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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 2, 1980

SECRETARY OF LABOR,	:	Docket Nos. VINC 75-267
MINE SAFETY AND HEALTH	:	75-269
ADMINISTRATION (MSHA),	:	75-270
	:	75-271
v.	:	75-273
	:	
OLD BEN COAL COMPANY	:	IBMA No. 76-21

DECISION

This proceeding arises under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976 & Supp. I 1977)[the 1969 Coal Act]. 1/ It involves the provisions for issuance of orders of withdrawal set forth in section 104(c) of that Act. 2/

1/ On March 9, 1978, this case was pending on appeal before the Secretary of Interior's Board of Mine Operations Appeals. 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).

2/ Section 104(c) of the 1969 Coal Act provided:

> (1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any notice given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation be also caused by an unwarrantable failure of such operator to comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
>
> (2) If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) of this subsection until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) of this subsection shall again be applicable to that mine. [Emphasis added.]

In October 1974, a Mining Enforcement and Safety Administration (MESA) inspector issued five orders of withdrawal to Old Ben Coal Company. The orders stated that they were issued under the authority of section 104(c)(1) of the 1969 Coal Act. Old Ben filed an application for review of the withdrawal orders.

At the hearing, the parties stipulated in substance the following facts:

> 1) On July 9, 1974, MESA issued notice 2-MK to Old Ben under section 104(c)(1) of the 1969 Coal Act.
>
> 2) On October 1, 1974, a section 104(c)(1) order of withdrawal (1-WRM) was issued based on the underlying July 9th notice.
>
> 3) On October 19th and October 21st, four additional section 104(c)(1) withdrawal orders were issued. These withdrawal orders refer to the section 104(c)(1) notice of July 9.
>
> 4) A fifth order of withdrawal described an underlying section 104(c)(1) notice that had been issued on July 11, 1974.

Old Ben argued that the five withdrawal orders issued on October 19 and 21 were issued more than 90 days after the underlying section 104(c)(1) notices and were therefore issued contrary to the provisions of section 104(c)(1) of the 1969 Coal Act. MESA agreed that more than 90 days elapsed between the underlying notices and the issuance of the withdrawal orders in question. However, MESA argued, inter alia, that the passage of 90 days ceased to be determinative after the issuance on October 1, 1974 of the first section 104(c)(1) order; that the orders issued during the October 19 and 21 inspections became section 104(c)(2) orders for which there is no 90-day limit.

A written opinion was rendered by the judge on July 16, 1975. He concluded that the first withdrawal order issued under section 104(c) must be issued within 90 days after the issuance of the underlying notice of violation. Noting the issuance on October 1, 1974 of a section 104(c)(1) order of withdrawal (1-WRM) within 90 days after the issuance of the underlying July 9 and 11 notices, the judge held that the circumstances presented in this case would support the issuance of withdrawal orders under section 104(c)(2) of the 1969 Coal Act. He found no conceptual distinction between section 104(c)(1) and section 104(c)(2) orders of withdrawal, and held that Old Ben, which was charged with knowledge of the intervening October 1 order issued under section 104(c)(1), was not prejudiced by a "clerical" mistake by the MESA

inspector in indicating on the face of the documents that the withdrawal orders in question were issued under section 104(c)(1), rather than under section 104(c)(2). Accordingly, the judge held that each of the orders under review was properly issued under section 104(c) of the 1969 Coal Act. The applications for review of the withdrawal orders were dismissed.

Old Ben appealed the judge's decision to the Board of Mine Operations Appeals. It again argued that because the withdrawal orders were issued more than 90 days after the issuance of the underlying notices, they were not validly issued under section 104(c)(1). 3/

The primary issue before us is whether the judge erred in finding that the withdrawal orders in question were validly issued under section 104(c) of the 1969 Coal Act. We hold that he did not.

Subsection (1) of section 104(c) provided for the issuance of a withdrawal order within 90 days after the issuance of an underlying notice. After an order of withdrawal was issued under subsection (1), subsection (2) provided for additional orders of withdrawal based on violations similar to that which led to the first, without regard to time limitations, and until there had been an inspection of the mine which revealed no such similar violations.

The parties stipulated that the underlying July 1974 notices were the predicate for an order of withdrawal issued under subsection (1) on October 1, 1974 (1-WRM). They also stipulated that the orders in question were subsequently issued based on the same July 1974 notices. Thus, under the scheme set forth in section 104(c), the latter orders of withdrawal were authorized by subsection (2). That they were facially issued under subsection (1) is the crux of the instant dispute.

We hold that the judge had the authority under section 105(b) of the 1969 Coal Act 4/ to modify the withdrawal orders from 104(c)(1) to (c)(2) in his written decision after hearing, and the effect of what he

---

3/ Old Ben also argued that the judge erred in not dismissing the withdrawal order in Docket No. VINC 75-273. It contended that notice 1-HG issued on July 11, 1974, as the underlying notice for that order, had been vacated by another judge in a separate proceeding. We take official notice, however, of the subsequent developments in Docket No. VINC 75-246, the proceeding to which Old Ben refers. The initial decision in that docket was appealed to the Board of Mine Operations Appeals (IBMA 76-5) and it was in turn remanded for further consideration. In June 1977, the judge assigned to that case issued a second decision, in which notice 1-HG was affirmed. (VINC 75-246, et al, June 23, 1977).

4/ Section 105(b) of the 1969 Coal Act provided:

> 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.

did is just that. We note, as the judge did in his written decision, that Old Ben was in no way prejudiced. Old Ben did not claim lack of notice, and it did not otherwise indicate how its defense to a withdrawal order issued under section 104(c)(2) would differ from its defense to an order issued under section 104(c)(1).

For the foregoing reasons, the withdrawal orders in issue are affirmed.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 6, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 79-248-M
v.	:	
ORACLE RIDGE MINING PARTNERS	:	

DECISION

In this civil penalty proceeding, the administrative law judge held that Oracle Ridge Mining Partners violated a mandatory safety standard and assessed a civil penalty of $122. We reverse the judge's decision.

A Mine Safety and Health Administration inspector issued a citation to Oracle Ridge alleging a violation of 30 CFR §57.6-20(c). That regulation requires:

> Magazines shall be: *** Constructed substantially of noncombustible material or covered with fire-resistant material.

The citation provided:

> ... The explosives and detonators magazines were not constructed of substantial material. The magazines were constructed of aluminum sheeting.

The two magazines were constructed of aluminum sheeting 1/16th of an inch thick and the detonator magazine was lined with 3/4-inch plywood. The magazines were located in cutouts in the side of a mountain. The judge held that the "constructed substantially of noncombustible material" provision of the regulation must be interpreted in light of the definition of "substantial construction" in 30 CFR §57.2, i.e., "constructed of such strength, material and workmanship that the object will withstand all reasonable shock, wear, and usage to which it would be subjected." Under his interpretation, the standard effectively requires two duties of operators: to construct magazines to minimize risk of fire, and to construct magazines of sufficient density to

"withstand all reasonable shock, wear and usage." He accepted the inspector's testimony that a rock could fall on top of the magazines, pierce the aluminum, and set off the detonators. He found that because of the potential rock fall hazard, the magazines would not withstand "reasonable shock, wear, and usage" to which they would be subjected. Accordingly, the judge determined that the operator did not comply with the density requirement of the standard, and assessed a civil penalty.

On review Oracle Ridge argues that the judge erroneously construed the standard to require that magazines be built in accordance with the definition of "substantial construction" in 30 CFR §57.2. The operator maintains that the standard was intended only to minimize the risk of fire and that this purpose is not related to the density of magazine construction. We agree.

Section 57.6-20(c) permits alternative methods of compliance: Magazines shall be "constructed substantially of noncombustible material" or "covered with fire-resistant material." This latter method of compliance obviously is directed solely at fire prevention. Because compliance can thus be achieved without regard to density by covering the magazines with fire-resistant material, compliance by the alternative method of having magazines "constructed substantially of noncombustible material" obviously is also satisfied with regard to fire prevention only, and without regard to density.

Accordingly, we hold that 30 CFR 57.6-20(c) requires that magazines be constructed for the most part of noncombustible material or covered with fire-resistant material. We reject the judge's interpretation which imposes a density requirement for compliance with the standard. 1/ The decision of the judge is reversed.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

1/ Our decision is restricted to the conclusion that the purpose of the standard cited, 30 CFR 57.6-20(c), is limited to fire prevention. We do not reach the issue of whether an operator has a duty to build magazines of sizeable bulk to withstand all reasonable shock, wear and usage. Cf., e.g., 30 CFR 57.6-20(d). Scrutinizing and rewriting of this regulation by the Secretary would appear to be appropriate, however, if his intention is to mandate such a duty.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 12, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PIKE 79-125-P
C.C.C.-POMPEY COAL COMPANY, INC.	:	

DECISION

A Mine Safety and Health Administration inspector cited C.C.C.-Pompey Coal Company, Inc. ("Pompey") for an accumulation of combustible materials on the electrical components of a scoop. The citation alleged the accumulation constituted a violation of 30 CFR §75.400. 1/ The Secretary sought a penalty under section 110 of the Act for the alleged violation. The administrative law judge ruled the Secretary had not proved the violation and dismissed his petition for assessment of a civil penalty.

On September 27, 1979, at the conclusion of the evidentiary hearing, the judge issued an oral bench decision in favor of Pompey. The judge found that an accumulation of combustible materials did exist and that Pompey knew or should have known of its existence. He held, however, that the Secretary failed to establish a violation of section 75.400 because the MSHA inspector did not know how long the accumulation had been on the machine and thus could not establish that the operator

1/ Section 75.400 provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

failed to clean it up within a reasonable time. 2/ On January 28, 1980, the judge's bench decision was reduced to writing and was issued in written form by the Commission's Executive Director. For the reasons discussed below, we reverse and remand.

On December 12, 1979, in the interim between the judge's oral and written decisions, we reversed the Board's decision in Old Ben and rejected its reasoning with regard to the elements of proof necessary to establish a violation of section 75.400. Old Ben Coal Co., 1 FMSHRC 1954, 1 BNA MSHC 2241, 1979 CCH OSHD ¶24,084 (1979). 3/ We held that "[t]he language of the standard, its legislative history, and the general purpose of the Act all point to a holding that the standard is violated when an accumulation of combustible materials exists." 1 FMSHRC at 1956. We stated that section 75.400 is "directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated." Id. at 1957. Nevertheless, in his written decision of January 28, 1980, the judge stated that because his bench decision of September 27, 1979, was "final insofar as the parties were concerned", he did not believe that he should amend his bench decision so as to conform to our intervening decision in Old Ben. In the judge's view, the Board's Old Ben decision was the "applicable law" at the time that his bench decision was rendered.

2/ The judge based his holding on a decision by the former Interior Board of Mine Operations Appeals in Old Ben Coal Co., 8 IBMA 98 (1977). In that case, the Board had set out three elements of proof necessary to establish a violation of 30 CFR §75.400. Those elements of proof were: 1) that an accumulation of combustible materials existed; 2) that the operator knew or should have known of the existence of the accumulation; 3) that the operator failed to clean up, or to undertake to clean up, the accumulation within a reasonable time after the accumulation was discovered or should have been discovered by the operator. With respect to this case, because the inspector did not know the length of time that the accumulation existed, the judge concluded that the Secretary did not satisfy the Board's third criterion and, as a result, failed to establish a violation of section 75.400.

3/ The Board's decision in Old Ben Coal Co., 8 IBMA 98 (1977), was before the Commission upon remand from the D.C. Circuit. See Old Ben Coal Co., 1 FMSHRC at 1955.

We hold that a judge's decision is not final insofar as the parties are concerned until it is issued in writing by the Commission's Executive Director. Rule 65, 29 CFR §2700.65. 4/ Thus, the judge's decision in this case was not final until it was issued on January 28, 1980. Because a judge is bound to follow prior Commission precedent, the judge here erred in not applying the principles set forth in our decision in Old Ben Coal Co., 1 FMSHRC 1954 (1979). 5/

Accordingly, the judge's decision is reversed and remanded for further proceedings consistent with this opinion. 6/

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

4/ Rule 65 in part provides:

(a) Form and content of the Judge's decision. The Judge shall make a decision that constitutes his final disposition of the proceedings. The decision shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record, and an order. If a decision is announced orally from the bench, it shall be reduced to writing after the filing of the transcript. An order by a Judge approving a settlement proposal is a decision of a Judge.

(b) Procedure for issuance. The Judge shall transmit to the Executive Director his decision, the record (including the transcript), and as many copies of his decision as there are parties plus seven. The Executive Director shall then promptly issue to each party and each Commissioner a copy of the decision.

(c) Termination of the Judge's jurisdiction; correction of clerical errors. The jurisdiction of the Judge terminates when his decision has been issued by the Executive Director....

5/ We continue to look favorably upon the practice of issuing bench decisions. We hold only that a bench decision is not a final decision of a judge.

6/ On remand, the judge may, if he deems it appropriate, allow the parties to comment upon the effect of our decision in Old Ben Coal Co. on the merits of this case.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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June 12, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. LAKE 80-223-M
v.	:	
J. P. BURROUGHS & SON, INC.,	:	

DECISION

This civil penalty proceeding was initiated on April 17, 1980, when the Secretary of Labor filed a proposal for a penalty with the Commission pursuant to section 110(a) of the Act and Commission Rule 27, 29 CFR §2700.27 (1979). Simultaneously, the Secretary filed a motion to dismiss, with a request that the Secretary's proposed penalties be assessed as a final order of the Commission. The basis for the Secretary's motion was that the operator's notice of contest was not received by the Secretary within 30 days after the operator received the Secretary's initial notification of proposed penalty, as provided by section 105(a) of the Act and Commission Rule 26, 29 CFR §2700.26 (1979). On April 30, the administrative law judge granted the Secretary's motion. On that same day, the operator mailed to the judge its opposition to the Secretary's motion. 1/ The opposition was received on May 2, after the judge issued his final disposition. On June 9, we granted the operator's petition for discretionary review.

Commission Rule 10(b), 29 CFR §2700.10(b) (1979), provides that "[a] statement in opposition to the motion may be filed by any party within 10 days after the date of service." Rule 8(b), 29 CFR §2700.8(b) (1979), provides that "[w]hen 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." The Secretary's motion to dismiss was served on the operator by mail on April 17. Thus, the operator had 15 days, or until May 2, within which to file an opposition to the motion. 2/

1/ In its opposition, the operator challenged the Secretary's position on the timeliness of its notice of contest.

2/ Rule 5(d), 29 CFR §2700.5(d), provides, in pertinent part, that "[f]iling is effective upon receipt, or upon mailing by certified or registered mail, return receipt requested...." In this case, the operator's opposition was sent by certified mail. Thus, it was filed on April 30th, the day it was mailed to the judge.

The judge erred in ruling on the Secretary's motion and issuing his final disposition without waiting for and considering the operator's timely opposition to the motion. Accordingly, the judge's order is vacated and the case is remanded for further proceedings consistent with this decision.

Richard V. Backley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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June 23, 1980

VICTOR McCOY	:	
	:	
v.	:	Docket No. PIKE 77-71
	:	
CRESCENT COAL COMPANY	:	

DECISION

The issue in this case is whether the administrative law judge erred in finding Victor McCoy in default and dismissing his application for review of discharge. We find that he did err, and we therefore reverse the order of dismissal and remand the case for further proceedings.

McCoy initiated this case on May 10, 1977, by filing an application for review of discharge under section 110(b)(2) of the Federal Coal Mine Health and Safety Act of 1969. 1/ McCoy asserted that he was dismissed from employment at Crescent Coal Company because he invoked his rights under the 1969 Coal Act by refusing to ride a belt-line he believed to be unsafe.

On March 27, 1979, the chief administrative law judge ordered Crescent Coal to show cause why it had not answered McCoy's application for review of discharge. Crescent Coal asserted on April 4, 1979, that it had been mistakenly informed that McCoy had withdrawn his application, but could not recall or furnish any evidence substantiating that belief or the source thereof. It then filed an answer.

On May 1, 1979, the administrative law judge assigned to the case found good cause for Crescent Coal's late filing of its answer. He ordered the parties to meet on or before May 15th to discuss a settlement and, if unable to settle, to agree on a time and place for a hearing.

1/ 30 U.S.C. §801 et seq. (1976 & Supp. I 1977).

The parties were instructed to report the results of their discussion to the judge by June 1, 1979. McCoy's counsel informed the judge in a letter dated May 23, 1979, that he was withdrawing from the case. The parties did not meet, and on June 6th the judge issued a notice of hearing. The notice scheduled the hearing for July 16-17, 1979. The notice also contained various prehearing requirements. 2/ The copy of this notice addressed to McCoy was returned to the judge marked "unclaimed" and "addressee unknown." On June 26th the administrative law judge issued an order to McCoy to show cause why he had not complied with the prehearing matters in the June 6th notice of hearing. McCoy received this order and an attached copy of the notice of hearing. On July 9th the judge received a letter from an attorney requesting an extension of time so that McCoy could obtain counsel in order to fulfill the prehearing requirements. 3/ The judge issued an order confirming the hearing and directing McCoy to comply immediately with the prehearing requirements.

McCoy appeared pro se at the hearing. He stated he had been unable to find a lawyer and asked for more time to find one. Crescent Coal's counsel moved for an order finding McCoy in default for failure to comply with the judge's June 26th order. The administrative law judge granted the motion. In his written order of August 8, 1979, the judge stated McCoy was found in default because he "unjustifiably failed to comply with ... the prehearing requirements contained in the Notice of Hearing dated June 6, 1979." The order also noted the judge's personal efforts to locate McCoy and inform him of the hearing and prehearing requirements.

McCoy obtained counsel following the dismissal and, through counsel, filed a petition for discretionary review. Although the petition was untimely because we received it more than 30 days after the issuance of the order of dismissal 4/, we do not deem this to bar review in this case.

2/ Part B required McCoy to furnish an address by June 11, 1979. Part C ordered each party to file by July 3, 1979, a list of witnesses, summaries of their testimony, a list of exhibits, all motions, and a precise statement of the issues.

3/ The letter stated that the attorney was not acting as counsel for McCoy, but merely was attempting to preserve McCoy's rights.

4/ See 30 U.S.C. §823(d)(2)(A)(i) (Supp. II 1978); 29 C.F.R. §2700.70 (1979); 29 C.F.R. §2700.5(d) (1979).

In deciding whether late petitions can be accepted, we look to the purposes behind the enactment of the 30-day time limit within which petitions for discretionary review must be filed. Decisions of administrative law judges become final decisions of the Commission 40 days after issuance, unless directed for review. The 10 day interim between the last day for the filing of a petition and the date when the decision of the judge becomes the final decision of the Commission is intended to allow the Commission time to evaluate a petition's merits. The 30-day deadline was established to enable the Commission to give adequate consideration to the petitions it receives. Consequently, in extraordinary circumstances, as in this case, we are prepared to extend the 30-day deadline and accept a petition that is filed late.

In this case McCoy appeared pro se at the hearing and did not succeed in obtaining counsel until after his case had been dismissed. His counsel requested a copy of the order of dismissal from the administrative law judge, and obtained it only 10 days before the petition for discretionary review was due. The petition was mailed on the 30th day after the administrative law judge's decision. Under these circumstances, we find good cause for the late filing and accept the petition for discretionary review. 5/

The issue in the case is whether the judge erred in defaulting McCoy and dismissing his application for review. McCoy had failed to respond to a prehearing order, and had failed to answer a show cause order. Three days after certain prehearing requirements should have been fulfilled, McCoy requested an extension of time within which to obtain a new attorney and respond. 6/ McCoy repeatedly stated his need for an attorney at the brief hearing. The 1969 Coal Act is a remedial statute and should be construed liberally to further its purposes. 7/

5/ Cf. Sunbeam Coal Company, 2 FMSHRC 775 (1980) [untimely petition dismissed where good cause for lateness was neither claimed nor shown].
6/ There is no indication or allegation that McCoy was at all responsible for his original attorney's withdrawal shortly before the hearing in the midst of the prehearing process.
7/ See Phillips v. IBMOA, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975).

One of its purposes is the prevention of discrimination or retaliation for the exercise of rights guaranteed by the Act. It is consistent with that purpose to encourage hearings on claims of discrimination. In view of this and the particular circumstances of this case, we hold that the administrative law judge's use of the severe sanction of dismissal was error. 8/ Accordingly, the order of dismissal is reversed and the case is remanded.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

8/ The judge was rightly concerned with expediting what had become an unduly protracted proceeding. However, we note that McCoy was not the sole cause for delay. Crescent Coal failed to answer McCoy's application for 22 months. We also note that Crescent Coal did not claim that it would be prejudiced by a further delay while McCoy sought counsel.

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1730 K STREET NW, 6TH FLOOR
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June 30, 1980

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) ex rel. WALTER W. KARNSTEIN	:	
v.	:	Docket No. LAKE 80-242-DM
ALLIS-CHALMERS CORPORATION	:	

ORDER

Pursuant to the joint motion filed by the parties on June 24, 1980, the order of temporary reinstatement entered by the administrative law judge on April 2, 1980 is dissolved, the Commission's direction for review issued on April 21, 1980 is vacated, and this proceeding is dismissed.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

Administrative Law Judge Decisions

(included are several decisions omitted from the MAY volume)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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7 MAY 1980

SECRETARY OF LABOR,		:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH		:	
ADMINISTRATION (MSHA),		:	Docket Nos. BARB 78-689-P
	Petitioner	:	A.C. No. 15-05046-02039S
v.		:	
		:	Docket No. BARB 78-697-P
PEABODY COAL COMPANY,		:	A.C. No. 15-05120-02013V
	Respondent	:	
		:	Alston Mine

DECISION

Appearances: Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Thomas R. Gallagher, Esq., Attorney for Respondent.

Before: Judge 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 Louisville, Kentucky, in August 1979. Both sides were represented by counsel.

Having considered the arguments of counsel 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, Peabody Coal Company, operated two coal mines known as the Alston No. 3 Mine, and the Ken No. 4 North Mine, in Ohio County, Kentucky, which produced coal for sales in or affecting interstate commerce. Both mines used conventional mining equipment. Alston No. 3 produced about 6,000 tons of coal per day, and employed about 450 people. Ken No. 4 North produced about 500 tons of coal per day and employed about 50 people.

2. On December 9, 1976, a federal inspector, Darryl Winkleman, conducted a regular inspection of Respondent's Alston No. 3 Mine, accompanied by Don Jackson, the second shift foreman. When they entered the motor barn

they were informed that the scoop operator, Charles Matheny, had been injured by falling roof in the No. 6 room of the last old crosscut on the righthand side of the No. 2 unit.

3. Before the accident, the "pinner" (roof-bolter), Karl Kaylor, had been checking the roof supports. He found some loose roof and told the foreman, Ricky Roberts, that it should be pulled down. The pinner apparently believed that pulling down bad roof was preferable to propping it up because it would be difficult to predict whether or not the roof would fall when the props were removed. Two temporary supports and some pins were installed before the pinner pulled down a section of roof with a 6-foot bar. Roberts then instructed the scoop operator to go in and remove the rock from the ground so pinning could resume. Two timbers in the entry and the temporary supports were removed before the scoop went in.

4. Normally, before the pinner entered an area to install pins, the scoop would be sent in to remove any loose rock from the mine floor. After the area was cleaned, the pinner would go in and bolt the roof and then back out to allow more cleaning before the sequence continued. The scoop was about 25 feet from front to back and about 12 feet from the front of the shovel to the front of operator's deck. As a matter of practice under the roof control plan, it was recognized as safe to allow the front portion of the scoop to go under unsupported roof so long as the operator remained under supported roof. No violation is charged as to this practice.

5. The scoop had removed one load when the belt feeder broke down in another area of the mine. Before leaving to attend to this problem, the foreman instructed the crew to load the rock in cycle, to pin the roof back in, and not to go out under unsupported roof. Before Roberts left, the pins appeared to support the roof well and the scoop operator had not proceeded past supported roof.

6. As the scoop was backing out with a full bucket, a piece of rock, about 200 pounds and 3 to 4 feet in size, fell on the scoop about 4 feet in front of the operator's deck. A piece of this rock, between 30 and 50 pounds, splintered off and struck the operator's legs.

7. When the inspector arrived, the injured scoop operator had already been removed, but the scoop had not been moved. The inspector observed what is depicted in Government Exhibit No. 5. He observed pieces of rock on the mine floor on both sides of the scoop, a large piece on the forward section of the scoop and a smaller piece in the operator's compartment. He observed 12 to 18 inches of roof that had fallen out between two of the pins.

8. Some of the pins in the roof appeared to be supporting roof; however, other pins were not. In the area of the scoop shovel, there were four pins that were not supporting any roof and one of them was hanging down with a piece of rock suspended from it. To the rear of the scoop and behind the operator's deck were two good pins. Closer to the operator's deck, three

pins formed a triangle. One leg of the triangle was 7 feet, one leg was 6 feet, 6 inches, and the third was 3 feet. All three pins forming the triangle appeared to be supporting roof; however, two pins, in the vicinity of the longer legs of the triangle, did not appear to support any roof. The inspector determined the roof had fallen in the area of one of the loose pins.

9. After a brief investigation, which included measuring distances between some of the pins, the inspector concluded that the scoop operator had proceeded past the last row of properly supported roof. He issued a notice of violation, which read in part:

> The approved roof control plan was not being followed on No. 2 unit (I.D. 014) supervised by Ricky Roberts in 1 South Submain entries in that a scoop operator, Charles Matheny, was injured by falling rock while operating a scoop under unsupported roof where roof material had been taken down in the right crosscut in No. 6 working place.

10. The inspector determined that Respondent had violated paragraph 24(C) of its approved roof-control plan. Paragraph 24 provides:

> The roof where falls had occurred shall be considered unsupported, and no person shall enter such areas, either to travel over the fall or clean it up unless the roof is supported. Where falls or blasted roof materials are cleaned up, management shall devise and have in writing at the scene of the fall a plan incorporating the following procedures: (A) such work shall be under the direct, and unless the workmen are specially trained to do such work, constant supervision of a properly trained company official. (B) Adequate support shall be set under the brow of the fall before any work is done in the area. A minimum of four posts or jacks on a maximum of 5' centers or at least two crossbars shall be used to support such brow. (C) Roof supports shall be advanced as cleanup work progresses, and when it is necessary to load material before support can be set, such loading shall be done from areas of permanent support with the operator and other persons in the area under supported roof at all times.

11. The inspector concluded that the poor physical condition of the roof was obvious before the accident and that loose roof bolts (pins) were a contributing cause of the roof fall. He testified that his investigation did not indicate that the roof fall had lossened the bolts.

12. The inspector also said that he would have issued a citation even if the bolts were supporting roof because they were not spaced on 5-foot centers as required by the roof plan.

13. The roof on the left side of the run consisted of draw slate running from 12 to 18 inches. It was fractured, without strata, and tended to break off in chunks. Respondent's roof control plan called for B-type bolts on 5-foot centers, but because the roof in this area appeared to be getting worse (and was worse than in other parts of the mine), Respondent went to stronger roof supports, metal straps with 6-foot pins on 4-foot centers.

14. In the area in question, the roof appeared smooth until Karl Kaylor noticed the loose roof that he subsequently pulled down.

15. The pinning sequence in this area was unusual in that the pins were not aligned in a straight row. Holes could be drilled only in the thickest part of the roof and the roof thickness was not uniform. When the roof bolter, Karl Kaylor, arrived on the shift, he noticed some spot pins that had probably been set during an earlier shift.

16. Roof bolts would normally be torqued every night and would be checked again at the start of a shift. Karl Kaylor checked every fifth bolt with a sounding device when he came on the shift that day.

17. A roof bolter would be required, at least every 6 months, to read the roof control plan thoroughly to be sure he understood what it required. There were also training sessions at the mine, and bolters would spend several hours training and retraining for a particular job because the roof varied in each section of the mine. The supervisor would also recieve 16 hours of specialized training in roof bolting each year.

18. On October 19, 1977, a federal inspector, Thomas Lyle, inspected Respondent's Ken No. 4 North Mine, accompanied by the mine manager, Alton Fulton. About 11:30 a.m., they entered the mine and proceeded to the ratio feeder.

19. The ratio feeder had been installed about 1 week earlier. Coal dumped on the front end of the ratio feeder would move along the conveyor and pass through the pick breaker (which breaks large lumps of coal into smaller pieces) before being dumped off the back end onto the tailpiece of the conveyor belt. When the inspector (and Fulton) arrived at the ratio feeder, the machinery was operating and a shuttle car had just pulled away after dumping a load of coal. The inspector approached the left side of the equipment and observed that a guard over the clutch coupling was improperly secured. One corner of the guard was secured with a bolt and the other side was secured with a thin piece of wire, about 18-1/2 inches long (with a tensile strength of 160 pounds), in place of a bolt. The side secured by the wire was hanging down, leaving the coupling and shaft exposed. The coupling was about 3 feet off the ground and spinning very fast.

20. The inspector found that the guard over the clutch coupling, secured only with a thin piece of wire, could not withstand the pressure of a fall against it and that this condition exposed persons traveling in the area to a high risk of danger. The area was frequently traveled by shuttle car operators, the belt examiner, and cleaning personnel.

21. On the right side of the ratio feeder, a guard for the clutch coupling was missing altogether. It was lying on the mine floor just below the coupling.

22. The inspector also observed that a 4-foot section of a guard to protect persons from contacting the moving rollers on the tailpiece was missing. There was no self-activated shut-off. The tailpiece was about 10 feet long, 5 feet wide, and 2 feet high.

23. Respondent's foreman, Charles Ford, had inspected the area earlier in the morning.

24. The inspector issued an order of withdrawal, which read in part:

> Guards adequately secured and fastened were not provided for the clutch coupling on the left side of the ratio feeder in that it was only tied on with small wire, and no guard was provided for the right side of the ratio feeder clutch coupling while in motion. Also a guard was not provided for approximately four feet of the right side of the tailpiece and rollers while in motion to prevent persons from coming in contact with the moving belt and rollers. On No. 1 unit (I.D. 004) Responsibility of Charles Ford foreman. The operator or his agent knew or should of known this violation existed.

25. The order was abated promptly by providing a bolt on the guard on the left side of the ratio feeder and by installing guards on the tailpiece and over the clutch coupling on the right side.

DISCUSSION

Docket No. BARB 78-689-P

On December 6, 1976, Inspector Winkleman charged Respondent with a violation of 30 C.F.R. § 75.200, which requires a mine operator to adopt an approved roof control plan. In addition, section 75.200 provides: "No person shall proceed beyond the last permanent support unless 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." The inspector determined that Respondent's approved roof control plan was not being followed in that a scoop operator was operating under unsupported roof.

The Secretary argues that the inspector was the only hearing witness who had conducted an investigation of the accident and made a detailed sketch (Exhibit G-5) of the area including the location of the scoop and a schematic diagram of the roof bolt pattern. The sketch indicates the distances between some of the bolts and whether or not bolts were supporting roof.

The inspector testified that in his opinion the roof fall that injured the scoop operator did not loosen the roof bolts. If the roof fall had dislodged the bolts, he said, a much larger section of rock would have fallen out and would have probably killed the operator. He therefore concluded the operator was under roof that was not properly supported.

The Secretary argues that Respondent's first witness, the foreman, was not an eyewitness to the accident and the report he subsequently filed with the company was based on statements of others that supported his conclusion that the operator had not been operating beneath unsupported roof.

He also contends that none of Respondent's witnesses either conducted an investigation or was in a position to observe whether or not the operator proceeded past the last row of supports.

The Secretary recommends a penalty of $2,000.

Respondent argues that the inspector was not an eyewitness to the accident and was therefore unable to determine if the roof bolts over the operator's compartment were loose before the fall or became loose as a result of the fall. Respondent contends that the inspector's testimony, including Government Exhibit No. 5 (the diagram) and his measurements, was conclusory as he arrived at the cited area after the accident occurred. Respondent contends that the inspector's conclusion that the good roof bolts were spaced too far apart, based on three measurements he took, incorrectly assumed that the other roof bolts were loose before the accident.

Respondent argues that the inspector's diagram contains measurements of only three bolts although there were about 14 bolts pictured. The diagram contains no measurements for the scoop or the piece of rock that fell and the inspector could provide their measurements only by estimates from memory. The essential measurements, Respondent contends, were not made or recorded when the event was fresh in his mind.

The foreman, Ricky Roberts, testified that the inspector's diagram accurately reflected the area from where the rock had fallen but he disagreed with it insofar as it pictured loose bolts behind the scoop. He testified that the bolts above the scoop were checked by the operator at the start of the shift. He also testified that when he left to go to the belt feeder he gave instructions to the operator to load rock in cycle, pin the roof back in, and not to go beneath unsupported roof.

The pinner, Karl Kaylor, testified that when the scoop was sent in to remove rock that he had pulled down, he was standing toward the face, 20 to 40 feet behind the scoop. He testified that as the scoop was backing out a piece of rock fell and landed on the scoop about 4 feet in front of the operator.

Kaylor testified that the inspector's diagram appeared to be accurate in reflecting the cited area but he said the two bolts on either side of the

cavity from which the rock fell were tight before the accident. He testified that when he came on the shift he probably checked every fifth bolt but did not recall precisely which ones. Finally, he testified that the bolts did not become loose as a result of his prying down the bad roof. His testimony would indicate that any loose bolts over the scoop became loose as a result of the roof fall.

The shooter, Ruben Williams, testified that he was standing a few feet from the scoop on the same side as the operator and slightly to his rear when the roof fell. He testified that the operator was beneath supported roof when the roof fell but he was unable to say whether or not the inspector's diagram accurately pictured which bolts were loose and which bolts supported roof. He was able to recall very little else.

The scoop operator, Charles Metheny, testified that he did not go beneath unsupported roof. He said that, before the roof fall, no pins were missing and none were loose apart from a pin in front of the bucket.

Respondent also argues that the occurrence of a roof fall is not prima facie evidence of the operator's failure to follow the roof control plan.

I find that the Secretary failed to prove by a preponderance of the evidence that the scoop operator went beneath unsupported roof in violation of Respondent's roof control plan. The inspector did not observe the roof fall and the only basis for his conclusion that the roof fall did not loosen the roof bolts was his unsubstantiated opinion that a much larger rock fall would have been required to loosen the bolts. Four witnesses (including three who were present at the time of the fall) testified that the roof bolts above the operator were tight before the roof fall. The evidence does not preponderate in showing any violation of the roof control plan.

Docket No. BARB 78-397-P

On October 19, 1977, Inspector Lyle charged Respondent with a violation of 30 C.F.R. § 75.1722, which provides:

> Gears, sprockets, chains, drives, head and tail, take up pulleys, drive wheels, coupling shafts, sawblades, fan inlets, and considerable exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded. Guards, conveyor drives, conveyor heads, and conveyor tail pulleys shall extend a distance sufficient to prevent persons from reaching behind the guard and becoming caught between the belt and the pulley. Except when testing the machinery, guards shall be securely placed while the machinery is being operated.

The inspector observed that one guard was inadequately secured on the left side and two guards were missing from the right side of the ratio feeder.

The Secretary argues, with respect to the insecurely fastened guard over the clutch coupling, that one side of the guard was bolted in place but the other side was tied on with a thin piece of wire, allowing the inspector to see into the machine and observe its moving parts. The Secretary contends that even if the wire were of sufficient tensile strength, the guard was still not secured adequately to withstand the pressure of a fall against it.

The Secretary also argues that the other two guards on the right side of the ratio feeder were not in place. With regard to the guard over the clutch coupling on that side, the Respondent admits that it was lying on the ground.

The Secretary proposes a penalty of $4,000.

The main thrust of Respondent's argument is that the Secretary's proposed penalty is excessive. Respondent contends that one of the guards over the clutch coupling was lying on the ground and one was partially secured with a wire. Respondent argues that the latter guard was adequately secured with a wire of substantial strength and that it would be difficult for anyone to fall through the guard into the moving parts.

Respondent also argues that the tailpiece guard on the right side of the ratio feeder was not missing, as alleged by the inspector. Fulton testified that a J-bolt had broken off on one side of the tailpiece and was secured instead with a wire. He stated:

> The back one was bolted on, and the back part of the front one was bolted on with a J-Bolt which is welded onto the tailpiece with a nut on it. And, the front of the guard was dropped down--it was wired--wire running through tied to a rope--belt rope--to the tailpiece and it was dropped down to about two and a half to three inches from the top.

Fulton also disagreed with the inspector's testimony that a man could have become caught in the tail rollers. Respondent contends that a person would have had to force his hand through a 2-1/2-inch opening, which was highly unlikely, to become caught in the moving rollers.

I find that the Secretary proved, by a preponderance of the evidence, three violations of 30 C.F.R. § 75.1722 as alleged in Order No. 7-59. Although the inspector did not actually apply pressure to the guard he determined to be inadequately secured, he was able to see into the machinery and did observe the guard vibrating.

The inspector provided a contemporaneous, detailed diagram of the ratio feeder showing which guards were not in place. I credit the inspector's testimony with more accuracy as he took notes and made a diagram at the time.

I also credit his testimony as to the gravity of the violations.

Respondent knew or should have known of the cited conditions before the inspection, and is therefore found to be negligent.

Conclusions of Law

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

2. Petitioner did not meet its burden of proving a violation as alleged in Notice No. 6-2927.

3. Respondent violated 30 C.F.R. § 75.1722 by failing to guard exposed moving machine parts as alleged in Order No. 7-59. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory standard, Respondent is assessed a penalty of $2,500.00 for the above violation.

ORDER

WHEREFORE IT IS ORDERED that (1) the charge based on Notice No. 6-2927 is DISMISSED, and (2) Peabody Coal Company shall pay the Secretary of Labor the above-assessed civil penalty, in the amount of $2,500.00, within 30 days from the date of this decision.

