back into the No. 1 Unit after about three shifts because Mr. Ford estimated that two shifts could be required to move a pump into the No. 1 Unit and that one shift would be required to install supporting timbers. Mr. Ford would not have objected to reentering the No. 1 Unit to work after the dangerous places had been timbered properly (Tr. 177).

4. Mr. Alton Fulton, the mine manager, worked the day shift on May 21, 1979, and he received the aforementioned call from Mr. Ford about 2:15 p.m. The call had been made by Mr. Ford to advise Mr. Fulton that crossbars were needed at two crosscuts. Mr. Fulton advised Mr. Ford that he would check into the matter and discuss the problem with Mr. Brock, the unit foreman on the evening shift, before Mr. Brock began working on his shift. Mr. Fulton made an inspection of the No. 1 Unit. He did not see any cracks and Mr. Fulton did not see any roof-bolting machines in operation although he had been told that jumps were occurring (Tr. 190-191).

5. Mr. Fulton had gone home on May 21, 1979, before it was reported to him by telephone that the imminent-danger order had been issued. Mr. Fulton called Mr. Conrad Bowen, the assistant mine superintendent, and Mr. Ford and Mr. Bowen went to the mine and tried to convince the inspector, without making any examination of the conditions then existing in the No. 1 Unit, that the roof in the No. 1 Unit was not bad enough to warrant the issuance of an imminent-danger order, but the inspector adhered to his original position that the top constituted an imminent danger (Tr. 193-194). On May 22, 1979, Mr. Fulton, Mr. Bowen, Mr. Miller, and Mr. French, the mine safety director, went into the No. 1 Unit and made an inspection (Tr. 195). All of them concluded that the roof was safe. Mr. Fulton said he would work under the roof if he were a union employee (Tr. 202). Mr. Miller said he would spend his vacation under the roof (Tr. 247).

6. Mr. Miller tried to get the supervisor of the inspector who wrote the imminent-danger order to make a personal examination of the roof in the No. 1 Unit, but the supervisor declined to do so, explaining that he did not

want to become involved in the controversy (Tr. 252). Mr. Miller said that MSHA could force them to do almost anything, but in this instance he was in a position to make a test of MSHA's actions. Therefore, he decided that he would not take any steps to abate the order because he believed that any work he might do to abate the conditions alleged in the inspector's order would be interpreted as a concession by respondent that an imminent-danger actually existed (Tr. 222; 255).

7. Mr. Guy McDowell, respondent's roof-control specialist, presented testimony and several exhibits which show that he has considerable expertise in designing resin-anchoring systems for both roof bolts and trusses (Tr. 271-283). After the imminent-danger order had been issued, management requested Mr. McDowell to examine the roof in the No. 1 Unit. Mr. McDowell saw no signs of roof failure during his examination which was made by testing the roof with the sound and vibration method and by observation (Tr. 284-285). Mr. McDowell also checked 100 of the 2,800 roof bolts in the area covered by the order and found that 50 bolts had resin on them at the bottom plate. Mr. McDowell concluded that the resin roof bolts were anchoring satisfactorily (Tr. 300-302).

8. Mr. McDowell made no checks of the roof in the No. 1 Unit by any method which was not also used by the operators of the roof-bolting machines and by the inspector, that is, he checked the roof by the sound and vibration method and by observation just as the inspector and operators of the roof-bolting machines did. Mr. McDowell stated that if there really were separations in the roof at or near the extreme end of the 42-inch bolts, the resin would go into the separations and not produce a proper bond for supporting the roof. He also said that one of the signs of roof failure would be cracks in the roof. Moreover, he agreed that if the V-shaped cracks described by the inspector really existed, such cracks would be a preliminary sign of roof failure even when resin bolts are used (Tr. 321; 324).

9. Mr. Inman, the roof bolter who accompanied the inspector on May 21, 1979, was afraid to work under the roof in the No. 1 Unit as it existed just prior to issuance of the imminent-danger order (Tr. 358). Mr. Inman said that resin will exude at the bottom or heads of resin bolts when no jumps or separations occur near the tops of the bolt holes, but the last night that Mr. Inman bolted before the imminent-danger order was issued, the drill stem was jumping in seven out of eight holes drilled and resin was coming out at the bottom of only one or two bolts out of eight (Tr. 376-378). Mr. Inman did not cause the jumps by deliberately manipulating the roof-bolting machine to produce that sort of manifestation and Mr. Inman did not believe that it would be possible for anyone to operate a roof-bolting machine so as to create an artificial appearance of jumping (Tr. 366-367). Mr. Inman did not think the jumps could have been caused by the drill stem's encountering alternate soft and hard places in the roof strata (Tr. 379-380).

10. Mr. Shemwell, who operated the roof-bolting machine for drilling test holes for the inspector, agreed with Mr. Inman's and the inspector's description of the jumps occurring when holes were drilled. Mr. Shemwell

was still at the dinner hole on May 21, 1979, when he heard someone say that one of the working places had been designated as an imminent danger by the inspector (Tr. 388-389). Mr. Shemwell believed that the roof in the No. 1 Unit was definitely bad and he would have been afraid to have continued working in the unit without installation of support in addition to the resin bolts they were installing at the time the imminent-danger order was issued (Tr. 390). Mr. Shemwell said that every operator of a roof-bolting machine has experienced hitting hard rocks and soft places in the roof strata and knows the difference between the slowing down of the drill and the speeding up of the drill at such times, as compared with the jumps which occur when the drill hits separations between the strata as was occurring in the No. 1 Unit prior to the issuance of the imminent-danger order (Tr. 394-395). Mr. Shemwell agreed with Mr. Inman that it was very dangerous to work in the No. 1 Unit and he said he would have joined with any other miners who might have been willing to decline to work under the roof (Tr. 396).

11. Management had used conventional bolts in the No. 1 Unit up to May 15, 1979, but management had changed to use of resin bolts because water had been encountered and tests showed that torque was being lost on the bolts after they had been installed (Tr. 266). Mr. Shemwell did not think the resin bolts were performing their intended function with respect to water leaking through the roof because he could install resin bolts and thereafter find water dripping off the bottom of them when he came by the same bolts again during the next mining cycle. In Mr. Shemwell's opinion, if the resin bolts had been anchoring as was intended, water would not have been running off the bolt heads (Tr. 401).

12. Mr. Charles W. Howard, among other things, operated the roof-bolting machine and he had shortly before the imminent-danger order was issued declined to install resin bolts in the No. 5 entry because he considered the roof unsafe. He reported the unsafe roof to Mr. Ford, the unit foreman, and Mr. Ford reported the hazardous condition to the mine manager (Tr. 407). Mr. Howard agreed with the other operators of roof-bolting machines that the drills cannot be made to jump by manipulating the upthrust lever to create such an impression (Tr. 418).

13. Mr. Jerry D. Fulton has been a coal miner for about 11 years and has been an operator of a roof-bolting machine for approximately 10 years (Tr. 424). He agreed with the other operators of roof-bolting machines that the roof was in fair to good condition in the Nos. 1, 2, and 3 entries, but he believed that the roof in the Nos. 4, 5, 6, and 7 entries was in poor condition, as cited in the inspector's order, because the drilling stem would jump in those entries. He had previously had to back up his roof-bolting machine in the No. 7 entry and install longer roof bolts when the conventional bolts then being used lost their torque (Tr. 425). Thereafter, management converted to using resin bolts (Tr. 426). Mr. Fulton tested the roof by using sound and vibration and observation and the roof appeared to be fair in the Nos. 1, 2, and 3 entries and substandard in the Nos. 4, 5, 6, and 7 entries. Mr. Fulton said that on previous occasions when the operators of the roof-bolting machines believed that they had encountered adverse

conditions which warranted use of roof support in addition to roof bolts, management had provided the extra support, but for some reason, when the roof bolters encountered the jumps and the miners observed cracks in the roof in the No. 1 Unit shortly before the imminent-danger order was issued, management refused to provide the extra support the miners thought was needed (Tr. 428-429).

The findings above support a conclusion that a high degree of negligence was associated with the violation of section 75.200 cited in Order No. 795972. If respondent's management had been given no preliminary reports concerning hazardous roof conditions in the No. 1 Unit prior to the writing of the imminent-danger order, I would have concluded that little, if any, negligence was associated with the violation because the facts show that respondent was using a 42-inch resin bolt which is superior to conventional bolts. Respondent had adopted the use of the 42-inch resin bolt for the purpose of overcoming problems associated with separations in the roof and with water coming through the roof.