William Fauver
WILLIAM FAUVER, JUDGE

Distribution:

Leo J. McGinn Esq., Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Thomas R. Gallagher, Esq., Counsel for Peabody Coal Company, 301 North Memorial Drive, P.O. Box 235, St. Louis, MO 63166 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 13, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. DENV 78-512-P
	:	A/O No. 29-00095-02021V
v.	:	
	:	York Canyon No. 1 Mine
KAISER STEEL CORPORATION, Respondent	:	

DECISION

Appearances: Manuel Lopez, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner, Secretary of Labor; David Reeves, Esq., Oakland, California, for Respondent, Kaiser Steel Corporation.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

In this case, Petitioner seeks a penalty for a violation of the mandatory standard contained in 30 C.F.R. § 75.301 alleged in an order of withdrawal issued February 2, 1977. The case thus arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801(1970).

The order charged that the standard was violated in that the quantity of air reaching the last open crosscut in section 6L of the subject mine was far below the minimum 9,000 cubic feet per minute required. In addition, there was methane in the working face in excess of 3.5 percent. Respondent does not challenge either of these findings but contends that the proposed penalty of $4,000 is excessive, because the drop in airflow was due to an improperly anchored brattice line. This condition, asserts Respondent, could not have existed for more than a few hours. The shift involved was a maintenance shift and it is not disputed that the foreman of the next working shift corrected the problem within an hour after the inspector issued an order.

The Petitioner maintains that the brattice in question was too short and therefore improperly installed. It believes the lack of airflow had been present for some time and should have been noticed and corrected by company officials on the last working shift. This, combined with the fact that concentrations of methane nearing the explosive level were present within 15 feet of three mechanics working on an energized continuous miner, argues Petitioner, amounted to gross negligence on the company's part.

A hearing was held at Raton, New Mexico, on November 1, 1979, before Administrative Law Judge Michels. Witnesses were Lawrence Rivera, a federal mine inspector, George Krulyac, foreman for Respondent, and Paul McConnell, a mine safety inspector employed by Respondent. Because of the retirement of Judge Michels, the case was, with the consent of counsel, assigned to me for decision on the transcript of the hearing before Judge Michels. The parties have waived their rights to file written proposed findings of fact and conclusions of law.

ISSUES

1. Did Respondent on February 2, 1977, fail to ventilate the last open crosscut in section 6L with an airflow of at least 9,000 cubic feet per minute?

2. If so, was this failure due to Respondent's negligence?

3. Can accumulations of methane at the working face be taken into account in fixing an appropriate penalty for violation of 30 C.F.R. § 75.301?

4. If a violation occurred, what is the appropriate penalty?

FINDINGS OF FACT

1. At all times relevant to this proceeding, Respondent was the operator of a coal mine in Raton, New Mexico, known as the York Canyon No. 1 Mine.

2. The York Canyon No. 1 Mine annually produces between 576,000 and 738,000 tons of coal and 350-450 employees are engaged in all of Respondent's York Canyon mines.

3. The proposed penalty will have no effect on the operator's ability to remain in business.

4. On February 2, 1977, in section 6L of the subject mine an air reading showed that there was less than 9,000 cubic feet per minute of air in the last open crosscut.

5. The failure in airflow was due to a line brattice which was not functioning properly.

6. Whether the line brattice was improperly installed or damaged, or both, the condition was obvious and could have been noticed during the last working shift.

7. At 6 a.m., February 2, 1977, the air at the working face area in section 6L contained 3.55 percent methane.

8. Three miners were at or near the working face performing maintenance work on an energized continuous miner at the time the methane was detected.

9. Paul McConnell, a mine safety inspector working for Respondent, was with federal inspector Lawrence Rivera when the latter discovered a total absencé of airflow at section 6L at about 6 a.m. He did not undertake to correct the problem at that time but left for other areas of the mine, before Mr. Rivera began to check for methane.

10. After ordering all miners out of the affected area and ordering the power deenergized, Mr. Rivera issued an order of withdrawal to George Krulyac, mining foreman, at 7:15 a.m. The violation was abated by 8:45 a.m.

DISCUSSION

It is not disputed in this case that the 9,000 cubic feet per minute airflow required by 30 C.F.R. § 75.301 was not being maintained in section 6L. In fact, both Mr. Rivera and Mr. McConnell were unable to obtain any reading by an anemometer or by use of a smoketube. The parties agree that a faulty brattice "short-circuited" the airflow and was thus the cause of the violation. Mr. Rivera stated that the brattice was simply too short and that the deficiency was corrected when Mr. Krulyac hung a new curtain of sufficient length parallel to it. Mr. Krulyac stated that the brattice was merely loose in one corner, a condition he remedied by nailing it down. Yet Mr. McConnell, who discovered the lack of airflow earlier with Mr. Rivera, believes that if the brattice had been long enough he would have nailed it down himself. In this light, I accept Mr. Rivera's version of the brattice's condition. Further, the dispute is made somewhat less relevant since two other brattices in the section were ripped as well, which also could have contributed significantly to the loss of airflow.

The amount of time during which the violation existed is crucial to the issue of how much negligence, if any, should be ascribed to the Respondent. Respondent's pregraveyard shift report, made between 3 and 11 p.m. the previous night indicates a sufficient amount of air

flow in section 6L. There is no indication that Mr. Rivera examined this report when he arrived at the mine that night, and Petitioner has not challenged its accuracy. Nevertheless, Mr. Rivera's expert opinion is that the rips in the brattices were caused by the movement of machinery which could have happened only during the production shift ending the previous night. I find that the loss of airflow dated back at least to the start of the February 1-2 graveyard shift.

Respondent urges that potentially harmful accumulations of methane cannot be considered in aggravation of the penalty imposed for violation of the ventilation standards in 30 C.F.R. § 75.301. Admittedly, it was held by the Interior Board of Mine Operations Appeals that a citation charging "methane in excess of 5 percent" was properly dismissed when brought under 30 C.F.R. § 75.301. Mid-Continent Coal, 8 IBMA 204 (1977). But the Board, declaring that 30 C.F.R. § 75.308 provides for specific actions in response to methane accumulation, emphasized that the citation was issued solely for methane accumulation under a regulation designed to ensure proper ventilation. In fact, improper ventilation was not even charged in that case. Improper ventilation is the central concern in the case at hand. The regulation here involved seeks to ensure adequate ventilation so that miners will not be exposed to "harmful quantities" of "noxious or poisonous gases." Methane is such a gas, and an accumulation of 3.55 percent where 5 percent may produce an explosion is certainly harmful.

CONCLUSIONS OF LAW

1. On February 2, 1977, Respondent violated 30 C.F.R. § 75.301 by failing to properly ventilate section 6L of its York Canyon No.1 Mine, thereby allowing a dangerous concentration of methane to accumulate near the working face. The violation was serious.

2. Respondent's disregard of a known risk posed by the violation of 30 C.F.R. § 75.301 constituted gross negligence.

3. Respondent is a large operator.

4. Respondent abated the condition promptly and in good faith after being cited.

5. Considering the six statutory criteria, I conclude that a penalty of $4,000 should be assessed for the violation.

ORDER

Respondent is directed to pay the sum of $4,000 for the violation found herein within 30 days of the issuance of this decision.

James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

David B. Reeves, Esq., Attorney at Law, Kaiser Steel Corporation, 300 Lakeside Drive, KB 2608, Oakland, CA 94666

Manuel Lopez, Esq., Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Assessment Office, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. PENN 79-97 A.C. No. 36-03425-03017
v.	:	
	:	Maple Creek No. 2 Mine
UNITED STATES STEEL CORPORATION, Respondent	:	

DECISION

Appearances: James Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Louise Q. Symons, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter, MSHA) under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), to assess a civil penalty against United States Steel Corporation (hereinafter, U.S. Steel) for a violation of a mandatory safety standard. The petition alleges a violation of 30 C.F.R. § 75.200, failure to comply with the approved roof-control plan. A hearing was held in Pittsburgh, Pennsylvania, on January 22, 1980. Inspector Basil Zaycosky testified on behalf of MSHA. Ronald Franczyk, John Lowther, and Robert K. Bryan testified on behalf of U.S. Steel. The parties filed briefs with proposed findings of fact and conclusions of law.

At the commencement of the hearing, MSHA moved to withdraw Citation No. 620282 which alleged a violaton of 30 C.F.R. § 48.9(a), failure to make training certificates of miners available for inspection. At the hearing, MSHA stated that U.S. Steel did not violate the above regulation. U.S. Steel did not oppose the withdrawal of this petition. Hence, Citation No. 680282 was vacated and the portion of the petition for assessment of civil penalty relating to Citation No. 680282 was dismissed. Although the hearing commenced on the remaining proposed assessment of Citation No. 391262, it became apparent during the hearing that the civil penalty was proposed under Order No. 391264 rather than Citation No. 391262. Without objection, MSHA amended its petition to assess a civil penalty to include Citation No. 391262 and Order No. 391264. At all times, U.S. Steel asserted its right to contest the validity of the order of withdrawal in this civil penalty proceeding even though it did not file any contest of that order with the Federal Mine Safety and Health Review Commission (hereinafter Commission).

This matter involves the alleged violation of 30 C.F.R. § 75.200, failure to comply with an approved roof-control plan, on March 28 and March 30, 1979, at the Maple Creek No. 2 Mine. The specific violation alleged is that the roof control plan for the area in question permitted mining of entries, crosscuts, rooms, and splits to a 16-foot width. MSHA alleged the mining of entry No. 15 to a width of between 16 feet 8 inches and 17 feet 6 inches. U.S. Steel contended as follows: (1) it is impossible to mine exactly 16 feet; (2) although there were areas measuring more than 16 feet, they were "offsets" at intermittent locations; and (3) it was unnecessary to erect posts to support the roof in areas exceeding 16 feet in width.

ISSUES

Whether U.S. Steel violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

30 C.F.R. § 75.200 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, 1970. 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 or inadequacy of support 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.

Section 110(i) of the Act provides in pertinent part as follows:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

STIPULATIONS

The parties stipulated the following:

1. U.S. Steel owns and operates the Maple Creek No. 2 Mine and both U.S. Steel and the mine are subject to the Mine Safety and Health Act of 1977.

2. Inspector Basil Zaycosky is an authorized representative of the Secretary of Labor.

3. Copies of Citation No. 391262 are authentic and may be admitted into evidence as authentic documents.

4. U.S. Steel is a large operator.

5. The assessment of a civil penalty in this proceeding will not adversely affect the operator's ability to remain in business.

SUMMARY OF THE EVIDENCE

On March 28, 1979, Inspector Basil Zaycosky performed a "spot" inspection of U.S. Steel's Maple Creek No. 2 Mine. He was accompanied by Cletus McConville, chairman of the union safety committee. The approved roof-control plan for this area of the mine provided for 16-foot widths of entries and crosscuts. It also provided that "[t]olerances of 12 inches on width openings * * * may be allowed provided tolerances are at intermittent locations." In entry No. 15 of five flat 15 room section, Inspector Zaycosky and Cletus McConville measured nine places between crosscuts or splits 19 and 22 which were between 16 feet 8 inches and 17 feet 6 inches. Three of the measurements were in excesss of 17 feet. The measurements were taken approximately 20 to 30 feet apart. There was no significant sloughing of the ribs in question. Inspector Zaycosky testified that the continuous miner cut the entries too wide. Thereupon, he issued Citation No. 391262 for a violaton of the approved roof-control plan.

Concerning the gravity of the cited violation, Inspector Zaycosky testified that the excessive width of the entry would cause additional stress on the roof and possibly cause the roof to collapse. He stated that the following miners would be exposed to this hazard in the haulageway: motormen, mechanics, and passengers on the portabus. A collapse of the roof could result in injuries ranging from minimal to fatal. However, he conceded that he was unaware of the condition of the roof in the area in question. He did not inspect or test the roof. He was unaware of any roof falls in this section. However, he had observed roof falls in other parts of this mine at a distance of 2,000 to 3,000 feet away from the section in question.

Concerning the issue of negligence of the operator, Inspector Zaycosky testified that the excessive width of the entry was readily observable. Since the face of this entry was approximately 500 feet away, he estimated that this condition had been present for one or two weeks.

When he returned to the mine on March 30, 1979, to inspect the abatement of this violation, he found that nine posts had been set between 19 and 20 splits but no other posts had been set. He again made measurements and found three points between 20 and 22 splits in excess of 17 feet. His initial citation on March 28, 1979, required that the violation be abated by 4 p.m. of that date. In his opinion, little had been done to abate the violation. Thereupon, he issued an order of withdrawal pursuant to section 104(b) of the Act. Thereafter, the violation was abated in 1-1/2 hours. He did not believe that a further extension of the time for abatement was warranted because of the lack of good faith compliance by U.S. Steel. He

reiterated his belief that the posts were necessary to support the excessive width of the roof.

At all relevant times, Ronald Francyzk was the assistant mine foreman of sections at U.S. Steel's Maple Creek No. 2 Mine. He has 7 years of experience in coal mine employment. He was familiar with the roof and the roof-control plan of the mine in question. He described the roof as "excellent." He testified that there had never been any roof falls in 15 room. The roof-control plan for the area in question permitted 16-foot entries with a 12-inch tolerance at intermittent locations. Subsequently, in September 1979, the roof-control plan was amended to permit 20-foot entries in 2 flat, 24 room. That room was approximately 2,000 to 3,000 feet away from the roof in controversy here. The roof in each room was the same. The amended roof-control plan was for a longwall staging entry where the roof was expected to be supported for about 2 years. The room in question in this proceeding was to be mined conventionally with a continuous miner.

On March 28, 1979, Assistant Foreman Francyzk was called to the area in question. He observed chalk marks on the ribs at excessive widths. He measured some of the widths with Inspector Zaycosky. He recalls some widths "around 17 feet" but does not recall any in excess of 17 feet. He believed that the excessive widths were "offsets" caused by the continuous miner avoiding the line brattice on the right side. These would occur when the continuous miner went in at an angle rather than at a straight cut. He expressed his belief that it is impossible to cut entries at exactly 16 feet. Although he did not believe that there was a violation of the roof-control plan because the "offsets" were at intermittent locations, he did not question

the inspector's measurements. He ordered nine posts to be set on the next shift. Inspector Zaycosky never told him to set posts on 4-foot centers. While he conceded that the posts gave some support to the roof, he did not believe that they were necessary.

On March 30, 1979, Inspector Zaycosky returned to the mine. He advised Mr. Franczyk that U.S. Steel had not properly reduced the excessive widths. At the time the order of withdrawal was issued, approximately 20 posts had been set. Thereafter, another 12 or 13 posts were set. On that date, he also assisted Robert K. Bryan, mine operating engineer, in measuring the widths at 2-foot intervals between splits 21 and 22. Of the 33 measurements taken in that entry, only two were 16 feet or less. Seven of those measurements were in excess of 17 feet. Mr. Bryan also measured the other areas in controversy. In 15 entry between splits 20 and 21, there were no measurements of 16 feet or less.

John Lowther was the assistant mine foreman on the third shift at all relevant times. He testified that on March 29, 1979, he received a note from Ronald Franczyk to measure and post entry 15 between 19 and 22 splits. His crew set 12 posts between 19 and 20 splits on that date. He measured the widths and found a couple in excess of 17 feet. Twelve more posts were set. He described the roof as "exceptionally good." There was not much sloughing at the ribs. He did not see any violation of the roof-control plan. He did not think that posts were really needed.

Robert K. Bryan, mine operating engineer, took measurements of the area in controversy on March 30, 1979. Thereafter, he prepared a map of the area

(Exh. O-6). His measurements were made in feet and tenths of a foot. A measurement listed as 17.3 means 17.3 feet not 17 feet 3 inches.

Documentary Exhibits

The pertinent facts concerning the citation, order of withdrawal, approved roof-control plan, amendment to the approved roof-control plan, and maps of the affected area have been previously summarized. U.S. Steel also put in evidence one page of the MSHA Underground Manual which, under the heading "Policy," provides as follows:

> Excessive width is defined as twelve inches or more than the width approved in the roof control plan. If it is evident that excessive widths are prevalent and are caused by poor mining practices, a citation shall be issued. The citation should describe the distance that the excessive widths existed.

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, briefs, and proposed findings of fact and conclusions of law have been considered. The evidence shows that on March 28, 1979, Inspector Zaycosky made numerous measurements of the width of 15 entry in Maple Creek No. 2 Mine. The approved roof control plan for that entry provided for a 16 foot width with "tolerances of 12 inches * * * at intermittent locations." The inspector made nine measurements between 16 feet 8 inches and 17 feet 6 inches in the entry between splits 19 and 22. Thereupon, he issued Citation No. 391262 for violation of the approved roof control plan pursuant to 30 C.F.R. § 75.200. The citation provided that the condition be abated by 4:00 p.m. on that day. On March 30, 1979, the inspector returned to the area. He testified that only nine posts had been set between

19 and 20 splits and no posts had been set between 20 and 22 splits. On the other hand, Ronald Franczyk, assistant mine foreman, testified that approximately 20 posts had been set by March 30. John Lowther, another assistant mine foreman, testified that 24 posts had been set by March 30. In any event, Inspector Zaycosky issued an order of withdrawal on March 30, 1979, under section 104(b) for failure to abate the violation. Thereafter, another 12 or 13 posts were set and the order was terminated.

While there was some confusion at the hearing as to whether the civil penalty was assessed on the initial citation or the subsequent order, this question was resolved without objection when MSHA amended its petition to include the order as well as the citation. The first issue to be resolved is whether U.S. Steel violated the Act or regulation. It is clear that a violation of an approved roof control plan is a violation of 30 C.F.R. § 75.200. See Ziegler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976). I find that the testimony of Inspector Zaycosky concerning measurements of 15 entry in excess of 16 feet was credible and corroborated by U.S. Steel's measurements set forth in its mine map (Ex. O-6). In the area in controversy, the U.S. Steel mine map shows several areas in 15 Entry in excess of 17 feet in width. Moreover, of the 33 measurements by U.S. Steel in 15 entry between splits 21 and 22 only 1 was less than 16 feet and one was 16 feet. Hence, even under the twelve inch tolerance, allowed by the roof control plan, the tolerances were not "at intermittent locations." Any reliance on the MSHA Underground Manual to excuse the excessive widths is rejected. The manual does not have the force and effect of law and is not controlling. Therefore, I find that U.S. Steel was in violation of its approved roof control plan

and 30 C.F.R. § 75.200 as alleged by MSHA. This is so because MSHA has established that 15 entry measured in excess of 17 feet in several places and the remaining measurements in excess of 16 feet were not at intermittent locations.

U.S. Steel also contends that there was "no basis for issuing an order on March 30, 1979." The order of withdrawal under section 104(b) of the Act was issued because the inspector found that the condition had not been totally abated and the period of time for the abatement should not be extended. There is a dispute between MSHA and U.S. Steel concerning the number of posts which had been set prior to the issuance of the order. Inspector Zaycosky contended that only nine had been set while U.S. Steel alleged that approximately 20 had been set. For the purpose of determining the validity of the order, this conflict will be resolved in favor of U.S. Steel. Nevertheless, after the order was issued additional posts were set in 1-1/2 hours. U.S. Steel failed to establish any valid reason why the condition could not have been abated prior to the issuance of the order. Likewise, it presented no basis for an extension of the time for abatement. Its principal contention in this regard is that the posts were unnecessary. Such an assertion is entitled to little weight in the light of the fact that U.S. Steel was in violation of the approved roof control plan and its witnesses admitted that the posts provided additional support for the roof. Hence, I reject U.S. Steel's challenge to the validity of the order for the reasons that the violation was not totally abated within the time allowed and no valid reason has been established for an extension of the time for abatement.

Since I have found the citation and order to be valid, the next issue is the amount of the civil penalty to be assessed. In assessing a civil penalty, the six criteria set forth in section 110(i) of the Act shall be considered. As pertinent here, the operator's prior history of 276 violations in this mine in the previous two years is noted. Forty-three of those violations were of 30 C.F.R. § 75.200. U.S. Steel is a large operator and the assessment of a civil penalty will not affect its ability to continue in business.

U.S. Steel was negligent in its failure to discover and correct the violation of the approved roof control plan. Such conduct amounts to ordinary negligence.

Since many miners pass through the entry in question, the number of miners exposed to potential injury is high. However, the uncontroverted evidence of record is that the roof in question was excellent. The inspector did not examine or test the roof. There was no history of roof falls in this section. Subsequent to the citation and order in controversy here, a roof control plan was approved for a nearby section permitting entries up to 20 feet in width. Thus, while a significant number of miners were exposed to potentially severe injuries, the likelihood of such an injury was remote.

The failure of U.S. Steel to abate the citation in time prescribed demonstrates a lack of good-faith compliance. Its belief that it was not in violation of the approved roof control plan is no excuse for failure to abate a citation. Its claim that it abated the citation by setting posts

where there were marks on the rib is rejected because the inspector gave it proper notice of the area in violation and it had the means available to attain compliance.

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 $500 should be imposed for the violation found to have occurred.

ORDER

Therefore, it is ORDERED that respondent pay the sum of $500 within 30 days of the date of this decision as a civil penalty for the violation of 30 C.F.R. § 75.200. It is FURTHER ORDERED that Citation No. 680282 is vacated and the petition to assess a civil penalty thereon is DISMISSED.

James A. Laurenson

James A. Laurenson, Judge

Distribution by Certified Mail:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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14 MAY 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. KENT 79-281
	:	A.O. No. 15-10445-03013 H
v.	:	Bevins Branch Prep. Plant
CALL & RAMSEY COAL CO., INC., Respondent	:	

DECISION AND ORDER

The parties move for approval of a settlement of a violation by an independent contractor of the prohibition against operating a mobile crane within 10 feet of an energized overhead power line, 30 CFR 77.807-2. The violation was the subject of an imminent danger closure order issued December 4, 1978 and terminated January 23, 1979.

As noted, the operator, Call and Ramsey Coal Company, did not commit the violation charged. The violation was committed by W. D. Robertson and Co., an independent contractor, who furnishes mobile cranes to dip slurry ponds.

The difficulty is that the order does not allege a violation of the standard in that it is not charged that at the time the order was written the crane was being operated within 10 feet of an energized power line. The only charge is that the crane, which at the time was parked and idled, was "in close proximity to energized power lines." The inspector admitted that at no time did he measure the distance from the boom to the nearest power line. On the other hand, the operator's chief engineer measured the distance and reported there was no way the crane boom could contact the wire.

The premises considered, I find the charge and the proof offered in its support legally insufficient to establish the violation charged. 1/

1/ In accordance with my understanding of section 110(k) of the Act, factual assertions in this Decision and Order are based on an independent evaluation and de novo review of the information submitted in support of the parties' motion to approve settlement. Should the disposition proposed be unacceptable the parties may request a settlement conference or evidentiary hearing to offer additional facts in support of the settlement proposed.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, DENIED. It is FURTHER ORDERED that the captioned proposal for penalty be, and hereby is, DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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15 MAY 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. CENT 79-70
	:	A.O. No. 34-00976-03005
v.	:	
	:	Red Oak Mine
FARRELL-COOPER MINING COMPANY, Respondent	:	

DECISION

Appearances: David S. Jones, Attorney, U.S. Department of Labor, Dallas, Texas, for the petitioner;
Genevieve Farrell Yoes, Esquire, Forth Smith, Arkansas, 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 on April 23, 1979, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking assessment of civil penalties for three alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. The alleged violations were served on the respondent in three section 104(a) citations issued by MSHA inspector Donalee Boatright on October 18, 1978.

Respondent filed a timely answer to the petitioner's proposals, asserted several factual and legal defenses, and by notice of hearing issued on February 4, 1980, the case was docketed for hearing in Fort Smith, Arkansas, on April 15, 1980. Subsequently, by telephone call to my office at approximately 4 p.m. , Friday, April 11, 1980, counsel for the petitioner advised me for the first time that the case had been settled and that he mailed a letter to that effect to the Commission on Wednesday, April 9, 1980. I advised counsel that the letter had not been received and that I considered his telephone call as untimely, and that the petitioner should enter an appearance at the hearing or run the risk of my dismissing the docket. Counsel was further informed that another case scheduled for hearing at

2 p.m. on April 15, was being handled by his office and that the attorney representing MSHA in that proceeding could present any settlement proposals with respect to this matter on the record when the docket was called for trial.

The parties appeared at the hearing, and after a brief prehearing conference concerning the proposed settlement, including a discussion with counsel regarding the timely filing of proposed settlements, the parties were afforded an opportunity to present their settlement proposals on the record.

Discussion

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

Citation No.	Date	30 C.F.R Section	Assessment	Settlement
393052	10/18/78	77.1605(k)	$ 140	$ 90
393053	10/18/78	77.1110	90	66
393054	10/18/78	77.1605(k)	140	90
			$ 370	$246

In support of the proposed settlement, the parties filed a joint settlement agreement executed on April 14, 1980, and petitioner asserts therein that it has reconsidered and reviewed the statutory factors concerning the size of the respondent, its previous history of violations, the gravity of the violations in issue here, respondent's negligence, and its good faith compliance. Petitioner also filed copies of the citations, the "inspector's statements" concerning each citation, and information concerning respondent's prior history of violations, its size, the abatements, and the gravity presented as to each citation (Exhs. P-1(a) through P-1(k)).

Citation Nos. 393052 and 393054 both allege violations of the provisions of 30 C.F.R. § 77.1605(k), which requires that berms or guards be provided on the outer banks of elevated roadways. The information contained in Exhibit P-1(j) with regard to Citation No. 393052 reflects that the roadway in question was not a regularly traveled roadway, that due to the height of the drop-off there was very little chance of injury, and that the berm was provided in the shortest possible time. With regard to Citation No. 393054, the information provided reflects that the "roadway" in question had not been established since the scrapers were removing topsoil and as soon as it was removed a berm was provided.

In addition to the foregoing, the parties conceded that the proposed settlement takes into consideration the fact that the berm citations issued by the inspector allege that berms were not provided on the inner banks of the roadways in question, and that this defense was raised by the respondent in its initial answer to the petitioner's proposals for assessment of civil

penalties for these citations (Tr. 15). Petitioner's counsel also asserted that respondent rapidly abated the conditions cited.

With regard to Citation No. 393053, the inspector's citation reflects that it was issued because the fire extinguisher on a piece of equipment was discharged and not maintained in an operable condition. However, the record (Exh. P-1(j)), reflects that a new one was provided immediately and that there was no gross negligence (Tr. 14).

The parties agree that the respondent is a medium-sized coal mine operator, and its prior history of violations during the 2-year period preceding the issuance of the citations in question here consists of 38 citations (Tr. 16-18; Exh. P-1(i)).

Conclusion

After careful consideration of the arguments presented by the parties in support of the proposed settlement, including review of the information contained in the exhibits and pleadings, I conclude and find that the proposed settlement disposition of this case should be approved.

ORDER

Pursuant to Commission Rule 29 C.F.R. § 2700.30, the settlement is APPROVED, and respondent is ORDERED to pay civil penalties in the amount of $246 within thirty (30) days of the date of this decision and order in satisfaction of the aforementioned citations. Upon receipt of payment by MSHA, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

MAY 20 1980

EASTERN ASSOCIATED COAL CORP., Applicant	:	Notice of Contest
	:	Docket No. WEVA 80-120-R
v.	:	
	:	Citation No. 0628565
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	October 29, 1979
	:	Federal No. 2 Mine
Respondent	:	

DECISION AND ORDER GRANTING MOTION AND DISMISSING PROCEEDING

Appearances: Robert C. Brady, Legal Assistant, Eastern Associated Coal Corporation, Pittsburgh, Pennsylvania, for Applicant; Barbara F. Kaufmann, Esq., Office of the Solicitor, Department of Labor, Philadelphia, Pennsylvania, for Respondent.

On October 29, 1979, the Applicant, hereinafter, Eastern, received a section 104(a) Citation. The Citation was terminated some 9 hours after its issuance, presumably after the violative conditions were abated. Eastern's notice of contest which was filed on November 26, 1979, challenged:

1. The existence of the violative conditions described in the citation.

2. The occurrence of a violation of 30 C.F.R. § 75.1403 as cited in the citation, and

3. The special findings contained in the citation, i.e., that the alleged violation was "of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard."

MSHA's answer was filed on December 7, 1979, requesting, inter alia, that the review (contest) proceeding be continued and consolidated with a penalty case (presumably to be filed by MSHA in the future), in accord with advisory language contained in the FMSHRC decision in Energy Fuels Corporation, DENV-78-410, decided May 1, 1979, to wit:

> If the citation lack(s) a need for an immediate hearing, we would expect (the mine operator) to postpone his contest

> of the entire citation until a penalty is proposed. Even if he were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and up for hearing. The two contests could then easily be consolidated for hearing * * *.

On February 28, 1980, Eastern responded to MSHA's motion to continue and consolidate, quoting other portions of the Commission's Energy Fuels decision and citing subsequent Commission decisions to the general effect that an operator under the 1977 Act may obtain review of abated citations and also to the effect that an operator has an interest in obtaining immediate review of such citations in order to avoid followup withdrawal orders, particularly where the citations contain "special findings" which subject the operator to such orders.

On February 29, 1980, the Office of Assessments, proceeding under the 30 C.F.R., Part 100 administrative settlement procedures, proposed an initial penalty of $150. An informal conference was held on March 28, 1980, after which the Office of Assessments lowered the proposed penalty to $106. Eastern paid this penalty on April 8, 1980, which apparently by coincidence was the same date I heard argument from counsel at a prehearing conference on MSHA's motion for continuance and consolidation.

The initial question in this proceeding was whether Eastern was entitled to immediate review. An affirmative answer would have required my denying MSHA's request for continuance and consolidation. However, by paying the proposed penalty when it did Eastern changed the complexion of this proceeding as well as the issue. The issue now to be decided is: Does a mine operator who has filed a prior notice of contest have the right to proceed with review of the citation after paying the proposed penalty therefor? Some of the issues at stake in the resolution of this question are the effectiveness of the Office of Assessments, 1/ and the encouragement of automatic filings of notices of contests.

Having duly considered the contentions of both parties, I note at the outset that an operator's payment of the initial proposed penalty in the past has resulted in the citation's becoming a part of the operator's history of previous violations. The Valley Camp Coal Co., 1 IBMA 196, 204 (1972). From this, I conclude that by paying at the administrative level a penalty, whether the full amount of the proposed assessment or a compromised amount, an operator necessarily concedes the existence of the conditions alleged

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1/ "Half-settling" a case could ultimately dilute the authority and effectiveness not only of the Assessment Office, but also of the Commission (and its judges) when the time came for it to operate on its half of the matter.

to be a violation and that such conditions as a matter of law constitute a violation of the safety or health standards. 2/

Focusing specifically on the "special findings" question, i.e.: Where an operator has filed a notice of contest specifically challenging specific findings, such as "unwarrantable failure" or "significant and substantial" is such issue set to rest by the operator's payment of a penalty during the administrative settlement stage pursuant to 30 C.F.R. §§ 100.5 and 100.6, I conclude that it should be.

It must first be recognized that the operator, of course, is under no compulsion, at this stage, to pay the proposed assessment issued by MSHA's Assessment Office. Special findings, such as "unwarrantable failure", and "significant and substantial", although different from, are analogous to the statutory assessment factors of negligence and seriousness, respectively, and as such will have been considered generically by MSHA in its determination of a proper penalty and by both parties in reaching any penalty settlement at the administrative level prior to a petition for penalty assessment being filed with the Commission. If the mine operator wishes to challenge these findings, it can and should abstain from paying a penalty at the administrative level, not only to preserve its objection to such findings but also to mitigate the amount of penalty to be assessed should prevail when the matter is subsequently heard.

2/ Otherwise, the situation might arise where after an administrative settlement is reached a penalty is paid by the operator and thereafter, in a subsequent review (notice of contest) proceeding, the citation (or order) is found to be improperly issued and vacated.

It should also be noted that 30 C.F.R. § 100.6(c) provides that the failure of a mine operator to contest the proposed penalty within 30 days of receipt of notice thereof shall result in the proposed penalty being deemed a "final order of the Commission" and not subject to review by any court or agency. This seems to be a recognition of the necessity of merging the contest and penalty proceedings at the earliest possible juncture. To permit both types of proceedings to run separate courses to the end of the line (final adjudication) will result in an absurdity. A precise cut-off point must be established to avoid needless duplicative litigation, confusion, and "jockeying for position" by the parties. The better approach would seem to be that when a penalty is imposed at the administrative level whether by operation of the mine operator's default or by agreement of the parties, all issues, whether the occurrence of the violation, the validity of "special findings", or the amount of the penalty, are resolved thereby. The purpose of the Office of Assessments and the Part 100 procedures is to settle a case with resultant convenience, economy and expedition. These purposes are not served by dividing a case up, dragging it out, and giving the parties two bites at the apple. From the mine operator's point of view, the solution is clear: If you wish to proceed with review, do not pay the penalty prematurely.

It is therefore held that a mine operator's payment of a proposed penalty at the adminstrative level constitutes acceptance of the validity of the citation (or order) involved in all its aspects and that such payment moots the issues raised in its notice of contest proceeding previously instituted. 3/

ORDER

MSHA's motion to dismiss, having been found meritorious, is GRANTED. This proceeding is DISMISSED.

Michael A. Lasher, Jr., Judge

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3/ Nothing in this holding infringes on the "immediate review" rights granted operators by Energy Fuels. Should MSHA drag its heels in issuing notifications of its proposed assessments, the operator's remedy may well lie in a motion to dismiss for the Secretary's failure to issue same "within a reasonable time" as required by section 105(a) of the Act.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 1 MAY 1980

MATHIES COAL COMPANY, Contestant	:	Contest of Citation
v.	:	Docket No. PENN 79-149-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mathies Mine

DECISION

Appearances: William H. Dickey, Jr., Esq., Pittsburgh, Pennsylvania, for Contestant;
James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by Mathies Coal Company (hereinafter "Mathies") under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), to contest the validity of a citation issued by the Mine Safety and Health Administration (hereinafter MSHA) for violation of a mandatory safety standard. The citation alleged a violation of 30 C.F.R. § 75.316, violation of approved ventilation plan. A hearing was held in Pittsburgh, Pennsylvania, on January 23, 1980. Basil Zaycosky testified on behalf of MSHA and John Goroncy testified on behalf of Mathies. The parties filed briefs, proposed findings of fact, and conclusions of law.

This case involves the alleged violation of 30 C.F.R. § 75.316, failure to follow approved ventilation plan. Specifically, Mathies was charged with having only 16,200 cubic feet per minute (cfm) of air moving in entries 5 and 6 whereas its approved ventilation plan called for 18,000 cfm of air in the affected areas.

ISSUE

Whether Mathies violated the Act or regulations as charged by MSHA.

APPLICABLE LAW

30 C.F.R. § 75.316 provides that a "ventilation system and methane and dust control plan" shall be adopted by the operator and approved by the Secretary for each coal mine. The approved ventilation plan for the mine in controversy provided that "a minimum quantity of 18,000 cfm will be directed to not more than two entries located just outby the line of blocks being mined". (Exhs. G-1 & G-2).

STIPULATIONS

The parties stipulated the following:

1. Mathies Mine is owned and operated by Applicant, Mathies Coal Company.

2. Mathies Coal Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to Section 105 of the 1977 Act.

4. The inspector who issued the subject Citation was a duly authorized representative of the Secretary of Labor.

5. A true and correct copy of the subject Citation was properly served upon the operator in accordance with Section 104(a) of the 1977 Act.

6. Copies of the subject Citation and Termination are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

SUMMARY OF THE EVIDENCE

On August 24, 1979, Mathies was engaged in retreat mining at 2 Butt, 19 face section of the Mathies Mine. Basil Zaycosky, an MSHA inspector, performed a saturation spot inspection at that time. After performing some preliminary tests, the inspector decided to measure the air velocity at entries 5 and 6. He attempted to use an anemometer, an instrument for measuring air velocity. However, he was unable to obtain a satisfactory reading on the anemometer because of insufficient air velocity.

Thereupon, he decided to calculate the air velocities by use of a smoke cloud test. He took measurements which disclosed that each entry was 16 feet wide and 7-1/2 feet high. He then measured a distance of 10 feet in each entry. At one end of this 10-foot measurement, he would release a smoke cloud from an aspirator containing a smoke tube. At the other end of the 10-foot measurement, he stationed Jim Smith, chairman of the union safety committee. Jim Smith was instucted to "holler, 'now'" when the smoke cloud reached the end of the 10-foot measurement. From the time the inspector released the smoke cloud until he heard Mr. Smith say "now," the inspector watched the sweep second hand on his wrist watch. The inspector then wrote the number of seconds it took the smoke cloud to traverse the 10 feet on

each test. He performed the smoke cloud test five times, at different places, in each of the two entries in controversy.

After the 10 smoke cloud tests were completed, he averaged the results to calculate the air velocity in each entry. The average time obtained for entry No. 6 was 9 seconds; the average for entry No. 5 was 9.6 seconds. Inspector Zaycosky then obtained the velocity in each entry by dividing the constant of 600 (60 seconds times 10 feet) by the average time obtained on the above smoke cloud tests. He obtained the cubic feet per minute by multiplying the velocity by the width and height of the entry. On the day the citation was issued, Inspector Zaycosky calculated cubic feet per minute of air as follows: Entry No. 5 had 8,220 cfm and Entry No. 6 had 8,040 cfm. Thus, he arrived at a total of 16,260 cfm at the involved entries whereas the approved ventilation plan called for 18,000 cfm. However, on the witness stand, Inspector Zaycosky conceded that he had committed a mathematical error in calculating the velocity at entry No. 5. The correct amount of cubic feet per minute at entry No. 5 should have been 7,500 rather than 8,220. Hence, the combined cubic feet of air reaching the affected entries was only 15,540.

Inspector Zaycosky testified that from the time he released the smoke cloud until he heard Mr. Smith say "now", he was continually observing the sweep second hand of his watch. He relied upon Mr. Smith's verbal act to obtain the necessary data for his calculations. In his 8 years as an inspector, he has performed approximately six smoke cloud tests.

Mathies called section foreman John Goroncy as a witness. Mr. Goroncy stated that the preshift examination for the shift in question showed

19,696 cfm of air in entries No. 5 and 6. On the day in question, safety supervisor John Marn, now deceased, approached foreman Goroncy and told him that there was not enough air in the section. At that point, Mr. Goroncy shut off the power to the entire section and ordered everyone to stop mining and to begin correcting leaks in the canvas to increase the amount of air. Mr. Goroncy did not make any measurements of the air in the affected entries but he assumed that John Marn made such measurements. Mr. Goroncy did not observe Inspector Zaycosky and James Smith perform the smoke cloud tests.