As the above findings show, however, respondent's management had made a superficial response to complaints from the roof bolters about the jumping of the drill stem and the miners' concern about separations in the roof strata. Mr. Jerry Ford, for example, testified that when separations had previously occurred, management had been responsive and had provided supplemental support in addition to roof bolts, but when the roof bolters reported the separations prior to issuance of the imminent-danger order, management declined to provide extra support.

The inspector was put on the defensive at the hearing by respondent's counsel who wanted to know why the inspector did not use a borescope to enable him to determine for certain whether separations in the roof actually existed (Tr. 51-53). Respondent's management had available among its employees an expert in designing and experimenting with resin bolts and trusses. Respondent's management could have asked its roof-control expert to check the roof with a borescope when the roof bolters complained about the separations. If the jumps in the drill stems of the roof-bolting machines had been proven by the borescope to be mere soft strata in the roof, the miners would have been reassured and management would have had a basis for its belief that no separations in the roof strata were actually occurring as claimed by the miners.

Management's inspection of the roof before and the day after issuance of the imminet-danger order consisted of nothing more than personal observations of the roof. Top management did not even watch the roof bolters install roof bolts. Their conclusions, therefore, that no separations existed were not based on a thorough investigation of the dangerous conditions about which their miners and some unit foremen were complaining. Management's efforts to convince the inspector that no imminent danger existed were first made without engaging in any kind of preliminary examination of the conditions which actually existed at the time the inspector's order was written. The inspector was able to justify the issuance of his

order on the basis of information gained by observing the drilling of 35 test holes. Those holes were accompanied by jumps in the drill stem and by no resin appearing around the bolt heads to provide evidence that the resin was hardening along the full length of the bolts rather than being lost into the cavities formed by the separated strata. Management's decision to contest the order was made without ever watching any roof-bolting machines in operation and without ever using the borescope which they apparently believed would have removed all doubt about whether the roof strata had actually separated.

Management's failure to determine for certain whether separations were occurring left management with no solid reason for declining to have supplemental supports installed when the hazardous roof conditions were reported. Since management did not make an updated personal inspection of the conditions which existed at the time the imminent-danger order was issued, management had no basis for trying to persuade the inspector to retract his imminent-danger order. If the inspector had been less suspectible to pressure from mine officials, he might have been persuaded to vacate the order and the miners might have been killed when they continued to produce coal without having the protection which would have been provided by the erection of the crossbars which the inspector and the miners believed were needed in the absence of any concrete proof that the roof bolters were mistaken about the separations which they believed existed in the roof strata.

Assessment of Penalty

In view of the fact that the violation was very serious, that a large operator is involved, and that there was a high degree of negligence, a penalty of $8,000 would have been assessed. As indicated above, however, the penalty will be increased by $150 to $8,150 under the criterion of respondent's history of previous violations.

WHEREFORE, it is ordered:

Respondent, within 30 days from the date of this decision, shall pay a civil penalty of $8,150.00 for the violation of section 75.200 cited in Order No. 795972 dated May 21, 1979.

Richard C. Steffey

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

29 APR 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. BARB 79-190-P
	:	A/O No. 40-02280-03003F
v.	:	
	:	B.S.K. No. 1 Surface Mine
B.S.K. MINING COMPANY, INC., Respondent	:	

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Gary N. Fritts, Esq., Dayton, Tennessee, for Respondent.

Before: Judge Cook

I. Procedural History

On December 29, 1978, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty in the above-captioned proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) (1977 Mine Act). The petition alleges two violations of provisions of the Code of Federal Regulations as set forth in two notices of violation issued pursuant to section 104(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970) (1969 Coal Act). The Petitioner's certificate of service was filed on January 5, 1979, alleging that a copy of the petition had been mailed to B.S.K. Mining Company, Inc. (Respondent) on January 4, 1979.

On February 28, 1979, the Petitioner filed a motion for an order to show cause as to why the Respondent should not be deemed to have waived its right to a hearing and to contest the proposed penalty and why the proposed order of assessment should not be entered as the final order of the Federal Mine Safety and Health Review Commission (Commission). As grounds therefor the Petitioner stated that the Respondent had failed to file a timely answer to the petition. The requested order to show cause was issued on March 9, 1979, requiring the Respondent to respond within 15 days.

On March 15, 1979, the Respondent filed an answer to the motion for an order to show cause as well as a proposed answer to the petition. In addition, the Respondent filed an affidavit alleging that it had not received a

copy of the petition. A written communication was filed by the Respondent on April 30, 1979, stating that as of April 26, 1979, copies of the documents had been mailed to counsel for the Petitioner.

The Respondent's answer was received for filing by an order dated May 10, 1979. In addition, the order noted that the Petitioner had not filed a certified mail receipt establishing the Respondent's receipt of the petition. The Petitioner was ordered to serve a copy of the petition on the Respondent and to file proof of service in the form of a certified mail receipt, but only in the event that the Petitioner was unable to file a certified mail receipt showing actual service of the December 29, 1978, petition.

On May 14, 1979, the Petitioner filed a written communication stating that counsel for the Respondent had been provided with a copy of the petition and copies of all attachments thereto.

A notice of hearing was issued on August 24, 1979, scheduling the case for hearing on the merits on November 27, 1979, in Chattanooga, Tennessee. The hearing was held as scheduled with representatives of both parties present and participating.

A schedule for the submission of posthearing briefs was agreed upon following the presentation of the evidence. The Respondent filed its posthearing brief on March 13, 1980. The Petitioner did not file any posthearing briefs.

Additionally, Exhibit No. 0-5 was set aside during the hearing for the posthearing filing of a certified copy of the Respondent's 1978 Federal tax return. The Petitioner was accorded time in which to file any objections to the receipt of such exhibit into evidence. On April 11, 1980, the Respondent filed a copy of its 1978 Federal tax return. The Petitioner filed no objections thereto. Accordingly, the tax return, denominated Exhibit 0-5, was received in evidence by an order dated April 29, 1980.

II. Violations Charged

Notice No.	Date	30 C.F.R. Standard
7-6 (1 LRA)	November 2, 1977	77.1700
8-1 (1 LRA)	February 22, 1978	77.404(a)

III. Witnesses and Exhibits

A. Witnesses

Both Petitioner and Respondent called Robert McCann, president of B.S.K. Mining Company, Inc., as a witness. Additionally, the Petitioner called MSHA inspectors Lee Aslinger and Lawrence Spurlock as witnesses.

B. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

M-1 is a computer printout compiled by the Office of Assessments listing the history of previous violations for which the Respondent had paid assessments beginning November 2, 1975, and ending November 2, 1977.

M-2 is a copy of Notice No. 7-6 (1 LRA), November 2, 1977, 30 C.F.R. § 77.1700.

M-3 is a copy of the termination of M-2.

M-4 is a copy of the inspector's statement pertaining to M-2.

M-5 is a copy of Notice No. 8-1 (1 LRA), February 22, 1978, 30 C.F.R. § 77.1606(c).

M-6 is a copy of the termination of M-5.

M-7 is a copy of the inspector's statement pertaining to M-5.

M-8 is a copy of a subsequent action form modifying M-5 to allege a violation of 30 C.F.R. § 77.404(a) instead of 30 C.F.R. § 77.1606(c).

2. The Respondent introduced the following exhibits in evidence:

O-1 is a copy of a document prepared by the Alabama Department of Revenue, Motor Vehicle and License Division.

O-2 is a copy of a document styled "Employer's Quarterly Contribution Report, Tennessee Department of Employment Security."

O-3 is a copy of safety rules in effect on October 30, 1977, to be observed by the Respondent's employees.

O-4 is a copy of a document styled "BSK Mining Co., Inc., Statement of Financial Position."

O-5 is a copy of the Respondent's 1978 Federal tax return.

3. J-1 is a drawing prepared by Robert McCann during the hearing.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the 1969 Coal Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of

previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

On November 27, 1979, the parties filed the following stipulations:

> The parties, by and through their respective counsel, for the sole purpose of this proceeding, hereby agree to the following stipulations:
>
> I
>
> The Secretary of Labor (Secretary), in the civil penalty proceeding docketed above, filed a Petition for the Assessment of Civil Penalty pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 820(a), hereinafter referred to as the Act, and in accordance with the Interim Procedural Rules of the Federal Mine Safety and Health Review Commission published in Title 29, CFR 2700.24 against respondent for alleged violations of the Act and the regulations issued thereunder (30 CFR Part 77).
>
> II
>
> On March 7, 1979, respondent, B.S.K. Mining Co., Inc., filed its answer to the Secretary's Petition pursuant to Interim Procedural Rules of the Federal Mine Safety and Health Review Commission published in Title 29 CFR 2700.25.
>
> III
>
> Respondent, B.S.K. Mining Co., Inc., is, and at all times hereinafter mentioned was, engaged in the operation of a mine known as the B.S.K. No. 1 Surface Mine located at Pikeville, Bledsoe County, Tennessee.
>
> IV
>
> Respondent, B.S.K. Mining Co., Inc., B.S.K. No. 1 Surface Mine is, and at all times hereinafter mentioned was, subject to the provisions of both the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801, et seq. and

the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801, et seq. and the regulations issued under them (30 CFR Part 77).

V

During the period November 2, 1977 through February 22, 1978, respondent's B.S.K. No. 1 Surface Mine was inspected by Inspectors Lee R. Aslinger and Lawrence Spurlock, authorized representatives of the Secretary, pursuant to section 813(a) of the Federal Coal Mine Health and Safety Act, 30 U.S.C. 813(a).

B. Respondent's Liability for Violations of Mandatory Safety Standards

On Sunday, October 30, 1977, 17-year-old Jody Lynch sustained a fatal injury at the B.S.K. No. 1 Surface Mine. Federal mine inspectors conducting the ensuing fatal accident investigation believed that the victim was the Respondent's employee (Tr. 35, 48). However, the evidence presented by the Respondent establishes that the victim was never its employee (Tr. 116-117). The initial question presented is whether the Respondent can be properly charged with violations of the mandatory safety standards in connection with Mr. Lynch's death. For the reasons set forth below, I answer this question in the affirmative.

The relationship among three separate business entities, as set forth in the testimony of Mr. Robert McCann, president of B.S.K. Mining Company, Inc., must be considered in resolving the liability issue.

The Respondent held written, recorded leases to the mine property (Tr. 154-155). Both the permit and Mine Safety and Health Administration mine identification number were issued in its name (Tr. 72-75). Howton Coal Company (Howton) mined coal at the subject mine under an oral agreement with the Respondent (Tr. 119, 124-125). Mr. McCann described the terms of this oral agreement as "quite loose" (Tr. 165). Under the agreement as structured, it would not have been feasible to separate Howton out for a separate permit (Tr. 173). Howton was not at liberty to sell the coal it mined to the customer of its choice. Once mined, the coal became the Respondent's to sell (Tr. 164-165). In fact, "ownership" of the coal passed to the Respondent when it was loaded aboard the trucks in the pit area, trucks belonging to unidentified independent trucking companies engaged by the Respondent (Tr. 166-167). Howton was paid whatever the Respondent received for the coal, less the cost of handling, tippling, and "the royalties that were paid for the certain tax." Thus, payments to Howton varied as the markets varied (Tr. 170).

Howton supplied its own mining equipment (Tr. 124-125, 165). The Respondent had no control over the determination as to when Howton started or stopped work, over how much coal Howton produced per day, or over any of Howton's equipment operators. Additionally, the Respondent had no right to direct Howton's employees in the performance of their tasks (Tr. 140).

According to Mr. McCann, Howton was "in essence" more responsible for the overall operation of the pit than was the Respondent. He further testified that the Respondent assumed responsibility for marketing and office work (Tr. 167). However, it is significant to note that the Respondent also mined on the property (Tr. 116) and that the oral agreement did not designate a specific area in which Howton was to work (Tr. 163-164). The best available evidence indicates that coal mined by the two companies was stockpiled separately, but in the same general area (Tr. 159).

According to Mr. McCann, Samuel Lynch, Sr., the victim's father, was an outside contractor hired by Howton to perform maintenance work on Howton's equipment (Tr. 117, 125, 168-169). Mr. McCann further testified that to the best of his knowledge the victim worked for Samuel Lynch, Sr. (Tr. 117). In view of the circumstances surrounding the accident, as set forth below, I find that the victim was in his father's employ on October 30, 1977 (See also, Tr. 58-59). No contractual or employment relationship existed between the Mssrs. Lynch and the Respondent (Tr. 117-118). 1/

The foregoing considerations compel the conclusion that Howton's status at the subject mine was that of an independent contractor engaged in the extraction of coal, and that Samuel Lynch, Sr. was an independent contractor performing maintenance work for Howton. The alleged violations arose from activities performed at the B.S.K. No. 1 Surface Mine in the course of the equipment maintenance activities of Samuel Lynch, Sr.

In Republic Steel Corporation, 1 FMSHRC 5, 1979 OSHD par. 23,455 (1979), the Commission held that a mine owner can be held responsible for violations of the 1969 Coal Act created by independent contractors performing work on mine property even though none of the mine owner's employees were exposed to the violative conditions and even though the mine owner could not have prevented the violations. Accordingly, it is found that the Respondent was properly charged with the alleged violations.

1/ The possibility remains that Jody Lynch was a regular employee of Howton. The inspector's possessed information indicating that he had been a drill operator at the mine for approximately 2 months (Tr. 15). The existence of an employer-employee relationship between Howton and Jody Lynch would resolve much of the conflict in the testimony as to his regular employment status. Inferences drawn from Inspector Spurlock's testimony would support such a conclusion since at one point the inspector indicated that Jody Lynch came to the mine to see his father and that his father asked whether he could help perform some maintenance while he was there (Tr. 58-59). The tone of this conversation implies that Jody Lynch visited the mine for a purpose other than equipment maintenance but was persuaded to assist his father. However, it remains clear that at the time of death Jody Lynch was engaged in his father's equipment maintenance activities.

C. Occurrence of Violations

MSHA inspectors Lawrence Spurlock and Lee Aslinger participated in an investigation at the B.S.K. No. 1 Surface Mine which began on November 1, 1977 (Tr. 12, 46). The record reveals that Mr. Pete Patterson, an employee of Howton (Tr. 118), was the primary source of their information as relates to the facts surrounding the death of Mr. Jody Lynch. The three individuals present at the mine on the day of the fatality did not testify at the hearing. The findings of fact set forth in the following paragraphs are based largely upon both the out-of-court statements given to the inspectors during the investigation and the testimony of Mr. Robert McCann.

1. Notice No. 7-6 (1 LRA), November 2, 1977, 30 C.F.R. § 77.1700

Notice No. 7-6 (1 LRA), November 2, 1977, 30 C.F.R. § 77.1700 (Exh. M-2), alleges in pertinent part that the decedent "was assigned or being allowed to work in an area where hazardous conditions existed and he could not be seen, heard or communicated to in this area." The cited mandatory safety standard provides as follows: "No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard or can be seen."

Jody Lynch arrived at the mine at approximately 10 a.m., October 30, 1977, and helped his father perform some maintenance (Tr. 48, 58-59). The evidence in the record reveals that Jody Lynch was allowed to work alone in the pit area of the B.S.K. No. 1 Surface Mine on the afternoon of October 30, 1977 (Tr. 19, 24, 50). He left the maintenance area in his own pickup truck at approximately 12:45 p.m. in order to change the air filters and oil on one of Howton's D8 bulldozers located in the pit (Tr. 20, 48-49, 117). Three other individuals were present on the mine site, all of whom were working in the maintenance area (Tr. 28, 48-49). 2/ Mr. Lynch's body was found in the pit area at approximately 1:50 p.m. pinned between the underside of the pickup truck and the ground (Tr. 22, 42, 49). The vehicle was approximately one-half mile from the maintenance area and was parked on a 10-percent grade (Tr. 13, 24, 50-51).

Mr. Patterson was of the opinion that Mr. Lynch had positioned the truck on the incline in such a manner so as to permit him to crawl underneath it for some purpose. Mr. Patterson believed that the truck apparently rolled back, pulled him out of an offset and pinned him between the truck and the ground (Tr. 42, 50-52).

2/ The three individuals were identified as Pete Patterson, an employee of Howton; Burl Wise, a truck driver; and Samuel Lynch, Sr. (Tr. 28, 47-48, 118).