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, arguments of counsel, proposed findings of fact and conclusions of law have been considered. Mathies has challenged the citation in controversy for the following reasons: (1) the smoke cloud test was improper; and (2) even if the volume of air in question was less than 18,000 cfm, no violation occurred.

The inspector was required to use a smoke cloud test to measure the amount of air in question because he was unable to obtain a sufficient velocity of air to use an anemometer. While Mathies aggressively challenges the validity of the smoke cloud test in this proceeding, its own evidence and statements of its counsel indicate that there was less than 18,000 cfm of air in the area in question. In the opening statement of Mathies counsel, he stated that "management was taking every possible method to correct it--to correct the lack of air or the slight drop in air and bring it up to 18,000." (Emphasis supplied.) (R. 9). Moreover, Mathies section foreman John Goroncy, testified that Mathies safety supervisor John Marn, stated,

"I don't think you have enough air coming up your tramway" (R 67). Mathies did not present any evidence concerning the amount of air in the affected area. At the hearing, it did not offer any evidence concerning the proper method of performing a smoke cloud test. After the record was closed, in its posthearing brief, Mathies submitted a report and a bulletin from the Bureau of Mines concerning low-velocity airflow measurements in mines. This practice of submitting evidence after the record in the proceeding is closed, with no request to reopen the record, is to be discouraged. However, suffice it to say that nothing contained in the above-mentioned publications negates the validity of the tests performed by Inspector Zaycosky. While the inspector committed a mathematical error in his calculations of the cubic feet of air per minute, the error favored Mathies. The citation alleged 16,220 cfm whereas the correct amount should have been 15,540 cfm. I find that MSHA has established that the adopted and approved ventilation plan called for 18,000 cfm in the affected area and that Mathies had less than 18,000 cfm at the time the citation was issued.

Mathies contends that even though the approved ventilation plan required 18,000 cfm, no violation occurred. This assertion is premised on an analogy to the presence of methane in excess of 1.0 percent which does not constitute a per se violation. Mathies goes on to argue that, "if the operator is allowed to take corrective measures when methane is detected, it is certainly reasonable to permit the operator the same latitude to correct an air quantity deficiency prior to the issuance of a citation." Mathies' purported analogy to excessive methane accumulations is misplaced. Unlike accumulations or inundations of methane, the quantity of air delivered to

an area of a mine is totally under the control of the operator. Moreover, the violation in controversy here was of the plan adopted by the operator itself. It is clear that the provisions of a ventilation plan adopted by the operator and approved by MSHA are enforceable as mandatory safety and health standards under the Act. Ziegler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976). Mathies' violation of the ventilation plan establishes a violation of a mandatory standard for which a citation was properly issued. Mathies' evidence concerning the quantity of air on the preshift examination and its decision to voluntarily terminate normal mining operations in the section is irrelevant to the question of whether it violated the adopted and approved ventilation plan.

I find that Mathies violated 30 C.F.R. § 75.316 in that it failed to deliver 18,000 cfm of air to the affected area in violation of the adopted and approved ventilation plan.

ORDER

Mathies' contest of citation is DISMISSED and Citation No. 0623975 is AFFIRMED.

James A. Laurenson

James A. Laurenson, Judge

Distribution:

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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

29 MAY 1980

KENTUCKY CARBON CORPORATION, Applicant	:	Application for Review
	:	Docket No. KENT 79-142-R
v.	:	
	:	Order No. 704007
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	May 9, 1979 Kencar No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. KENT 80-171 Assessment Control No. 15-02107-03021 H
v.	:	
KENTUCKY CARBON CORPORATION, Respondent	:	Kencar No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ERNIE FULLER, FRANKIE PRATER, ERVIN HURLEY, DARRELL VARNEY, RONNIE RATLIFF, RONNIE CASEY, TERRY HAGER, and DONALD EPLING, Complainants	:	Complaint of Discharge, Discrimination, or Interference Docket No. KENT 79-344-D Kencar No. 1 Mine
v.	:	
KENTUCKY CARBON CORPORATION, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LARRY SIMKINS, RICHARD A. DOTSON, DARRELL REYNOLDS, RICKY JUSTUS, and GARY D. VARNEY, Complainants	:	Complaint of Discharge, Discrimination, or Interference Docket No. KENT 79-352-D Kencar No. 1 Mine
v.	:	
KENTUCKY CARBON CORPORATION, Respondent	:	

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LARRY SIMPKINS, Complainant	:	Complaint of Dischrage, Discrimination, or Interference Docket No. KENT 79-353-D Kencar No. 1 Mine
v.	:	
KENTUCKY CARBON CORPORATION, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: C. Lynch Christian III, Esq., Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia, for Kentucky Carbon Corporation;
William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, for Complainants.

Before: Administrative Law Judge Steffey

When the hearing in the above-entitled consolidated proceeding was convened in Pikeville, Kentucky, on March 25, 1980, counsel for the parties stated that they had been able to settle all of the issues involved and asked that I approve the settlement agreements which they had reached in the interrelated cases.

Docket No. KENT 79-142-R

The Application for Review filed in Docket No. KENT 79-142-R contended that Order No. 704007 issued May 9, 1979, under section 107(a) of the Federal Coal Mine Health and Safety Act of 1977 was invalid because no imminent danger existed at the time the order was issued. Order No. 704007 alleged the existence of an imminent danger because a portion of the roof in the No. 9 Longwall Section had dropped down and two miners were working on the roof near the No. 8 Chock.

Counsel for Kentucky Carbon stated that he wanted to withdraw his Application for Review of Order No. 704007 because MSHA had agreed that the two miners were not exposed to an imminent danger and that the violation of section 75.200 had been written because a danger board, posted by the company before the inspector's arrival, had been knocked down so that it was not apparent to the inspector that the company had recognized existence of the bad roof conditions and was correcting them at the time the order was written.

Docket No. KENT 80-171

The Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-171 seeks assessment of a civil penalty for the violation of section 75.200 alleged in Order No. 704007 which is the subject of the Application for Review filed in Docket No. KENT 79-142-R discussed above. Counsel for the parties stated that under the settlement agreement reached by the parties, respondent had agreed to pay a penalty of $50 for the violation

of section 75.200 alleged in Order No. 704007 instead of the penalty of $563 proposed by the Assessment Office. In support of their settlement agreement, the parties presented the facts hereinafter discussed to show how they had considered the six criteria set forth in section 110(i) of the Act.

As to the size of respondent's business, the Kencar No. 1 Mine here involved produces about 1,700 tons of coal per day. Kentucky Carbon Corporation is a wholly owned subsidiary of Carbon Fuel Company which is a moderate to large-sized operator. Counsel for Kentucky Carbon stated that payment of penalties would not cause the company to discontinue in business.

Exhibit 1 was introduced at the hearing to present facts pertaining to Kentucky Carbon's history of previous violations. That exhibit shows that the company is endeavoring to reduce the number of violations of section 75.200 which have occurred at its Kencar No. 1 Mine. There were seven violations of section 75.200 in 1977, two in 1978, and 1 in 1979. That trend in the reduction of violations of section 75.200 justifies only a nominal penalty under the criterion of history of previous violations.

As to the criterion of negligence, the parties agreed that the roof had dropped down as stated in the inspector's order, but the condition of the roof did not occur because of any failure on the part of respondent to follow the roof-supporting provisions of its roof control plan. Kentucky Carbon was, therefore, not negligent with respect to occurrence of the violation.

With respect to the criterion of gravity, it must be borne in mind that the violation of section 75.200 related to the fact that the danger board had either fallen down or had been taken down. The parties agreed that regardless of the reason that the danger board was not in a proper position, the miners on the longwall section were aware of the condition of the roof and the two men described in the inspector's order were under the four legs of a longwall chock and were therefore not exposed to the dangers of the roof which did exist over the top tips of the chocks. The miners were working on the chocks to assist in correcting the conditions that existed.

With respect to the criterion of whether Kentucky Carbon demonstrated a good faith effort to achieve rapid compliance, the facts show that Kentucky Carbon's employees had discovered the condition of the roof, had posted the existence of the bad roof condition in the preshift book, had posted a danger board, had adopted a plan for correcting the roof condition, and were in the process of correcting the condition when the order was written.

I find that the parties presented facts showing adequate consideration of the six criteria and giving satisfactory reasons for approving the settlement agreement under which respondent will pay a penalty of $50.

Docket No. KENT 79-344-D

The complainants in Docket No. KENT 79-344-D alleged that they were illegally discharged because they withdrew from the No. 10 Longwall Section after finding equipment which would not deenergize when overloaded and after learning that the two-way communication facilities would not function.

Counsel for complainants stated at the hearing that he had agreed to withdraw the complaint in Docket No. KENT 79-344-D because the matters at issue in that docket have been the subject of an arbitration hearing which resulted in resolution of all issues in a manner satisfactory to the miners, namely, the payment to the miners of all back pay from the date of their suspension with intent to discharge.

Docket No. KENT 79-352-D

The complaint in Docket No. KENT 79-352-D contended that the miners had been illegally discharged when they objected to the unsafe manner in which management had instructed them to correct a hazardous roof condition in the No. 9 Longwall Section. Counsel for the complainants stated that he had agreed to withdraw the complaint in Docket No. KENT 79-352-D because Kentucky Carbon has agreed to pay each of the five complainants in this case back pay for 4 days, 2-1/2 hours representing one-half of the time they were off from work as a result of the activities which occurred on May 8, 1979, and which were the subject of their complaint.

Docket No. KENT 79-353-D

The complaint in Docket No. KENT 79-353-D alleged that management had ordered complainant to leave mine property and had refused to let him examine allegedly unsafe conditions in the No. 10 Longwall Section in his capacity as the representative of the miners. Counsel for complainant indicated at the hearing that he would withdraw the complaint in Docket No. KENT 79-353-D because Kentucky Carbon's management has recognized his right to act as a safety committeeman on the day in question, that is May 8, 1979.

With respect to all of the discrimination cases, Kentucky Carbon has agreed to remove from the personnel files of each of the complainants all references to the suspensions with intent to discharge which were the subject of the complaints.

I find that satisfactory reasons were given at the hearing to justify granting the requests to withdraw the three discrimination complaints. The complaining miners were present at the hearing and indicated that they were satisfied with the outcome of the settlement negotiations. I have been orally advised by the Secretary's counsel that the back pay which Kentucky Carbon agreed to pay the complainants has been received by the complainants.

WHEREFORE, it is ordered:

(A) The motion of Kentucky Carbon for withdrawal of its Application for Review in Docket No. KENT 79-142-R is granted and the Application for Review is deemed to have been withdrawn.

(B) The parties' motion for approval of the settlement agreement reached in Docket No. KENT 80-171 is granted and the settlement agreement is approved.

(C) Pursuant to the settlement agreement, Kentucky Carbon, within 30 days from the date of this decision, shall pay a civil penalty of $50 for the violation of section 75.200 alleged in Order No. 704007 dated May 9, 1979.

(D) The requests by the Secretary's counsel for permission to withdraw the complaints filed in Docket Nos. KENT 79-344-D, KENT 79-352-D, and KENT 79-353-D are granted and the complaints in those dockets are deemed to have been withdrawn.

(E) All further proceedings in Docket Nos. KENT 79-142-R, KENT 80-171, KENT 79-344-D, KENT 79-352-D, and KENT 79-353-D are terminated.

Richard C. Steffey

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

Distribution:

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(703) 756-6210/11/12

29 MAY 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. KENT 79-11 A.O. No. 15-02709-03032 V
v.	:	Camp No. 1 Mine
PEABODY COAL COMPANY, Respondent	:	

DECISION

This is a civil penalty proceeding initiated by the petitioner against the respondent through the filing of a proposal for assessment of civil penalties 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 one alleged violation of certain mandatory safety standards promulgated pursuant to the Act.

Respondent filed a timely answer and the matter was scheduled for hearing in Evansville, Indiana, June 26, 1980. However, by motion filed May 27, 1980, petitioner seeks approval of a proposed settlement. The citation, initial assessment, and the proposed settlement amount is as follows:

Citation No.	Date	30 CFR Standard	Assessment	Settlement
396441	4/18/78	75.400	$2,500	$1,250

Discussion

Petitioner advances the following arguments in support of the proposed settlement:

> The citation alleges a violation of safety standard 30 C.F.R. 75.400, and particularly that loose coal, coal dust, and float coal dust were permitted to accumulate along the belt conveyor entry in No. 4 east off 2 main south. This violation is a result of a low degree of ordinary negligence, and the probability of an occurrence against which the cited standard is directed was remote due to the fact that the operator had duly noted the

condition in the crew shift examination book and immediately had instituted steps to correct the condition before production was to begin.

It is the parties' belief that the proof would show that the spillage of coal and the accumulation of float coal dust occurred during the latter portion of the second shift on Apirl 17, 1978. This is the last production shift before the citation was issued on April 18, 1978. Furthermore, the proof would show that the spillage and accumulation was duly noted in the preshift examination book, and at the time the citation was issued coal was not being produced. In addition, the respondent had taken steps immediately to correct the condition before production of coal would begin.

Concluding, therefore, the violation is a result of a low degree of ordinary negligence. The occurrence of the event against which the cited standard is directed was improbable due to the circumstances set forth above. In addition, the respondent is entitled to maximum good faith consideration by achieving rapid compliance.

In addition to the foregoing, petitioner states that respondent's history of prior violations does not appear to be excessive, that respondent is a large operator and the penalty agreed upon by the parties will have no effect on its ability to remain in business. Finally, petitioner asserts that the parties believe that approval of the proposed settlement is in the public interest and will further the intent and purpose of the Act.

Conclusion

After careful review of the arguments submitted by the petitioner in support of the proposed settlement, and after review of the pleadings and the information of record concerning the six statutory criteria contained in section 110(i) of the Act, I conclude that the proposed settlement disposition of this case is reasonable, will adequately protect the public interest, and should be approved.

Order

Pursuant to Commission Rule 30, 29 CFR 2700.30, settlement is approved and respondent is ordered to pay a civil penalty in the amount of $1,250 in satisfaction of the citation in question, payment to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter is dismissed. The hearing scheduled for Evansville, Indiana, June 26, 1980, is cancelled.

George A. Koutras
Administrative Law Judge

Distribution:

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

29 MAY 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. SE 79-57-M
	:	Assessment Control No. 31-00427-05003
v.	:	
	:	Grove Pit and Mill
GROVE STONE AND SAND COMPANY, Respondent	:	

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Thomas C. Newman, Corporate Safety Director, Swannanoa, North Carolina, for Respondent.

Before : Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 27, 1980, a hearing in the above-entitled proceeding was held on April 8, 1980, in Asheville, North Carolina, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

After completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 101-105):

> This proceeding involves a Proposal for Assessment of Civil Penalty filed in Docket No. SE 79-57-M on August 27, 1979, by the Mine Safety and Health Administration seeking to have a civil penalty assessed for an alleged violation of 30 CFR 56.9-2 by Grove Stone and Sand Company.
>
> The issue in every civil penalty case is first of all whether a violation occurred and then, of course, if a violation is found to have occurred, a civil penalty has to be assessed under the Act based on the six criteria which are set forth in section 110(i) of the Act.
>
> The first consideration in this case is whether a violation of section 56.9-2 actually occurred. That section provides "[e]quipment defects affecting safety shall be corrected before the equipment is used." Citation No. 108078 dated March 1, 1979, which is Exhibit 1 in this proceeding, states that, "[t]he audible automatic reverse signal alarm was inoperable on the G-258 Caterpillar front end loader used in the stock pile area."

The section of the regulations which is involved does not state specifically that a front-end loader must have an operable back-up alarm. The section that is alleged to have been violated would require that this particular Caterpillar front-end loader have no safety defect in it before the equipment is operated.

In order for the inspector to have been certain that that defect existed before the equipment was ever operated, it would have been necessary for him to have either checked with the equipment operator or with Mr. Green, who was the mechanic, or with someone who knew whether or not the equipment had been inspected and checked before it was put into operation.

The facts are that Mr. Mouser, the inspector, wrote Citation No. 108078 at 8:10 a.m. on March 1, 1979, after the front-end loader had been used to load some mud dredged out of the settling pond. At the time the inspector checked the piece of equipment and had it operated to see if the back-up alarm was working, the front-end loader had been parked and was not being used at that moment.

Everyone agrees, including Mr. Newman, who represents the respondent in this case, that at the moment the equipment was checked the back-up alarm did not work. The back-up alarm is a type which has four steel balls in it and when the equipment is in forward gear the balls stay in their compartments and make no noise, but when the equipment is reversed, the balls fall out of their compartment against a bell and make a clanging alarm sound.

Mr. Green, who is the mechanic for the company respondent, testified that he saw and observed this equipment on March 1, 1979, and that he checked this equipment and other equipment and found no defects in them on that date.

Therefore, his testimony shows that there was no equipment defect on this Caterpillar front-end loader prior to the commencement of the shift. And Mr. Green says that he would have corrected anything that he found wrong with this alarm if he had found anything, because that was his practice.

The inspector seemed to think that the alarm did not work because it was bent, whereas, the mechanic, Mr. Green, states that the only thing that kept the alarm from working was the fact that it had a lot of mud in it as a result of having been used in the area where the settling pond was located.

So, I have before me some evidence which is fairly strong that the back-up alarm was operative before the shift started and I don't have any testimony from the inspector or anyone else who really knows that the equipment was not free

of defects before it was operated. The inspector does not claim to have made a check to make certain that it was defective before it was operated. And, I do have the testimony of Mr. Green that he did check the equipment, and that it had no defects before it was put into operation.

Now, it is true that Mr. Taylor has made some very good arguments about credibility and his primary point is that Mr. Green could not have remembered a check of the equipment which he made on March 1, 1979. But Mr. Newman has countered that argument by pointing out that he did inquire of Mr. Green after the mud was removed from this alarm as to whether the equipment had been checked and as to whether the bent portion of the alarm would have kept it from working. And, it is Mr. Green's position that the bent condition of the alarm did not prevent it from working but that the mud inside the alarm did prevent it from working.

Additionally, Mr. Green based his testimony not entirely on whether he remembered March 1, 1979, but the fact that it is his practice to correct anything wrong with equipment every morning if he finds a defect in it.

So, we do not really have a situation here in which the inspector claims unequivocally that this equipment was defective before it was used, but we have a statement by the inspector that when he checked it, it was defective. And, we have the statement of Mr. Green that it was not defective before it was operated.

So regardless of whether Mr. Green remembers each and every detail about this piece of equipment, I think that the preponderance of the evidence supports a finding that the equipment had been checked and it was not defective before the equipment was used; rather, the alarm became defective from having been splashed by mud in the first hour of the day before it was inspected.

Therefore, I think that the violation was not proved and that the Proposal for Assessment of Civil Penalty should be dismissed.

I should mention that one of the stipulations in evidence in this case is that respondent has agreed that it is subject to the jurisdiction of the Commission, and that I have jurisdiction to decide the case.

WHEREFORE, it is ordered:

The Proposal for Assessment of Civil Penalty filed in Docket No. SE 79-57-M is dismissed.

Richard C. Steffey

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

Distribution:

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

Grove Stone and Sand Company, Attention: Thomas C. Newman, Corporate Safety Director, P.O. Box 425, Swannanoa, NC 28778 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

30 MAY 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. PITT 79-91-P
Petitioner	:	A.C. No. 36-00841-03010F
v.	:	
	:	Nanty Glo No. 31 Mine
BETHLEHEM MINES CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Sidney Salkin, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
T. W. Ehrke, Esq., Senior Industrial Relations Attorney, Bethlehem Mines Corporation, Bethlehem, Pennsylvania, for Respondent.

Before: Judge Lasher

I. Procedural Background

This proceeding arises under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), hereinafter "the Act."

On January 9, 1979, Petitioner filed its petition for assessment of civil penalty. Respondent answered on February 16, 1979. The formal hearing on the merits was held in Ebensburg, Pennsylvania, on August 15, 1979, at which both parties were represented by counsel.

II. Violations Charged

In a citation issued by MSHA on June 26, 1978, the Respondent is charged with a violation of 30 C.F.R. § 75.200, noncompliance with an approved roof-control plan. The condition or practice described in the citation alleges that the roof-control plan was not being completely complied with in the 4 Right, 5 Cross (021) section as provided in Drawing No. 1 contained in the roof-control plan. The citation further alleges that temporary support Nos. B, E, F, G, and I, were not installed in the pillar split between the No. 3 and No. 4 entries 40 feet inby spad No. 7441 after mining was completed and before a roof-bolting machine began installing permanent supports. The citation indicates that the violation was revealed during an investigation into a roof fall accident which resulted in a fatality.

III. Statement of the Issues

1. Whether the conditions or practices described in the citation violated mandatory health or safety standards, and, if so, the amount of the penalty which should be assessed based on the criteria set forth in section 110(i) of the Act.

2. Whether negligence on the part of Respondent was involved in the alleged violation, and, if so, the degree thereof.

3. Whether a causal relationship exists between (a) any violation found to have occurred or (b) any act of negligence attributable to Respondent found to have occurred and the roof fall which resulted in the death of Ken Vivis, a roof bolter who was crushed to death when the roof fell.

IV. Findings of Fact with Respect to the Three General Criteria

The factors of (1) size of business, (2) history of previous violations, and (3) effect on Respondent's ability to continue in business lend themselves to preliminary findings of fact.

1. Size of Business

The parties stipulated that the Nanty Glo No. 31 Mine produces 216,861 tons of coal per year and that Bethlehem Mine's total annual production of coal is in excess of 8 million tons. The parties stipulated, and I find that this is a large coal mine operator.

2. History of Previous Violations

The computerized history of previous violations introduced at the hearing indicates that Respondent, during the 2-year period preceding the commission of the alleged violation, committed approximately 268 violations. I find that this is not an unusual number of prior violations for a large operator and that this statutory factor affords no basis for either increasing or decreasing the amount of any appropriate penalty should a violation be found to have been established.

3. Effect on the Operator's Ability to Continue in Business

The parties stipulated, and I find, that any penalty imposed in this proceeding will not adversely affect Respondent's ability to continue in business (Tr. 5).

V. Findings of Fact with Respect to Liability And The Three Specific Criteria

The Respondent acted in good faith in attempting to achieve rapid abatement of the conditions resulting in the issuance of the order of withdrawal involved herein. Thus, the occurrence of the violation charged and the

factors of negligence and seriousness remain for consideration and are the focus of the findings which follow:

1. A roof-fall accident occurred at Bethlehem Mines Corporation's Nanty Glo No. 31 Mine at about 7 p.m. on Thursday, June 22, 1978, in the No. 22 room between the Nos. 3 and 4 entries of the 4 Right, off the 5 Cross, in the 0-21 section which resulted in the death of Kenneth R. Vivis, a roof-bolter operator.

2. MSHA was notified shortly thereafter and an investigation began that evening (June 22, 1978).

3. The area of the mine involved in the accident was known by the operator to have bad roof along the right rib.

4. Vivis was informed of the condition of the roof.

5. Vivis had 39 months' mining experience, 9 months of which he was a roof-bolter operator.

6. Vivis knocked out two temporary roof supports immediately prior to the fatal accident.

7. The approved roof-control plan for the No. 22 room required at least 12 posts.

8. There were less than 12 set at the time of the accident.

9. The circumstances of the accident are as follows:

On Thursday, June 22, 1978, at approximately 4 p.m., the 4 Right off 5 Cross, 0-21 section crew, under the supervision of William J. Zamboni, lead foreman, entered the mine via portal bus and traveled to the working section arriving there at approximately 4:35 p.m. Zamboni made an examination of the working places after which he instructed Thomas R. Yahner, continuous-miner operator, to complete the mining in the No. 22 room. The room was being developed by splitting the pillars perpendicular to the section entries. A cut-through had been made between the Nos. 3 and 4 entries on the previous shift, but additional mining was required to develop the room to its normal width. Zamboni's instructions to Yahner were to remove the temporary supports from the face area, finish mining and to clean up the place. After removing the supports, Yahner observed the roof was broken along the right rib and reported the condition to Zamboni.

Zamboni left the No. 22 room and traveled down the No. 3 entry. The roof-bolting machine was parked in the first open crosscut outby the entrance to the No. 22 room. Kenneth R. Vivis, roof-bolter operator, and Diane M. Costlow, roof-bolter helper, were waiting to move the machine into the No. 22 room upon withdrawal of the continuous miner. Zamboni told Vivis

and Costlow to install line canvas in the No. 21 room while they were waiting. He also told them to move into the No. 22 room upon completion of mining and to install the temporary supports before beginning the bolting cycle and to be aware of the bad roof on the right side of the place. Zamboni told Vivis the roof was drummy on the right side and to "timber it heavy."

Shortly thereafter, mining was completed in the No. 22 room and the continuous miner was trammed to the belt feeder in the No. 3 entry for servicing. Zamboni instructed Rick West on how to hang the cable of the continuous miner as the miner backed up over to No. 20 room.

Vivis and Costlow moved the roof-bolting machine into the No. 22 room. Costlow began to install temporary supports while Vivis prepared for roof bolting. Then, both Vivis and Costlow came out into the No. 3 entry for additional supplies. Zamboni asked Vivis if the place was timbered and he replied that it was. 1/ Vivis and Costlow returned to the No. 22 room. Costlow began putting in more temporary supports while Vivis drilled a test hole. After Costlow had put in a grand total of four or five temporary props, she informed Vivis that she was going for more props. 2/ Vivis already had started the roof-bolting machine and had starting bolting, despite the fact that Costlow had not yet finished putting up the temporary supports. Costlow went to an area where she thought she would find props but finding none, she returned to room No. 22.

As Costlow returned, she saw Vivis accidentally knock out two temporary supports while he was maneuvering the roof bolter. Costlow heard a roar and yelled a warning to Vivis, but the rock fell on him before he could react. The rock fell immediately upon dislodgement of the temporary props.

Costlow deenergized the roof bolter and immediately summoned help from the other crew members. The rock was raised and Vivis was removed from under it and placed on a stretcher. Mouth-to-mouth resuscitation and CPR were started and continued as Vivis was transported to the shaft bottom where he was pronounced dead by Doctor Magley.

10. Zamboni, who was foreman at the time of the accident, gave Vivis a direct order to "timber it heavy" (Tr. 243), meaning to put in more than the normally required for the area involved, 12 props. Vivis ignored Zamboni's order and unnecessarily exposed himself to a known hazardous roof condition.

11. Zamboni properly designated Vivis and Costlow to install temporary supports since the roof-control plan did not bar the roof-bolter crew from putting in the required supports, and the miner crew does not necessarily have to install temporary supports.

1/ However, in fact, the room was not timbered in accordance with the roof-control plan which called for at least 12 props.

2/ The record is unclear as to how many posts were installed at the moment of the fatality. Apparently, there were four posts along the left side which were put up prior to Costlow's installation of an additional four or five.

12. Although the general consensus was that Vivis was a safe worker, Rick West who worked with Vivis on occasion, said that Vivis claimed the day before that the roof was good and the temporary supports were not necessary. Even so, some temporary supports were there. Along these lines, I find that there is no previous indication that Vivis was an unsafe worker or that management had reasons to believe he was careless.

13. It is not certain exactly how may props were set in place or how many more than the minimum of 12 should have been posted. I find that less than 12 were installed. This is at least a technical violation.

14. Even though a violation of the law existed there was no causal relationship between the alleged violation and the fatal accident. The proximate cause of the accident was Vivis' knocking out the posts which supported the roof which fell. Vivis was a well trained employee. He knew his job. He was satisfactorily supervised. He was capable of carrying out his roof-bolting assignment. He was a careful and trusted employee who apparently had a momentary lapse in observation or attention. These circumstances, when carefully examined in the record, do not fairly indicate blame on the part of any other persons or Respondent's management.

15. I find that there were valid reasons for having the timber removed in No. 22 room by the miner crew. There was no way the roof bolter could get into the area unless the place was cleaned up and leveled. Furthermore, removal of the timbers was not in violation of the roof-control plan. Under the circumstances removal of the props was a proper exercise of discretion.

16. Management's training program for roof control is effective and was not a causal factor in the accident. There was extensive testimony concerning Respondent's supervisory safety training program. Records were kept to check and confirm that proper training was received by each employee. Employees making mistakes were both reinstructed and reobserved by management to assure that their jobs were done safely in the future. Furthermore, I find Zamboni's qualifications, training and certification to be of a high quality. He received appropriate instruction in two separate training programs of 4 weeks each, he is qualified as an instructor, and his past performance as an instructor has been reviewed without incident. Costlow testified about the type of training which she received as a bolter helper (Tr. 35), which I find to be satisfactory. Similarly, Vivis had been satisfactorily instructed in safety methods.

17. I find no merit to the contention that Respondent was negligent because Zamboni did not return to No. 22 room prior to when the roof-bolting operation began. Vivis was an experienced employee who knew his job and could be trusted. Also, Zamboni had instructed Costlow on the roof-bolter helper job and he expected Vivis to help her put up the temporary posts. Zamboni's decision in staying with West, an inexperienced continuous miner helper, was a proper exercise of discretion. Furthermore, Zamboni testified that Vivis told him the place was timbered (Tr. 285). There was no reason for Zamboni to believe that Vivis was not telling him the truth. I find that the trust Zamboni put to Vivis' assertion was without fault.

In addition, Inspector Chappell testified that there was no requirement in the roof-control plan for Zamboni to check on Vivis prior to roof-bolting operations (Tr. 169). Further, Zamboni testified that he planned to check on Vivis during his normal rounds (Tr. 250).

Gravity

In weighing the gravity of the violation,, it is important to determine if there was a causal relationship between the violation and the death of Vivis. At the hearing, the only eyewitness to the accident, Costlow, testified that Vivis had "knocked two (props) out, and it came down. That is it" (Tr. 29).3/The direct, proximate cause of the roof fall was the act of Vivis in knocking down two of the props, causing the roof to immediately fall. While an insufficient number of props had been put up, which I find is a technical violation of the Act, it is conjectural whether or not the roof would have fallen if additional props had been up. Therefore, I find the violation to be only moderately serious.

Penalty

Respondent is assessed a penalty of $1,000 for the violation of 30 C.F.R § 75.200 found to have occurred.

ORDER

Wherefore it is ORDERED that Respondent pay to MSHA the penalty herein assessed of $1,000 within 30 days from the date of this decision.

Michael A. Lasher, Jr., Judge

Distribution:

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3/ According to MSHA's Report of Investigation (Exhibit P-8), the "two dislodged posts were supporting the rock that fell."

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

30 MAY 1980

SECRETARY OF LABOR,	:	Complaint of Discrimination
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 79-349-DM
	:	
On Behalf of Johnny N. Chacon,	:	Morenci Mine
Applicant	:	
v.	:	
	:	
PHELPS DODGE CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Applicant;
Stephen W. Pogson, Esq., Evans, Kitchell & Jenckes, Phoenix, Arizona, for Respondent.

Before: Judge Lasher

This proceeding arises under section 105(c) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Clifton, Arizona, on April 16, 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 bench decision containing findings, conclusions and rationale appears below as it appears in the transcript, other than for minor corrections of grammar and punctuation and the excision of dicta:

> This proceeding arises upon the filing of a discrimination complaint by the Secretary of Labor on behalf of Johnny N. Chacon against the Phelps Dodge Corporation pursuant to the provisions of section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., wherein the Applicant alleges that the Respondent unlawfully discriminated against Mr. Chacon by issuing him a written warning on or about February 6, 1979, and by suspending him from employment without pay for 3 days on February 13, 14, and 15, 1979.

1/ Tr. 242-277.

In its answer, the Respondent denies the allegations of the complaint with respect to the alleged discrimination and affirmatively alleges that Mr. Chacon was warned and suspended because he operated a locomotive at excessive speeds which caused derailments at the two times involved.

The Respondent also alleged in its answer that the "Alleged Complaint of Discrimination could have been raised in the grievance and arbitration procedure in that because an effective grievance and arbitration procedure is in operation the Secretary is precluded from bringing this action." At the commencement of this hearing, I ruled that the availability of arbitration procedures in the labor contract between the United Transportation Union and its Local 1668 and the Respondent did not preclude the Federal Mine Safety and Health Review Commission from proceeding with the instant case nor did it bar the Commission's jurisdiction. In Phillips v. Kentucky Carbon Corporation, 2 IBMA 5, decided by the Interior Department's Board of Mine Operations Appeals on January 30, 1973, the Board pointed out that, "Should we defer to an umpire's decision made under the National Labor Relations Act of 1947, or an arbitration agreement, as controlling upon us, we would be abdicating the statutory obligations assigned to the Secretary by the Congress." The Board went on to point out that in NRLB v. Pacific Intermountain Express Company, 228 F.2d 170, the court found that each fact finding agency is entitled to make its own decision upon the evidence before it. I thus affirm the ruling which I made at the beginning of this proceeding in this connection.

The general issues involved in this proceeding are whether the alleged discriminatee, Mr. Chacon, engaged in activities protected by the Act, particularly those in Paragraph 105(c)(1) thereof, and, if so, whether the Respondent mine operator was aware of those activities and, if so, if the Respondent disciplined Mr. Chacon because of his engaging in such activities. The precise facets of these issues will be subsequently dealt with in this decision.

Mr. Chacon has been an employee of Respondent for nearly 15 years and has been a locomotive engineer for approximately the last 10 years of his employment. He is employed at Respondent's Morenci Mine located at Morenci, Arizona. The Morenci Mine is an open-pit mine. It employs approximately 70 to 75 locomotive engineers who work three shifts and who operate locomotives which weigh approximately 75,000 pounds, are 54 feet long, are 15 feet high, and 10 feet wide. Each car pulled by the locomotive has a capacity of 72 tons and the locomotive and the cars it pulls move over a railroad track which for the purposes of this proceeding run along

"benches" along the sides of the open pit. The track which is laid on "panel grades" comes in 30- to 50-foot lengths and is placed on ties. The track is portable and it is constantly being moved. When the track is moved, the ties can become loose and when there is bad or rainy weather the stability of the track is adversely affected in that the spikes holding the ties "give." Each locomotive which pulls a train is operated by one locomotive engineer who operates the locomotive either from the cab of the locomotive, from the caboose, or from the side of the locomotive. The cab of each locomotive contains a speedometer and a "Chicago-Pneumatic" speed recorder which is mechanically attached to the engine and which records the speed of the locomotive on a tape. The speed recorded on the tape is that which is shown on the speedometer of the locomotive.

The speedometer is approximately the size of a standard American automobile's and it measure speeds up to 70 to 80 miles per hour. I find that the needle of the speedometer fluctuates or "bounces" regularly between 5 and 15 miles per hour based upon the testimony of the locomotive operators who operate the same who testified in this hearing. I find that the speedometer and the speed recorder which records the speeds shown on the speedometer are unreliable as a precise indicator of the speed of the locomotive based upon the credible evidence in this proceeding. All witnesses who testified on the subject conceded that to some extent there was or there could be a variance between the speed shown on the speedometer and the actual speed being traveled. One of the reasons mentioned for the imprecision of the speedometer was "slippage of wheels." I find that because of the imprecision of the speedometer that the responsibility for operating a locomotive at a safe and proper speed under the circumstances and under varying circumstances must necessarily rest upon the judgment of the locomotive operator. This, of course, is a subjective judgment.

Under the Code of Safe Practice for Railroad Train Operations applicable to the Morenci Mine, Exhibit R-2, unless a so-called "slow order" is posted on a call board, located for purposes of this proceeding in a lineup shack, the maximum permissible speed on good track which is to be observed by locomotive engineers is 15 miles per hour for "bench tracks." I note that the Code also provides that "track conditions may dictate speeds slower than those listed above," which also is evidence that in the final analysis the subjective judgment of the locomotive engineer must determine what a safe and proper speed is.

Derailments are common occurrences at the Morenci Mine. The damage caused by a derailment can be negligible and can

range upward to a cost of approximately $100,000. The cost of derailments where panels are damaged is approximately $1,500 per panel. In 1977, 1,082 derailments occurred at the Morenci Mine, in 1978, 1,164, and for the month of September 1979, a total of 77 derailments occurred. Figures for the first 8 months of 1979 were not available. Following a derailment, the track can be made operable the majority of the time by "rerailing." Locomotive engineers experience a derailment at the rate of approximately one per month. Derailments can occur at slow speed as well as high speed because of defects in the rails, the track generally, or the equipment. A locomotive operator, upon the occurrence of a derailment, customarily reports the derailment to his foreman and ultimately a "Foreman's Derailment Report" is prepared which indicates among other things the speed of the train based upon the speed recorder tape. See Exhibit A-3.

When "slow orders" are posted on the call board, the "slow order" does not customarily indicate what the maximum speed is to be. However, on occasion, a "slow order" does specify the maximum speed. There is no written instruction or provision in operators' manuals or in courses taught by either the Government or the operator or elsewhere or otherwise which express what a maximum speed is under a "slow order." Neither Chacon specifically, nor other operators have been advised by management personnel that there is a maximum permissible speed under a "slow order," although Respondent's witnesses generally were of the opinion that the maximum speed would range from 5 to 10 miles per hour. See testimony of Wesley Brooks, general mine foreman; Joseph Hayes, assistant training coordinator--8 to 10 miles per hour.

Chacon became a union safety committeeman in 1977 and in January 1979, he became Vice-Chairman of Local 1668, UTU. As Vice-Chairman, he handled grievances usually in conjunction with James Starr, the Chairman of the Local. When Chacon became Vice-Chairman, the union's concern and degree of militancy with respect to handling safety complaints elevated beyond its previous level. Testimony of Starr and Exhibit A attached to Answers to Interrogatories. On December 7, 1978, Chacon participated in a grievance involving a safety complaint, a signal system defect, which was filed pursuant to Article VIII of the Labor Agreement above mentioned. On January 31, 1979, Chacon signed a grievance as committeeman containing approximately 72 signatures of union members complaining of unsafe and improper maintenance on cabooses. Exhibit A-7. On February 11, 1979, Lester D. Olson, mine superintendent, issued a letter to Mr. E. H. Franco, representative of Local #1668 in connection with grievance hearings which were held in Olson's office on February 7 and 8,

1979, which indicated, among other things, that the caboose conditions were being investigated. On approximately February 21, 2/ 1979, Chacon issued a letter to the acting subdistrict manager of MSHA concerning the conditions involved in the January 31, 1979, grievance. Exhibit A-9. On February 8, 1979, Starr and Chacon signed a grievance for the purpose of having the written warning which was issued to Chacon on February 6, 1979, removed from his records. Exhibit A-14. The written warning referred to, Exhibit A-13, was signed by Kenneth A. Lines, assistant shift foreman, on February 6, 1979, and warned Chacon for "excessive speed under a slow order" on "2-5-79." The written warning is entitled "Notice of Warning or Discipline" and indicates that Mr. Chacon was informed that a repetition of such an offense would subject him to a "more severe penalty."

On February 12, 1979, Mr. Chacon received a suspension for 3 days. The suspension was contained on the same standard printed form as the prior warning. The heading of the document was entitled "Notice of Warning or Discipline" with the word "Discipline" underlined. In this suspension, Mr. Chacon was disciplined for "excessive speed on slow order track (designated) all bench tracks and dumps." Chacon was given a disciplinary lay-off from February 13, 1979, to February 16, 1979, a total of 3 working days.

In addition to the warning and suspension involved in this proceeding, Mr. Chacon had received a warning in December 1971, involving operation of his train, a warning on June 18, 1972, involving a failure to control his train and the derailing of a caboose, a disciplinary 3-day lay-off on September 26, 1973, for running a light, a 7-day disciplinary lay-off on December 22, 1973, involving an operating violation, a warning on October 14, 1975, for failing to control his train which resulted in a collision, a warning on March 14, 1977, for being AWOL, a warning on August 28, 1977, for not wearing a safety hat, a 3-day suspension on December 27, 1977, for AWOL, a warning on July 30, 1978, for an operating violation; to wit, "He is to maintain total control of his train at all times and avoid splitting a switch," a warning on January 8, 1979, for reading on the job and again another warning on January 8, 1979, for not wearing a safety hat and glasses. Whether that number of warnings is unusual I am not able to find on this record since there are no comparative statistics or information. Likewise, I do not infer that Chacon is a bad or unsatisfactory employee on the basis of that history of warnings and suspensions all of which are reflected in Exhibit R-3.

2/ Incorrectly shown as "December" 21 (Tr. 249) in my bench decision.

Respondent's records indicate that in 1977 there were no warnings to employees for excessive speeds which resulted in derailments. These records indicate that in 1978 there were four warnings given to employees for excessive speeds which resulted in derailments and that with respect to three of the four the records do not indicate what the speed was or the amount of damage. With respect to the fourth 1978 warning, the speed was 20 miles per hour and the damage was described as "Track destroyed under locomotive which was partially buried in the ballast." For the first 9 months of 1978, Respondent's records indicate there were three warnings for excessive speeds which resulted in derailments, the speeds on two of which were 15 and 20 miles per hour, respectively, and the damage indicated being "Damage to track and locomotive" and "Tore up seven or eight panels," respectively. With respect to the third 1979 warning, no indication was given with respect to speed or damage. Exhibit A-2, page 2. During the years 1976, 1977, 1978, and 1979, only one of Respondent's employees, aside from Johnny Chacon, was suspended from employment without pay for operating a locomotive at an excessive speed causing a derailment. Respondent's records indicate that one M. F. Naccarati was suspended for 3 days for violating the Code and that there was no record of the speed or damage. For the same 4-year period, only five locomotive engineers were suspended for reasons other than excessive speed. Four of these involved running a red light. In addition, three locomotive engineers received disciplinary lay-offs for unexcused absences in 1978. I conclude that warnings and suspensions generally are rarely given and that in particular warnings and suspensions for excessive speed infractions involving derailments are exceedingly rare and have been during the 4-year period 1976 through 1979.

I find that in December 1978, two letters were sent by Local 1668 to Robert Riley, District Manager, MSHA, Phoenix, Arizona, which were signed by James Starr, Chairman, but which were prepared by Mr. Chacon. Exhibits A-4 and A-5. I find in that connection that Chacon prepared the letters for Starr to sign for the reason that Starr's signature as chairman would carry more weight than Chacon's signature. I find, based upon the testimony of Starr, that if Local 1668 members had safety complaints they customarily would go to Chacon who, in turn, would take the problem to the management of Respondent and also that Chacon was the first union representative to take complaints to MSHA. I find that Chacon brought the subject matter involved in the complaints to MSHA signed by Starr, Exhibits A-4 and A-5, which were mailed to MSHA in December, to the attention of management some 4 or 5 days before writing those letters and that subsequently there was a hearing or meeting in December at which L. B. Olson, the

mine superintendent, and Joseph Roche, general mine foreman, attended as well as Chacon and Michael Cranford of the union. At this meeting--and at the very beginning--Mr. Olson mentioned the letters sent to MSHA and indicated he did not appreciate the union's sending such letters to MSHA. I find that Mr. Olson's mood was angry or as described by Cranford, "agitated" and that his tone was loud. Olson indicated that the company should have been given more time to make the corrections.

Turning now to the incidents which resulted in the issuance of the warning and the suspension I find that on February 5, 3/ 1979, Chacon was operating his locomotive on the bench proceeding towards the dump when his train was derailed. Chacon was in the caboose which contained no speedometer. Chacon had not been told by management either in writing or orally what the maximum permissible speed was that he should go. There was, however, a "slow order" in effect and (I find) that Chacon was going no more than 10 miles per hour. I make this finding on the basis of the following reasons: Various witnesses for the Respondent have indicated that they can tell or should be able to tell how fast a locomotive is going within 2 or 3 miles per hour; that is, a locomotive engineer should be able to make such a judgment. On the other hand, Mr. Starr testified that he could estimate his speed only within 5 to 7 miles per hour and that it is difficult at speeds above 5 miles per hour to determine exact speed. Mr. Chacon testified that he was going between 5 and 10 miles per hour and that he could tell he was not going 15 miles an hour based upon his experience. I conclude that Mr. Chacon, being the operator of the locomotive at the time, is in the best position to determine his speed. The tape mechanism, in my judgment, is not sufficiently credible based upon the testimony in this hearing for me to rely on it. Were the speed-recording tape reliable, I would consider it to be the best evidence and to have overwhelmed the opinions and subjective judgment of the individuals. The testimony in this case with respect to speed has been all over the lot. I do not find it sufficiently accurate from the standpoint of Respondent to credit it. On the basis of the testimony in this case, I am inclined to credit the testimony of the individual who was operating the locomotive and also the opinion of a locomotive engineer. I further find for similar reasons that gauging damage--and surveying damage done--is not particularly probative of the speed that a train is traveling in a given instance. There is testimony in this

3/ Incorrectly shown as February "4", in my bench decision (Tr. 253). See Tr. 81, 134.

record with respect to factors which could change that--including the weather, the conditions, the wetness, the rain, and the like. The opinions given, likewise, are suspect for the reason that gauging speed on the basis of damage is not particularly susceptible to persuasive proof by the rendering of a mere general opinion. There was really little corroboration beyond the expression of such general opinions in this case. Certainly, these were not sufficient evidence to overwhelm the testimony of the person in the best position to gauge the speed, which in this case is the operator himself. I also find no reason to discredit in this case the testimony of Mr. Chacon on this subject and on other subjects contained in his testimony. The occurrence of derailments is very frequent and can occur from many, many causes. To attribute the derailments to excessive speed in this instance would require a higher quality of proof than that presented by Respondent.

The following morning, that is, February 6, 1979, Kenneth A. Lines delivered a written warning to Chacon saying, "They told me to give you this." Chacon asked, "Who is they?" to which Lines replied, "The Office." Chacon took this to mean, and I find, that this meant Mr. Olson or Mr. Roche since they were the only ones in the office who could impose disciplinary punishment. Aside from the written warning of July 30, 1978, Chacon had received no warnings, oral or written, for operating violations prior to the February 6, 1979, warning. I footnote that he did receive two warnings on January 8, 1979, for reading on the job and for not wearing a safety hat.

On February 12, 1979, Chacon was in the cab of the locomotive which was on the south side of the pit. The speedometer was indicating between 5 and 15 miles per hour. Chacon believed he was going 10 miles per hour when the derailment occurred. At this time, Chacon was not working on his usual shift and was working for a different assistant shift foreman, Mr. William D. Pounds. Following the derailment, Chacon and Pounds discussed the speed he was going and according to Chacon, agreed that Chacon had been going between 10 and 12 miles per hour. At approximately 3:30 p.m., on February 12, 1979, Mr. Pounds drove up in a truck and handed Chacon the written 3-day suspension indicating that Chacon was being given the suspension because he had been given a previous warning. Pounds and Chacon went to the call board to determine if a 5-mile per hour designated speed maximum had been established. While a "slow order" had been posted, no excessive 5-mile per hour speed limit had been set. Subsequently, when Chacon returned from the suspension, Pounds asked Chacon if he enjoyed the time off, Chacon replied, no, it was blankety blank (an epithet) to which

Pounds replied that it had been up to him he would not have given Chacon the suspension and that the suspension had come from the office.

Chacon subsequently filed grievances with respect to both the warning and suspension and was rejected on both grievances by two levels of management, Olson and Bolles. During the hearing of the grievances before Mr. Olson under the grievance procedure provided in the labor contract, Mr. Olson indicated that there had been "Lots of derailments" and that "they had to start somewhere." Following the derailment on February 12, 1979, on February 13, the locomotive involved received repairs on its speedometer.

I find that Respondent's management was aware of Chacon's engagement in activities protected under the Act and, in particular, his activities involved with the filing of grievances in December, the forwarding of complaints to MSHA reflected in Exhibits A-4 and A-5 and also with the complaint to MSHA concerning the grievance which was signed by some 72 employees and union members. In the grievance meeting at which Mr. Olson complained to Chacon about taking safety complaints to MSHA before allowing the company to correct the same, the expression of Mr. Olson establishes that the company was aware of Chacon's activities. Furthermore, Chacon had created a change in the force with which safety complaints were being handled by the local union. There has been no contention of a lack of knowledge of this and I find that the requisite element of awareness by the mine operator of the alleged discriminatee's safety reporting activities was clearly established in this record. Mr. Olson, in his testimony, admitted that he told Chacon at the grievance meeting that he felt that any safety problem should go to the company first by way of the safety suggestion or safety grievance procedure before being sent to MSHA. Mr. Olson subsequently indicated that his remarks were addressed to the group in general, not Mr. Chacon personally.

The record is clear that the primary management figure engaged in the decision to issue the written warning on February 6th and the 3-day suspension on February 12, 1979, was Mr. Joseph Roche, the general mine foreman, who transferred to Respondent's Ajo operation in approximately July of 1979 and was not a witness in this proceeding. Mr. Lines testified that on the morning of February 6, 1979, when he went to Mr. Roche's office that Mr. Roche raised the subject of the warning. Mr. Olson denies that he knew of the situation before the warning issued, although he did put on Mr. Roche's desk on the morning the warning was issued two reports which showed excess speed derailments and suggested

that Mr. Roche look at them. Mr. Olson denies knowing that Chacon was involved in either of the two derailments. With respect to the suspension, the two management figures involved were again Mr. Roche, and Mr. Pounds--who was not Mr. Chacon's usual assistant shift foreman. From Mr. Pounds' testimony, it is clear that the decision to suspend Chacon was made by Mr. Roche. In analyzing the evidence with respect to discriminatory motivation in a case such as this which involves a corporate defendant with numerous personalities engaged in the channel of management's command, it is necessary to pinpoint exactly which person actually made the decision to levy the punitive action. In this action, I find that person was Mr. Roche. While I make no inference with respect to the fact that Respondent did not call Mr. Roche, I do note at this point that if there is evidence of discriminatory motivation of a circumstantial nature or indirect nature it would seem that he would be the only person who would be in a position as the top management executive involved who could set the record straight, if such is possible.

The question remains at this point whether there is evidence of discriminatory motivation since I have found that there were protected activities engaged in by Chacon as specified in section 105(c)(1) of the Act, specifically, that Mr. Chacon as a representative of miners--not just a miner--had filed and made complaints under the Act, including complaints notifying the operator of alleged dangers and safety and health problems and also because Mr. Chacon, as a union representative on behalf of other miners, made such reports both to the mine operator and the government agency charged with enforcing the Act.

In Munsey v. Morton, et al., 507 F.2d 1202 (D.C. Cir. 1979), the Circuit Court of Appeals established the elements under the 1969 Act, of which the 1977 Act is an amendment, necessary to constitute a prima facie case of discrimination. Those elements were:

> (1) That the miner had reported to the Government or its authorized representative an alleged violation or danger in a coal mine.
>
> (2) That after such reporting occurred such miner was discharged from his employment, and I would footnote, or otherwise subjected to a retaliatory action. And,
>
> (3) That such discharge was motivated by reason of such reporting and not for some other reason.

The 1977 Act, among other things, broadens the jurisdiction to include all mines not just coal mines and also broadens the types of activities which are protected. The objective of section 105(c) is the protection of mine safety reporting. I conclude that under the 1977 Act the general elements of proof an Applicant must meet are that:

> (1) The miner has engaged in the safety reporting activities or any of them described in and protected by Section 105(c)(1) of the Act.
>
> (2) After such reporting occurred such miner was the subject of retaliatory action by his employer adversely effecting the conditions or incidents of his employment and,
>
> (3) That such (action) was motivated in at least significant part by reason of such protected activities and not for some other reason.

In the instant case there is evidence, based upon Mr. Olson's statement at the grievance meeting, that Respondent was unhappy with Chacon's taking a safety complaint to MSHA. I have found that this was expressed in an angry tone. In addition, there is evidence that at the time of the February 12, 1979, derailment Mr. Olson came across Mr. Pounds, who was Chacon's assistant shift foreman on that particular day, at which time Mr. Pounds stated to Mr. Olson these words: "Your boy done it again," or words to a similar effect. By using the words "Your boy" in this conversation I infer a prior knowledge or awareness on the part of Pounds that Chacon was more than an ordinary locomotive engineer. The words "your boy this" or "your boy did that" in the abstract would normally carry two meanings. First, it could mean an awareness on the part of the one uttering such a phrase that the person referred to is a favorite of the individual to whom the words were uttered. In the real world, it can also mean a sarcasm and an inference that the person referred to is an enemy of or otherwise stands in disfavor with the person to whom such words are uttered. The context of the conversation, the words uttered by Pounds to Olson, was one laden with the problem which Chacon had caused, i.e., "Your boy done it again." This means he had done something unfavorable again. By uttering such a phrase, Pounds understood that Olson would know who he meant even though he did not mention Chacon's name. Olson said he knew who Pounds was referring to because he had heard on the radio that there had been a derailment, but that does not answer the question . . . Pounds did not know that Olson knew that from being on the radio. Pounds knew when he uttered the expression that

Olson would know who he was talking about. Olson told Pounds at this point that he should take it from there. We thus have Olson's unhappiness with Chacon for filing safety complaints with MSHA, we have the Olson-Pounds conversation which in and of itself means nothing, but which taken in context creates an inference of displeasure on the part of management with Chacon.

Is there any further evidence of discriminatory motivation? It appears that Chacon was the first, or from Respondent's standpoint, the second employee ever suspended for an excessive speed derailment. I find that the statistical evidence which I previously specified indicates that Chacon was treated in a disparate manner. The general burden of establishing by a preponderance of the evidence a case of discrimination is on the Applicant. However, the burden of proof is on Respondent as proponent of the rule that it urges in this case, that is that Chacon was warned and suspended for operating a locomotive at excessive speeds causing derailment. Thus, Respondent's argument that the Government has failed to show that there were other derailments where excessive damage was done and where the locomotive engineer was not punished in retaliation for safety reporting activities in my judgment has no merit if the Government has established otherwise a prima facie case. I would conclude that the burden would shift to Respondent to show that there were excessive speed derailments and that the locomotive engineer did receive a suspension. The Government has shown that such was not the case clearly. The records furnished by Respondent in answering the interrogatories show no such suspension other than the Naccarati incident which is not sufficiently documented, in my judgment, to count. So, I conclude on the basis of the statistical information that the Government has established that Chacon was treated disparately.

Now then we turn to the timing of this treatment. The treatment occurred within approximately 1-1/2 months-and possibly less time since we do not apparently have an exact date--(from) the grievance meeting where the Olson-Chacon confrontation occurred. We have the first warning and the suspension occurring in proximity to the expression of discontent by management's top man at the mine and such treatment is a first. I find that to be very significant. I find that Mr. Lines' testimony to the effect that several days after he had warned Mr. Chacon on February the 5th he similarly warned another locomotive engineer for an excessive speed derailment to be actual evidence of bad faith in the context of the facts of this record. Up to that point there had been no such warnings and then a warning is given to Chacon for the first time and then a warning follows to somebody else within 3 or 4 days and then after that there are no

similar episodes. That smacks of action taken to bolster the disciplinary action taken against Chacon. It smacks of pretext. It does not lend itself to being viewed as part of action taken in accordance with the general pattern of disciplinary action on the part of Respondent's management over a period of 1 year or (even of) several years.

Respondent's case, as I have previously indicated, is exceedingly weak from the standpoint of justification for its punitive actions, that is, its evidence as to the speed the locomotive was traveling. The argument that it makes with respect to being able to estimate (speed) by (damage) was too general, in my opinion, to overcome the more reliable testimony of the other locomotive engineers who testified. There is evidence that the speedometer bounces between 5 and 15 miles per hour that I find credible and I do accept that evidence. That, in turn, makes the tape recording which was offered by Respondent as Exhibit R-4 unreliable as evidence, in my opinion. The Respondent sought to keep absolute control not only of the operating engineers while they were on the job, but of the evidence, in my opinion, by its handling of the "slow order." If the Respondent wishes a forum or a tribunal or a court to recognize that there is some maximum speed involved in the "slow order," then it should print or publish such a maximum speed. It should teach its engineers what it is. It should spell it out on the call board. It would then have the proof that it can come in and say, "Look this is what it is," but to come into a hearing and express an opinion, and there were different opinions even among Respondent's witnesses apparently as to what it meant, would seem to give it complete latitude to say anything it would want in a tribunal. If it wants to set a maximum, it should do it either by printing it or at least when a "slow order" is put up to specify what the maximum speed is. The reliability of the speed recorder would still be a problem from the standpoint of proof. So the affirmative defense that Respondent raised, in my opinion, was not established by probative evidence that I can recognize.

Respondent has argued that at the grievance hearings which were argued before management's personnel, Mr. Chacon did not raise the question about what Mr. Olson had said and what Mr. Pounds had stated. I do not find this unusual. In the grievance proceeding, it is for management to make these determinations, not an independent, impartial forum. It would not be unusual in my opinion for one charged by a party to come in and (not) argue before that very party the points that are actually adverse to the very party who is deciding the outcome of his case. I do not find that a persuasive point under those circumstances. Thus, I do not infer from

the fact that Mr. Chacon had not previously raised those points that such incidents did not happen or that this was simply an afterthought on his part in this proceeding to raise those arguments. Indeed, his prospects of succeeding in the grievance area might well have been recognized by him to be enhanced by not raising this point.

I note for the record that Mr. Roche who was not called as a witness is employed at Ajo (Arizona) which is a distance of approximately 300 miles from the site of this hearing.

I conclude that Applicant has established a prima facie case by showing protected activities, the employer's knowledge thereof, retaliatory disciplinary measures by Respondent and inherent, of course, in the concept of retaliation the fact that the warning and suspension were motivated in at least significant party by reason of such protected activities. I find that the Respondent in this case did (not) establish, because of failure of the quality of its proof, its justification for the warning and suspension of Chacon. I further find that in view of the timing of this retaliatory action, the obvious animosity at the top management level toward Chacon for filing complaints with the Government, and the fact that such punitive action constituted a different pattern of disciplinary procedure than had been previously exhibited at the Morenci Mine, that the justification set forth by Respondent for such action was a pretext. I find that the primary reason for the suspension and warning of Chacon was his leadership and his pronounced efforts in processing safety complaints at the Morenci Mine in his role as Vice-Chairman of Local 1668. In the very least I find that there is a mixed motivation situation, that is, where the management has some justifiable basis for punishing Chacon but where also part of its motivation is retaliation because he is becoming a pain in the neck and troublesome to their total control of the safety programs at the Morenci Mine. It is well established in labor law that the mere existence of a valid ground for discharge of an employee is no defense to an unfair labor practice if such ground was a pretext. NLRB v. Yale Manufacturing Company, 356 F.2d 69 (1st Cir. 1969); NLRB v. Ace Comb Company, 342 F.2d 841 (8th Cir. 1965), and (it) is also well established that the disciplining of an employee which is motivated in part by activity protected by a remedial act is unlawful. Socony Mobil Oil Company, Inc. v. NLRB, 357 F.2d 662 (2nd Cir. 1966).

I reach the following decision or judgment in this case and that is that the alleged discriminatee, Johnny N. Chacon, was indeed the subject of discrimination with respect to the

warning and the suspension and that there is merit to the application for review which was filed by the Government on his behalf in this case.

I reach the following conclusions of law:

(1) The Federal Coal Mine Safety and Health Act of 1977 is remedial. It should be construed liberally in order to carry out the Congressional purpose of protecting and enhancing the health and safety of coal miners.

(2) If one of the reasons for, or a significant part of the motivation for, a mine operator's discharging or otherwise discriminating against a miner is attributable to any of the specified activities set forth in Section 105(c)(1) of the Act by the miner, a violation of the Act occurs.

(3) Even though a valid basis for the discharge or punishment of a miner may exist, if, such punishment or discharge is in significant part motivated by the miner's protected activities under Section 105(c)(1) of the Act the punishment or discharge is unlawful.

(4) In violation of Section 105(c) of the Act the Respondent discriminated against Johnny N. Chacon by warning him on February 6th, 1979, and by suspending him from employment for three days (commencing February 13th, 1979.

All other proposed Conclusions of Law and Findings of Fact not expressly incorporated by me in this decision are rejected.

* * * * * * *

It is ordered that within 30 days from the issuance of my written decision which will issue hereafter and which will incorporate the bench decision which I have just rendered in this case aside from grammatical corrections Respondent pay to the Applicant, in full reimbursement of the wages which he lost during the 3-day suspension, his full pay for said period including any overtime which he would have drawn had he been employed on those 3 days together with statutory interest provided in the State of Arizona running on said amount from February 15, 1979, to the date of payment.

Respondent is further ordered to expunge from the personnel records of Mr. Chacon and all other records the warning of February 5, 1979, and the 3-day disciplinary suspension commencing February 13, 1979, and all references thereto.

* * * * * * *

I find, in addition, that Respondent has commited a violation of the Act.

* * * * * * *

The statute requires a consideration of six criteria in a penalty case. The usual penalty case, however, involves a violation of specific safety or health standards and some of the criteria are not relevant to a discrimination violation, that is, a violation of section 105(c)(1). 4/

I find that this is a very large mine operator. It has a moderate history of previous violations and, as counsel for the Government indicates, it is on the low side of a moderate history of previous violations. With respect to this history of previous violations, I find that there is no record of any similar violation having been committed by this Respondent. In view of the size of Respondent, I find that it would have the economic ability to pay any penalty which I would assess in this case, up to the maximum, without endangering its ability to continue in business.

The concept of negligence is one of the statutory criteria which is not relevant in this case. The violation, due to its nature, is found to be willful.

4/ Section 110(a) of the Act requires that, in addition to the remedies provided in section 105(c), a penalty be assessed if the mine operator is found to be in violation of section 105(c). The parties were notified by my order of April 4, 1980, that the penalty aspect of this matter would be heard simultaneously with the discrimination aspect if a violation were found. In its complaint in this proceeding the Secretary of Labor asked that a penalty be assessed. The procedural regulations, 29 C.F.R. § 2700.25 through 29 C.F.R. § 2700.30, apply to violations of health and safety standards determined after issuance of orders and citations during inspections and investigations pursuant to section 104 of the Act. Such regulations are the procedural implementations of sections 105(a) and (b) of the Act. Such regulations do not appear to be applicable to discrimination proceedings arising under section 105(c) of the Act. To hold otherwise will result in piecemeal litigation and resultant inconvenience to all parties, as well as needless expenditure of the time and resources of the parties and the taxpayers.

The statutory criterion relating to abatement in good faith after the conditions or problem is discovered is again not relevant.

The remaining statutory criterion is how serious the violation is. There are different aspects of the gravity of this violation. One is that it is very serious because the discriminatee was the vanguard of the union's reporting procedure under the Act. And contrary to Mine Superintendent Olson's belief--directly contrary to Mr. Olson's belief--this is the whole purpose of this law which is passed by Congress and which is applicable in every state of the union, not just this area. The whole purpose of the law is to encourage reporting. Conversely, there is an obligation on the part of MSHA and the Government not to encourage frivolous or bad-faith reporting. Indeed, that is counterproductive even to the purpose of the law. If someone comes and calls wolf all the time after a while nobody pays any attention to it. So there are two aspects of this, but the purpose of this law which I have found to be violated is to do the very thing that the Respondent apparently disagrees with. There is an absolute right of any miner, and particularly the union representative charged with processing safety complaints, to go to MSHA.

I also would like to note with respect to Exhibit R-5, which is the MSHA Surface Miner Training Program, that this is applicable to miners, and granted that Mr. Chacon is a miner he also wears an entirely different hat when he acts as a union safety representative. I do not find this (Exhibit R-5), particularly relevant in this proceeding and particularly I do not view it as much of a restriction which MSHA would have put on any miner to go to the company first. I do not read this training manual to require miners to go to the company first. It states on the third page of the exhibit, "you also have the right to call MSHA to ask for help in the problem." That appears to me to be a collateral right, not one that must be taken in sequence. Certainly, it is not a restriction on the part of the union representative, in his judgment of what to do, and I would certainly expect that the attitude and the belief that there is some restriction on that on the part of Respondent to be straightened out.

* * * * * * *

The second aspect is what effect the retaliatory action which I have found in this case will be on the rights of miners and on the rights of the union representative which is expressly provided for in 105(c)(1). It is certainly--in the context of this community and this is a small area where I

would assume most of the people work and where the union is located--discouraging in my opinion for the union representative for the first time to be given a punishment after he has become the spearhead of the safety-reporting activities of the union and of the miners. Had Mr. Roche testified we may have had a clearer understanding of the thinking of the Respondent's management since he was the one who did make the decision. There is little for me to find in the way of mitigation in terms of seriousness. I find this to be a very serious violation in view of the geographical area, the timing, and the dampening effect it would have on safety reporting. The intent of Congress was that safety reporting was to be encouraged since miners are out in the different areas of the mine and in the best position to spot immediately hazardous conditions. The penalty will be raised on the basis of gravity. On the other hand, I would find relatively commendable the history of previous violations and the fact that this is apparently a first as far as discriminatory activity is concerned by this Respondent. Those factors militate for a lowering of the penalty. I find a penalty of $2,500 is appropriate and it is so assessed.

Respondent is ordered to pay the sum of $2,500 to the Secretary of Labor within 30 days after the issuance of my written decision.

ORDER

Respondent, if it has not previously done so, is ORDERED to pay to the Secretary of Labor the sum of $2,500 within 30 days of the issuance date of this decision.

Michael A. Lasher, Jr., Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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30 MAY 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	:	Civil Penalty Proceedings Docket No. LAKE 79-94 A/O No. 33-01253-03001
v.		:	Docket No. LAKE 79-100 A/O No. 33-01253-03002R
ROSE COAL COMPANY,	Respondent	:	Rose No. 3 Mine

DECISION

Appearances: Linda Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner;
Mr. James Rose, Rose Coal Company, Jackson, Ohio, for Respondent.

Before: Judge Edwin S. Bernstein

On April 8, 1980, I conducted hearings pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 801 et seq., and 29 C.F.R. § 2700.50 et seq., and issued the following decisions from the bench.

Docket No. LAKE 79-94

This is my bench decision in Docket No. LAKE 79-94.

The parties have stipulated that the mine in question, Rose No. 3 Mine, was very small in size. With regard to the history of prior violations, the Solicitor stated that the history was moderately good. Mr. Rose stated that there was a small number of prior violations. I find that the history was moderately good.

With regard to the alleged violations covered by No. 7-0003, the Solicitor contended that the Respondent failed to furnish a report of a periodic survey of noise levels, and that that failure violated the health and safety standards at 30 C.F.R. § 70.508(a).

Mr. Rose did not dispute the violation and did not deny that he violated that standard.

I find that the gravity was slight. In order for the violation to endanger health, prolonged exposure to noise would be required. I accept Mr. Rose's testimony that in a previous survey, noise was detected to be one-quarter of the allowable limit.

I find that the operator was negligent.

As to good faith abatement, the evidence was that the operator was slow in abating the violation.

Considering all these factors, I assess a penalty of $45 for this violation.

With regard to Citation Nos. 278782, 278783 and 278785, the Secretary of Labor contended that the operator violated the mandatory standard at 30 C.F.R. § 75.503. That section reads: "The operator of each coal mine shall maintain in permissible condition all electric face equipment required by Sections 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine."

With regard to Citation No. 278782, the Secretary of Labor charged that the coal drill used in the 001 section had a trailing cable that was not insulated on both sides.

With regard to Citation No. 278783, the Secretary of Labor charged that the cutting machine in the 001 section had a trailing cable that was not insulated on both sides.

With regard to Citation No. 278785, the Secretary of Labor charged that the shuttle car used in the 001 section had a trailing cable that was not insulated and had an opening in the plane flange joint at the headlight resistance compartment in excess of .005 inches.

The operator did not dispute Mr. McNece's testimony that when, on December 21, 1978, Mr. McNece inspected the equipment in the 001 section, he found that insulation was worn from the side of the drill's trailing cable, the shuttle car's trailing cable and the cutting machine's trailing cable, and that with respect to the shuttle car's headlight resistance compartment, there was an opening in excess of .005 inches. Therefore, I find that the operator violated the permissible standard as alleged in all three citations.

I find that the operator was negligent even though Mr. Rose testified that the cable had previously been painted with insulating paint. There is no indication as to when the insulation work had been done, and there was no testimony as to when this cable had been painted. A periodic inspection should have detected the fact that the insulation on the cables was worn and

that the opening was excessive. Mr. Rose testified that he made periodic inspections, but he did not indicate when prior to December 21, 1978, he inspected this equipment.

The gravity was moderate. There were few employees in this mine, and as conceded by Mr. McNece, this was a mine which had no history of being a gassy mine. Therefore, the chances of a methane explosion were slight. However, the danger to a miner who happened to touch the bare cable would have been great.

As indicated by the Secretary of Labor's witness and by the Solicitor, the operator acted in good faith and rapidly corrected these violations.

A final factor which I considered is that there is no evidence of a fine being proposed which would affect the operator's ability to continue in business.

I therefore assess the following penalties: I assess a penalty of $60 for the violation with respect to Citation No. 278782; a penalty of $60 for the violation with respect to Citation No. 278783; and a penalty of $70 with respect to the violation regarding Citation No. 278785.

The total penalties assessed for this case are $235.

Docket No. LAKE 79-100

My bench decision in Docket No. LAKE 79-100 is as follows:

The Petitioner in Citation No. 279802 has charged that Respondent and its owner, James Rose, refused an authorized representative of the Secretary

of Labor, specifically Jesse Petit, right of entry in Rose No. 3 Mine on June 27, 1978.

Section 103(a) of the Federal Safety Mine Safety and Health Act of 1977 states in part:

> For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

The testimony of the witnesses indicates that on June 27, 1978, at about 7:15 a.m., Mr. James Rose refused to permit Mr. Jesse Petit, an authorized representative of the Secretary of Labor, to remain on his premises in order to conduct a safety inspection of his coal mine. This action constituted a violation of Section 103(a) of the Act.

In deciding upon the penalty to be assessed, I have considered the six factors set forth in Section 110(i) of the Act. I find that Rose No. 3 Mine was a very small mine. It had a moderately good history in connection with prior violations. There was good faith abatement of this violation.

The assessment of this penalty will have no effect on the operator's ability to remain in business since it has been undisputed that Mr. Rose, the operator, is no longer in business.

As to gravity, I find the gravity is great. The right of representatives of the Secretary of Labor to inspect coal mines and other mines is essential to the proper enforcement of the Federal Mine Safety and Health

Act of 1977 and other statutes and to the protection of the health and safety of the workers in the mines. It is essential that representatives of the Secretary of Labor be permitted to inspect mines. Refusing them access could result in serious accidents as a result of lack of enforcement of the statute.

Similarly, there is no provision in the law permitting owners of mines to decide which inspectors can enter upon their property and which inspectors cannot. Nor are mine operators permitted to select inspectors. This would result in only those inspectors that are kind to the mine operators being allowed to inspect, rather than other inspectors who may, in the course of their jobs, have offended operators.

We can see what this would lead to. It would result in a breakdown of the purpose of the law. Therefore, I find the gravity to be great.

With respect to the factor of negligence, there was undisputed testimony that on a previous occasion, Mr. Rose refused to permit inspectors to enter his property.

However, there was one factor that I did consider in mitigation that touches on the question of negligence, and that factor is that Mr. Knight has testified that he told Mr. Rose that he would make every effort not to send Mr. Petit to Mr. Rose's property. It is clear that Mr. Rose and Mr. Petit had some bad feelings. Mr. Knight told Mr. Rose that he would try not to send Mr. Petit there. Apparently, as indicated by the testimony, on June 27, 1978, Mr. Knight was on vacation. Mr. Rose was unable to reach Mr. Osborne, who was acting supervisor in Mr. Knight's place,

when Mr. Rose tried to telephone on or about 7 a.m. on that day. Mr. Rose, therefore, felt that he had an understanding with Mr. Knight, that that understanding was not being honored, and I think that chain of circumstances offers an explanation as to his conduct on that date, and is a mitigating factor. This reduces his element of fault in refusing Mr. Petit entrance on that date.

Upon consideration of these factors, I assess a fine of $700 for this violation.

That concludes my bench decision.

I hereby affirm these bench decisions.

ORDER

Respondent is ORDERED to pay $935 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge

Distribution:

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30 MAY 1980

BISHOP COAL COMPANY, Contestant	:	Contest of Order
v.	:	Docket No. HOPE 79-241
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 254429 January 29, 1979
	:	Bishop No. 33-37 Mine
and	:	
UNITED MINE WORKERS OF AMERICA, Respondent	:	

DECISION

Appearances: Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant;
Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent;
Joyce A. Hanula, Esq., United Mine Workers of America, Washington, D.C., for Respondent.

Before: Judge Stewart

Bishop Coal Company filed a timely contest of Order No. 254429, pursuant to the provisions of section 105(d) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act). MSHA and the United Mine Workers of America (UMWA) subsequently filed answers denying the allegations set forth in the contest of order and asked that the proceeding be dismissed. Subsequent to the hearing in this matter, posthearing briefs were filed by MSHA, the UMWA, and the Contestant. Proposed findings of facts and conclusions of law which are inconsistent with this decision are rejected.

A citation issued pursuant to section 104(a) of the Act alleged a violation of section 103(f) of the Act and described the pertinent condition or practice as follows: "Due to severe weather conditions, this inspector was late arriving at the mine (8:10 a.m.), January 29, 1979. The operator refused to notify the representative of the miners who had already entered the mine."

In an order of withdrawal issued pursuant to section 104(b) 1/ of the Act, the inspector stated that "[n]o effort was made to abate this citation."

The primary issues presented are (a) whether a representative of miners was afforded an opportunity to accompany an inspector during an inspection as required by section 103(f) 2/ of the Act and (b) whether the inspector exercised his authority reasonably in the issuance of 104(b) Order No. 254429.

On January 29, 1979, Federal coal mine inspector Tommy F. Robbins, accompanied by trainee inspector William H. Uhl, arrived at the Bishop Coal Company's No. 33-37 mining complex to continue a regular health and safety inspection of the No. 33 Mine. Since January 1, 1979, Inspector Robbins had spent approximately 10 days at the No. 33 Mine conducting the inspection. The inspectors did not arrive at the mine until about 8:10 a.m., approximately 10 minutes after the miners on the shift had proceeded underground.

Inspector Robbins asked Arnold Shrader, company safety inspector, to notify a union representative that they were about to continue the underground inspection of the No. 33 Mine. Mr. Shrader went to the office of Mr. Camp, superintendent at the No. 33 Mine, where they called the portal office and found that the men had already gone underground. Mr. Shrader returned to the office at the respirable dust room and told Inspector Robbins that the men had gone underground and he did not have the authority to call anyone out of the mine to go with him. The travel time

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1/ Section 104(b) of the Act reads as follows:

"If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection 104(a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

2/ Section 103(f) of the Act in pertinent part reads as follows:

"Subject to regulations issued by the Secretary, a representative of the operator and representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection [103(a)] for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine."

between the portal and working section was approximately 30 minutes. At approximately 8:27 a.m., the inspector informed Mr. Shrader that a citation would be issued and that it must be abated by 8:45 a.m.

Mr. Camp was then told by Mr. Shrader that the inspector had issued the citation and was considering the issuance of an order. Mr. Camp proceeded to the office where he was told in a conversation with Inspector Robbins that the time set for abatement was 15 minutes and that an order would be issued if abatement was not achieved within that time. When asked about the terms of the order, the inspector stated that the order would not result in the closure of any mine areas.

During this time, inspector Eugene Mounts and a miner representative, Mr. Armond Smith, were present in the mine office. These two were preparing to conduct an inspection of the No. 34 Mine. Mr. Camp told Inspector Robbins that he was notifying Mr. Smith of the inspection of No. 33 Mine at that time. He then informed Mr. Smith that an inspection of the No. 33 Mine was to be undertaken. Under the mistaken belief that by doing so he had complied with the requirements of section 103(f) of the Act, Mr. Camp argued with Inspector Robbins, telling him that he did not have a right to issue the citation because "the union had been notified."