According to Inspector Spurlock, the three men in the maintenance area could not have heard Mr. Lynch due to the distance involved, the approximate 50-foot height of the highwall and the fact that "you had to go down a plateau and down a bluff into the pit area" (Tr. 50-51). The testimony of Inspector Aslinger reveals that mounds of dirt would have prevented the men in the maintenance area from seeing Mr. Lynch (Tr. 25).

Based on the foregoing, it is found that Jody Lynch was allowed to work alone in the pit area of the B.S.K. No. 1 Surface Mine. 3/ It is further found that he could not communicate with others, could not be heard or could not be seen by the three other men at the mine while working alone in the pit area.

The remaining question is whether the Petitioner has proved that the pit was an area where hazardous conditions existed within the meaning of the mandatory safety standard. For the reasons set forth below, I answer this question in the negative.

The Administrative Procedure Act provides that "[a] sanction may not be imposed * * * except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d). The inspectors' testimony precludes a finding that a hazardous condition has been established by reliable and substantial evidence. Inspector Aslinger initially testified that hazardous conditions were involved throughout the pit area as far as incline of roadways and highwalls (Tr. 13), but contradicted himself on cross-examination by stating that the truck was the only hazardous condition (Tr. 37). During recross-examination, Inspector Spurlock attempted to show that all surface coal mines are inherently hazardous and that the B.S.K. No. 1 Surface Mine was as hazardous as any other surface mine, as set forth in the following testimony:

3/ Mr. McCann testified that the fatality occurred on the approach to the topsoil storage area. He described the pit area as several hundred feet south of this location (Tr. 120-121, 125). However, Mr. McCann was not present at the mine on the day of the accident (Tr. 150) and the source of his information was not revealed. Inspector Aslinger, however, testified that Mr. Patterson and a former truck driver pointed out where the victim was found (Tr. 16-17). Additionally, the inspector testified that he had observed indications that oil had been changed in the immediate area where Mr. Lynch's body had been found (Tr. 23). The inspectors' account as to where the accident occurred is deemed the most probative of the two accounts since the record reveals that their information was provided by a man who was at the mine on the day of the fatality and that corroborating evidence was found in the pit area.

Q. There wasn't any type of hazardous conditions which had been existing like coal, dust, or gas, or anything like that?

A. Mr. Fritts, I don't know what you are referring to, but in a coal mine -- In a coal mine, anything can happen. You can slip off a piece of equipment getting down. We have accidents happen like that; or such as a truck run over. Coming into the pit area, there was a steeping incline coming down into the bottom of the pit off the wall. He could have lost control of his vehicle there. He could have. There are many ways you can get injured in a coal mine.

(Tr. 59). However, when pressed, he too took the position that Jody Lynch's pickup truck was the sole hazardous condition existing on October 30, 1977 (Tr. 59-60).

In summary, Inspector Aslinger appears to refer to specific hazards existing in the pit area as relate to roadways and highwalls at one point in his testimony, yet both inspectors affirmatively state that the pickup truck was the sole hazard. As set forth in Part V(C)(2), infra, the Petitioner has failed to prove the existence of the alleged defect as relates to the truck at the time of the accident. Therefore, it cannot be found that either the truck or the pit area presented a hazardous condition within the meaning of 30 C.F.R. § 77.1700 when the accident occurred.

Additionally, I cannot accept the proposition that the pit was an area where hazardous conditions existed within the meaning of the regulation merely because it was a pit area. All surface mines present certain common dangers, yet the wording of the regulation is such that its mandate applies only when conditions outside the norm are present. The regulation is designed to assure that an individual working in an area where hazardous conditions exist that would endanger his safety is within sight or hailing distance of others who can render or summon assistance when necessary.

In view of the foregoing, I find that the Petitioner has failed to prove the violation alleged in Notice No. 7-6 (1 LRA), November 2, 1977, 30 C.F.R. § 77.1700.

2. Notice No. 8-1 (1 LRA), February 22, 1978, 30 C.F.R. § 77.404(a)

The subject notice states as follows:

The victim's vehicle, a green Chevrolet truck, license number Ala. PP0228, was being used as a haulage pit truck for transportation of lubrication and supplies on the 001 working section, whereby the transmission linkage, an equipment defect affecting safety, had not been corrected before the truck was put into use.

(Exh. M-5, Tr. 77). 4/

Mandatory safety standard 30 C.F.R. § 77.404(a) provides as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

The collective testimony of Inspectors Aslinger and Spurlock asserts that Mr. Patterson told them that he had seen Jody Lynch crawl under the pickup truck on numerous prior occasions to release or unhang the transmission levers (Tr. 15, 49). According to Inspector Spurlock, Mr. Patterson indicated that the problem was associated with having changed from a column shift to a floor shift (Tr. 107). The inspector testified that Mr. Patterson indicated that the transmission levers on the shift column would "hang up," and that Jody Lynch would have to go underneath the truck to release them before he could move the vehicle (Tr. 108-109). The inspector further testified that Mr. Patterson stated that on the day of the accident Jody Lynch had apparently experienced a problem with the transmission levers, had crawled under the truck to disengage them, and that when he disengaged the levers the truck rolled over him and smothered him (Tr. 51-52, 110).

The truck was removed from the mine site subsequent to the accident but prior to the investigation (Tr. 37-38, 52, 55, 81). 5/ The inspectors went to a nearby home where the truck was allegedly parked (Tr. 37-38, 55, 104). Inspector Aslinger did not examine the truck (Tr. 37-38), and the evidence reveals that Inspector Spurlock performed only a cursory examination consisting merely of shifting gears with the engine off (Tr. 55). He testified that the gears "worked pretty stiff, but that still does not mean it was not

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4/ The truck mentioned in the notice is a 1964 green Chevrolet pickup truck, Alabama license number PP0228 (Tr. 20, 77). The Respondent read the "0" in the license number set forth in the notice as a "V" and obtained a document from the Alabama Department of Revenue, Motor Vehicle and License Division, showing that Alabama license number PPV228 identified a blue 1967 Ford pickup owned by one W. S. Cooper (Exh. O-1). Therefore, it cannot be found that Exhibits M-5 and O-1 refer to the same vehicle.

5/ It appears that disturbance of the accident site was a principal reason for the Petitioner's inability to produce reliable, probative and substantial evidence establishing the occurrence of the alleged violations. The Respondent should have been charged with a violation of section 103(e) of the 1969 Coal Act which provides, in part, that "[i]n the event of any accident occurring in a coal mine, the operator shall notify the Secretary [of Interior] thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof." No information has been presented to the undersigned indicating whether such charge was brought and, if so, disposed of prior to the Respondent's request for an evidentiary hearing.

jammed" (Tr. 55, 106), and that he found no distinguishing, unsafe conditions (Tr. 104). 6/

I am unable to conclude that the Petitioner has proved the occurrence of the alleged violation by reliable, probative and substantial evidence. Three factors weigh heavily in this determination. First, the theory propounded by the hearsay declarants as to how the accident occurred was not corroborated by a thorough MSHA examination of the truck designed to determine on the basis of reliable, probative evidence whether the alleged transmission linkage problem existed and whether it was responsible for Mr. Lynch's death.

Second, it cannot be stated with certainty that the truck examined by Inspector Spurlock was the truck involved in the fatality. There is no indication that individuals capable of positively identifying the truck accompanied the inspectors to the nearby home, and both inspectors indicated that the dwelling's residents were not at home when the examination was performed (Tr. 38,55). The inspectors never spoke to the decedent's father, an individual who certainly possessed the necessary information (Tr. 38, 105). Furthermore, the testimony of Inspector Aslinger heightens the level of uncertainty. He testified as follows during cross-examination:

> Q. Now, this truck, did you examine it?
>
> A. No, sir.
>
> Q. You didn't examine it?
>
> A. The truck had been removed from the mine property immediately after the fatality, and we had learned where it was parked, and we went to see the truck at a neighboring home nearby.
>
> Q. Was the truck there?
>
> A. I think it was.
>
> Q. Okay. Did you examine the truck there?
>
> A. No, I did not myself.
>
> Q. Was anyone with you that did examine the truck?
>
> A. The investigating team did.

(Tr. 37-38) (emphasis added).

6/ It should also be noted that the inspector appeared to contradict himself while describing the test performed. At one point, he testified that he tried to engage the transmission levers and that "[t]hey weren't rough." (Tr. 55). However, he subsequently indicated that the gears felt rough when he shifted them (Tr. 106).

The foregoing passage confirms that an examination was performed on a truck, but the emphasized portion betrays some uncertainty on the inspector's part as to whether the truck actually examined was the one involved in the fatality.

The testimony of Inspector Spurlock indirectly confirms Inspector Aslinger's testimony on this point. It is significant to note that Inspector Spurlock did not affirmatively state that the victim's family actually resided in the dwelling. Instead, he testified that he "went to the place where they was supposed to live" (Tr. 55) (emphasis added).

Third, the inspector opined that the transmission locked when the victim stopped and turned off the engine (Tr. 112). He further testified that "when one of the levers lock up, they split gears, they lock up the whole works," and that the vehicle cannot be moved (Tr. 113). However, the testimony indicates that the victim carefully selected the site on which the truck was parked, a site where the terrain permitted him sufficient space to crawl under the truck (Tr. 42, 111-112). This testimony cannot be characterized as reliable, probative and substantial evidence establishing the violation as charged since it is inconsistent. On the one hand it points to careful selection of a site to correct an existing problem or perform some other undisclosed maintenance or inspection, and on the other hand indicates that the levers malfunctioned the instant the engine stopped. The two accounts contain an unresolvable inconsistency.

It could be argued that the levers malfunctioned every time the vehicle's engine was turned off. This theory could resolve the inconsistency since the victim would have foreseen the necessity of parking in a location providing sufficient space to permit access to the underside of the truck. However, the record contains no evidence of this. The hearsay declarant's statement points to "numerous occasions," but the record contains no indication as to how the hearsay declarant defined the term. (See, e.g., Tr. 17-109.)

In summary, there is no reliable, probative, and substantial evidence as to the actual condition of Jody Lynch's truck on the day of the accident. Accordingly, I conclude that the Petitioner has failed to prove the violation alleged in Notice No. 8-1 (1 LRA), February 22, 1978, 30 C.F.R. § 77.404(a).

VI. Conclusions of Law

1. B.S.K. Mining Company, Inc., and its No. 1 Surface Mine have been subject to the provisions of the 1969 Coal Act and the 1977 Mine Act at all times relevant to this proceeding.

2. Under the Acts, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. MSHA inspectors Lee Aslinger and Lawrence Spurlock were duly authorized representatives of the Secretary of Interior between November 1, 1977, and February 22, 1978.

4. The Petitioner has failed to prove the violations charged in Notice No. 7-6 (1 LRA), November 2, 1977, 30 C.F.R. § 77.1700, and Notice No. 8-1 (1 LRA), February 22, 1978, 30 C.F.R. § 77.404(a).

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

VII. Proposed Findings of Fact and Conclusions of Law

The Respondent submitted a posthearing brief. Such brief, insofar as it can be considered to have contained proposed findings and conclusions, has been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

IT IS ORDERED that Notice No. 7-6 (1 LRA), November 2, 1977, 30 C.F.R. § 77.1700 and Notice No. 8-1 (1 LRA), February 22, 1978, 30 C.F.R. § 77.404(a) be, and hereby are, VACATED.

IT IS FURTHER ORDERED that the petition for assessment of civil penalty be, and hereby is, DISMISSED.

John F. Cook
Administrative Law Judge

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Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

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29 APR 1980

HELVETIA COAL COMPANY, Applicant	:	Application for Review
	:	Docket No. PENN 79-165-R
v.	:	
	:	Lucerne No. 6 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
and	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PENN 80-68
	:	A.C. Control No. 36-00917-03036
v.	:	Lucerne No. 6 Mine
HELVETIA COAL COMPANY, Respondent	:	

DECISION

Appearances: Jay W. Freedman, Esq., Freedman, Levy, Kroll, & Simonds, Washington, D.C., for Helvetia Coal Company; Robert Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Secretary of Labor.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a consolidated proceeding involving an application for review and a civil penalty proceeding. The application for review was filed by Helvetia Coal Company (hereinafter "Helvetia") under section 107(e) of the Federal Mine

Safety and Health Act of 1977, 30 U.S.C. § 817(e), to modify an order of withdrawal due to imminent danger issued by a federal mine inspector employed by the Mine Safety and Health Administration (hereinafter "MSHA") pursuant to section 107(a) of the Act. The civil penalty proceeding was filed by MSHA under section 110(a) of the Act, 30 U.S.C. § 820(a), to assess a penalty against Helvetia for violation of a mandatory safety standard. The parties filed prehearing statements and the case was heard in Pittsburgh, Pennsylvania, on March 11 and 12, 1980. The following witnesses testified on behalf of MSHA: Roy C. Craver, inspector; George E. Tersine, inspector; and Robert Nelson, inspection supervisor. The following witnesses testified on behalf of Helvetia: Robert Anderson, manager of mines; Ronald Evanick, section foreman; Jerome Strong, mine foreman; and Edward Onuscheck, assistant to the president and safety director.

This matter involves the discovery of methane concentrations in excess of five percent at the Lucerne No. 6 Mine in September 1979. Thereafter, MSHA issued the following: (1) an order of withdrawal of the entire mine due to imminent danger; and (2) a citation for failure to immediately notify MSHA of the occurrence of an accident. Helvetia contends as follows: (1) although an imminent danger existed, the order of withdrawal should be modified to close only one section of the mine rather than the entire mine; and (2) Helvetia was not required to report an accident because there was no unplanned inundation of a mine by a gas. Helvetia requested a modification of the withdrawal order and a vacation of the citation. MSHA requested that the withdrawal order be affirmed as issued and that a civil penalty be assessed for the violation of the Act.

ISSUES

The first general issue is whether the order of withdrawal due to imminent danger was properly issued. The specific issue is whether the order of withdrawal should be modified to cover only the one section rather than the entire mine.

The second general issue is whether Helvetia violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

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

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Section 3(j) of the Act, 30 U.S.C. § 802(j), states: "'imminent danger' means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

30 C.F.R. § 50.10 provides in pertinent part as follows: "If an accident occurs, an operator shall immediately contact the MSHA district or subdistrict office having jurisdiction over its mine * * *."

30 C.F.R. § 50.2 defines an "accident," inter alia, to be "an unplanned inundation of a mine by a liquid or gas * * *."

Section 110(i) of the Act, 30 U.S.C. § 820(i), provides in pertinent part as follows:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

STIPULATIONS

1. Lucerne No. 6 Mine is subject to the jurisdiction of the Mine Safety and Health Act of 1977.

2. Lucerne No. 6 Mine is a gassy mine liberating in excess of one million cubic feet of methane within a 24-hour period.

3. Lucerne No. 6 Mine is a large mine employing approximately 460 miners working on 13 working sections rotating on a three-shift basis.

4. Lucerne No. 6 Mine is a part of Helvetia Coal Company, which is a subisidary of R & P Coal Company.

5. The inspectors who represent the Secretary in this case were at all pertinent times to this proceeding duly authorized representatives of the Secretary of Labor.

6. The operator has a previous history of 448 paid violations issued against Lucerne No. 6 Mine within the previous 24-month period to September 7, 1979. There is no previous history of violation of section 50.10.

7. The operator does not contest the validity of the issuance of the imminent danger order but is primarily concerned with the extent of the order.

8. Any penalty assessed in this proceeding would not affect the operator's ability to remain in business.

9. With regard to the alleged violation of 30 C.F.R. § 50.10, the violation was abated by the operator in good faith.

SUMMARY OF THE EVIDENCE

Undisputed Evidence

The Lucerne No. 6 Mine was classified as a gassy mine with a prior history of excessive methane concentrations and methane ignitions. The section involved in this incident, 1 Butt 4 Right, had been mined by retreat mining. At approximately 12:30 p.m. on September 5, 1979, the day-shift foreman of this section was making his weekly inspection of the return airway. He called the mine superintendent, William Tanner, and reported that he had found methane in the return airway in concentrations of five percent or greater. No other section used this return airway. When the 4:01 shift came on duty that day, this information was reported to section foreman Ronald Evanick. Thereafter, Mr. Evanick took his crew of six or seven men up to the working face where he found only .1 to .2 percent methane. The crew went to work and Mr. Evanick went to the air return to check for methane. He reported that the methane in the air return "pegged my spotter." The reading was taken 12 inches from the roof and indicated that there was more than 9.9 percent methane in that area. Thereupon, Mr. Evanick returned to his section and consulted with other members of mine management. At approximately 6:30 to 7 p.m. on September 5, 1979, management decided to cut off all power to the affected section and

to stop all mining. Thereafter, the members of the crew remained in the area to correct problems with the ventilation system. The working face in this section was approximately 500 feet from the place where the high concentration of methane was found.