Most of the miners on the list of walk around representatives UMWA Local Union 6025, dated December 17, 1978, worked at Mine No. 34. Mr. Harold Bland was the only person on the walk-around list who worked in the No. 33 Mine on the day shift. In his testimony, Mr. Camp stated that "[H]e would have had to notify a man in No. 33 if Mr. Smith would have asked him." Mr. Camp also testified that as he read the law, "[e]very member of Local Union 6025 is a representative of the United Mine Workers at Bishop Coal Company" and that if he "[W]ould have talked to any of those 721 men [so far as he was concerned] that is notifying the United Mine Workers * * *."

Effect of Notification of Representative of Miners Already Committed to Accompany Another Inspector on Inspection of Different Mine

Contestant's position is that it notified one of the miners' representatives, Mr. Armond Smith, of the inspection to be conducted at the No. 33 Mine and that this complied with the requirements of section 103(f) of this Act, even though Mr. Smith had already been assigned to accompany another inspector on an inspection of the No. 34 Mine.

Section 103(f) of the Act requires that a representative of miners shall be given an opportunity to accompany an inspector during an inspection pursuant to section 103(a) of the Act. In order for the opportunity to be afforded, a representative must, of course, be notified of the impending inspection. Although notification of the impending inspection must be given in order to allow the requisite opportunity to accompany, notification alone may not meet the requirements of the Act.

Mr. Smith was already committed to join in an inspection of No. 34 Mine. Neither the notification of Mr. Smith nor Mr. Smith's failure to specifically request that someone else be afforded the opportunity to accompany one of the inspectors serves as a valid excuse for Respondent's failure to provide a representative when requested by Inspector Robbins. From the record, it is clear that Contestant did not give a representative authorized by the miners an opportunity to accompany the inspector. Mr. Harold Bland, a representative of miners who was able to accompany the inspector, was made available only after a citation had been issued. This failure to notify and, hence, to provide the requisite opportunity to accompany, was in violation of section 103(f) of the Act.

Time Of Inspector's Arrival

As a result of delays caused by adverse weather conditions and difficulty in purchasing gasoline with a Government credit card, the inspectors did not arrive at the mine until about 8:10 a.m., approximately 10 minutes after the miners on the shift had proceeded underground. The normal starting time for the day shift was 8 a.m.; however on some mornings there were delays, and starting time might be as late as 8:10. It was sometime between 8:25 and 8:30 when Mr. Shrader went to Mr. Camp's office and said that Mr. Robbins and Mr. Uhl were in the dust room and had notified him that they wanted to continue their inspection of the No. 33 Mine. The mine foreman has a small office next to the drift mouth located about 500 feet from the mine office at the dust room. When Mr. Camp called the foreman to see if there was any one outside to accompany the inspectors as a miner representative, the mine foreman told Mr. Camp that all of the mantrips had gone and that there was no one outside on the hill available.

Although the inspector had arrived on previous days at 7:30 a.m., there is no requirement in the Act or in the regulations that he appear at the mine at any specific time. Section 103(a) of the Act is explicit in requiring that no advance notice of an inspection shall be provided to any person when the inspection is for the purpose of determining whether there is compliance with the mandatory health or safety standards. Therefore, there may be occasions when an inspector will begin an unannounced inspection at a time after the miners have gone underground at the beginning of a shift. While there may be a saving in time benefiting both MSHA and the operator if the inspector arrives early enough to allow him to go underground with the miners' representative, there is no requirement that he do so. The late arrival of the inspectors did not provide a valid excuse for the failure of the operator to afford representatives an opportunity to accompany the inspectors.

Requirement to Notify Representatives of Miners Who Had Already Gone Underground

The operator was verbally notified that a citation would be issued at 8:27 a.m. The order of withdrawal was issued orally at 8:45 a.m. The citation was issued in writing shortly before 9:00 a.m. The order was issued in writing at approximately 9:00 a.m.

After arrival at the mine at about 8:10 a.m., Inspector Robbins asked that a miner's representative be notified. Mr. Schrader misunderstood the inspector's request and believing that he had requested that a representative be brought back to the surface, went to the office of Mr. Camp. Mr. Camp was also under the erroneous impression that the inspector had demanded that a representative of miners be brought out of the mine when he proceeded to the respirable dust office and spoke with Inspector Robbins.

In asking that a miner's representative be notified in order that he could accompany the inspectors, Mr. Robbins did not use the explicit words "out to the surface." Mr. Schrader took the inspector's words to mean "to bring them out of the mine, because they were already underground". The initial misunderstanding on the part of Mr. Shrader and Mr. Camp should have been corrected by the subsequent events. The inspector allowed the operator 15 minutes to notify the representative by telephone. This should not have been misconstrued as a requirement to bring him to the surface which would have taken 30 minutes. On cross-examination, Mr. Camp testified that realistically a 15-minute period would not have been sufficient time to bring a man to the surface.

To travel to the inspection site, the inspector would pass by the section where the miners' representative was working and he would have been satisfied to have the representative brought out to meet him at the main line switch. Arrangements had been made on previous occasions to have the miners' representative meet the inspector underground. The inspector testified that, had the representative been notified, he would have been willing to meet him on route to the section which was to be inspected. As an alternative, the representative could have met the inspection party at the section to be inspected.

While it had been company policy to take an inspector to the section where the miners' representative was located or pick up the representative on the way to the inspection site, the operator on this occasion refused to take the required initial step in notifying the miners' representative in the belief that it had fulfilled the requirements of the Act by notifying Mr. Armond Smith. It was not until after the refusal to notify the miner's representative that the operator decided to allow him to meet the inspector underground on this occasion. Mr. Camp had been keeping his superior, Mr. Trump, informed as to the course of events. When he talked this situation over with Mr. Trump, they decided, "[W]e'll even go beyond what we've done. We will offer the opportunity for him to meet the man at the panel switch on the section, or wherever he wants to go."

Mr. Camp testified that he then went and told Inspector Robbins that he would bring "that man down there." Mr. Bland, however, was not notified until after the order was issued. The circumstances were such that they did not dispel Mr. Robbins' understanding that the operator was refusing to call on the telephone and notify a representative.

The written order of withdrawal was handed to Mr. Camp at approximately 9:02 a.m., at which time he went to the telephone and told the mine foreman that the order of withdrawal had been issued and that he should call the section foreman and get Mr. Bland out of the mine. Mr. Camp testified that he did not explain to his superior that the citation alleged only a failure to notify because he did not have a copy of the citation at the time the order was issued. It was normal practice for orders and citations to be issued verbally and then written out at a later time. While he did not have a copy at the time of the oral order, the record clearly establishes that at the time Mr. Camp called the mine foreman at 9:02 a.m., he had both the citation and the order.

Not knowing that Mr. Bland had been summoned, the inspectors changed clothes in preparation for going underground without a representative. They were delayed for a short while because of unavailability of transportation. When Mr. Bland unexpectedly appeared on the surface at approximately 9:50 a.m., Inspector Robbins terminated the order.

The fact that Mr. Bland was brought to the surface by the operator does not mean that the inspector required him to be brought from the mine. It is obvious that Mr. Bland was not brought from the mine on the basis of what the written citation and the order stated. Before Mr. Camp made his call to get Mr. Bland out of the mine, he had been afforded the opportunity to read the specific allegation on the face of the citation and he had, in fact, read the citation. This allegation simply stated that the operator had refused to notify the miners' representative. Even though the operator might have previously misunderstood the nature of the inspector's oral citation, it most certainly should have questioned such an obvious discrepancy before bringing Mr. Bland to the surface.

Since a requirement by the inspector that the miners' representative be brought to the surface is not established by the record, the issue as to the reasonableness of such a requirement by an inspector is not presented. It should be noted, however, that Section 103(a) of the Act provides for unannounced inspections and Section 103(f) of the Act requires that a miner's representative be given an opportunity to accompany the inspector to participate in pre- or post-inspection conferences as well as to aid in the inspection.

ORDER OF WITHDRAWAL

Section 104(b) of the Act requires that an inspector shall issue an order under that subsection when he finds that a violation described in a citation issued pursuant to section 104(a) has not been totally abated within the time specified and that the time for abatement should not be further extended. As noted above, mine management did not abate the violation within the 15 minutes set by the inspector. The test as to whether a

104(b) order was properly issued was enunciated by the Board of Mine Operations Appeals in United States Steel Corporation, 7 IBMA 109, 116 (1976). 3/ It was stated therein that "the inspector's determination to issue a section 104(b) order must be based on 'facts confronting the inspector at the time he issued the subject withdrawal order regarding whether an additional abatement period should be allowed.'" The critical question is whether the inspector acted reasonably in failing to extend the time for abatement and in issuing the subject order.

After arriving late, the inspector found the operator unwilling to call an available representative of the miners on the telephone. Such a call would have been necessary in order to arrange a meeting at the switch along the inspector's way to the inspection site even if Mr. Camp and Mr. Trump had agreed that Mr. Bland could have met the inspectors there prior to the oral citation. The failure of the operator to take the initial requisite step in calling and notifying the representative was a failure to afford an opportunity to accompany.

The abatement effort requested by the inspector and the time set by the inspector for abatement were reasonable. It is accepted here that the inspector did not demand that a representative be brought out of a mine, but only that the representative be notified. It is probable that Mr. Shrader misunderstood Inspector Robbin's request and relayed an incorrect message to Mr. Camp, thereby setting the chain of events in motion.

3/ The Board was addressing section 104(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970), which reads as follows:

"(b) Except as provided in subsection (i) of this section, if, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated."

This section of the 1969 Act and section 104(b) of the 1977 Act are substantially similiar with respect to the requirements each imposes on an inspector confronted with an operator's failure to abate a violation within the time specified.

The testimony of Petitioner's witnesses to the effect that Inspector Robbins did not demand that a representative be brought out of the mine is supported by the allegation contained in the citation, as well as by the length of time set by the inspector for abatement. In his description of the condition, the inspector stated that the operator failed to notify a representative. He did not allege a failure on the part of the operator to bring a miner out of the mine. Moreover, although the inspector was aware that it took 30 minutes each way to travel between the portal and working section, he provided only 15 minutes for the abatement of the citation. There is no evidence that the inspector set this time period in bad faith. Given the shortness of the period for abatement, the inspector could not have intended that management bring a miner to the surface.

The inspector testified that, had the representative been notified, he would have been willing to meet the representative on the way to the section which was to be inspected. As an alternative, the representative could have met the inspection party at the section to be inspected. The 15-minute period set by the inspector was an adequate length of time in which to notify the representative and afford him the opportunity to rendezvous with the inspector underground.

No purpose would have been served in this instance by an extension of time in which to achieve abatement. Mine management made no effort to achieve abatement within the original 15-minute period. Although management in the past had been generally cooperative in providing miner representatives with the opportunity to accompany inspectors, the inspector was given no reason to believe that an extension of time was necessary in this instance or that management would attempt abatement if an extension of time was granted. In view of the facts with which he was confronted, the inspector reasonably exercised his authority. Not only was an extension of time specified for abatement unnecessary, but it was not requested. Order No. 254429 was properly issued.

ORDER

It is ORDERED that the above-captioned contest of order is hereby DISMISSED.

Forrest E. Stewart

Forrest E. Stewart
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

3 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. WEST 79-274-M
v.	)	A/O CONTROL NO. 02-00855-05007
ASARCO, INCORPORATED,	)	MINE: MISSION MILL
Respondent.	)	

DECISION

Appearances:

Judith G. Vogel, Esq., Office of Daniel W. Teehan, Regional Solicitor, United States Department of Labor, 450 Golden Gate Avenue, Box 36017, Room 11071 Federal Building, San Francisco, California 94102

William O. Hart, Esq., ASARCO, Incorporated, 120 Broadway, Room 3719, New York, New York 10005

Before: Judge John J. Morris

STATEMENT OF THE CASE

In this case Petitioner seeks an order affirming a citation and assessing a civil penalty therefor. The issues arise under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (as amended, 1977),

CITATION NO. 378557

It is undisputed that a violation of 30 CFR 55.16-6 [1/] occurred at ASARCO's mine on February 27, 1979. The parties also agree that an employee of Peco Steel, an independent contractor, was responsible for the violation (Stipulated Facts).

ISSUE

The single issue is whether ASARCO can be held liable for the violation herein.

1/ 30 CFR 55.16-6. Mandatory. Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use.

CONTENTIONS

ASARCO contends it cannot be held responsible for the actions of an independent contractor. Further, ASARCO argues that Secretary v. Old Ben Coal Company VINC 79-119-P (October 1979) is not applicable to this case.

DISCUSSION

For the reasons hereafter stated, the citation and penalty are affirmed.

ASARCO's initial argument seeks to reargue the merits of Old Ben. The writer lacks the authority to overturn Commission precedent. Cf Duval Corporation, WEST 79-194-M (March 1980).

ASARCO's second contention is that the citation should be vacated in view of the failure of the Secretary to have implemented rules to proceed against independent contractors on mine property at the time the citation was issued. ASARCO points out that the citation in Old Ben was issued a mere 33 days after the Act became effective; the citation here was issued February 27, 1979, some 11 months after the Act became effective. Respondent contends that this distinction negates the applicability of Old Ben to this case.

The difficulty with ASARCO's position is that in Old Ben the Commission in effect approved the action of the Secretary in filing his proposed regulations on August 14, 1979. Any charge sounding in the nature of laches against the Secretary could not apply to a citation issued before August 1979. Specifically, it could not apply to this citation issued in February 1979.

The ruling of the Commission in Old Ben is clear.

> If the Secretary unduly prolongs a policy that prohibits direct enforcement of the Act against contractors, he will be disregarding the intent of Congress.

The time appears to be approaching when the Old Ben doctrine will eviscerate rather than insulate the Secretary.

For the foregoing reasons, I conclude that Citation 378557 and the proposed

penalty 2/ should be affirmed.

CITATIONS NOT LITIGATED

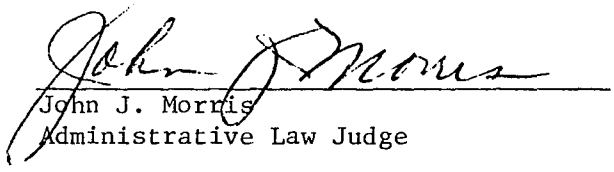
A motion to dismiss the proposed penalty assessments for Citation Nos. 378543, 378547, 378549, 378551, and 378555 was filed by Petitioner on November 2, 1979. Good cause having been shown, such motion is granted.

On the uncontroverted record and based on the conclusions stated herein, I enter the following:

ORDER

1. Citation 378557 and the proposed penalty therefor are AFFIRMED.

2. Citations 378543, 378547, 378549, 378551, 378555 and all proposed penalties therefor are VACATED.



John J. Morris
Administrative Law Judge

Distribution:

Judith G. Vogel, Esq., Office of Daniel W. Teehan, Regional Solicitor, United States Department of Labor, 450 Golden Gate Avenue, Box 36017, Room 11071 Federal Bu8ilding, San Francisco, California 94102
Bui

William O. Hart, Esq., ASARCO, Incorporated, 120 Broadway, Room 3719, New York, New York 10005

2/ Post trial briefs of the parties.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 3, 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 79-231-M
Petitioner	:	A.C. No. 20-01047-05003 W
v.	:	
	:	Docket No. LAKE 79-232-M
SUPERIOR SAND AND GRAVEL, INC.,	:	A.C. No. 20-01047-05004
Respondent	:	
	:	Docket No. LAKE 79-297-M
and	:	A.C. No. 20-01047-05005 A
	:	
PATRICK K. THORNTON,	:	Superior Wash Plant
Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner, Secretary of Labor;
Norman McLean, Esq., McLean and McCarthy, Houghton, Michigan, for Respondents, Superior Sand and Gravel, Inc. and Patrick K. Thornton.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

The petition charges that on September 8, 1978, an employee of Superior Sand and Gravel, Inc., operating a portable crusher was exposed to airborne contaminants exceeding the threshold limit values (TLV) adopted by the American Conference of Governmental Industrial Hygienists (ACGIH) in violation of the mandatory standard in 30 C.F.R. § 56.5-1(a). A citation for the alleged violation was served upon Patrick Thornton, the company's vice president, on October 20, 1978. Seven days were allowed for abatement, which could be accomplished by eliminating the dust hazard or by requiring the crusher operator to wear an approved respirator. The inspector returned on October 30, 1978, and found Respondent had not abated the condition. A withdrawal order was issued pursuant to section 104(b) of the Act. The inspector was informed by Mr. Thornton that neither

the citation nor the order would be honored and the company continued to operate until late November when it closed for the winter. The order was not terminated until June 12, 1979.

The Respondent operator contends that it was selectively and discriminatorily singled out for inspections under the Act. It complains that it was denied an opportunity to prove this, since its request for production of all records of inspections of sand and gravel operations within the jurisdiction of MSHA's Marquette, Michigan, Field Office, including all citations and notes prepared by the inspector who issued the present citation, Bruce Haataja was rejected. Respondent's counsel moved at the commencement of the hearing for a "mistrial" because he did not receive the notice of hearing which was issued by me on February 20, 1980, and was not aware of the hearing date until March 17, 1980, when he discussed the case with counsel for Petitioner, and because ("more importantly") of my denial of his request for a subpoena requiring the production of all records of all inspections made of sand and gravel mining operations within the geographic jurisdiction of the Marquette, Michigan MSHA office on or before September 8, 1978, and all field notes of Inspector Bruce E. Haataja pertaining to inspections of sand and gravel operations while he was an employee of MSHA on or before September 8, 1978. Counsel for Respondents further moved for continuance because of the failure of Petitioner to supply the field notes of Inspector Haataja related to Respondent's mine in accordance with my order of January 31, 1980. Although Petitioner's counsel stated that copies of the notes were sent to Respondent's counsel in February, 1980, they were apparently not received. Respondent's counsel received a copy on April 8, 1980, and was shown the originals on the day of hearing.

Pursuant to the aforementioned notice, the hearing was held at Houghton, Michigan, on April 9, 1980. Bruce Haataja, a Federal mine inspector; Diane Brayden, a health specialist at MSHA's Duluth, Minnesota Office; Kathleen Hazen, lead chemist at MSHA's office in Denver, Colorado; Aurel Goodwin, Chief of the Health Division, Metal/Nonmetal Mines, at MSHA's Arlington, Virginia, Office; and William Carlson, head of MSHA's field office in Marquette, Michigan, testified for Petitioner. Thomas Thornton, Superior's president; Patrick Thornton, the vice president and individual Respondent herein; and Matthew and Gerald Tchida, two of their employees testified for Respondents. On motion by Respondent Patrick K. Thornton, the cases were consolidated for the purposes of hearing and decision. The parties have waived their rights to file written proposed findings of fact and conclusions of law and are agreeable to having the case decided on the basis of the record and transcript of the hearing.

ISSUES

1. Was Respondent operator in violation of 30 C.F.R. § 56.5-1(a) on September 8, 1978?

2. Did Respondent operator fail to abate the alleged violation within the time set in the citation?

3. Did the Respondent operator fail to obey the withdrawal order issued on October 30, 1978?

4. Did Respndent Patrick K. Thornton knowingly authorize, order or carry out any violation of Respondent Superior Sand & Gravel, Inc., as the agent of the corporation?

5. If the violations alleged occurred, what is the appropriate penalty for each?

6. Were Respondents prejudiced by denial of their request for discovery into records relating to the enforcement activities of MSHA's office in Marquette, Michigan?

7. Were the Respondents prejudiced by denial of a continuance of the hearing?

FINDINGS OF FACT

1. At all times relevant to these proceedings, Superior Sand and Gravel, Inc., was the corporate operator of a sand and gravel pit in Houghton County, Michigan; Patrick K. Thorton was its vice president.

2. The operator's business produces between 1,400 and 1,500 tons of sand and gravel per shift. It operates one shift per day for approximately 6 months of the year. It is a relatively small operator.

3. There is no evidence that penalties assessed herein will have any effect on the operator's ability to remain in business, and therefore, I find that they will not.

4. On September 8, 1978, the company's crusher operator was exposed to levels of respirable silica dust in excess of the limits prescribed in 30 C.F.R. § 56.5-1(a).

5. The operator failed to abate the cited violation within the time set for abatement, because of the refusal of Patrick Thornton to comply.

6. The operator ignored a withdrawal order issued on October 30, 1978, because of Patrick Thorton's refusal to comply.

7. No prejudice resulted to Respondents' case from denial of motions to produce or subpoena all records of MSHA's Marquette Field Office relating to sand and gravel enforcement activities.

8. Respondents were not prejudiced by denial of a continuance at the hearing.

DISCUSSION

In its answer, Superior Sand and Gravel, Inc., denied that its crusher operator was on September 8, 1978, exposed to levels of respirable dust in excess of those prescribed in 30 C.F.R. § 56.5-1(a). At the hearing, Respondent had the opportunity to examine all persons involved in determining the violation. Exhaustive testimony was assembled regarding the preinspection calibration of the testing devices, controls used during testing, and weighing, measurement and analysis of the samples obtained. The credentials of the witnesses for Petitioner were not challenged and Respondent never questioned the accuracy of their testimony. The evidence is clear that the crusher operator was exposed to respirable dust in excess of the limits set out in the mandatory standard, and I so find.

Superior Sand and Gravel, Inc., is a company of moderate size with an average history of prior violations. The standard violated seeks to minimize the risk of a multitude of ailments caused by inhaling respirable dust. Silica dust was the respirable dust found by laboratory analysis in this case. Exposure to silica dust can cause silicosis. This is a serious disease. However, under the circumstances of this case, the probability of one of the operator's employees contracting it is slight. The operator's negligence is mitigated by the fact that, under all the circumstances, it had no reason to believe, prior to the citation, that a violation existed. However, as will be discussed later, there was a total absence of good faith on the operator's part in abating the violations.

Respondents failed to abate the violation within the 7-day period provided in the citation. A withdrawal order was therefore issued. This, too, was ignored. Bruce Haataja, the Federal inspector, testified that he explained the violation to Patrick Thornton, Superior's vice president, along with the consequences of failure to abate. He stated that Mr. Thornton was furnished copies of the regulation and ACGIH standards upon which it is based. He also stated that he explained the alternative measures available to the operator to bring itself into compliance. Mr. Thornton denied this and claimed that when he called William Carlson at MSHA's Marquette, Office, he received no help in understanding the violation. This asserted lack of an adequate explanation of the violation is the prime reason why Mr. Thornton and his company refused to abate the violation. Mr. Carlson testified that he explained the violation to Mr. Thornton. It was not shown to their satisfaction, say the Respondents, that the violation posed a risk to their employees. They point to the fact that neither they nor any of Petitioner's witnesses are aware of a single case of silicosis ever occurring in the region. I accept as accurate the testimony concerning these conversations of Inspector Haataja and Mr. Carlson.

Respondents misconceive the nature and purposes of the Act. Its aim is to prevent health and safety hazards. A "body count" or some similar showing of present adverse effects as a prerequisite to enforcement would undermine the legislative purpose. Cf. Society of the Plastics Industry v. OSHA, 509 F.2d 1301, 1308 (2nd Cir. 1975), cert. denied, 421 U.S. 992 (1975).

Respondents chose to proceed in a manner outside and contrary to the law. No lawful excuse has been offered for the operator's failure to fulfill its plain duty under section 2(g) of the Act to comply with the order. I find the failure to comply with the terms of the citation and the order to be a very serious violation.

Respondent, Patrick Thornton, acting as the agent of the corporate respondent, knowingly refused to comply with that order. He therefore is liable under section 110(c) of the Act for a violation of section 104(b). I consider the refusal to comply with a closure order a very serious violation. It was intentional and there was no attempt to abate the violation.

Respondents urge in their defense that the operator was singled out for enforcement of the Act by the Marquette Office of MSHA, in violation of its right to due process. Respondents do not claim any bias or enmity on the part of MSHA personnel. Rather, the gist of this defense is that other operators were probably violating the law but were not being inspected or fined. This bare allegation, even if true, affords no grounds for relief:

> [The agency's] mere inability does not render such enforcement as it accomplished wrongful. The fact that others violated the law with impunity is no defense. It is only when the enforcement agency is vested with a discretionary power and exercises its discretion arbitrarily or unjustly that enforcement of a valid regulation [violates the law].

Thompson v. Spear, 91 F.2d 430, 433-34 (5th Cir. 1937), cert. denied, 302 U.S. 762 (1938).

Respondents' claim of prejudice from denial of broad-ranging discovery into the enforcement activities of the Marquette Office must be denied. At no time was the claim supported by factual allegations of any substance.

The claim of prejudice from denial of a continuance fails for the same reason. The record is barren of anything apart from the request for a continuance. Counsel for the Respondents did not indicate how or why it would be prejudiced by denial of a continuance. It is clear that counsel received actual notice of the hearing at least 2 weeks in advance. Copies of the inspector's field notes

pertinent to the case were made available in advance of the hearing. His motion does not explain how the failure to receive the notes at an earlier date prejudiced his ability to prepare for the hearing. The motion was made after the hearing commenced, and after counsel, witnesses and the judge had travelled many miles to the hearing site.

CONCLUSIONS OF LAW

1. Respondent operator on September 8, 1978, was in violation of 30 C.F.R. § 56.5-1(a). The appropriate penalty for this violation, taking into consideration the criteria in section 110(i) of the Act, is $250.

2. Respondent operator was in violation of section 104(b) of the Act because of its failure to comply with the order of withdrawal issued October 30, 1978. The appropriate penalty for this violation, taking into consideration the criteria in section 110(i) of the Act, is $2,000.

3. Respondent Patrick K. Thornton, as agent of the corporate operator, deliberately refused to comply with the withdrawal order. This constitutes a violation of section 104(b) of the Act. A penalty in the amount of $2,000 will be assessed under section 110(c) of the Act for this violation, based on my finding that the violation was deliberate and very serious.

4. Respondents failed to show prejudice from denial of broad-ranging discovery into the enforcement activities of the Marquette, Michigan office of MSHA or from denial of a continuance at the hearing.

ORDER

Within 30 days of the issuance of this decision, Respondents are ORDERED to pay the following civil penalties: Superior Sand and Gravel, Inc.: $2,250; Patrick K. Thornton; $2,000.

James A. Broderick
Chief Administrative Law Judge

Distribution:

Page 7.

Distribution: By certified mail.

Norman McLean, Esq., Attorney for Superior Sand and Gravel, Inc., McLean & McCarthy, 706 Shelden Avenue, P.O. Box 65, Houghton, MI 49931

Karl Overman, Attorney, Office of the Solicitor, U.S. Department of Labor, 657 Federal Building, 231 West Lafayette, Detroit, MI 48226

Philip Smith, Esq., Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Assessment Office, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. FMC CORPORATION, Respondent.	3 JUN 1980 CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-168-M A/O NO. 48-00152-05007 Mine: FMC Mine

APPEARANCES:

James H. Barkley, Esq., Office of the Regional Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294, for the Petitioner,

Clayton J. Parr, Esq., Martineau, Rooker, Larsen and Kimball, 1800 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111, for the Respondent.

DECISION AND ORDER

Before: Judge Jon D. Boltz

Statement of the Case

Petitioner seeks an order assessing civil monetary penalties against Respondent for violations alleged in 8 citations. The standards allegedly violated were promulgated under the authority of the Federal Mine Safety and Health Act of 1977. (30 U.S.C. § 801 et seq.).

The Respondent, in its answer, denies that any of the regulations cited were violated. Pursuant to notice, a hearing was held on the merits in Salt Lake City, Utah, commencing on February 20, 1980. During the course of the hearing two citations were withdrawn by the Petitioner. I received Respondent's post hearing brief on April 7, 1980, and, by letter, the Petitioner waved filing a post hearing brief.

In this Decision each citation will be discussed separately and in the same order which it was dealt with at the hearing.

Findings of Fact

1. In the course of its business, Respondent operates a coal mine, known as the FMC Mine, in Sweetwater County, Wyoming.

2. During the course of an inspection of Respondent's mine, a duly authorized representative of the Petitioner issued to the Respondent four citations alleging violations on February 5, 1979, and four citations alleging violations on February 7, 1979, all of which are the subject of this proceeding.

3. The Respondent has a history of 41 assessed violations in 76 inspection days.

4. The Respondent is a large operator having 1380 underground mine employees who worked 647,641 man hours in the calendar quarter prior to the issuance of these citations.

5. The imposition of the civil monetary penalties requested by Petitioner will not effect Respondent's ability to continue business.

Citation 336461

This citation alleges a violation of 30 CFR § 57.9-37[1]. The evidence is conflicting, and I find the following facts are established:

6. A flatbed service truck, used for purposes of field lubrication (Tr. 96) and to haul tools and parts (Tr. 12), was observed parked with the front part of the truck resting on a steep grade (Tr. 10) which continued to downgrade for approximately 20 to 25 feet.

1/ "Mandatory. Mobile equipment shall not be left unattended unless the brakes are set. Mobile equipment with wheels or tracks, when parked on a grade, shall be either blocked or turned into a bank or rib; and the bucket or blade lowered to the ground to prevent movement."

7. Beyond the downgrade, in front of the truck, the ground leveled off for a distance of approximately 100 feet, to where a guard house was located. (Tr. 10).

8. The truck was left unattended, the brakes were not set and the wheels were not blocked.

The citation should be affirmed.

The Respondent argues that the cited regulation is misapplied because the truck was not mobile equipment used for loading, hauling, and dumping ores or for any other purposes as required under the standards of 30 CFR § 57.9, entitled "Loading, Hauling, and Dumping."

Although the evidence concerning the use of the truck is conflicting, it appears that it was used, among other things, for hauling purposes. Respondent's garage supervisor testified that the truck was used for hauling purposes, although it was to be taken out of service and replaced by a new truck. (Tr. 12).

The truck was mobile equipment and was left unattended without the brakes being set. This is sufficient to support a finding that there was a violation of 30 CFR § 57.9-37.

Citation 336462

This citation alleges a violation of 30 CFR § 57.9-2[2].

The following facts were established:

9. The brake and tail lights on the truck referred to in the previous citation were not operating when inspected. (Tr. 12, 13).

10. The truck was not used after the inspection, but was sold. (Tr. 102).

2/ "Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used."

The citation should be vacated because the equipment was not used after the time of the inspection. The fact that the brake and tail lights were not operating did not affect safety.

Citation 336465

This citation charges a violation of 30 CFR § 57.14-6[3] in that the guard for the V-belt drive on the Centurian coal feeder was allegedly not in place while the machinery was operating.

I find that the evidence establishes the following:

11. The motor on the coal feeder operates only when coal is dumped into the hopper. This dumping operation occurs three times per week. (Tr. 112).

12. The coal feeder motor operates for approximately 3 hours when coal is dumped into the hopper. Thus, the coal feeder operates approximately 9 hours per week. (Tr. 112, 113).

13. The coal feeder motor does not turn on automatically, but must be turned on in a control room located approximately 30 to 40 feet away, up a flight of steps above the area of the coal feeder. (Tr. 114, 115).

This citation should be vacated because the Petitioner failed to prove that the guard was not in place on the coal feeder motor while the machinery was being operated. It was conjecture by the Mine Safety and Health Administration witness that because dust was on the metal guard lying by the coal feeder that "the unit may have been operated with the guard off." (Tr. 16). Likewise, it was speculative to conclude, based upon his "understanding" (Tr. 17) that the unit comes on automatically without the

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3/ "Mandatory. Except when testing the machinery, guards shall be securely in place while machinery is being operated."

necessity of turning on a switch, that the coal feeder unit could operate. Such testimony is insufficient to prove a violation occurred.

Citation 336466

A violation of 30 CFR § 57.14-1[4] is alleged.

The facts are as follows:

14. Three return idler rollers, which provide a support system for a conveyor belt on its under side (Tr. 19), were unguarded.

15. At the time of the inspection there was spillage under the unguarded return idler rollers. (Tr. 20).

16. Employees of the Respondent would be in the proximity of the unguarded return idler rollers when cleaning up spillage and while inspecting the equipment. (Tr. 20).

17. The return idler rollers were located on an incline, approximately one to four feet above the floor level depending on the angle of the incline. (Tr. 19, 21).

18. A person, while working in the area, might get caught between the moving parts of the idler rollers and the conveyor belt and might suffer injury. (Tr. 19).

The Respondent argues in its brief that the return idler rollers should not be considered to be "similar exposed moving machine parts." I conclude, however, that the wording of the regulation is sufficiently broad to include them. The idler rollers and conveyor belt are moving machine parts and there is a danger of injury to persons as a result of

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4/ "Mandatory. Gears; sprockets; chains; drive, head, 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."

pinch points being left unguarded. The more relevant question is whether or not these exposed moving machine parts "may be contacted." Judge Koutras in his decision of Secretary of Labor v. Massey Standard Rock Company, 1 MSHC 2111, June 18, 1979, sets down a test by which the applicability of section 57.14-1 may be measured. The Massey case dealt with section 56.14-1, but the wording is the same as section 57.14-1.

> "...when an inspector cites a violation of section 56.14-1, it is incumbent on him to ascertain all of the pertinent factors which lead him to conclude that in the normal course of his work duties at or near exposed machine parts, an employee is likely to come into contact with such parts and be injured if such parts are not guarded." Massey at p. 556 of official text.

Differently stated, this same test was applied in the case of Secretary of Labor v. Central Pre-Mix Concrete Company, 1 MSHC 2237, September 26, 1979.

> "...on a case-by-case basis, petitioner (the Secretary of Labor) must establish that the unguarded area in question, by its location and proximity to the comings and goings of mine personnel, exposes them to the hazard or danger of being caught in the unguarded pulley. ...[T]his question can only be determined by consideration of the prevailing circumstances at the time the citation issued." Central Pre-Mix at p. 1431 of official text.

Upon applying these tests to the foregoing findings of fact, I conclude that the citation should be affirmed.

Citation 336471

This citation alleges a violation of 30 CFR § 57.14.1[5].

The facts are as follows:

19. Three return idler rollers that support a moving conveyor belt, located approximately seven, eight and nine feet above the floor in the distribution building, were unguarded. (Tr 23-30, 186-187).

5/ See footnote 4 on page 5.

20. There was a build-up of muck or dirt on the floor below the return idler rollers at the time of the inspection.

Applying the tests used in the Massey and Central Pre-Mix cases previously cited, this citation should be vacated. The evidence does not support a finding that in the normal course of his work duties at or near the exposed machine parts, an employee may come in contact with such parts and may be injured if the parts are not guarded. As the return idler rollers were seven, eight and nine feet above the floor, they were guarded by location. In addition, by removing spillage from the floor, it would not be necessary for an employee to work close to the return idler rollers.

Citation 336472

This citation alleges a violation of 30 CFR § 57.14.1[6].

I find the following facts:

21. This takeup pulley operates on a vertical belt and is used to take the slack out of the conveyor belt, as it starts up or as it continues under load (Tr. 189), and provides tension on the belt. (Tr. 192).

22. On the takeup pulley, a pinch point is created at the point where the belt comes into contact with the rotating device around which the belt travels. (Tr. 76).

23. A horizontal work platform with two handrails was located near the vertical belt. The belt travels up vertically within two to three inches of the handrails. (Tr. 193, 67).

24. The lower portion of the takeup pulley was guarded. (Tr. 64).

A guard was located at the end of the takeup pulley, but the Petitioner presented testimony to show that the vertical movement of the tail pulley

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6/ See footnote 4 on page 5.

can vary from a few inches to two or three feet when the belt starts up initially or when under load conditions. (Tr. 217). This testimony is disputed by Respondent's witness who testified that the movement is eight inches. I find that the testimony of Respondent's witness is more acceptable because he made actual measurements after the citation issued. (Tr. 229). As the lower portion of the tail pulley was guarded, no violation was proven in regard to its function.

However, I find an unsafe work area was created by the nearness of the upward moving belt to the two handrails which were two to three inches away from the belt. (Tr. 67). The evidence was in dispute as to how close the running belt would come to the railings, three to four inches (Tr. 200) or "about a foot" (Tr. 208), but I find from the evidence that there is some horizontal movement and fluctuation in the operation of the belt. In addition, the mine inspector testified that the belt moves at approximately ten feet per second, and "[i]f you got into it there is no way you could get out of it." (Tr. 75). He also testified that in actual operation, "when it got flopping," the belt probably could touch the handrails. Thus, in the normal course of his work duties on the work platform, an employee may come into contact with such moving parts and may be injured if such parts are not guarded. This citation should be affirmed.

Citation 336660 and 336470

These citations were withdrawn by the Petitioner.

I find the facts to be as stated in paragraphs 1 through 24 and in addition find the following:

25. Respondent's history of prior violations is not significant and good faith was demonstrated in achieving rapid compliance after notification of the violations alleged.

Conclusions of Law

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding at all times relevant to this proceeding. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977.

2. The Respondent violated the regulations cited in Citations 336461, 336466 and 336472.

3. The Petitioner failed to prove violations of the regulations cited in Citations 336462, 336465 and 336471.

4. The Petitioner having withdrawn Citations 336660 and 336470, the citations should be vacated.

Order

1. Citation 336461 and the proposed penalty of $44 are affirmed.

2. Citation 336466 and the proposed penalty of $20 are affirmed.

3. Citation 336472 and the proposed penalty of $18 are affirmed.

4. Citations 336462, 336465, 336471, 336660 and 336470 and all penalties therefor are vacated.

It is further Ordered that the Respondent pay the affirmed penalties within 30 days from the date of this Decision.

Jon D. Boltz
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

3 JUN 1980

ISLAND CREEK COAL COMPANY, Contestant	:	Contests of Citations and Orders
	:	Docket No. VA 79-62-R
VIRGINIA POCAHONTAS COMPANY, Contestant	:	Citation No. 0694332
	:	Order No. 069433; May 16, 1979
v.	:	
	:	Virginia Pocahontas No. 3 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
	:	Docket No. VA 79-63-R
Respondent	:	Citation No. 0694936
	:	Order No. 0694937; May 9, 1979
UNITED MINE WORKERS OF AMERICA (UMWA),	:	
	:	Virginia Pocahontas No. 4 Mine
Respondent	:	
	:	Docket No. VA 79-61-R
	:	
	:	Citation No. 0695807; May 18, 1979
	:	
	:	Virginia Pocahontas No. 2 Mine

DECISIONS

Statement of the Proceedings

These cases concern contests filed by the contestants pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, on June 8, 1980, challenging the legality of the captioned citations and orders issued by respondent MSHA for contestants' refusal to pay certain employee representatives for the time spent accompanying MSHA inspectors on their spot inspection rounds.