On the morning of September 6, 1979, a regular MSHA inspector of this mine, George E. Tersine, was on the mine property to conduct an inspection. No one from management reported to him that high concentrations of methane had been found on the previous day. He went about his regular inspection in another section of the mine. At about the same time, Robert Anderson, manager of mines, was informed that methane in excess of five percent had been found in the return airway on the prior day. Manager Anderson, Superintendent Tanner, and Mine Foreman Jerome Strong went into the section to investigate. They found methane in excess of five percent. They decided to rearrange the stoppings and tighten the canvas and checks in order to bleed off the excessive methane. They reaffirmed the prior decision to de-energize the section and discontinue mining operations.

While Inspector Tersine was conducting his regular inspection of the Lucerne No. 6 Mine, a miner approached him at the dinner hole and advised him that Helvetia had voluntarily closed one section of the mine because of methane problems. At approximately 1:30 p.m., Inspector Tersine encountered Manager Anderson and Superintendent Tanner. When the inspector inquired about the methane problem, he was advised by Superintendent Tanner that approximately 1.8 percent methane had been found in the return airway of the affected section and that this section was closed and the power was cut off. Inspector Tersine asked why this had not been reported to MSHA and

Helvetia stated that it had no duty to report this incident. Mr. Anderson conceded that the operator did not have a copy of Part 50 of the applicable regulations in its mine office. After this exchange, Inspector Tersine returned to the MSHA office. He did not go into the affected section at any time on September 6, 1979.

Upon returning to the MSHA office, Inspector Tersine mentioned the methane problem at this mine to Robert Nelson, his supervisor. Supervisor Nelson then ordered Inspector McClure to investigate this matter during the 4:01 p.m. shift on September 6. According to Helvetia's witnesses, Inspector McClure went into the affected section and took methane readings. It was alleged that he obtained methane readings in excess of five percent, but left the mine without issuing any orders or citations. In any event, Inspector McClure did not testify in this case.

At approximately 11:30 p.m. on September 6, 1979, Supervising Inspector Nelson entered the mine to conduct his own inspection. No one from Helvetia advised him that methane in excess of five percent had been found. In fact, the company advised him that it had obtained low readings in this area. Supervisor Nelson took several readings in various places but did not detect methane in excess of 1.3 percent. Based upon the information that was available to him at the time, Supervisor Nelson concluded that he did not have enough evidence at that time to issue a withdrawal order. While he was conducting his inspection, Supervisor Nelson noted that the power to the section was cut off and no mining was being performed. Miners were hand-carrying blocks for stoppings.

On the morning of September 7, 1979, Supervisor Nelson assigned Inspector Roy C. Craver and regular Inspector George E. Tersine to the mine in question to conduct a further inspection. At approximately 8:15 a.m., Inspectors Craver and Tersine went underground. Inspector Craver admitted that he may have said that he would issue a closure order for the entire mine if he found methane in excess of 1.5 percent. After arriving in the affected section, four check points were established for methane sampling. At each check point, the inspectors took methane readings on their methanometers and obtained bottle samples which were later analyzed in the MSHA laboratory. At check point No. 1, the methanometers indicated 1.2 to 1.3 percent methane. A bottle sample was subsequently analyzed as showing 1.13 percent methane. The inspectors then advanced inby and established check point No. 2. The methanometers indicated 1.1 to 1.3 percent methane. A bottle sample was subsequently analyzed as showing 1.2 percent methane. The inspectors again advanced inby and established check point No. 3. The methanometers indicated methane at 2.8 percent and a bottle sample was subsequently analyzed at 2.83 percent. At this point, Inspector Craver advised management that they were over 1.5 percent methane and were subject to a closure order. He did not write any closure order at this time but rather advanced inby to establish check point No. 4 to determine the extent and concentration of the methane. At check point No. 4, the methanometer indicated 4.0 percent methane and a bottle sample was subsequently analyzed at 6.25 percent methane. Although no additional check points were established, Inspector Craver testified that he took additional methane readings which established methane concentrations in the range of 5 to 10 percent. Inspector Craver believed that the methane was coming from a caved-in section of the gob area.

Based upon finding the foregoing methane concentrations, Inspector Craver determined that a section 107(a) order should be issued closing the entire mine due to imminent danger. He thereupon left the section and returned to the surface. He called Supervisor Nelson and informed him of the methane readings and his decision to issue the order of withdrawal. At 1:15 p.m. on September 7, 1979, the order of withdrawal was issued closing the entire mine. Thereupon, 161 miners were removed. On September 9, 1979, Inspector Tersine terminated the withdrawal order during the day shift. The termination was based upon the fact that methane had been reduced below one percent in the entire affected area.

On September 12, 1979, Inspector Tersine issued a citation under section 104(a) for violation of 30 C.F.R. § 50.10 for Helvetia's failure to notify MSHA of an accident. This citation was based upon the fact that Helvetia never reported an accident to MSHA and did not mention the methane problem until after interrogation by Inspector Tersine.

It is undisputed that methane concentrations between five and 15 percent are explosive. It is agreed that no one from MSHA had any disagreement with the methods used by Helvetia to abate this condition.

Other Evidence

Roy C. Craver has been an MSHA inspector for nine years. He testified that based upon his experience and findings on September 7, 1979, the methane problem in the affected section presented an imminent danger to miners working in the mine and required the closure of the entire mine. His reasons were as follows: (1) there was no way to determine the extent

of the area which would be affected in the event of an explosion and the threat of an explosion affected the entire mine; (2) it was impossible to determine the amount of methane present in the mine; (3) continued mining in other sections would have liberated more methane; (4) if the sand rock roof collapsed, it could cause a spark which could ignite the methane; (5) all three elements necessary for an explosion were present: oxygen, fuel, and a possible ignition source; and (6) the mine had a history of an ignition during the preceding month and five ignitions in the previous 8 years. Inspector Craver testified that he was primarily concerned about an ignition and the safety of miners. He stated that he would not necessarily close an entire mine if 1.5 percent methane were found in an advancing section. However, in this case he found methane in excess of five percent in a retreat section. While he did not know precisely where the other working sections were located in the mine, he testified that if the No. 1 fan had a problem, eight working sections would be affected. At the time he issued the order, no one from Helvetia complained to him that the order was too broad or that it should be limited to the one section.

George E. Tersine has been an MSHA inspector for 4 years. He was a regular inspector of this mine. He testified that Superintendent Tanner advised him that there was a feeder resulting from a fall in the affected area. Since there was no report of a methane accumulation in the prior weekly report, he assumed that this was a sudden inundation of methane. Although Helvetia never advised him of the existence of the methane problem, he did not believe that it was trying to hide the problem from him.

Robert Nelson has been an inspection supervisor since 1971. He has been a mine inspector since 1962. He reported that on March 11, 1977, Helvetia experienced a cave-in at this mine resulting in an inundation of methane. At that time, Helvetia immediately reported this accident to MESA (MSHA's predecessor). In September 1979, all of the top management of the mine were new to this mine within the previous year. Supervisor Nelson did not think that mine management had experience in liberating large quantities of methane. He stated that if the methane exploded, it would endanger a large area of the mine. He further testified that the order of withdrawal for the entire mine was proper under the circumstances. He stated that while the methane was being diluted and removed from the mine it could cause an explosion at a fan or bathhouse. At the time the order of withdrawal was written, Helvetia had no plan to remove the methane and had not decided where to build stoppings. It was necessary to issue an order of withdrawal for the entire mine because of the necessity to move large quantities of methane. Control of a large area of the mine was necessary in order to liberate this amount of methane.

Supervisor Nelson did not recall any conversation with Helvetia management wherein they expressed the opinion that only one section of the mine should be closed. He also testified that he would not necessarily close an entire mine if methane in excess of 1.5 percent was found. With regard to Inspector McClure's alleged detection of methane in excess of five percent, Supervisor Nelson testified that he was informed that Inspector McClure obtained such a reading at a cave by the roof rather than at a place where methane readings should be taken by law. Supervisor Nelson stated his

opinion that an inundation of gas was a sudden inrush or a slow build up that covered an area.

Robert Anderson has been the manager of mines for Helvetia for one year. He testified that he did not know if anyone from Helvetia informed Inspector Tersine of the levels of methane found by the operator. Prior to the issuance of the order of withdrawal, Helvetia was rearranging stoppings and tightening canvas and checks. Four stoppings had been built during the day shift on September 6. The return air flow was changed. Manager Anderson assumed that the accumulation of methane was due to falls that knocked out canvas and disturbed the ventilation system. He never ascertained the cause of the accumulation of methane.

Manager Anderson testified that he was unable to determine the exact area of methane concentration because of the existence of falls. Nevertheless, he expressed his opinion that the entire mine should not have been closed, because even if there was an explosion, it would only affect one section, and the possibility of ignition was remote. He conceded that he had no experience or expertise in the area of mine explosions.

Manager Anderson admitted that on September 6, 1979, he did not have Part 50 of the MSHA regulations concerning a duty to report accidents. He thought he was only required to report inundations of water rather than inundations of gas as well as water. On the morning of September 7, 1979, he was informed by Superintendent Tanner that Inspector Craver had said that he would close the entire mine if he found over 1.5 percent methane because the inspector "had orders." Manager Anderson knew that the

inspector would find more than 1.5 percent methane because the sampling by Helvetia reported higher concentrations. Helvetia took more readings of methane than are reported on its Exhibit O-1.

Jerome Strong, mine foreman, testified that he was the general assistant mine foreman in March 1977 and he was involved in the removal of methane from the mine at that time. In the early afternoon of September 5, 1979, Section Foreman, Richard Barkley, called him and reported finding methane of "five percent or better." Mine Foreman Strong conceded that no one told Inspector Tersine, who was on the premises on September 5 and 6, 1979, what had been found regarding methane.

Edward Onuscheck is the assistant to the president and safety director of R & P Coal Company, Helvetia's parent company. He was on vacation at the time of this incident. He returned to work on September 8, 1979. He testified that he conducted an investigation which resulted in verbal reports being submitted to him. His investigation indicated that at a point a couple of hundred feet inby check point No. 4, retreat mining had disturbed ventilation and a combination of feeders, cave-ins, and ventilation problems resulted in the excessive accumulation of methane. He further concluded that there had been a gradual build up of methane but no inundation. He distinguished the March 1977 methane incident at this mine as being a massive chain reaction of falls which required that the entire mine be de-energized. He also distinguished the March 1977 incident because at that time, the extent of the affected area could not be identified, whereas in the present case, the area was defined. However, he agreed that as late as September 8, 1979, a finding of 4.1 percent methane was made at the

right regulator after the methane had been diluted. He also conceded that if there were an explosion in the mine, he would feel safer if all men were outside the mine. He defined "inundation" as a flooding or outburst. Hence, he did not believe that the incident in question was an inundation of methane. He also noted that section 50.10 of the regulations became effective in January 1978, wherein the definition of "accident" was expanded to include inundations of gas as well as inundations of liquid.

Documentary Evidence

Helvetia submitted reports of methane readings taken at various points in the mine from September 5 through 9, 1979. However, none of the reports for September 5, 1979, showed the percentage of methane found. On September 6, 1979, 9.7 percent methane was found at check point No. 3 at 2:35 p.m. The various readings for September 6 show three readings of five percent methane or more. On September 7, 9.9 percent methane was found at check point No. 3 at 9:35 a.m. Even as late as September 8, 4.1 percent methane was found at the right regulator which was approximately 1 mile from the points where methane in excess of five percent was previously found (Exh. O-1).

The Mine Examiner's Report of Daily Inspections submitted by Helvetia showed several alterations under the subject of explosive gases. For example, on September 5, the word "none" appears under the column of "Explosive Gases" but is crossed out and the following appears: "excessive amount of CH_4 found in right return" (Exh. O-3).

Helvetia submitted a copy of the definition of the term "inundation" from the Dictionary of Mining, Mineral, and Related Terms, Bureau of Mines, which is as follows: "An inrush of water on a large scale which floods

the entire mine or a large section of the workings" (Exh. O-4). Helvetia also submitted a definition of the term "inundate" from Webster's New Collegiate Dictionary which is as follows: "1: to cover with a flood: overflow. 2: overwhelm" (Exh. O-5).

MSHA submitted a computer printout of the prior violations at the mine in question for the previous 2 years. In that period of time, 448 violations were assessed for a total amount of $60,626. There were no prior violations of 30 C.F.R. § 50.10. (Exh. G-4).

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of counsel have been considered. The evidence shows that in the early afternoon of September 5, 1979, Richard Berkely, a section foreman, found methane in excess of five percent in the return airway of the 1 Butt 4 Right Section of the Lucerne No. 6 Mine. Several hours later, the power was cut off and normal mining operations were voluntarily discontinued in this section by Helvetia. No one informed MSHA of this condition until a miner mentioned the methane problem to MSHA Inspector George Tersine approximately 24 hours after the discovery of the excessive methane. When Inspector Tersine inquired of Helvetia management about the methane problem, he was advised that 1.8 percent methane had been found in the return airway and that the power had been cut off and normal mining operations discontinued. Inspector Tersine did not go into the affected area to conduct an inspection. He returned to the MSHA office and subsequently informed his supervisor, Robert Nelson. Three MSHA inspectors went into the affected section on the evening of September 6 and early morning of September 7. No orders were issued. At 8:15 a.m. on September 7, 1979, Inspector Roy Craver went

underground to conduct an inspection. He found concentrations of methane in excess of five percent at several places in the affected section. He advised Helvetia management that he would issue an imminent danger withdrawal order based upon his findings. He returned to the surface and discussed his findings and proposed course of action with Supervisor Robert Nelson. At 1:15 p.m. on September 7, 1979, Inspector Craver issued an imminent danger withdrawal order for the entire mine. At the time of the issuance of the imminent withdrawal order, 161 miners were removed. The order was terminated on September 9. On September 12, 1979, Inspector Tersine issued a citation to Helvetia for violation of 30 C.F.R. § 50.10, failure to report an accident to MSHA.

MSHA contends that the withdrawal order due to imminent danger pursuant to section 107 of the Act was properly issued and that the entire mine should have been closed because of the imminent danger. MSHA further contends that a civil penalty in the amount of $60 should be assessed against Helvetia for failure to report an accident. Helvetia concedes that an imminent danger existed in the affected section of its mine but contends that the withdrawal order should be modified to permit the rest of the mine to remain open because no imminent danger existed in other sections. Helvetia further contends that there was no inundation of its mine by gas and, hence, it had no duty to report an accident to MSHA.

Withdrawal Order due to Imminent Danger

Since Helvetia concedes that there was an imminent danger which warranted the issuance of a withdrawal order in the affected section, its evidence concerning the remoteness of a possible ignition of the methane

is of no moment. The sole issue is whether the order of withdrawal should be modified to limit it to the affected section rather than to the entire mine. In this regard, Helvetia is the party proposing a modification of the order and, hence, has the burden of proof to establish such a modification. See 5 U.S.C.A. § 1006(c) and Environmental Defense Fund v. Environmental Protection Agency, 548 F.2d 998 (D.C. Cir. 1977).

Helvetia's evidence fails to show that the imminent danger was confined to one section of the mine. Although Robert Anderson and Edward Onuscheck, Helvetia management employees, expressed their opinions that the order was too broad, they failed to support such opinions with facts or expertise in the area of mine explosions. Edward Onuscheck conceded that in the event of an explosion in the mine, he would feel safer if all miners were outside the mine. Moreover, since the area containing methane could not be specifically identified, it was impossible to estimate the extent of a potential explosion. Hence, the opinions of Robert Anderson and Edward Onuscheck concerning the area of the mine which would be affected by an explosion are entitled to little weight.

However, MSHA presented credible evidence that the entire mine would be affected by an explosion and that the safety of the miners required the protection of a withdrawal order encompassing the entire mine. Inspector Craver and Supervisor Nelson presented credible testimony concerning the reasons for closing the entire mine.