Contestants' defense to the citations and orders is based on the Commission's decisions in Magma Copper, 1 FMSHRC 1948, Kentland-Elkhorn Coal Corporation, 1 FMSHRC 1833, and Helen Mining Company, 1 FMSHRC 1796 (1979), holding that employee representatives are not entitled to compensation for the time spent accompanying MSHA inspectors during spot inspections of a mine.

In view of the aforementioned Commission decisions, which I find are controlling on the issue presented in these proceedings, I issued an order on May 5, 1980, directing the parties to show cause why the contestants are not entitled to summary judgment as a matter of law. At the same time, I dissolved a previous stay issued by Chief Judge Broderick on June 26, 1979, taking note of the fact that the stay was erroneously based on the decision in MSHA v. Monterey Coal Company, Docket Nos. HOPE 78-469 et seq.

Respondents MSHA and UMWA responded to my order of May 5, 1980, and they take the position that since the Commission's decisions in Helen Mining Company and Kentland-Elkhorn are currently on appeal in the Court of Appeals for the District of Columbia Circuit (appeals filed December 30, 1979), and since Magma Copper is on appeal in the Ninth Circuit, those decisions are not fully and finally dispositive on the issue of walkaround compensation, and that contestants are not entitled to summary decisions until such time as the court decides the appeals. Under these circumstances, respondents request that I deny the contestants further relief and reinstate the stays in these proceedings.

Contestants responded to my order of May 5, 1980, and they take note of the fact that Judge Broderick's previous stay of June 26, 1979, was actually based on the fact that Helen Mining, Kentland-Elkhorn, and Magma Copper had not as yet been decided by the Commission. Since the Commission has now finally decided the walkaround issue and rendered its decisions in these cases, contestants take the position that the instant proceedings are ripe for summary decision. Further, since there appears to be no factual dispute, contestants believe that the cases may be summarily decided without the necessity for any evidentiary hearings. Contestants move that the citations and orders issued be vacated ab initio.

Discussion

Based upon a review of the pleadings filed in these cases, the facts leading to the issuance of the contested citations and orders do not appear to be in dispute, and briefly stated, they are as follows:

Docket No. VA 79-62-R

On April 18, 1979, MSHA inspector James R. Baker conducted a section 103(i) spot inspection at the mine and was accompanied by employee representative Elmer Ball. Contestant refused to pay Mr. Ball for the time spent on this walkaround, and it did so on the basis of its belief that compensation for spot inspection walkarounds were not required in light of Judge Lasher's prior decisions in Magma Copper Company, DENV 78-533-M, and Kentland-Elkhorn Coal Corporation, PIKE 78-399. Thereafter, on May 16, 1979, at 9:07 a.m., MSHA inspectors Carl E. Boone II and James R. Baker issued a section 104(a) citation to the contestant charging a violation of section 103(f) of the Act for failing to pay Mr. Ball. The citation required payment to Mr. Ball no later than 12 p.m. on May 16, 1980, and when contestant again refused to pay

Mr. Ball, the inspectors issued a section 104(b) withdrawal order. Contestant then paid Mr. Ball under protest in order to terminate the citation and order, and the order was subsequently terminated.

Docket No. VA 79-63-R

On March 9, 1979, MSHA inspector James Franklin conducted a section 103(i) spot inspection at the mine and was accompanied by employee representative Larry Allen. As a result of contestant's refusal to pay Mr. Allen for the time spent on the walkaround, MSHA inspector Clarence W. Boone issued a section 104(a) citation to the contestant at 10:15 a.m. on May 9, 1979, citing a violation of section 103(f), and requiring payment to Mr. Allen by 12:30 p.m. that same day. Upon refusal by the contestant to pay Mr. Allen, Inspector Boone issued a section 104(b) withdrawal order and contestant then paid Mr. Allen under protest asserting the same defense as noted above. The order was subsequently terminated.

Docket No. VA 79-61-R

On April 10, 1979, MSHA inspector Jerry Wiley conducted a section 103(i) spot inspection of the mine and was accompanied by employee representative Lilah L. Agent. Upon refusal to pay her for the time spent on this walkaround, contestant was served with a section 104(a) citation by MSHA inspector Ronald L. Pennington at 8:30 a.m., on May 18, 1979, and the abatement time requiring payment to Ms. Agent was fixed as 12:30 p.m. the same day. Contestant paid Ms. Agent under protest, and the citation was terminated.

I take note of the fact that on March 21, 1980, the Commission denied a request by the United Mine Workers of America that the effect of its decisions in Helen Mining Company and Kentland-Elkhorn be stayed pending judicial review, 2 FMSHRC 778. As aptly noted by Commissioner Backley in his concurring opinion at page 779: "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."

Conclusion

After careful consideration of the pleadings and arguments presented by the parties in these proceedings, including a review of the facts, which I find are not in dispute, I conclude that contestants' position is correct and that they are entitled to summary decision as a matter of law. It seems clear to me that the Commission has finally decided the issues presented in these proceedings and has ruled that miners' representatives are not entitled to be compensated for the time spent on walkarounds during the course of a spot inspection. That precedent is controlling in these proceedings, and the fact that MSHA and the UMWA have seen fit to appeal the Commission's final rulings is no basis for staying these proceedings any further. Accordingly, respondents' motions for a continued stay of these proceedings are DENIED.

Since the facts are not in dispute, I accept and adopt the facts as set forth in the contests filed by the contestants as set forth above as my findings of fact. Further, I accept the legal arguments advanced by the contestants in these proceedings as my conclusions of law and find that contestants are entitled to summary judgment on the pleadings. The contrary arguments advanced by the respondents are rejected. I conclude and find that the Commission's precedent decisions as discussed herein with respect to the rights of a miner to be compensated during a spot walkaround inspection are dispositive of the issues presented in these proceedings, and that contestants are entitled to summary decisions as a matter of law.

ORDER

IT IS ORDERED that the captioned citations and orders which are the subject of these contests be VACATED.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

JUN 5 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	)	CIVIL PENALTY PROCEEDING
	)	DOCKET NO. CENT 79-281-M
	)	A/O NO. 29-01730-05002
	)	DOCKET NO. CENT 79-282-M
	)	A/O NO. 29-01688-05003
	)	DOCKET NO. CENT 80-6-M
	)	A/O NO. 29-01688-05004
v.	)	DOCKET NO. CENT 80-124-M
	)	A/O NO. 29-01688-05005
	)	(Consolidated)
PHILLIPS URANIUM CORPORATION, Respondent.	)	Mine: Nose Rock #1 Crownpoint
	)	Mine: Nose Rock #2 Crownpoint

APPEARANCES:

E. Justin Pennington, Esq., of Dallas, Texas, for the Petitioner,

Malcolm L. Shannon, Jr., Esq., of Albuquerque, New Mexico, for the Respondent.

DECISION

Carlson, Judge

These cases involve thirteen citations issued to respondent for safety violations committed by independent contractors performing work at respondent's mine near Crownpoint, New Mexico. The parties submitted a stipulation of facts in which they state that the alleged violations were in fact committed and that the penalties proposed by the Secretary are reasonable. All matters of fact recited in the stipulated record are hereby found to be true and are fully incorporated into this decision. Both parties also filed motions for summary decision.

Briefly summarized, the stipulations show that respondent owned mining rights to and was mining at the mine sites when they were inspected; that American Mine Services, Incorporated (AMS) and Cementation West,

Incorporated (Cementation) had contracted with respondent to construct mine shafts and other facilities and had been working continuously for several months when the citations were issued; that the work performed and the citations issued involved AMS and Cementation employees and equipment exclusively, except that respondent observed and inspected the work to assure compliance with the contract; and that the violations were abated by AMS and Cementation.

The sole issue, therefore, is whether respondent was the proper party to be cited. In MSHA v. Old Ben Coal Company, 1 FMSHRC 1480 (October, 1979) and again in MSHA v. Monterey Coal Co., 1 FMSHRC 1781 (November, 1979), the Commission ruled that mine owners may be cited for violations committed on their property by independent contractors. Until the Commission changes its position, these decisions are controlling and, together with the parties' stipulations, support a finding of violation.

ORDER

Accordingly, respondent is ordered to pay a civil penalty of $672 within 30 days of this decision.

John A. Carlson
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 5 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings Docket No. VINC 79-247-P A.C. No. 11-00585-03012M
v.	:	
FRANK J. BOUGH, employed by Peabody Coal Company, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. LAKE 79-91 A.C. No. 11-00585-03014 No. 10 Underground Mine
v.	:	
PEABODY COAL COMPANY, Respondent	:	

DECISION

Appearances: Miguel Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner; Thomas Gumbel, Esq., Collinsville, Illinois, for Respondent Frank J. Bough; and Thomas R. Gallagher, Esq., St. Louis, Missouri, for Respondent Peabody Coal Company.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding arises out of the consolidation of two civil penalty proceedings. On April 18, 1978, the Mine Safety and Health Administration (hereinafter MSHA) filed a petition for assessment of a civil penalty against Frank J. Bough (hereinafter Bough), a miner employed by Peabody Coal Company,

for smoking a cigarette in an underground mine on October 10, 1978, in violation of 30 C.F.R. § 75.1702. On June 29, 1979, MSHA filed a petition for assessment of civil penalties against Peabody Coal Company (hereinafter Peabody) for violation of the same regulation on the same date and for a ventilation violation under 30 C.F.R. § 75.316. On January 2, 1980, I ordered these cases consolidated under Procedural Rule 12 of the Federal Mine Safety and Health Review Commission, 29 C.F.R. § 2700.12, because the two cases involve similar issues of law and fact.

A hearing was held in Springfield, Illinois, on February 21, 1980. MSHA inspectors, John D. Stritzel and Mark Bryce testified on behalf of MSHA. Waldo Prasun, a buggy operator; Burt Lahr, the union steward and walkaround; and Frank J. Bough testified on behalf of Bough. Wally Heil, an environmental dust technician; Winston Robinette, a face boss; Irvin Shimkus, Peabody's safety manager; and Bob Hall, Peabody's mine manager testified on behalf of Peabody. Bough submitted his case on a closing argument at the close of the taking of testimony. MSHA and Peabody submitted briefs.

At the outset of the hearing, I approved a proposed settlement between MSHA and Peabody concerning a violation of Peabody's approved ventilation plan. That settlement is set forth later in this decision. The unresolved controversy that required a hearing was whether Bough and Peabody violated 30 C.F.R. § 75.1702. MSHA contends that Bough was seen smoking a cigarette. Bough contends that he did not smoke a cigarette. MSHA further charges that Peabody did not have an effective program to insure that persons entering the underground area did not carry smoking materials. Peabody contests that charge.

MOTION TO DISMISS AND APPROVE SETTLEMENT

On January 15, 1980, the Solicitor filed a motion to dismiss and approve settlement of the part of the civil penalty proceeding against Peabody (Docket No. LAKE 79-91-M) which involved a citation for violation of 30 C.F.R. § 75.316. Citation No. 264754B was originally assessed by MSHA for $760 whereas the parties proposed a settlement in the amount of $600.

This citation arose out of a finding by MSHA that the ventilation for the area in question was inadequate. A reduction in the proposed assessment is submitted by MSHA because the violation was due to an air curtain which had been knocked down. Further investigation showed that Peabody was in the process of rehanging the curtain at the time the citation was issued and, hence, its negligence was overassessed.

Having duly considered the matter, I conclude that the recommended settlement is consistent with the purposes and policy of the Act. The recommended settlement is, therefore, approved.

ISSUES

Whether Bough and Peabody 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 317(c) of the Act, 30 U.S.C. § 877(c), and 30 C.F.R. § 75.1702 provide:

No person shall smoke, carry smoking materials, matches, or lighters underground, or smoke in or around oil houses, explosives magazines, or other surface areas where such practice may cause a fire or explosion. The operator shall institute a program, approved by the Secretary, to insure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters.

Section 110 of the Act, 30 U.S.C. § 820, provides in pertinent part:

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

* * * * * * *

(g) Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission, which penalty shall not be more than $250 for each occurrence of such violation.

STIPULATIONS

The parties stipulated the following:

1. The administrative law judge has jurisdiction over this matter.

2. Peabody Coal Company is a large operator.

3. Peabody Coal Company has a better than average record of violations per inspection man day when compared with the rest of the coal industry.

4. Inspectors John D. Stritzel and Mark G. Bryce are duly authorized representatives of the Mine Safety and Health Administration.

5. Frank J. Bough was a miner employed at Peabody Coal Company's Underground Mine No. 10 on October 10, 1978.

SUMMARY OF THE EVIDENCE

John D. Stritzel testified that he has been a federal mine inspector for 9 years. On October 10, 1978, he was conducting a regular mine inspection of the No. 10 Underground Mine of Peabody Coal Company. On the day in question, he had checked on the abatement of two prior citations. He then led the inspection party up to a crosscut between rooms 2 and 3. A buggy behind a loading machine blocked his entry into the crosscut. When the buggy pulled out, he stepped around the corner and saw Frank Bough 15 feet away operating the loading machine with a lighted cigarette in his mouth. Mr. Bough had both hands on the controls of the loading machine and the inspector had a profile view of him. Inspector Stritzel described the cigarette as filter tipped, freshly lighted, and glowing. Inspector Stritzel raised his light and Bough looked at him and did a "double take." The inspector observed Bough with a cigarette in his mouth for approximately 5 seconds. Thereafter, Bough ducked down in the cab and the inspector signaled him to stop the loading machine. Instead, Bough then started tramming the machine back in the direction of the inspector and swinging the tail of the loader back and forth. Approximately 30 to 45 seconds thereafter, Bough stopped the machine and the inspector approached him.

Inspector Stritzel stated that he told Bough that he had seen him smoking and asked where was the cigarette. Bough allegedly replied, "I loaded it out." Inspector Stritzel knew that was false because the buggy had already left the scene before he saw him smoking. The inspector looked around the loader for approximately 5 minutes but did not find a cigarette.

The loading machine was not moved. Inspector Stritzel was upset, aggravated, and disappointed because he had known Bough for 5 or 6 years on a first name basis. He stated that Bough had been his "good friend." The inspector threw his walking cane down on the ground. He stated, "I didn't want to cite Mr. Bough." For the next 15 minutes, the inspector remained in the crosscut and could smell cigarette smoke for that period of time. There was no ventilation moving in the crosscut because the curtain was not up. The inspector found .5 percent methane on his methane detector and issued an order of withdrawal. This was the first time the inspector ever saw any person smoking in an underground mine. The inspector was later told that Bough had been searched but no smoking materials were found. Bough was not searched in the presence of the inspector.

Inspector Stritzel further testified that at the time of this occurrence, Peabody Coal Company had an approved program for prohibition of smoking underground for Mine No. 10. This approved plan had been adopted by Peabody on April 13, 1970. The plan seemed to be reasonably good but all searches were conducted in the same manner. According to Inspector Stritzel, Peabody only searched lunch boxes and required the miners to remove their caps. Peabody never searched thermos bottles, tobacco pouches, or shoes. Inspector Stritzel had no reason to presume that the program was ineffective until he saw Bough smoking a cigarette. Since he found Bough smoking a cigarette, he had to find that the program was insufficient.

No. 10 Underground is classified as a gassy mine. In the event of an ignition caused by the lighted cigarette, Inspector Stritzel stated that up

to 10 miners would be exposed to injury. After the inspector issued a citation to Bough and an order of withdrawal to Peabody, Peabody demonstrated reasonable good faith in abatement. Peabody conducted searches on all preshifts at all three portals. Inspector Stritzel testified that, in his opinion, Peabody violated the Act and regulations because it did not insure that miners would not smoke underground.

Mark Bryce was an inspector-trainee at the time. He was accompanying Inspector Stritzel at the time of this occurrence. He did not see Bough smoking a cigarette because he was approximately 30 feet behind Inspector Stritzel at the time of the occurrence. Bough was not in his line of vision. As Bryce approached the crosscut in question, he smelled cigarette smoke. He did not see any cigarette smoke and he smelled no other odor. There was no ventilation in the crosscut in question and a cigarette odor remained throughout the time he was present. Inspector Stritzel was the person closest to Bough at the time of this incident.

Waldo Prasun, a buggy operator, testified on behalf of Bough. He worked with Bough for 10 years. He was the operator of the buggy which had just pulled out of the crosscut before Inspector Stritzel stepped around the corner. Bough was in his line of vision until he pulled out of the crosscut. He estimated that it was 2 or 3 seconds from the time he moved his buggy until Inspector Stritzel stepped around the corner. In response to the question as to whether he had seen Bough smoking a cigarette at that time, Mr. Prasun responded, "if he had it, I didn't know it." He went back into the crosscut while the inspector and Bough had their conversation. He did

not smell any cigarette smoke. There was a haze of oil smoke and brake band smoke in the crosscut.

Burt Lahr, a union steward and walkaround, also testified for Bough. He was the union walkaround accompanying Inspector Stritzel on the day in question. Bough was not in his line of vision when the inspector allegedly saw him smoking. When Mr. Lahr entered the crosscut, he did not smell cigarette smoke. However, he stated that there was smoke coming off the brake shoes of the loading machine. He described a strong odor of smoke. He stated that there was some air flowing into the crosscut even though the line curtain was down. Mr. Lahr did not recall anyone being searched.

Frank J. Bough testified that he had worked in the Underground 10 Mine for 22 years. He was a loader operator on the day in the question. He testified that while he was operating the loader, he saw Inspector Stritzel signal him to stop. Inspector Stritzel approached him and stated, "I saw you smoking." Bough responded, "You are a damn liar." At that point, Inspector Stritzel threw his cap or cane down on the ground. Bough stated that he did not smoke a cigarette. He smokes Lucky Strike cigarettes and never smoked a filter cigarette in his life. He never refused a search at the mine and no smoking materials were ever found on him. There was poor visibility in the crosscut at the time because the brake discs were smoking. Approximately 30 minutes after this occurrence, he was searched by the mine manager. No smoking materials were found. He never had any problems with Inspector Stritzel and does not know why the inspector would accuse him of smoking.

Peabody called Wally Heil, an environmental dust technician, as its first witness. Mr. Heil was the Peabody representative on the inspection in question. At the time of the occurrence, he could not see Bough or the inspector. He heard Bough deny that he was smoking. Mr. Heil did not smell anything when he got to the crosscut in question. He stated, "I didn't pay any attention to smells * * *." He stated that if there had been any smoke in the crosscut, it would stay in the entry. The only significant difference between the program which was in effect on October 10, 1978, and the new program subsequently adopted was that Peabody searches more often under the new program.

Irvin Shimkus, has been the safety manager at No. 10 Mine since 1970. He stated that under the plan in effect at the time of this occurrence, Peabody conducted periodic searches. During the search, management would pat the miner's pockets and ask some miners to open their lunch buckets. Periodic safety meetings were held concerning the prohibition on smoking. Bough attended such safety meetings in June and July 1978.

Bob Hall was mine manager of No. 10 Underground on the day in question. He has worked for Peabody for 20 years. On the day in question, Bough told Mr. Hall that he was not smoking. Mr. Hall searched Bough and only found a box of Skoal. Under the plan in effect at the time of this occurrence, Peabody searched miners once a week. Most of the searches were conducted on top but occasionally there was a surprise search conducted on the bottom. In all of the time that Hall has been connected with Peabody, no smoking materials were ever found in any of the searches. However, Hall volunteered

the information that he had seen people go back to their lockers when they were aware that a search would be conducted. Mr. Hall's pertinent testimony is as follows:

> Q. In all the searches that Peabody has conducted at Mine No. 10, underground mine, have you ever found any smoking articles?
>
> A. We have never found any in our search on top or bottom. We have had people go back to their locker before if they seen we had a search program coming up.
>
> * * * * * * *
>
> Q. When the search would be done on top, would it be your policy, then, to let those people go back to their lockers before they were searched?
>
> A. We don't give them case until they are searched.

(Tr. 201-202).

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, arguments, briefs, and proposed findings of fact and conclusions of law have been considered. The first issue to be resolved is whether Frank Bough smoked a cigarette in an underground mine as alleged by MSHA. While the testimony of Inspector Stritzel and Bough is in direct conflict on this question, there are other facts which are not disputed. They are as follows: (1) At the time Inspector Stritzel alleged that he saw Bough smoking a cigarette, no one else saw or could have seen Bough; (2) no cigarette was found at the site of this occurrence; (3) Bough was searched for smoking materials approximately 30 minutes after the occurrence and no smoking materials were

found; (4) Bough and Inspector Stritzel knew each other and Bough could supply no motive for Inspector Stritzel's charge against him; (5) in approximately 9 years as a federal mine inspector, Inspector Stritzel had never seen anyone else smoke a cigarette in an underground mine; and (6) Frank Bough knew that smoking in an underground mine was prohibited. Hence, MSHA's allegation against Frank Bough must be resolved by determining the credibility of the testimony of Inspector Stritzel and Frank Bough.

I find that the testimony of Inspector Stritzel was more credible and worthy of belief than the testimony of Frank Bough. This is so for the following reasons: (1) Inspector Stritzel was 15 feet away from Bough at the time of this occurrence and had an unobstructed view; (2) there is no evidence of record which would establish any motive for Inspector Stritzel to make a false charge against Bough--in fact the evidence establishes that they were friends and the inspector did not want to cite Bough; (3) the fact that the cigarette was not found is not significant in light of the inspector's credible testimony that after he signaled Bough to stop his loader, Bough ducked down in the cab, could have dropped the cigarette under the loader, and trammed the loader back and forth for some 30 seconds before stopping it; (4) based upon the demeanor of the witnesses--including their appearance, tone of voice, zeal, and candor--I find that the testimony of Inspector Stritzel was truthful and that the testimony of Frank Bough was not; (5) Bough's assertion that he never smoked filter tip cigarettes is insignificant under the facts herein; and (6) the testimony of Bough was self-serving and unpersuasive.

I should note here that there was some other conflicting evidence which I did not find to be significant in arriving at the above findings. First, there was a dispute as to whether the area in question contained cigarette smoke, oil smoke, brake band smoke, or no smoke at all immediately after the occurrence. Second, there was a dispute as to whether the ventilation, if any, would have removed the smoke, if any, in the 15 minutes after the occurrence. Third, there was a dispute as to the relative positions of the members of the inspection crew at the time of this occurrence. Suffice it to say that none of these disputes affected the outcome of this matter. Even if all three had been resolved against MSHA, my decision would be the same. The disputed evidence did not affect the credibility of Inspector Stritzel. Hence, this evidence is immaterial and insignificant.

Therefore, I find that MSHA has established by a preponderance of the credible evidence that Frank Bough smoked a cigarette in Peabody Coal Company Underground Mine No. 10 on October 10, 1978, in violation of section 317(c) of the Act and 30 C.F.R. § 75.1702. Section 110(g) of the Act provides that "any miner who willfully violates the mandatory safety standard relating to smoking * * * shall be subject to a civil penalty assessed by the Commision, which penalty shall not be more than $250 for each occurrence of such violation." There are no extenuating or mitigating facts in the record of the instant case which would justify the assessment of less than the maximum civil penalty. To the contrary, the life and safety of each member of the crew was placed in jeopardy by this violation in a gassy mine at a place were ventilation was inadequate. Frank Bough knew that smoking was prohibited and, therefore, his violation of the Act and regulation was willful.

I conclude that a civil penalty of $250 should be imposed upon Frank Bough for the violation found to have occurred.

The next issue to be resolved is whether Peabody violated the Act or regulation and, if so, the amount of the civil penalty which should be assessed. MSHA asserts that Peabody is liable for the following reasons: (1) The fact that Frank Bough was smoking a cigarette underground in a Peabody mine establishes that Peabody's program did not insure that smoking materials were not carried to the underground area of the mine; and (2) Peabody is chargeable with "deficient enforcement of the anti-smoking program." Peabody alleges that it is not liable because: (1) Bough did not smoke a cigarette underground; and (2) even if Bough did violate 30 C.F.R. § 75.1702 by smoking a cigarette underground, Peabody "is not absolutely liable in such a situation and, therefore, also guilty of a violation of § 75.1702."

As noted above, the language of section 317(c) of the Act and 30 C.F.R. § 75.1702 is identical. The Act and regulation require an operator to institute a program, approve by the Secretary, "to insure that any person entering underground area of the mine does not carry smoking materials, matches, or lighters." (Emphasis supplied.) Hence, Congress has imposed upon the operator the highest possible duty: that of an insurer. The fact that I previously found that Frank Bough was smoking a cigarette establishes that Peabody failed in its role as an insurer and, hence, violated the Act and regulation. While such a finding could alleviate the need for any further discussion of the question of whether Peabody violated the Act or

regulation, the evidence of record in the instant case also establishes notice to Peabody that its anti-smoking program was ineffective. The manager of the mine in question testified that he had seen miners go back to their lockers when they became aware of the fact that a search would be conducted. Peabody acquiesced in this practice by permitting the miners to return to their lockers before being searched. It is reasonable to infer from this fact that Peabody had notice that miners would carry smoking materials underground but for the fact that they had advance warning of a search. The evidence of record fails to show that Peabody took any action to change the methods or places of its searches in the light of this information. Thus, Peabody not only violated the Act and regulation herein, it was also negligent in failing to institute a program which would insure compliance. Therefore, I agree with MSHA that Peabody violated the Act and regulation because (1) the fact that Frank Bough smoked a cigarette underground establishes that Peabody's program did not insure that smoking materials would not be taken underground and (2) Peabody had notice that its plan did not insure compliance with the Act and regulation but failed to institute a different program.

Section 110(i) of the Act, 30 U.S.C. § 820(i), requires consideration of six criteria in the assessment of a civil penalty. As pertinent here, the operator's prior history of 106 violations in the previous 2 years is noted. None of these violations is relevant to the instant case. Peabody is a large operator and the assessment of a civil penalty will not affect its ability to continue in business.

As noted above, Peabody was negligent in its failure to institute a program which would insure that smoking materials were not carried underground. It had notice that its program in this regard was deficient in that miners who were about to be searched for smoking materials were permitted to return to their lockers prior to such a search. In the light of such notice, Peabody's failure to take additional action to insure compliance with the Act and regulation amounts to ordinary negligence.

The gravity of this violation is severe. Underground 10 Mine is classified as a gassy mine. The violation in question endangered the lives and safety of at least 10 men employed in the section. The lighted cigarette served as a potential ignition source in an area were there was no effective ventilation to remove methane. A serious accident was avoided only because the methane present at that time was less than 5 percent.

Peabody demonstrated good faith compliance upon notification of the violation.

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 $1,500 should be imposed upon Peabody for the violation found to have occurred.

ORDER

Therefore, it is ORDERED that Respondent Frank Bough pay a sum of $250 within 30 days of the date of this decision as a civil penalty for the violation of section 317(c) of the Act and 30 C.F.R. § 75.1702.

It is FURTHER ORDERED that Peabody pay the sum of $2,100 within 30 days of the date of this decision for the violation of 30 C.F.R. § 75.316, section 317(c) of the Act, and 30 C.F.R. § 75.1702.

James A. Laurenson

James A. Laurenson, Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

JUN 9 1980

GEX COLORADO INCORPORATED, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	NOTICE OF CONTEST 104(d)(1) CITATION NO. 078600 MAY 1, 1980, 75.200 DOCKET NO. WEST 80-306-R Mine: Roadside Mine 05-00281

APPEARANCES:

Curt Neumann, Acting Safety Director, appearing pro se, GEX Colorado Incorporated, Grand Junction, Colorado
for the Contestant,

Ann M. Noble, Esq., Office of Henry C. Mahlman, Regional Solicitor, United States Department of Labor, Denver, Colorado
for the Respondent.

Before: Judge John J. Morris

DECISION

Petitioner, GEX Colorado Incorporated, contests the unwarrantable failure designation of a citation issued by respondent, Mine Safety and Health Administration, on May 1, 1980. An expedited hearing was held in Grand Junction, Colorado on May 20, 1980. MSHA's answer[1] admits the issuance of the citation but denies the remaining portions of GEX's notice of contest.

1/ Transcript 2-3.

Citation 786800 alleges that GEX violated 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, 1970. 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 or inadequacy of support 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.

Ray Brandon, Pet Darland, Eugene Lopez, and Kenneth Short testified for GEX.

Matthew Biandeck testified for MSHA.

The parties waived the filing of post trial briefs.

Issue

The issue is whether the citation should have been issued as an unwarrantable failure by GEX in not complying with the cited standard. (Tr. 3).

Findings of Fact

Based on the record I find the following facts to be credible.

1. GEX's method of coal mining involves pillar recovery. A large portion of the coal is removed and the roof is then allowed to collapse. (Tr. 32).

2. Pillars, originally 45 feet by 100 feet, are split into three pieces. The final pillars are 45 foot by 20 foot (Tr. 32).

3. The canopy of GEX's 33 foot continuous miner was covered when the unsupported roof caved in (Tr. 14,22,30).

4. The regular machine operator was attending a meeting at the time of this accident (Tr. 36).

5. The substitute operator, who had been instructed in running the miner, did not know he had passed the last permanent roof support (Tr. 38,39).

6. A company rule prohibits the use of the continuous miner beyond the last permanent roof support (Tr. 33,34,37).

7. In the ordinary course of events the continuous miner would not be under the unsupported roof (Tr. 33).

8. Ray Brandon, the GEX section foreman, who was in the immediate area, was not in a position to observe that the continuous miner had moved beyond the last permanent roof support (Tr. 34).

9. The foreman heard the timber squeak and he hollored for the operator to get out.

DISCUSSION

The case involves a credibility determination. For the reasons hereafter discusssed I have determined that the unwarrantable failure portion of the citation was improvidently issued and it should be vacated.

MSHA's case for the issuance of its unwarrantable failure designation rests on the evidence that the section foreman stated, after the roof collapse, that he was aware the miner operator was under unsupported roof. Further, he was not going to lie about it (Tr. 14,15). The evidence did not establish when the section foreman knew the continuous miner was under the unsupported roof (Tr. 20).

In GEX's case the section foreman does not deny the statements attributed to him by the inspector. He thinks the statement was a matter of hindsight. At trial he could not recall at any time seeing the continuous miner pass out under the unsupported roof (Tr. 35).

The statement of the section foreman attributed to him by the inspector is clearly admissible as an admission against interest as well as an excited utterance [Rule 804(b)(3); 803(2) Federal Rules of Evidence]. However, I am equally persuaded by the demeanor and the testimony of the section foreman. His failure to deny the statement, in my view, adds credibility to his other testimony.

The issues here are close but the evidence indicates this was an inadvertent violation.

One of the elements of an unwarrantable failure citation is that the mine operator must know or should have known of the violation cf Alabama By-Products Corporation, v. Mine Workers, BARB 78-601 (July 1979, Lasher, J).

Petitioner's evidence on this issue is not persuasive.

For the foregoing reasons I enter the following

ORDER

The unwarrantable failure portion of Citation 78600 is VACATED.

John J. Morris
Administrative Law Judge

Distribution:

Curt Newmann, Acting Director of Safety, GEX Colorado Incorporated, P.O. Box W, Palisade, Colorado 81526

Office of the Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294, Attention: Ann M. Noble, Esq.

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

9 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
Petitioner	:	Docket No. SE 79-16-M
	:	A.O. No. 31-00582-05003
v.	:	
	:	Docket No. BARB 79-266-PM
IDEAL BASIC INDUSTRIES-CEMENT DIVISION,	:	A.O. No. 31-00582-05002
Respondent	:	Castle Hayne Quarry & Mill

DECISIONS

Appearances: Darryl A. Stewart, Attorney, U.S. Department of Labor, Nashville, Tennessee, for the petitioner;
Karl W. McGhee, Esq., Wilmington, North Carolina, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated civil penalty proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), on January 31 and April 12, 1979, charging the respondent with a total of 10 alleged violations of certain mandatory safety standards set forth in Part 56, Title 30, Code of Federal Regulations. Respondent filed timely answers contesting the citations and requested hearings. Hearings were held pursuant to notice on March 5, 1980, in Wilmington, North Carolina, and the parties appeared and participated therein. The parties waived the filing of written briefs or proposed findings and conclusions and were afforded an opportunity to present arguments on the record during the course of the hearings.

Issues

The principal issues presented in these proceedings 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 these decisions.

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

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

Stipulations

The parties stipulated as to jurisdiction, that the respondent's quarry and mill is subject to the Act, that the site was inspected by MSHA inspectors during the period July 25-27, 1978, that respondent was given an opportunity to accompany the inspectors during their inspection, and that the citations in issue in these proceedings were duly served upon respondent's representatives (Stipulation filed August 29, 1979).

In addition to the prehearing stipulations, the parties also agreed as to the size and scope of respondent's mining operation at its Castle Hayne Quarry and Mill, indicated that the product mined at the open pit quarry is marl, which is the basic substance for producing cement, and agreed that respondent has an average history of prior violations (Tr. 9, 10).

DOCKET NO. SE 79-16-M

The five section 104(a) citations issued in this docket were all issued by MSHA Inspector Edwin E. Juso, and they are as follows:

Citation No. 103821, July 25, 1978, 30 C.F.R. 56.9-87: "The reverse signal alarm for the 988 cat loader working near the primary crusher was not functioning."

Citation No. 103824, July 25, 1978, 56.14-1: "The idlers under the skirtguards and the take-up pulleys for the No. 2 clinker belts were not guarded. The pinch points were exposed. The No. 2 clinker belt is on the 5th floor of the mill building."

Citation No. 103827, July 25, 1978, 56.14-1: "The idlers under the skirtboards and the tail pulley for the No. 1 clinker belts were not guarded. The No. 1 clinker belt is on the 5th floor of the mill building.

Citation No. 103830, July 25, 1978, 30 C.F.R. 56.14-1: "The idlers under the skirtboards for the coal stacker belt were not guarded.

Citation No. 103843, July 25, 1978, 30 C.F.R. 56.9-2: "The hydraulic side coupling for the track mobile No. 1 was broken. Railroad cars could not be stopped due to this in case of an emergency.

Testimony and Evidence Adduced

Citation No. 103821 - Petitioner

Inspector Edwin Juso confirmed that he issued the citation in question after observing the loader in question back up and no alarm was sounded. The machine is a very large one, and access to the operator's seat is by means of a ladder. The machine has an obstructed view to the rear at eyesight level and a man standing behind it at some distance would not be visible to the operator. The inspector indicated that he has been in the cab of such a machine and has been seated next to the operator. The machine in question had side view exterior mirrors, and while an alarm was in fact installed on the machine, it was inoperable. He observed the machine in operation, and indicated that it was loading marl from a pit pile and taking it to the primary crusher. Although the area where the machine in question was an area traveled by pedestrians, he observed no one on foot near the machine on the day the citation issued. Although a spotter is acceptable in lieu of an alarm, he saw no one stationed as a spotter, and he recalled no other vehicle in the vicinity. The machine in question is an "articulating" machine; that is, the wheels do not turn, but the cab turns to a maximum of some 70 degrees. When the cab turns right or left there is an obstructed view to the other side (Tr. 11-18). Inspector Juso indicated that abatement was achieved by repairing the alarm, and the respondent acted in good faith quickly and there was no willful neglect (Tr. 19).

On cross-examination, Inspector Juso stated that it was possible that the machine operator had disconnected the wire from the backup alarm to keep it from sounding because he was alone and did not want to hear the sound. However, he could not recall the operator telling him that because it was so long ago. He confirmed that he observed no one in the area except the loader operator, but indicated that people do travel through the area while walking from the mill building to the crusher. He could not recall whether the loader had a horn and he indicated that he cited the respondent for not having an automatic reverse alarm. The purpose of such a requirement is to prevent the machine from backing over a pedestrian or a smaller piece of equipment. Although the crusher operator is normally stationed inside the building, there are times when he must leave and go to the area where the loader is operating. Although the loader operates in different areas, he did observe it move to other locations on the day in question. Although he

personally has never operated such a loader he does know that it operates forward and reverse while loading. While conceding that the sound emitted by the reverse alarm is "annoying", he believed that it is not if one is wearing ear protection. Even though an operator may be alone while operating the machine, the standard still requires an alarm because the machine may be moved to another operating location. There are always blind spots and obstructed views to the rear of such loaders, but this would depend on the particular circumstances presented (Tr. 20-31).

Respondent's Testimony

Robert Pyles, plant administrator, testified that he accompanied the inspector when the citation was issued and he stated he was familiar with the loader in question. It was equipped with a backup alarm as well as a horn, but the alarm had been disconnected. The wire to the micro-switch located on the steering column had been disconnected and this was contrary to the company safety rules. Mine management was not aware of this fact until the morning of the inspection. The machine was subsequently completely overhauled, and in the process the alarm was connected directly to the transmission so that it sounded automatically when the machine was placed in reverse. He identified exhibit R-1 as a photograph of the primary crusher and estimated that it was some 100 yards from the main plant where people walk and come by. No one had any reason to be in the area where the machine was operating on the day in question (Tr. 36-39).

On cross-examination, Mr. Pyles testified that the loader was taking material from the stock pile and dumping it in the crusher. Material is not ordinarily stockpiled, but is only stock piled for emergency. The normal operation entails transporting the material directly from the pit quarry by trucks and then dumping the loads directly into the crusher. He was not aware that trucks would be operating in the vicinity of the loader, and he was not aware that someone was in the crusher building. Company policy dictates that backup alarms be connected regardless of where the machine may operate, and if the operator of the machine disconnected it he had no authority to do so (Tr. 40-42). The function of the loader operator is to dump the marl materials into the crusher (Tr. 43).

Citation No. 103824, 103827, and 103830.