The preponderance of the evidence establishes that the withdrawal order of the entire mine was properly issued and should not be modified. The application for review is DISMISSED.

Civil Penalty Proceeding

A mine operator is required to "immediately contact the MSHA District or Subdistrict Office having jurisdiction of its mine" if an accident occurs. 30 C.F.R. § 50.10. An "accident" is defined, inter alia, as "an unplanned inundation of a mine by a liquid or gas." 30 C.F.R. § 50.2. MSHA contends that a civil penalty should be assessed because Helvetia failed to notify it of the accident in question. Helvetia contends that it did not violate the Act because there was no "inundation" of the mine and, hence, no duty to report this occurrence to MSHA.

Resolution of the civil penalty case depends upon whether there was an "inundation" by methane. The parties cite no prior cases construing this term.

As noted, supra, the term "inundation" is defined in the Dictionary of Mining, Mineral, and Related Terms as "an inrush of water on a large scale which floods the entire mine or a large section of the workings." Webster's New Collegiate Dictionary defines "inundate" as "1. to cover with a flood: Overflow. 2. Overwhelm." Webster's New International Dictionary, 2d Ed., Unabridged (1955) defines inundation as follows:

> 1. Process or act of inundating, or state of being inundated; an overflow; a flood; a rising and spreading of water over low grounds.
>
> 2. An overspreading of any kind; an overflowing or superfluous abundance; as, an inundation of tourists.

Clearly, the purpose of the regulation in question is to afford MSHA the opportunity to make its own assessment of the "inundation" in order to accomplish the goal of protecting the safety of miners. Although Helvetia

never voluntarily informed MSHA of the methane problem in this case, MSHA's actions in the 24 hours after it had notice of the condition present a sorry example of mine safety enforcement. Upon questioning Helvetia management on the afternoon of September 6, 1979, Inspector Tersine was informed that 1.8 percent methane was found in the return airway of the affected section. Helvetia's own evidence shows that over five percent methane had been found prior to that time. None of Helvetia's witnesses contradicted the statement of the inspector that Helvetia reported only 1.8 percent methane. It is noted that Robert Anderson of Helvetia was present at the time Inspector Tersine was informed of the methane reading in question. 30 C.F.R. § 75.308 provides that where the air contains 1.5 percent or more of methane, all miners, except those necessary for abatement, shall be withdrawn and all electric power shall be cut off. Even though Helvetia advised the inspector that miners had been withdrawn and electric power cut off, the inspector did not go into the affected area to determine the actual amount of methane or the extent of the area affected by the hazard. Rather, the inspector returned to his office. While three MSHA inspectors visited the affected section later that same day, no orders were written despite Helvetia's own records which showed methane concentrations of up to 9.7 percent. It was not until September 7, 1979, at 1:15 p.m., 24 hours after MSHA's first notice and 48 hours after Helvetia's discovery of methane in the explosive range, that Inspector Craver issued the order of withdrawal for the entire mine. During the 48 hours after the methane was detected by Helvetia, all of the elements necessary for a mine explosion were present. Fortunately, no such incident occurred.

While MSHA can be criticized in this case for its lack of diligent enforcement of the law enacted to ensure the safety of miners, I find that the principal culprit in this occurrence was Helvetia. On a prior occasion in 1977, it had encountered a large quantity of methane and promptly reported it to MSHA's predecessor. In the instant case, it not only failed to report the incident to MSHA, but when asked about this condition by Inspector Tersine, Helvetia gave incorrect and misleading information to MSHA which minimized the danger. At no time did Helvetia advise MSHA that it found methane in the explosive range. Helvetia's Mine Examiner's Reports beginning on September 5, 1979, have been altered. The original entries showed no findings of explosive gas, whereas the alterations show "excessive amount of CH_4 found in right return."

In any event, the weekly inspection of the right return airway on August 31, 1979, showed no evidence of methane. The inspection on September 5, 1979, revealed methane concentrations in that area between five and ten percent. Neither the extent of the affected area nor the source of the methane was ever specifically identified. However, it is clear that the affected area was over 200 feet from the end of the mine and all reported readings in that area on September 5, 1979, were in excess of five percent methane. The facts of this case establish the following: (1) there was no methane present in the return airway on August 31, 1979; (2) on September 5, 1979, all of Helvetia's methane readings in the affected area were between five and ten percent; and (3) the methane in question covered a large, undefined area of the mine. Therefore, whether the term "inundation" is defined as an inrush of gas which floods an area, a covering of an area with a flood

of gas, or an overspreading of gas, I find that this mine was inundated by methane on September 5, 1979, and that Helvetia was required to report it as an accident to MSHA pursuant to 30 C.F.R. § 50.10.

Section 103(j) of the Act, 30 U.S.C. § 812(j) requires an operator to notify MSHA of any accident occurring in a mine. Section 3(k) of the Act, 30 U.S.C. § 802(k), defines "accident" to include a "mine inundation." Since I find that Helvetia violated section 103(j) of the Act and 30 C.F.R. § 50.10, a civil penalty must be assessed.

In assessing a civil penalty, the six criteria set forth in section 110(i) of the Act, supra, shall be considered. As pertinent here, the operator's prior history of 447 violations in this mine in the previous 2 years is noted. None of those violations was for 30 C.F.R. § 50.10. Helvetia is a large operator and the assessment of a civil penalty will not affect its ability to continue in business.

Helvetia was negligent in failing to report the inundation in question. Helvetia's management did not even have a copy of the regulation in question at its mine office. There is evidence in the record, in the form of alterations in the Mine Examiner's Report of Daily Inspection and misleading statements to Inspector Tersine that only 1.8 percent methane had been found, which would support an inference of gross negligence on the part of Helvetia. However, there is also evidence that Helvetia voluntarily cut off electric power and discontinued normal mining operations in this section and believed that it had no duty to report this occurrence to MSHA because the accumulation of methane did not amount to an "unplanned inundation of a mine by a

* * * gas." Although I have found that these contentions by Helvetia do not preclude a finding of violation of the Act and regulation, they are relevant to the issue of Helvetia's negligence. For these reasons, I find that Helvetia's conduct amounted to a high degree of negligence but less than gross negligence.

The gravity of this violation is extremely serious. MSHA's ability to perform its duty to protect the safety of miners was significantly impaired by Helvetia's failure to notify it of the inundation of the mine by methane. More than 400 miners continued to work in the mine after the discovery of excessive concentrations of methane. Since I have upheld the validity of a withdrawal order for the entire mine, supra, I find that the failure to report the inundation of the mine by methane constituted an extremely serious condition. I reject Inspector Tersine's testimony that this was not a serious violation. The inspector's conclusion that the failure to report an inundation of methane was not serious can only be explained by his refusal to take any action after being informed that 1.8 percent methane had been found and Helvetia had voluntarily cut off electric power and discontinued normal mining in the affected section. There can be no justification for concluding that the failure to report a mine inundation by methane is not serious.

The citation in question shows that it was terminated 15 minutes after it was issued upon a review by management of the procedures to notify MSHA of an accident. The issue of good-faith compliance is of little significance in this case.

At the hearing, the attorney for MSHA requested that a civil penalty of $60 be assessed. Such a statement in light of the evidence of record makes a mockery of the criteria mandated by Congress in section 110(i) of the Act. It is the purpose of those criteria to insure that while the amount of the penalty will not unduly hamper the ability of the operator to stay in business, it will deter future violations of the Act.

I conclude that the evidence established that Helvetia violated section 103(j) of The Act and 30 C.F.R. § 50.10 by failing to report to MSHA an inundation of its mine by methane. Helvetia's conduct amounted to a high degree of negligence. After MSHA finally heard about the problem, Helvetia told the inspector that it had only 1.8 percent methane when its own tests showed methane concentrations between five and ten percent. I further find that the violation was extremely serious because the lives of more than 400 miners were endangered. For these reasons, I reject MSHA's request to impose a civil penalty of $60. Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty of $2,500 should be imposed for the violation found to have occurred.

ORDER

Therefore, it is ORDERED that the application for review is DENIED and the subject withdrawal order is AFFIRMED.

It is FURTHER ORDERED that Respondent pay the sum of $2,500 within 30 days of the date of this decision as a civil penalty for the violation of section 103(j) of the Act and 30 C.F.R. § 50.10.

James A. Laurenson

James A. Laurenson, Judge

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