Petitioner's Testimony and Evidence

Inspector Juso confirmed that he issued the three citations in question and that he cited section 56.14-1 of the standards after finding unguarded moving machine parts. He issued Citation No. 103824 after observing that the belt idlers under the skirtboards on the No. 1 and No. 2 clinker conveyors were not guarded. The idlers, with the skirtboards located directly above them, formed a pinch point and if a man caught his finger or hand inside the pinch point, a serious injury could result. However, the extent of the injury would depend on the amount of pinch point clearance. While all idlers are not required to be guarded, those that are hazardous and have skirtboards

directly on top of them are required to be guarded. There was access to both conveyors on both sides, and the conveyors were some 42 inches off the floor, and this height was consistent along the entire length of the conveyors, which were some 50 to 100 feet long. He saw evidence that cleanup work had been performed adjacent to the unguarded idlers and observed footprints and a shovel adjacent to the idlers. Travelways where persons could pass by were adjacent to both sides of the belts. He observed no structural guards on the skirtboards or belts to prevent persons from falling into the unprotected idlers, and he observed a man near the skirtboards but he was not shovelling. The idlers were at a belt transfer point, normal spillage occurs there, and he observed evidence that cleaning had taken place under the belts, and he concluded that cleanup personnel would be exposed to a hazard since cleanup is required where there is spillage present (Tr. 45-52).

Inspector Juso testified that he also observed an unguarded belt takeup pulley which is used to take up the belt slack and keep it taut. This was at a different belt location, and while the unguarded idlers and takeup pulleys constituted separate violations, he incorporated them into one citation since it was on the same piece of equipment. The pulley was large but he did not measure it. He believed the pulley was guarded, but he determined that the guard was inadequate because the pinch point was exposed. He was not concerned about the belt rollers, but only with the pinch point. The pulley was located under the conveyor belt structure itself and slightly above the floor at a point where the takeup and bend pulleys are located. The pulley was of solid cylindrical construction and it is known in the trade as a "wing pulley" (Tr. 52-56).

Inspector Juso testified that the facts surrounding the issuance of Citation No. 103827 was essentially the same as the first guarding violation. The two belts in question are parallel belts with a travelway between them. The idlers on the number one belts where there were skirtboards installed were not guarded. Also, the tail pulley on the No. 1 belt was unguarded and was at the same end as the takeup pulley on the No. 2 belt. Both belts were of the same height and he saw evidence of cleanup on the No. 1 belt also. He observed footprints and determined that shovelling had taken place. The tail pulley is also known as a "wing or spoked pulley", a portion of it was exposed, and someone could inadvertently put his hand in or slip or fall into the pinch point. The hazard of being caught in the idlers is the same as that which was presented on the No. 2 belt. While the unguarded locations cited constituted two separate violations, he treated it as one citation (Tr. 56-59).

With regard to Citation No. 103827, Inspector Juso testified that the conditions were essentially the same as the other guarding citations, but that this one concerned only one condition, namely, the unguarded stacker belt idlers located under the belt skirtboards. The idlers under the skirtboards constituted pinch points which were required to be guarded under section 56.14-1. The area was at ground level toward the tail pulley side of the belt, and he believed the belt was inclined. The unguarded area was at a belt transfer point and the purpose of the skirtboards is to keep the

material on a straight flow up the conveyor. The hazard was between the idlers, and if someone got his hand into it it would have a mashing or pinching effect. All of the guarding citations were abated in good faith by the respondent (Tr. 59-61).

On cross-examination, Mr. Juso indicated that it is not necessarily true that some passing employee would have to slip or fall to come into contact with the pinch points at the locations cited in the three guarding citations. He was concerned with cleanup personnel in close proximity to the unguarded idlers under the skirtboards. While cleanup crews may use shovels or brooms and be that far from the pinch points, they may take breaks and start talking with their fellow workers, and the intent of the standard is to guard against accidents. Maintenance men and others walk through the areas cited, and he believed the unguarded areas cited were hazardous because of the pinch points, the grabbing effect, the spoked pulley, and "common sense tells me what is a hazard and what is not" (Tr. 73-78). Personnel may slip and fall into the pinch point, and a shovel may get caught in the pinch points and a hand may follow the shovel in.

Inspector Juso stated that he does not consider a belt idler roller per se to be a pinch point because there is no weight on top of the conveyor and if someone put there hand in, the belt would lift up and the hand would pass through. Although such a belt is considered moving machinery, it is not required to be guarded. However, if a skirtboard were installed, a pinch point would be created because the hand would be stopped by the skirtboard and be mashed (Tr. 80-83). Inspector Juso could not specifically recall the types of guards installed to achieve abatement of the guarding citations (Tr. 84).

In response to bench questions, Inspector Juso stated that the clinker belt tail pulley was guarded to some extent, but that the idlers beneath the skirtboards were not guarded at all. Regarding the pinch points in question, he indicated that they were approximately 1 foot inside the belt framework and that would be the approximate distance one would have to reach to contact the pinch points (88-91).

Respondent's Testimony

Al Klayshak, safety director, testified that the guarding standards published as "American National Standards" (ANSI) have been accepted by OSHA as sufficient to cover belt guarding requirements. He discussed several specific standards and indicated they were more specific and more to the point than the mandatory standards promulgated under the Act. He also believed that prior to the issuance of the citations in question, the belts in question were safe and he stated that the intent of the safety standards under the Act is not to prevent the inadvertent situation where an employee might fall, but rather, the normal and usual occurrences where an employee could accidentally come in contact with a pinch point in the normal course of his work. He conceded, however, that the ANSI standards may not be cited by MSHA under the Act, nor relied on by the respondent as compliance under the Act (Tr. 91-99).

Albert L. Simon, plant manager, testified that he was so employed at the time the citations in question were issued and he described the belt conveyor systems in question. The belts in question are 4-1/2 feet off the ground, and except for cleanup personnel, employees do not normally work at or near the belt lines or pinch points. The clinker belts on the fifth floor location cited are cleaned by shovelling the spillage into wheelbarrows and dumping it in a floor opening away from the belt line. This is done to keep employees away from the belt (Tr. 100-102).

In response to further questions, Mr. Simon stated that abatement was achieved by welding hooks along the skirtboards and hanging one-four-inch rubber belting, approximately 18 inches along, over the hooks. He did not believe anyone could get their arm or any part of his body caught in the locations cited, and he was aware that prior inspections determined that the existing guards were safe (Tr. 102-104).

Citation No. 103843 - Petitioner's Testimony

Inspector Juso confirmed that he issued the citation in question after determining that a side coupling for the number one track mobile vehicle used to push railroad cars was broken. The piece of equipment in question has a front hydraulic coupling as well as a rear manual coupling, and the hydraulic one was broken. The coupling is used to facilitate better traction when it pushes against the raiload cars. The "knuckle" which couples to the car was not functional, and in that condition it would not couple with or hold the car to which it is attached, and this would result in the car being pushed becoming disconnectd and the car would "free wheel" through the shop yard and rail loading area. Although the truck mobile has an audible warning horn, it was inoperative. Men and trucks would be in the area and would be exposed to a hazard. The broken coupling was replaced with a new one, and while he did not observe the mobile in operation, he was able to determine that it was being used with the broken coupling prior to the time he issued the citation (Tr. 161-165).

On cross-examination Mr. Juso confirmed that the track mobile in question had couplings on both ends, but that he could not determine whether the end coupling which was broken was in fact being used. Employees in the area told him that the end which was broken had been used, but he could not identify the employees by name. They simply told him that it was used at some unspecified time in the past. He did not see the equipment in operation and simply observed that one of the couplings was broken. He was shown a copy of an order form re-ordering a new coupling for the equipment in question, and he identified a photograph (Exhibit R-7) as a coupling similar to the one which he observed. He conceded that the equipment could have been used from either the front or the rear. He determined that the condition was hazardous from what he was told by the unidentified employees, and he did not record their names in his notes (Tr. 165-170).

In response to bench questions, Inspector Juso affirmed that he did not see the mobile equipment in operation and that it was parked at the time he

issued the citation. He conceded that he would not have issued a citation if no one had informed him that it had been used (Tr. 173). While there was another identical piece of mobile equipment undergoing repairs, he did not know whether the one with the defective coupling would have been put in operation before the other one was repaired and put back in operation (Tr. 164, 174).

Plant administrator Robert Pyles was called as petitioner's witness, and he confirmed that the track mobile in question had couplings on both ends, one hydraulic, and one manual. He also indicated that both ends of the equipment look identical. He stated that he did not know whether the equipment cited was being used with a broken coupling, and he could not confirm that anyone told the inspector that the track mobile was used with a broken coupling (Tr. 174-176).

Plant manager Albert Simon was called as petitioner's witness, and he testified that he was not with Inspector Juso when he inspected the track mobile. He observed the track mobile the day before the inspection and again on the afternoon of the inspection and on both ocassions it was parked at the pack house. The other track mobile was in the shop for repairs. The pack house is a shipping point where the railroad cars are loaded, and he is sure that the cars were loaded the day before the inspection as well as after. He was also sure that the track mobile which was cited would have been used safely prior to the inspection (Tr. 176-178).

On cross-examination, Mr. Pyles testified that the rail cars are actually stopped by their own braking systems. The broken hydraulic coupling on the mobile track was in fact a broken pin and since the track mobile can be operated from either end, instructions were given to use the end with the stationary coupling until the replacement part for the broken one was received (Tr. 179-181).

Findings and Conclusions - Docket SE 79-16-M

Fact of Violation - Citation No. 103821

With regard to the backup alarm Citation No. 103821, petitioner takes the position that while an alarm was in fact installed on the loader in question, since it was disconnected and not functioning, it is the same as not having one installed (Tr. 24).

Respondent conceded that the backup alarm was disconnected and was not working at the time the citation issued (Tr. 34). Respondent's defense is based on its assertion that the operator of the loader disconnected the alarm because the sound emitted was annoying to him, and that since he was the only person present in the area there was no need for the alarm to sound. Further, in the event the loader were moved to another area, all that would be required is for the alarm to be reconnected (Tr. 24-26).

Section 56.9-87 requires that heavy duty mobile equipment be provided with audible warning devices and that when the operator has an obstructed

view to the rear, the equipment is required to have 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.

In this case, the inspector observed the loader in operation, determined that it had an obstructed view to the rear, and that no observer was present. Although a backup alarm was installed on the loader, it was disconnected and emitted no sound when the loader was operated in reverse. Respondent conceded that the alarm had been disconnected and was inoperative at the time the inspector observed the condition and issued the citation. I conclude and find that petitioner has established a violation. The standard cited requires an audible backup alarm, and I agree with the petitioner's position that an installed inoperative alarm is insufficient to establish compliance. The citation is AFFIRMED.

Negligence

I conclude and find that the condition cited resulted from ordinary negligence in that respondent failed to take reasonable care to insure that the backup alarm was in an operative condition before the loader was used. Closer supervision or attention to the loading procedure and operation could have prevented the condition cited.

Gravity

Although the inspector observed no one other than the loader operator in the vicinity of the loading operations on the day the citation issued, he did indicate that persons on foot traveled through the area from time to time. Respondent's testimony is that the stockpile where loading was taking place was some 100 yards from the main plant where people travel. It would appear that on the day in question, no other pedestrians or equipment were in the area and petitioner has not established than anyone was exposed to any hazard of being struck or run over by the loader. Under the circumstances, I conclude that the condition cited constitutes a nonserious violation.

Fact of Violation - Citation Nos. 103824, 103827, 103830

With regard to the three guarding citations, respondent contended that prior MSHA inspections resulted in the extension of certain emergency stop cords to the skirtboard locations in question and that MSHA accepted this as adequate protection, approved this procedure for all of the plant conveyor belts, and that respondent was completely unaware that additional guarding was necessary. In short, respondent argues that it does not know what has to be done to meet the guarding requirements placed on it by MSHA inspectors from inspection-to-inspection (Tr. 63-73). Further, respondent argues that an inspector's judgment as to a hazardous pinch point, standing alone, is insufficient to establish a violation of the cited guarding standard because the standard itself is so broad (Tr. 85-87).

30 C.F.R. 56.14-1 provides as follows: 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.

It seems obvious to me that the inspector issued the three citations concerning the unguarded belt idlers after determing that the idlers, located appoximately 12 inches inside the belt frame, in combination with the skirtboards, constituted unguarded hazardous pinch points which could be contacted by cleanup and other personnel either working at or near those locations or walking by on the adjacent walkways. Since the unguarded pinch points were at belt transfer points, and since he observed evidence of cleanup at those locations, the inspector assumed that cleanup personnel were in close proximity to the unguarded pinch points. The inspector denied any knowledge of any instructional memorandums with respect to the application of the cited standard, and testified that his determination that the unguarded locations were hazardous and could be accidentally contacted by personnel was based on his experience and the facts as he found them on the day the citations issued.

Respondent's defense is based on the assertion that previous MSHA inspections had found that the belt systems in use were adequately guarded and that respondent was in compliance. However, the respondent produced no direct evidence that MSHA had previously inspected the specific locations cited by Inspector Juso and found them to be in compliance. Accordingly, this defense is rejected. Further, respondent's additional defense that OSHA has accepted certain ANSI guarding standards as sufficient compliance is likewise rejected. We are dealing with specific mandatory safety standards promulgated pursuant to a law enforced by MSHA and those requirements are imposed on a mine operator subject to the 1977 Mine Safety Act, and any OSHA-ANSI requirements are irrelevant and immaterial. Further, respondent's defense that the cited standard is intended to protect a mine employee from direct work-related hazards rather than inadvertent or accidental entanglement in a pinch point is likewise rejected. In my view, the two situations are directly related and inseparable. In other words, I believe the standard is intended to preclude injuries resulting from someone slipping, falling, or otherwise coming into contact with an exposed unguarded pinch point, and most injuries in this regard are the direct result of inadvertent or accidental contact with such unprotected locations.

After careful consideration of all of the testimony and evidence adduced with respect to these citations, I find that petitioner has established that the three unguarded idler pinch point locations, some 12 inches from the edge of the belt frames in question, where cleanup personnel were present and obviously working, constituted areas which could be contacted by persons, thereby inflicting injuries, and that the failure to provide guards at those locations constitutes violations of the cited standards. The citations are AFFIRMED.

With regard to the alleged unguarded takeup pulleys mentioned in Citation Nos. 103824 and 103827, which the inspector treated as single violations

along with the unguarded idlers, I take note of the fact that the inspector stated that he "believed" those pulleys were guarded, but that the guards were inadequate. However, he offered little credible evidence to establish that those locations were in fact hazardous, and I take note of the fact that section 56.14-3 requires that existing guards extend a sufficient distance to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley. I believe that the inspector should have cited this standard if he in fact believed that the existing takeup pulleys were inadequately guarded. He obviously treated all of the conditions described in the two citations as single violation, but I conclude that petitioner has not established a violation insofar as the take-up and tail pulleys are concerned, and for purposes of my decision in this matter, I have disregarded those alleged conditions and have levied penalty assessments on the basis of the unguarded idlers which I have found sufficiently support the citations insofar as those conditions are concerned.

Negligence

I find that the respondent should have been aware of the fact that the unguarded belt locations cited should have been guarded. Respondent conceded that men were required to be in the area of the belt transfer points to perform cleanup chores, and I believe it is reasonable to expect a mine operator to be aware of potentially hazardous conditions such as unguarded pinch points, and to insure that they are protected. I conclude that the conditions cited resulted from respondent's failure to exercise reasonable care and that this constitutes ordinary negligence.

Gravity

I have considered the fact that in at least two of the areas cited, namely, the clinker belts on the fifth floor of the mill building, respondent utilized a cleanup method that entailed shovelling and transporting any spillage by wheelbarrow to a dumping point away from the belts, and that this was done to keep cleanup crews away from the belts. This in itself is a tacit admission by the respondent that the unguarded belt areas posed a hazard, and the fact that walkways were adjacent to the unguarded belt locations added to the gravity of the situation. Further, the evidence establishes that the belts were some 4 to 4-1/2 feet off the ground and that the exposed pinch points were some 12 inches from the belt frames. Considering all of these circumstances, I find that the conditions cited in all three citations were serious.

Fact of Violation - Citation No. 103843

Petitioner's counsel argued that it offered testimony that the track mobile had a defective coupling and that Mr. Simon testified that it had been used. However, counsel conceded that the inoperable coupling was probably not used but that the defective one still affected safety since it could have been used. Regardless of whether the defective end is used or

not, he still maintained that a violation of the cited standard is established if in fact one of the couplings was broken. He conceded that there is no evidence that the defective coupling had been used. (Tr. 185-187).

Citation No. 103843 was vacated from the bench (Tr. 188). The basis for the vacation was my finding and conclusion that petitioner had failed to establish by a preponderance of the evidence that the defective coupling in question was in fact used prior to the time it was replaced by a new one. Section 56.9-2 provides that "equipment defects affecting safety shall be corrected before the equipment is used." I find that petitioner has failed to establish that the nonuse of a defective coupling on the opposite end of the track mobile affected safety. There is absolutely no credible evidence that the broken coupling was in use, and if it was, it was incumbent on the inspector to document the name of the employee who many have advised him that it was, and petitioner should have produce some credible testimony to prove its case. The evidence established that there were two couplings on the track mobile and that the equipment could do the job from either end. Further, petitioner conceded that the defective coupling was probably not used, and I conclude that petitioner has not established that merely using the track mobile with a defective coupling which is not being used rendered the equipment unsafe. My bench decision vacating the citation is reaffirmed and the citation is vacated.

Findings and Conclusions - Docket BARB 79-266-PM

The five citations issued in this docket are as follows:

104(a) Citation No. 103839, July 26, 1978, 30 C.F.R. 56.11-1:

> The safe access provided from the third floor to the mill room overhead crane was not being utilized by the crane operator. He had it stopped at the opposite end of the landing and was climbing over or thru the guardrails to gain access to the crane. The employee shall be instructed in the use of the proper access.

107(a) - 104(a) Citation 103840, July 26, 1978, 30 C.F.R. 56.11-1: "An employee was working above the moving raw feed belt conveyor in an unsafe position. The employee was standing straddling the conveyor approximately four to five feet above the ground floor. No protection was provided to keep the employee from falling."

Citation No. 103844, July 27, 1978, 30 C.F.R. 56.16-5: "Compressed gas cylinders belonging to the contractor building the new warehouse were not secured in a safe manner."

Citation No. 104890, July 27, 1978, 30 C.F.R. 56.15-7: "An employee was observed using a cutting torch without an eye shield or goggles. The employee was wearing regular safety glasses without side shields."

Citation No. 104892, July 27, 1978, 30 C.F.R. 56.9-61: "The clinker stockpile was not trimmed properly creating an overhang. A loader had been working in the area of the overhang which was approximately 20 feet high."

Citation No. 103839 - Petitioner's Testimony and Evidence

Inspector Juso confirmed that he issued the citation in question after determining that a safe means of access was not being utilized by the crane operator. The operator had stopped the crane at the opposite end of the third floor mill room landing and was climbing over or through the guard rails to gain access to the crane. Abatement was achieved by providing a safety belt and line for use by the crane operator in places other than those provided for suitable access. Gates are provided at places along the landing so that an operator may step directly onto the landing floor. Here, the crane was stopped at a place where there was no gate opening and the inspector assumed that the operator got off the crane by climbing over or through the handrails. No one was on the crane at the time he observed it and the crane is approximately 60 feet above the floor. The areas provided with gates are for egress and ingress from the crane, and there is no space between the crane and gate landing where one could slip through and fall to the floor below. The crane he observed was some 40 to 50 feet from the gate (Tr. 106-108).

Inspector Juso stated that the space between the crane and handrails where a person could slip to the floor was approximately 3 to 4 feet, but he could not remember exactly because he took no notes. He stated: "all I know is that it was unsafe, and that is why I wrote the citation" (Tr. 109). He saw no one on the crane, saw no one alight from it over or through the handrail, and the matter was brought to his attention by a mill employee whose name he could not recall (Tr. 109). He believed he asked someone how a person would get on and off the crane parked at the location where he found it, and the unidentified person did not know (Tr. 110). Inspector Juso described the operation of the crane and indicated that it traveled along the mill floor on rails and he assumed the crane operator was climbing over the handrails to alight from the crane, and since he considered this to be an unsafe practice, he issued the citation. He did not speak to the crane operator because he could not locate him (Tr. 111-112).

On cross-examination, Mr. Juso identified photographs of the top of the crane, the crane walkway, and the gate at the top landing (Exhibits R-4 and R-5). He could not recall the exact amount of space between the crane and the landing, but indicated there was a hazard of falling and this would depend on where the operator made his access to the landing (Tr. 114). As for the abatement, Mr. Juso stated that he "went along" with the use of a safety belt and line, but that he did believe that the use of an "A-frame" with handrails from the crane to the landing would be a good method for protecting the operator. The A-frame could be kept on the crane and be used as needed by the operator (Tr. 115). Once access is provided by means of gates, he believed that they should be used; however, a safety belt and line could be used to protect the operator in the event he attempted to climb over the

handrails from the crane rather than using the gate. The handrails along the landing are to protect pedestrians on the landing walkway from falling below and are not intended to protect a crane operator while climbing over them. An operator climbing through or over the handrails from the crane to the landing, or vice-versa, is not a safe practice (Tr. 115-119, 121-123).

In response to bench questions, Mr. Juso stated that had the crane been parked at a location where there was an exit gate at the time he observed it he would have assumed that the crane operator used the gate and he would not have issued the citation (Tr. 126-127). However, in response to a question as to whether he would automatically issue a citation every time he observes a crane parked at a place other than by an exit gate, he stated "well, I do not want to stop their production because there are certain cases where they have to do this because of other types of work that they use the crane for" (Tr. 128). At the time the citation was issued the crane had a heavy piece of equipment or motor attached to its cable and that is why the crane was parked where he found it (Tr. 129). Even if the crane were parked flush against the landing and the operator simply crawls under the landing handrail and onto the crane, that still would not be 100 percent safe because "something can go wrong" (Tr.128). Mr. Juso did not know where the operator got off the crane on the day he observed the crane (Tr. 129). He knows of no other way a man can get out of the crane other than sliding down the cable (Tr. 130-132).

Respondent's Testimony

Plant manager Robert Pyles testified that he was with inspector Juso when the inspector observed the parked crane. He confirmed that the usual and normal means of ingress and egress or access to the crane would be through the gate-type opening provided for that purpose on the third floor. The crane is frequently used at locations other than at the end of the rail and it may remain there for hours at a time. He identified a photograph of the crane (Exhibit R-6) and the cab where the operator is positioned. The operator exits the cab by means of a ladder to the third level, and once at the top of the ladder he will grab the landing handrail and go under it. It would be difficult for him to fall into the space between the crane and the space between the crane and the landing. The operator has hand holds at all points and he described his exit as similar to a boxer entering a ring, and he believed there is no danger involved in exiting the crane in this manner and no one has ever been injured (Tr. 146-149).

On cross-examination, Mr. Pyles confirmed that the gate at the third floor landing is the location where the crane is normally parked so that the operator may enter or exit the crane. The gate swings open for a four-foot wide distance and when opened one can walk through unobstructed by the handrail. He reiterated that it was normal for the crane operator to crawl through the guardrail (Tr. 150).

Al Klashak testified that the crane in question is similar to others used in the industry. He believed that access to and from the crane is safe

regardless of whether a safety line, A-frame, or other device is used because of the fact that there is insufficient distance between the crane frame for someone to fall to the rail below. He has observed the third floor landing level and there are hand holds for the operator as he reaches the top of the ladder. There is no danger in the operator simply walking through the landing guardrail (Tr.152-154).

On cross-examination, Mr. Klashak stated that the third floor guardrails were designed to fit the landing structure and not the crane. There are approximately four gates spaced some 50 or 60 feet apart and their purpose is to permit access to the crane when it is marked, as long as the operator hung on to himself there was no danger of his falling to the floor below (Tr. 152-156).

Albert Simon testified that there is only one gate on the third floor landing and it is positioned at one end. The crane is usually parked at that location if it is stopped for a long period of time. The crane is used at four grinding mills and when it has a suspended load it may stay in place for as much as 2 days. It would be impractical to have additional gates (Tr. 157-159). He does not know why the gate was installed at the end location, but presumes it was installed there so that the crane can be parked clear from the rest of the machinery beneath it (Tr. 160).

Citation No. 103840 - Petitioner's Testimony and Evidence

Inspector Juso confirmed that he issued the imminent danger citation in question after observing an employee working above the moving feed belt conveyor in an unsafe position. The man was standing and straddling the belt with each foot on the belt frame and Mr. Juso and Mr. Pyles immediately went to the area and instructed him to get off the belt (Tr. 134-135). Respondent's counsel stipulated that the man was in an unsafe and hazardous position (Tr. 136).

On cross-examination, Mr. Juso stated that he believed the employee took it upon himself to position himself on the belt in the manner described and that company management did not require him to do so (Tr. 138). However, he believed that closer supervision would have prevented the man from straddling the belt (Tr. 139).

Respondent's Testimony

Plant administrator Robert Pyles confirmed that an employee was in fact straddling the belt in question. He also indicated that the employee would have received the normal written plant safety rules at the time of his initial employement. The man was a laborer and the maintenance department was performing work in the area at the time the citation issued. He conceded that the man was in an unsafe position and he (Pyles) reprimanded him, and the man positioned himself in an unsafe position contrary to the company's safety rules (Tr. 142-145).

Citation No. 103844 - Petitioner's Testimony

Inspector Juso confirmed that he issued the citation in question after observing two or three compressed gas cylinders belonging to a contractor who was building the new warehouse unsecured in a safe manner. The cylinders were lying on the ground and were not upright. The guages on oxygen cylinders are capped, but acetylene cylinder guages are merely recessed. He quoted the hazards involved in handling acetylene cylinders, including an explosion hazard, and he indicated that they are hazardous if not secured in an upright manner with a chain to prevent them from falling over as required by section 56.16.5. The cylinders were immediately removed from the property after Mr. Pyles instructed the contractor to do so (Tr. 189-192).

On cross-examination, Mr. Juso testified that he did not determine whether the cylinders were empty and capped and he indicated that he would not open the valves to make this determination. He indicated that oxygen tanks usually have a metal cap, but that acetylene tanks do not and the valve is recessed within the bottle. He made no determination as to whether the cylinders in question were empty, but indicated that it is possible that they were capped. He believed that the fact that they were capped or not is no indication that they are dangerous. The danger lies in the fact that they were lying down. However, if the respondent proved to him "on the spot" that they were empty, he would not have issued the citation because he treats all cylinders lying on the ground and not secured upright in the same manner. He did not ascertain from the contractor whether the cylinders were full or empty, and he indicated that it is seldom that any cylinder is completely empty (Tr. 192-195).

In response to bench questions, Mr. Juso stated the two cylinders were lying outside of the new warehouse which was under construction. He confirmed that he does not distinguish between full and empty cylinders, but also indicated that if the cylinder was completely empty, he would not have issued a citation. A determination can be made to ascertain whether a cylinder is full or empty and this is done by means of a guage. When not in use, oxygen cylinders are capped, but acetylene tanks are not made for caps because the valves are recessed in the top of the bottle. The cylinders were not in an area where they were being used and they probably had been used and may have been half full or empty. Once they are used, the normal procedure is to secure them to a wall with a chain around the bottle so that it cannot fall over (Tr. 195-197).

Inspector Juso stated further that he could not recall whether the cylinders in question were capped and he made no efort to open the valve to determine whether they were empty (Tr. 198). He also indicated that oxygen cylinders "are not that dangerous lying down, but acetylene sure is" (Tr. 199). He also indicated that section 56.16-3 which states "materials that can create hazards if accidentally liberated from their containers shall be stored in a manner that minimizes the dangers" could probably have been cited, but he indicated that the intent of this standard is for application "more or less" in cases involving chemicals (Tr. 200).

Respondent's Testimony

Robert Pyles testified that he was with the inspector when the citation was issued. He confirmed that the two cylinders belonged to the contractor building a warehouse and indicated that they were both capped. The information he obtained from the contractor indicated that they had been used until they were empty (Tr. 200-201).

On cross-examination, Mr. Pyles stated that the contractor told him the cylinders were empty after the citation was issued. The cylinders had no guages on them and were capped and lying on a 60- by 100-foot concrete pad and they were not bound together (Tr. 202). The fact that they were capped does not indicate whether they are full or empty (Tr. 203).

Citation No. 104890 - Petitioner's Testimony

MSHA inspector Theil D. Hill confirmed that he issued the citation in question after observing an employee using an automatic cutting torch cutting some metal, and while he was wearing safety glasses, he was not wearing a face shield to prevent particles from coming in on the sides of his face. Sparks were flying and the employee was not wearing a head shield over his safety glasses. The condition was abated after the employee was given goggles by the plant superintendent and instructed to wear them (Tr. 205-208).

On cross-examination, Mr. Hill stated that he could recall no conversation with the employee who was using the torch. He identified photographs of the torch mechanism in question (Exhibits R-10 and R-11) and indicated that the employee was not wearing goggles or a shield. He recalled that the employee sought him out after lunch but did not recall that he said he raised his goggles in order to see the torch shut-off valve. The inspector confirmed that one cannot see through the goggles and indicated that he has never operated an automatic torch. He observed no goggles, but two or three minutes after he called it to the attention of the supervisor, he was told they were provided and the employee had been instructed to wear them (Tr. 208-213).

Inspector Hill testified further that the safety glasses which were worn by the employee afforded some measure of protection from particles coming directly at him, but not from the side or the bottom (Tr. 218).

Respondent's Testimony

Robert Pyles stated that he investigated the citation but was not with Inspector Hill when he issued it. He determined that the employee saw Mr. Hill and a company official in the area and when he pulled his goggles off his hat to reach down and turn the torch valve off, the torch was still burning but the metal had already been cut through (Tr. 222).

Citation No. 104892 - Petitioner's Testimony

MSHA inspector Thiel D. Hill confirmed that he issued the citation in question after observing that the clinker stockpile was not trimmed properly. This condition created a 20-foot high overhang and a loader had been working in the overhang area. It appeared to him that a loader had been removing material from the stockpile and had dug out under it, thereby creating an overhang. The overhang was approximately 8 to 10 feet in length and approximately 20 feet high. The condition was abated by taking the overhang down, but he does not know how this was done, and when he returned to the area to abate the citation, the overhang had been taken away (Tr. 223-225).

On cross-examination, Inspector Hill testified that he observed no equipment used to take material from the stockpile anywhere near the overhang area, and while it rained for 2 days prior, he saw tracks which appeared relatively fresh. He did not know when material was last taken from the stockpile prior to his arrival on the scene, and he was unaware that any records are kept in this regard. The tracks he observed went under the overhang and in the vicinity where the overhang was created. The tracks led him to believe that the overhang had been created by material being removed by a machine rather than being washed out by the rain water. However, this makes no difference since the standard requires that once an overhang is created, it shall be trimmed (Tr. 225-229).

Respondent's Testimony

Al Simon testified that he was with Mr. Hill when the citation was issued. He stated that the overhang was created by a wash-out which occurred a day or two prior to the inspection. Overhangs are normally taken care of by knocking the lip off from the bottom with a front-end loader or by pushing it down from the top with a bulldozer. Personnel or equipment are never placed under an overhang (Tr. 229-231).

In response to bench question, Mr. Simon stated that he advised Mr. Hill that the overhang had been washed out and that this was the first time he had observed it. It was immediately knocked down but Mr. Hill later issued the citation. Mr. Simon did not recall Mr. Hill mentioning the sight of any tracks and Mr. Simon saw none. He indicated that the last time the area was worked was the Thursday or Friday before the citation was issued. Material is normally removed from the stokpile with a front-end loader and the operator is usually seated 25 to 30 feet back from any overhang (Tr. 231- 234).

Fact of Violation - Citation 103839

Respondent argued that a safe means of access was in fact provided in this case since the location where the crane was parked was no different than if it had been stopped at one of the gate locations. Respondent maintains that there was no space between the landing and the crane for one to fall through and that climbing from the crane through the landing handrail is no different than opening the gate and walking through (Tr. 119-123).

Respondent moved for dismissal of the citation on the ground that the inspector did not actually observe anyone leaving the crane at the location where it was parked, and the motion was taken under advisement at the hearing (Tr. 238).

Although petitioner concedes that the inspector observed no one leaving the crane at the location where it was parked, its position is that since there was no gate at that location, the crane operator had to get off by climbing through or over the handrail, and since the inspector apparently saw no safety belt or line, the operator was not "tied on", and the inspector's assumption, based on what an unidentified mill employee told him, is sufficient to establish a violation (Tr. 130-132).

Section 56.11-1 requires that a safe means of access shall be provided and maintained to all working places. The testimony establishes, and the parties are seemingly in agreement, that the gates provided at the third floor landing were installed for the purpose of facilitating access to and from the crane by the operator. Therefore, it seems clear to me that respondent was in compliance with the requirements of the standard since the gates were in fact installed for that purpose. In fact, the condition described by the inspector on the face of the citation assumes this the inspector found that safe access was in fact provided. The alleged violation lies in the inspector's belief that the crane operator did not use the gate to exit from the crane on the day he observed the crane parked at a location other than next to the gate. Since the evidence established that the only way the operator of the crane can leave it is by means of protected walkway and ladder on top of the crane, I have to assume that this was the method used by the operator to leave the crane. However, since the crane was not parked by the gate, I can also assume by a credible inference that the crane operator exited the crane by either climbing over or through the hand railing located nest to the crane. The critical question is whether that method of exit is ipso facto an unsafe act and contrary to the cited standard. I think not. Since the inspector failed to interview the crane operator, or develop any evidence as to how he may have exited the crane on the day in question, I have no basis for determining whether the method used was safe or unsafe. Since a safe means of access was in fact provided, I conclude and find that respondent was in compliance and that petitioner has failed to provide any competent and credible evidence establishing a violation as charged in the citation. Accordingly, the citation is VACATED.

Fact of Violation - Citation No. 103840

Respondent conceded the fact of violation concerning Citation No. 103840, and did not dispute the fact that a man was in an unsafe position. Respondent's defense is that he was disciplined and that respondent could not possibly reasonably prevent an employee from placing himself in danger by doing an unauthorized act (Tr. 146).

Section 56.11-1 requires that a safe means of access be provided and maintained to all working places. Since the evidence establishes that the

individual was performing some work on the belt it seems clear that his position straddling the belt was at a working place and that his climbing on the belt and placing himself in such a precarious position was obviously not a safe means of access to the belt portion that he is working on. I conclude and find that the petitioner has established a violation and the citation is AFFIRMED.

Gravity

The respondent concedes that the individual in question was in a hazardous and dangerous position on the belt and I find that the violation is serious and exposed the man to serious injury since the belt was running.

Negligence

Respondent has established that the individual who was on the belt acted contrary to respondent's safety rules and policies and that his positioning himself astride a moving belt was an unathorized act. Under these circumstances, I cannot conclude that the respondent was negligent and I do not believe that as a general rule close supervision of an employee can prevent an employee from performing a foolhardy act in complete disregard for his own safety.

Fact of Violation - Citation No. 103844

Petitioner argued that the intent of the standard cited is to secure all cylinders regardless of whether they are full or empty (Tr. 199). Respondent takes the position that petitioner offered no proof that the cylinders were not safe, and maintains that since they were capped there is no proof that they were not empty. Further, respondent argues that if the cylinders were empty, admittedly, they were safe (Tr. 198).

Section 56.16-5 requires that compressed and liquid gas cylinders be securred in a safe manner. Petitioner has established that the cylinders in question were not secured but were in fact lying free and unsecured. Respondent does not dispute this fact. The standard cited makes no distinction between full or empty cylinders and respondent's defense in this regard is rejected. The citation in AFFIRMED.

Gravity

The inspector failed to determine whether the cylinders were full or empty. Under the circumstance, I conclude that petitioner has not established that the violation presented a serious hazard. Accordingly, I find that the violation is nonserious.

Negligence

The evidence establishes that the two cylinders in question were the property of a contractor who was performing some construction work. Petitioner presented no evidence that respondent knew or should have known that

the cylinders were not-securred. Under the circumstances, I can only conclude that respondent was not negligent.

Fact of Violation - Citation No. 104890

Respondent's defense to this citation rests on its assertion that at the time in question the employee who was using the cutting machine had protective glasses and that he was finished cutting and was simply turning off the cutting machine valve when the inspector observed him (Tr. 223).

Section 56.15-7 requires that face-shields or goggles be worn when welding or cutting is taking place. The inspector's testimony that the employee in question was wearing ordinary safety glasses, with no protection to prevent particles from striking him from the side or beneath the glasses, is unrebutted by the respondent. While the use or ordinary safety glasses may have afforded some protection for the employee, it seems clear from the evidence presented that the inspector observed no goggles or a shield being worn or in the possession of the employee at the time he observed him working at the cutting machine. Although Mr. Pyles testified to his after-the-fact investigation, it is clear that he was not present on the day in question. Further, although the inspector indicated that he called the infraction to the attention of a supervisor on the scene and that the supervisor told him he provided the employee with goggles to abate the citation, the supervisor did not testify, and neither did the employee. In these circumstances, I conclude and find that petitioner has established a violation and the citation is AFFIRMED.

Gravity

The inspector testified he observed sparks flying while the employee in question was at the cutting machine, and failure to wear goggles or a protective shield exposed the employee to a potential injury. I find that the violation is serious.

Negligence

I find that the violation resulted from respondent's failure to exercise reasonable care to prevent the cited condition. The inspector testified that a supervisor was in the area and I conclude that closer supervision may have detected the infraction before the inspector arrived on the scene. I find the citation resulted from ordinary negligence.

Fact of Violation - Citation No. 104892

Section 56.9-61 requires that stockpiles be trimmed to prevent hazards to personnel. Respondent's defense seems to be that the overhang observed by the inspector was created by natural causes, namely, heavy rains which occurred for 2 days prior to the inspection. However, the standard makes no distinction as to whether a hazard is created by natural causes or by a machine such as a loader. Further, respondent has not rebutted the fact that

an over-hang did in fact exist. As a matter of fact, Mr. Simon testified he observed the over-hang and had it knocked down immediately. I find that petitioner has established a violation and the citation is AFFIRMED.

Gravity

I find no credible evidence to support a conclusion that anyone was exposed to the hazardous over-hang and I accept the testimony of Mr. Simons that a loader operator, in the normal course of loading, is positioned in a manner which removes him from any such hazard. Absent any evidence that men were working under the over-hang on the day in question, I can only conclude that the condition cited was nonserious and that is my finding.

Negligence

I find Mr. Simon's testimony that he observed the over-hang for the first time at the time the inspector observed it and that he took immediate corrective action to be credible. I also accept his testimony that he observed no tracks or equipment in the area at the time the citation issued. Under the circumstances, I can find no credible evidence or testimony to support a conclusion that respondent was negligent, I find that there is no competent or credible evidence indicating any negligence by the respondent and that is my finding.

Findings and Conclusions Applicable to Both Dockets

History of Prior Violations

Petitioner asserts that respondent has an "average" history of prior violations, but submitted no computer printout or other evidence as to the extent of this history (Tr. 236). Petitioner conceded that after consulting with the inspectors, no great number of violations have been issued at the mining operation in question, and petitioner further conceded that under the 1977 Act, respondent has no prior history of violations at the mine in question since the inspection in question was the first one under the new law at the facility (Tr. 236).

I conclude that for purposes of civil penalty assessments in these proceedings, respondent has no prior history of violations which would warrant any increase in the penalty assessments imposed by me for the citations which have been affirmed.

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

The parties agreed that the mine in question employed 162 employees and that annual production is 600,000 tons of marl, the basic substance used to produce cement, and that annual production for the respondent as a whole was some four million tons. I conclude that respondent is a large operator and that its mining operation at the quarry and mill in question was medium in scope.

Respondent does not contend that the assessment of civil penalties will adversely affect its ability to remain in business and I conclude they will not.

Good Faith Compliance

The evidence adduced establishes that respondent demonstrated good faith abatement in correcting all of the citations in issue in these proceedings. Further, with regard to citation Nos. 104892, 103844, and 103821, the evidence establishes that they were rapidly abated, and this fact has been taken into consideration in the civil penalties assessed.

Penalty Assessments

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

Docket No. SE 79-16-M

Citation No.	Date	30 C.F.R. Section	Assessment
103821	7/25/78	56.9-87	$ 35
103824	7/25/78	56.14-1	50
103827	7/25/78	56.14-1	50
103830	7/25/78	56.14-1	50

On the basis of the foregoing findings and conclusions made in these proceedings, Citation No. 103843, July 27, 1978, is VACATED.

Docket No. BARB 79-266-PM

Citation No.	Date	30 C.F.R. Section	Assessment
103840	7/26/78	56.11-1	$ 50
103844	7/27/78	56.16.5	20
104890	7/27/78	56.15-7	35
104892	7/27/78	56.9-61	15

On the basis of the foregoing findings and conclusions made in these proceedings, Citation No. 103839, July 26, is VACATED.

ORDER

The respondent is ORDERED to pay the civil penalties assessed by me in these proceedings, in the amount shown above, within thirty (30) days of the date of these decisions.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUN 10 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		Civil Penalty Proceeding
Petitioner		Docket No. PENN 79-31
v.		A/O No. 36-05018-03018
U.S. STEEL CORPORATION,		Cumberland Mine
Respondent		

DECISION

ORDER TO PAY

Appearances: David Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner, MSHA;
Louise Symons, Esq., U.S. Steel Corporation, for Respondent, U.S. Steel Corporation.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by MSHA against the U.S. Steel Corporation. A hearing was held on May 14, 1980.

At the hearing, the parties agreed to the following stipulations (Tr. 4):

(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 this case;

(4) the inspector who issued the subject citation was a duly authorized representative of the Secretary;

(5) the inspector and other witnesses who will testify are accepted as experts generally in mine health and safety;

(6) imposition of any penalty herein will not affect the operator's ability to continue in business;

(7) the alleged violation was abated in good faith;

(8) the operator's history of prior violations is average;

(9) the operator is large in size.

At the hearing documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 7-201). 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. 201). A decision was rendered from the bench setting forth findings and conclusions with respect to the alleged violation (Tr. 214-220).

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 CFR 75.523 which provides as follows:

> An authorized representative of the Secretary may require in any mine that electric face equipment be provided with devices that will permit the equipment to be de-energized quickly in the event of an emergency.

Also relevant to this case is section 75.523-1(b) which provides:

> Self-propelled electric face equipment that is equipped with a substantially constructed cab which meets the requirement of this part, shall not be required to be provided with a device that will quickly deenergize the tramming motors of the equipment in the event of an emergency.

Further, section 75.1710-(b)(2) states that:

> For purposes of this section, a cab means a structure which provides overhead and lateral protection against falls of roof, rib, and face, or rib and face rolls.

Finally, section 75.1710-(c)(5) provides as follows:

> Lateral protection, such as that afforded by a substantially constructed cab, may also be necessary where the occurrence of falls of rib and face, or rib and face rolls is likely.

The citation in issue, dated October 6, 1978, sets forth that panic bars were not maintained properly in that the operator had to reach for the bar from his operating position to actuate the device on the Jeffrey ram cars Serial Numbers 36823 and 36820, operating in the South Main's right section. The citation had a termination date of October 13, 1978. However, on October 19, 1978, November 22, 1978, January 5, 1979, January 12, 1979, January 24, 1979, and January 29, 1979, extensions of time were granted in order to allow the operator time to devise a new design for the panic bars on the two ram cars. On February 5, 1979, the citation was terminated on the basis that the new panic bar design met the requirements of the regulation.

The primary issue presented is whether a violation exists. First, the operator has argued that the Jeffrey ram car in issue had a cab, which under the regulations relieves it of the necessity of having a panic bar. Much testimony was taken on this issue. The operator maintained that the manufacturer of the Jeffrey ram car had received a letter from the the Mining Enforcement and Safety Administration (predecessor to the Mine Safety and Health Administration) stating that its canopies on the ram cars constituted cabs.

The testimony from MSHA witnesses was directly to the contrary. Unfortunately, the letter was not produced. During the course of the hearing, I expressed distress at the operator's failure to produce the letter. The petition for civil penalty was filed over 10 months ago and the notice of hearing was issued 3 months ago. The operator has had ample opportunity to obtain the letter from the Jeffrey Manufacturing Company or through discovery procedures from the Mine Safety and Health Administration itself. Under the circumstances, I cannot accept testimony from the operator's witnesses that when confronted with this letter, responsible MSHA personnel refused to follow it. If such a letter exists, the operator should have produced it. The consequences of the failure to do so rest with the operator. I must therefore, accept the testimony from all the MSHA witnesses which was consistent to the effect that upon inquiry, they were advised that the canopies on these ram cars were never approved as cabs. Accordingly, the exemption from the requirement of a panic bar, where a cab is present, cannot be applied on the record made in this case.

Moreover, I accept the inspector's testimony that he made an independent judgment that the canopy on the ram cars did not provide sufficient lateral protection to constitute a cab. On this basis also, the exemption could not apply.

I have not overlooked the operator's allegation that panic bars have not been required on other Jeffrey ram cars in other mines. However, only the instant matter is before me and I can render a decision only on the basis of the facts which are presented to me. Here the evidence regarding a purported nationwide situation consists only of a few statements. I cannot decide this case on such a basis.

Section 75.523 requires that the electric face equipment be provided with devices that will permit the equipment to be deenergized "quickly" in the event of an emergency. I accept the testimony of the MSHA inspector and the MSHA electrical inspector to the effect that under certain circumstances with a disapproved panic bar being used, the operator of the ram car would not be able to reach the panic bar. For instance, if the operator were struck on the right side of his back so that his left arm were pressed against the contactor box, he would not be able to reach the panic bar. Also, MSHA testimony indicated that the operator could hit the contactor box without hitting the panic bar so as to move the bar enough to activate it. Other situations were also described. I accept such testimony and on the basis of it decide that the cited equipment could not be deenergized "quickly" within the meaning of the regulations. On this basis, I find the violation existed.

I also note in this connection the operator's mine superintendent expressed the view that the redesigned bar, which was accepted as adequate abatement, was in certain respects an improvement over the original panic bar. A great deal of time was spent at the hearing on the MSHA underground manual dealing with section 75.523 and following sections. The former Board of Mine Operations Appeals of the Department of Interior held that the manual does not have the status of official regulations. Kaiser Steel Corporation, 3 IBMA 489, at 498 (1974). In any event, as set forth above it is not necessary or appropriate to resort to the manual in order to decide this case. I would however, state that the cited panic bar does not satisfy either of the policies on pages 363 or 364 of the manual. Moreover, in my opinion, the reference to figures 3, 4 and 5 on page 364 of the manual is illustrative rather than exclusive.

Once again, based upon the mandatory standard itself and the language set forth therein, I find a violation existed.

I find the violation was of moderate gravity because although an injury could have been serious, the probability of its occurrence was unlikely.

Most significantly, I find the operator was not negligent. The record shows that the operator did its best in installing the original panic bar which eventually was the subject of the citation. This is to me a most significant factor. There is in this case no question of the operator's good faith.

The parties have stipulated that the operator is large in size, has an average history and the imposition of a penalty will not affect its ability to continue in business and that abatement was undertaken in good faith.

Bearing in mind all these factors, especially the operator's lack of negligence and its good faith attempt to deal with this situation, only a most nominal penalty is appropriate. Accordingly a penalty of one dollar ($1) is imposed.

AFFIRMATION AND AMENDMENT OF BENCH DECISION

The foregoing bench decision is AFFIRMED except that it is AMENDED to provide that the penalty amount be $125. A penalty of $125 is more consistent with the moderate gravity than the amount set at the hearing.

ORDER

The operator is ORDERED to pay $125 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

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JUN 10 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. CENT 79-48-M
	:	A.O. No. 16-00512-05005
v.	:	
	:	Docket No. DENV 79-161-PM
MORTON SALT DIVISION, MORTON-NORWICH PRODUCTS, INC., Respondent	:	A.O. No. 16-00239-05001
	:	Docket No. DENV 79-423-PM
	:	A.O. No. 16-00512-05003
	:	Weeks Island Mine & Mill

DECISIONS

Appearances: Douglas N. White, Attorney, U.S. Department of Labor, Dallas, Texas, for the petitioner;
James M. Day, Esq., Washington, D.C. for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated civil penalty proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Respondent filed timely answers contesting the alleged violations and its defense is based on the assertion that the citations for which civil penalties are sought were in fact committed by an independent contractor, Frontier-Kemper Contractors (FKC), and that petitioner's refusal to cite the contractor is arbitrary, capricious, unreasonable, and contrary to law.

After initial discovery, exchange of interrogatories, and rulings by me on several motions filed by the respondent, the cases were docketed for hearings at Baton Rouge, Louisiana, June 5, 1980, and the parties were so advised by notice of hearings issued by me on March 11, 1980. Subsequently, the parties advised me that the cases could be disposed by stipulation and agreement without the necessity for an evidentiary hearing. Under the circumstances, I issued an order on April 29, 1980, continuing the hearings

and directed the parties to submit their stipulations and arguments in support of their respective positions. Subsequently, by joint motion and stipulation filed May 19, 1980, the parties moved for summary decisions in two of the dockets, CENT 79-48-M and DENV 79-423-PM, and filed a settlement proposal in Docket No. DENV 79-161-PM.

Issues

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

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

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

Stipulations

The parties are in agreement that there is no genuine issue as to any material fact in these proceedings and that all pertinent facts have been agreed to by stipulation, pertinent portions of which are as follows:

1. Respondent, Morton Salt Division, Morton-Norwich Products, Inc., is the operator of salt mining operations at Weeks Island, Louisiana, the products of which enter and affect commerce, and respondent is an operator as defined under the Act.

2. Frontier-Kemper Contractors ("FKC") is an independent contractor hired by Morton to perform services and construction; namely, to sink two shafts and perform certain development work for a new mine at Weeks Island.

3. During the course of an inspection of Morton's Weeks Island mining operations, MSHA issued the subject citations to Morton based on violations of mandatory health and safety standards in 30 C.F.R. Part 57.

4. All violations specified in the citations were the result of acts or omissions committed by FKC employees during the construction of the new mine shafts in performance of development work.

5. The only employees exposed to the violations set forth in the citations were employees of FKC; no Morton employees were exposed to the hazards caused by these violations.

6. All violations specified in the citations were corrected or abated by FKC.

7. Morton did not control the day-to-day activities of FKC, and the contract between Morton and FKC specified that FKC would control the details of the work.

8. All of the citations were issued by MSHA against Morton and the proposed civil penalty assessments for said citations were also issued against Morton.

9. Morton agrees that the conditions specified in the citations constituted violations of the mandatory health and safety standards specified in each respective citation.

10. Although the parties agree that the facts concerning negligence and gravity, as set forth in attachment F to the stipulation are correct, Morton denies that it was responsible for the acts of omissions which led to these violations.

11. The parties agree that petitioner's proposed assessments are proper and appropriate under the conditions which existed at the time the violations were committed and that said proposed penalties took into consideration the six statutory criteria set forth in the Act. Nevertheless, Morton asserts that such penalties should be assessed against FKC and not against Morton.

12. The size of Morton for the year preceding the issuance of the subject citations (1977) was 2,677,189 man-hours worked. The size of the Week Island Mine & Mill for the year preceding the issuance of the subject citations (1977) was 4,504,918 man-hours worked.

13. For the period prior to March 1978, the subject mine had had no assessed violations and no inspection days. For the period preceding August 1978, the subject mine had eight assessed violations and had had 31 inspection days. For the period preceding October 1978, the subject mine had nine assessed violations and had had 37 inspection days. These facts are submitted as a stipulation of the history of violations as said history existed at the time the citations were issued.

14. A high degree of good faith was exhibited with respect to all of the citations in that each of the violations were corrected and abated within the specified time and rapid compliance was achieved.

15. Payment of the proposed assessed penalties will not adversely affect Morton's ability to continue in business.

Findings and Conclusions

The Independent Contractor Issue

Respondent takes the position that the citations in these proceedings should have issued to the independent contractor and that it is improper and contrary to law to cite the respondent owner-operator for the acts attributable to the contractor. Further, respondent's attempts to interplead the contractor as a party-respondent in these proceedings and its requests that I accept the contractor's agreement to pay the civil penalties so that the citations will not be part of respondent's history of violations have all been rejected by me and my rulings in this regard are a matter of record.

It seems clear to me from the facts presented in these proceedings that at the time the citations were issued and the petitions for assessment were filed, MSHA's enforcement policy was that owner-operators were liable for the violations of their independent contractors. This policy of enforcement has been affirmed by the Commission, Old Ben Coal Company, VINC 79-119 (October 29, 1979), and Monterey Coal Company, HOPE 78-469 and 78-476 (November 13, 1979), and I conclude that these decisions are controlling and dispositive of the independent contractor defense raised by the respondent in these proceedings. Accordingly, respondent's defense in this regard is again rejected, and I conclude and find that respondent is liable for the citations and the resulting civil penalties assessed for the citations in issue in these proceedings. Although I agree with many of the arguments stated by respondent's counsel in his posthearing brief filed on June 4, 1980, concerning MSHA's rigid enforcement policy concerning contractors and have stated my position on this issue in a number of "independent-contractor" decisions, I am constrained to follow the present and controlling decisions of the Commission on this issue.

In view of the foregoing, respondent's motions for reconsideration of my previous rulings concerning its motion to dismiss, to implead the contractor as a third-party respondent, and to assess the penalties imposed against the contractor rather than the respondent are DENIED, and my previous rulings and reasons of record for such denials are herein REAFFIRMED and incorporated by reference.

Docket No. CENT 79-48-M

This docket deals with the following citations:

Citation No.	Date	30 C.F.R. Section
156452	10/18/78	57.17-10

156453	10/18/78	57.17-10
156454	10/18/78	57.19-100
156547	10/18/78	57.17-10
156455	10/19/78	57.12-16
156456	10/19/78	57.12-16
156508	10/19/78	57.9-40(c)
156510	10/19/78	57.9-40(c)
156551	10/19/78	57.3-22
156553	10/23/78	57.9-40(c)
156509	10/24/78	57.19-120

Fact of Violations

Aside from the independent contractor defense advanced by the respondent in these proceedings, respondent does not dispute the fact that the conditions or practices described by the inspectors on the face of the citations issued in these proceedings constitute violations of the cited mandatory safety standards. Accordingly, I find that the fact of violation as to each of the citations enumerated above has been established and they are all AFFIRMED.

Gravity and Negligence

The parties stipulated as follows with respect to the questions of gravity and negligence:

Citation Number	Gravity	Negligence
156452	Only one employee exposed; improbable that an injury would result; no lost work days expected	Low ordinary negligence; failure to assure that all employees had their lamps underground
156453	Only one employee exposed; improbable that accident would occur; no lost work days expected	Low ordinary negligence; lack of cap lamp could have been observed
156454	One employee exposed; serious injury could result; improbable that accident would occur because of other safeguards	Low ordinary negligence; superintendent could have seen condition
156547	One employee exposed; Power failure could make it difficult for employee to see how to get to safe location; serious injury could result	Ordinary negligence; condition was obvious to supervisor

156455	Two employees exposed; permanently disabling injury could result; improbable that accident would occur	Low ordinary negligence; supervisors should have assured that power was turned off
156456	More than two employees exposed; minor injuries could result; very improbable that accident would occur	Low ordinary negligence; electrical switches were off, but supervisor had not assured of lock-out
156508	Two employees exposed; lost-time injury could result; accident would probably occur	Very little negligence; violation was not predicted and employees were violating safey rules
156510	Two employees exposed; lost-time injury could result; probable that accident would occur	Supervisor may have been aware; actions were in violation of safety rules
156551	One employee exposed; lost-time injuries could result; probable that accident could occur	Low ordinary negligence; violation was in area which was obvious to supervisors
156553	One employee exposed; lost-time injuries could result; probable that accident could occur	Low ordinary negligence employee was violating safety rule
156509	Up to 20 employees exposed; serious injuries could result; probable that accident could occur	Supervisor conducted inspections of shaft; however, provisions were not made to check areas which were not clearly visible

Based on the stipulations by the parties, I conclude and find that all of the citations in question were serious and that each resulted in ordinary negligence. In assessing the penalties for the citations, I have considered the fact that all of the citations resulted from acts committed by the independent contractor who had exclusive control over the worksite. I have also considered the fact that respondent's employees were not exposed to any of the hazards resulting from the cited conditions and practices. In these circumstances, I cannot conclude that the contractor's negligence should be imputed to the respondent or that the assessments levied against the respondent should be increased as a result of acts committed by the contractor.

Docket No. DENV 79-423-PM

This docket deals with the following two citations:

Citation No.	Date	30 C.F.R. Section
153272	3/29/78	57.5-5
156490	8/10/78	57.6-30

Fact of Violations

Respondent concedes that the conditions described by the inspectors who issued the citations in question constitute violations of the cited mandatory health and safety standards. Accordingly, I find that the fact of violation has been established as to each citation and they are AFFIRMED. I take note of the fact that respondent still disputes the applicability of 30 C.F.R. § 57.5-5 to salt dust, and has reserved its right to challenge the application and validity of that standard in other proceedings which may be brought against it by the petitioner.

Gravity and Negligence

The parties stipulated as follows with respect to the factors of gravity and negligence:

Citation Number	Gravity	Negligence
153272	One employee exposed; improbable that illness would result; effects of salt dust are disputed	Hazard was not easily ascertained; no previous overexposure
156490	One to four employees exposed; serious injuries or death could result if explosion occurs	Should have been readily observed by supervisors; area is used during each shift

Based on the stipulations by the parties, I conclude and find that the citations in question were serious and that each resulted from ordinary negligence. However, as indicated in the previous dockets, I cannot conclude that the contractor's negligence should be charged to the respondent.

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

Based on the information presented as part of the stipulated facts, I conclude that respondent is a large operator and find that the civil penalties assessed will not adversely affect respondent's ability to remain in business (applicable to both Docket Nos. CENT 79-48-M and DENV 79-423-PM). I also take note of the fact that the parties are in agreement that the civil penalties proposed by the petitioner in these proceedings are proper

and appropriate under the conditions which existed at the time the violations were committed and that the proposed assessments took into account the six statutory criteria set forth in section 110(i) of the Act.

Good Faith Compliance

The parties stipulated that a high degree of good faith was exhibited with respect to the abatement of the cited violations and that each condition or practice cited as a violation was corrected and abated within the specified time and rapid compliance was achieved. I adopt this stipulation as my finding with respect to Docket Nos. CENT 79-48-M and DENV 79-423-PM.

History of Prior Violations

Based on the stipulated prior history of violations by the respondent during all times pertinent to these proceedings (Stipulation No. 13 above), I cannot conclude that respondent's prior history is such as to warrant any increase in the assessed civil penalties levied in Docket Nos. CENT 79-48-M, and DENV 79-423-PM.

Docket No. DENV 79-161-M

This docket concerns the following citations:

Citation	Date	30 C.F.R. Section
153284	3/16/78	57.11-58
153264	3/21/78	57.15-7
153265	3/28/78	57.18-10
153325	3/28/78	57.11-12

By order issued on April 24, 1979, I dismissed that portion of the petitioner's civil penalty proposal which sought civil penalties against respondent Morton Salt for Citation Nos. 153264, 153265, and 153325, and my reasons for the dismissal are set forth in detail in the order which is a matter of record in these proceedings. A subsequent appeal taken by the petitioner with respect to my dismissal of its pleadings was denied by the Commission on June 4, 1979, on the ground that my order was not a final decision and that the appeal was premature.

With respect to the remaining Citation No. 153283, issued March 16, 1978, alleging a violation of 30 C.F.R. § 57.11-58, the parties now seek my approval for a proposed settlement disposition for the citation.

Respondent Morton Salt has accepted liability for this violation and has agreed to pay the full initial assessment of $34 in satisfaction of the citation.

After consideration of the arguments presented in support of the proposed settlement disposition of Citation No. 153283, including the information submitted by the parties concerning the six statutory factors set forth

in section 110(1) of the Act, I conclude and find that the proposed settlement is reasonable, and pursuant to 29 C.F.R. § 2700.30, IT IS APPROVED.

ORDER

Respondent is ordered to pay a civil penalty in the amount of $34 in satisfaction of Citation No. 153283, payment to be made within thirty (30) days of the date of the decision and order. With respect to the remaining three citations, my previous dismissal of petitioner's proposed assessments as noted above is hereby REAFFIRMED.

Penalty Assessments

On the basis of the foregoing findings and conclusions made in Dockets No. CENT 79-48-M and DENV 79-423-PM, and after review of all of the circumstances, including the conditions and practices cited as violations, I find that the initial assessments proposed by the petitioner are appropriate and I accept them as the civil penalties which should be assessed in the proceedings, and they are as follows:

Docket No. CENT 79-48-M

Citation No.	Date	30 C.F.R. Section	Assessment
156452	10/18/78	57.17-10	$44
156453	10/18/78	57.17-10	44
156454	10/18/78	57.19-100	84
156547	10/18/78	57.17-10	44
156455	10/19/78	57.12-16	52
156456	10/19/78	57.12-16	38
156508	10/19/78	57.9-40(c)	72
156510	10/19/78	57.9-40(c)	84
156551	10/19/78	57.3-22	52
156553	10/23/78	57.9-40(c)	72
156509	10/24/78	57.19-120	66

Docket No. DENV 79-423-PM

Citation No.	Date	30 C.F.R. Section	Assessment
153272	3/29/78	57.5-5	$48
156490	8/10/78	57.6-30	98

ORDER

The respondent IS ORDERED to pay the civil penalties assessed by me in these proceedings, in the amounts shown above, within thirty (30) days of the date of these decisions. Upon receipt of payment by MSHA, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUN 10 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. YORK 79-68-M
Petitioner	:	A/O No. 19-00553-050031
v.	:	
	:	Weymouth Plant
MARSHFIELD SAND & GRAVEL, INC.,	:	
Respondent	:	

DECISION

ORDER TO PAY

Appearances: David L. Baskin, Esq., Office of the Solicitor, U.S. Department of Labor, Boston, Massachusetts, for Petitioner, MSHA; Charles T. Callahan, Esq., Hutchings, Kopeman and Callahan, Boston, Massachusetts, for Respondent, Marshfield Sand and Gravel, Inc.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by MSHA against Marshfield Sand and Gravel, Inc. A hearing was held on May 29, 1980.

At the hearing, the parties agreed to the following stipulations (Tr. 3-4):

1. The operator is the owner and operator of the subject facility;

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

3. I have jurisdiction of this case;

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. The alleged violations were abated in good faith;

7. History of prior violations is noncontributory since the Solicitor does not have available at this time a printout of the history of prior violations;

8. The operator is very small in size, employing five to twelve men, seasonally, at the subject facility.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 6-93). 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. 124). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violations (Tr. 124-131).

BENCH DECISION

The bench decision is as follows:

This case is a petition for the assessment of two civil penalties. The first alleged violation is of section 56.11-1 of the mandatory standards which provides as follows: "Safe means of access shall be provided and maintained to all working places."

The second alleged violation is of section 56.14-35 of the mandatory standards which provides as follows: "Machinery shall not be lubricated while in motion where a hazard exists, unless equipped with extended fittings or cups."

Both alleged violations arise out of the same accident which occurred at the Weymouth plant of the Marshfield Sand and Gravel Company. Mr. David Colter was the safety director and safety supervisor of the Weymouth plant and of the Marshfield plant of the Marshfield Sand and Gravel Company. In this position he exercised supervision over everyone at both plants, including the foreman.

At the Weymouth plant, the Mine Safety and Health Administration had approved the use of a bucket truck (also called a cherry picker) to lubricate a double Telsmith screw conveyor. In accordance with this approval lubrication was to be done only on Saturdays when the machinery was not in operation. However, on Tuesday, December 5, 1978, the safety director sent the bucket truck from the Weymouth plant to the Marshfield plant. Thereafter, because the gears on the Telsmith screw conveyor at the Weymouth plant were noisy and because production was behind that day since two men were off,

the safety director himself used a front-end loader to reach the screw conveyor and attempted to grease the screw conveyor while it was in operation. In so doing, the safety director became caught in the machinery and suffered grievous injuries including partial loss of his left arm.

I find first that a violation of Section 56.11-1 occurred. I accept the inspector's testimony that generally use of a front-end loader presents hazards which are not presented by a bucket truck including the danger of dropping in the event of a hose failure. On this basis I conclude that the front-end loader did not constitute safe access and that therefore there was a violation. I further take note of the inspector's testimony which expressly stated that the hazards associated with the use of the front-end loader were not material to the accident which occurred and that this accident could have happened even if the approved bucket truck had been the means of access. However, because the use of a front-end loader generally presents the danger of injury, although it did not do so here, I conclude that the violation of section 56.11-1 was serious.

The testimony of the safety director makes clear that he was in fact lubricating the screw conveyor while it was in motion. Also, the testimony from the inspector, although requiring the drawing of certain inferences, was to the same effect. The actions of the safety director constituted a violation of section 56.14-35. Moreover, since this violation directly caused the safety director's severe injuries, it was extremely serious.

The Commission has held that the operator is liable for violations of the mandatory standards without regard to fault and that when its employees fail to comply with the standards the operator's efforts towards enforcement are irrelevant with respect to the issue of liability. United States Steel v. Secretary of Labor, Docket No. PITT 76-160-P, dated September 17, 1979. Also, the Commission has determined that a company cannot be relieved of liability where its foreman was killed when a front-end loader with an inoperable backup alarm backed over him, even though the deceased foreman had known the backup alarm was not working and had ordered the loader to commence operation. In that case the Commission expressly rejected the argument that the foreman, not the company, committed the violation. The Commission stated that the actions of the foreman cannot be separated from those of the company. Secretary of Labor v. Ace Drilling Coal Company, Inc., Docket No. PITT 75-1-P, dated April 24, 1980. Accordingly, it is clear that the operator in this case is liable for both violations, one of which was serious and the other of which was extremely serious.

The next matter, and the most difficult one to be considered in determining the appropriate amount of penalties to be assessed, is negligence. I previously have had occasion to consider situations analogous to that presented here. In Secretary v. Consolidation Coal Company, Docket No. VINC 79-25-P, dated December 1, 1978, petition for discretionary review denied January 9, 1979, I stated that I did not believe that with respect to the issue of negligence the operator could be held responsible for the unpredictable behavior of a fatally injured employee which was contrary to the usual and accepted manner of working in such situations as well as contrary to what the decedent himself had done before. In addition, in Mining Enforcement and Safety Administration v. NAACO Mining Company, Docket No. VINC 76-99-P, dated December 17, 1976, after reviewing many precedents on the subject, I stated as follows with respect to a violation committed by a supervisory employee which resulted in his death:

> It is one thing to hold the operator accountable for the negligence of one of its supervisors in failing to perform the regular duties required of him by the position in which the operator has placed him, especially where failure to perform could affect miners who are working under him by virtue of the supervisory position in which the operator has placed him. It is quite another thing to hold the operator responsible for the negligence which is part of the unexpected and inexplicable behavior of one of its supervisors, whose actions create the potential of harm and result in harm only to himself but not to any of the men under his supervision.

I believe this case falls within the unique circumstances set forth in the foregoing two decisions. The safety director was in charge of the Weymouth plant. Everyone working there was under his supervision and authority. In fact, he was responsible for safety and nothing in the record suggests that in the past he had been anything other than an exemplary employee. The uncontradicted evidence demonstrates that he was the one that sent the bucket truck away from the Weymouth plant so that only the front-end loader remained. Further, the safety director testified that one man had the day off and another had the afternoon off, so that they were short handed, but by virtue of his position, the safety director was the one to give permission for these people to take time off. No one senior in rank to the safety director was at the site. Indeed, only the owners of the plant were senior to him and they were at the company offices some twenty-five miles away.

Therefore, at least to some extent the safety director himself created the conditions which led him to employ unaccepted and unsafe procedures. In addition, the safety director expressly admitted that he knew that only the bucket truck was approved by the Mine Safety and Health Administration as safe access and that all employees were aware that machinery should not be lubricated while in motion. Nevertheless, contrary to everything he knew, and contrary to everything he presumably instructed his own subordinates, he used a nonapproved method of access and attempted to grease the screw conveyor while it was in motion.

I recognize that an operator acts only through its employees, supervisory and nonsupervisory. I am extremely sensitive to the fact that enforcement of the Act would be rendered meaningless if the negligence of an individual employee were not attributed to the operator except in the most extraordinary of situations. Nevertheless, I believe this is such an extraordinary situation. This is so because the actions of the safety director, duly trained and experienced, were so aberrational and unpredictable and were in no way attributable to conduct or conditions created by others placed in authority by the operator. Accordingly, I believe it would be manifestly unfair to impute the individual supervisor's negligence to the operator, where harm came to no other individual. I cannot see that more effective enforcement of the Act would be served by the imputation of negligence in such a situation. To be sure, this is a highly unusual situation which most probably should not be extended further but each case must be judged on its own facts. This is what I have tried to do here. Accordingly, I find the operator was not negligent.

The operator's vice president testified that the operator has been operating at a substantial loss for the last four years and that it has curtailed its activities as a result of these financial difficulties. The operator's corporate tax returns, which have been admitted into evidence, support this assertion. Accordingly, I conclude imposition of a very substantial penalty would adversely affect the operator's ability to continue in business.

The parties have stipulated that the operator is small in size, that prior history is noncontributory, and that the violations were abated in good faith.

In light of the foregoing, it is hereby ORDERED that a penalty of $200 be assessed for the violation of section 56.11-1.

In light of the foregoing, it is further ORDERED that a penalty of $750 be assessed for the violation of section 56.14-35.

ORDER

The foregoing bench decision is hereby, AFFIRMED.

The operator is ORDERED to pay $950 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204
1 2 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. KELMINE CORPORATION, Respondent.	CIVIL PENALTY DOCKET NO. WEST 79-392-M ASSESSMENT CONTROL NO. 05-03031-05002 MINE: C-JD-7

DECISION APPROVING SETTLEMENT

Appearances:

Ann M. Noble, Esq., Office of the Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294

Melvin R. Swanson, Mine Superintendent, Kelmine Corporation, 4901 York Street, Denver, Colorado 80216

Before: Judge John J. Morris

At a hearing held on May 19 and 20, 1980, the parties moved for an order approving a settlement agreement. They proposed that the recommended penalty be reduced from $48 to $24.

The facts and documentation presented at the hearing and contained in the file give due consideration to the criteria required to be examined in assessing a penalty, 30 U.S.C. § 820(i). Having analyzed this criteria, I approve the settlement agreement.

Respondent is directed to pay the agreed amount within 30 days of the date of this order.

John J. Morris
Administrative Law Judge

Distribution:

Ann M. Noble, Esq., Office of the Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294

Mr. Melvin R. Swanson, Mine Superintendent, Kelmine Corporation, 4901 York Street, Denver, Colorado 80216

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

12 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. YORK 80-60-M
	:	A/O No. 19-00557-05006-H
v.	:	
	:	Falmouth Pit & Mill
HYANNIS SAND & GRAVEL, INCORPORATED, Respondent	:	

DECISION

ORDER TO PAY

Appearances: David Baskin, Esq., Office of the Solicitor, U.S. Department of Labor, Boston, Massachusetts, for Petitioner, MSHA; Paul Lorusso, Hyannis Sand and Gravel, Inc., Hyannis, Massachusetts, for Respondent, Hyannis Sand and Gravel, Inc.

Before: Judge Merlin

The above-captioned case is a petition for the assessment of a civil penalty filed by MSHA against Hyannis Sand and Gravel, Incorporated. The citation at issue involved a lack of adequate brakes on a haulage truck, a violation of 30 CFR 56.9-3.

At the hearing on June 2, 1980, the Solicitor moved to have a settlement approved in the amount of $200, reduced from the original assessment of $1,000 (Tr. 4). The parties stipulated that respondent has a small history of prior violations, is small in size, that the alleged violation was abated in good faith and that the imposition of a penalty here will not affect the operator's ability to continue in business (Tr. 3). The Solicitor stated that the violation was only of moderate gravity since other braking systems as well as the emergency braking system were operational so that the vehicle could be stopped. From the bench I approved the settlement, expressing the view that the original proposed penalty was excessive (Tr. 4-5).

ORDER

The settlement approved on June 2, 1980, is hereby AFFIRMED.

The operator is ORDERED to pay $200 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

David L. Baskin, Esq., Office of the Solicitor, U.S. Department of Labor, JFK Federal Bldg., Boston, MA 02203 (Certified Mail)

Paul Lorusso, President, Hyannis Sand and Gravel Incorporated, P.O. Box 96, Hyannis, MA 02601 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041
12 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. YORK 80-39-M
	:	A/O No. 19-00557-05005
v.	:	
	:	Falmouth Pit and Mill
HYANNIS SAND & GRAVEL, INCORPORATED, Respondent	:	

DECISION

ORDER TO PAY

Appearances: Frederick Dashiell, Esq., Office of the Solicitor, U.S. Department of Labor, Boston, Massachusetts, for Petitioner, MSHA;
Paul Lorusso, Hyannis Sand and Gravel., Inc., Hyannis, Massachusetts, for Respondent, Hyannis Sand and Gravel, Inc.

Before: Judge Merlin

The above-captioned case is a petition for the assessment of civil penalties filed by MSHA against Hyannis Sand and Gravel, Incorporated.

At the hearing on June 2, 1980, the parties agreed to the following stipulations:

(1) The operator has a relatively small history.

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

(3) The operator is small in size, since it has only between nine and fourteen employees.

(4) The imposition of any penalties herein will not affect the operator's ability to continue in business (Tr. 3-4).

At the hearing, the Solicitor submitted a motion to approve settlements for all the violations contained in this petition. I approved settlements regarding twelve of these violations after having reviewed the Solicitor's motion and typewritten summaries of these violations (Tr. 5).

With regard to citation 218912 and the related § 104(b) withdrawal order 202766 originally assessed at $690, the Solicitor in his motion

recommended a reduction to $420. Even the reduced amount was far higher than the other assessments. Obviously, the original assessment and even the reduced amount were based upon the fact that a withdrawal order had been issued. However, the Solicitor admitted that respondent had not intentionally disregarded the Act and that it was confused as to what exactly was required for proper abatement. Although respondent did take steps to abate the citation which it sincerely believed would constitute compliance it did not learn its abatement was inadequate until the order issued. In light of these circumstances and bearing in mind all the statutory criteria, from the bench I assessed a penalty of $170 for this violation.

ORDER

The rulings issued from the bench on June 2, 1980, are hereby AFFIRMED.

The operator is ORDERED to pay $1,400 in fourteen weekly installments of $100 apiece beginning from the date of the issuance of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

12 JUN 1980

CONSOLIDATION COAL COMPANY, Applicant	:	Notice of Contest
v.	:	Docket No. WEVA 80-333-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Citation No. 812080 Order No. 632501 April 24, 1980
and	:	O'Donnell No. 20 Mine
UNITED MINE WORKERS OF AMERICA (UMWA), Respondents	:	

DECISION

Appearances: Karl Skrypak, Esq., and Samuel Skeen, Esq., for Applicant;
Thomas Mascolino, Esq., and Stephen Kramer, Esq., for Respondent, Secretary of Labor;
Mary Lu Jordan, Esq., for Respondent, United Mine Workers of America.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

On April 24, 1980, federal mine inspectors arrived to inspect Consolidation Coal Company's O'Donnell No. 20 Mine in response to a request by the miners under section 103(g) of the Act. Several miners were allowed by the operator to accompany the inspectors during the walkaround. However, the operator refused to permit representatives of the International Union's Safety Division to accompany the inspection party. Because of the refusal, the inspector on April 24, 1980, issued a citation to the operator for violating section 103(f) of the Act. When the operator failed to comply with the citation, a "no area withdrawal order" was issued on the same day.

Immediate review was sought by the operator under the Energy Fuels doctrine, 1 FMSHRC 299 (May 1, 1979). All parties have agreed to submit the case for decision based upon a joint stipulation of facts. Each party has filed a brief. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

STATUTORY PROVISION

Section 103(f) of the Act provides:

> (f) Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

ISSUES

1. Is the operator entitled to immediate review of the citation and order issued in this case?

2. Do miners and their representatives have the right, under section 103(f) of the Act, to accompany an inspector during a walkaround inspection conducted pursuant to section 103(g) of the Act?

3. Does the failure of the International Union and its representatives to file with MSHA under 30 C.F.R. Part 40 (or former Part 81) allow an operator to prevent such person or persons from accompanying an inspector during the walkaround portion of the inspection?

4. Did the operator violate section 103(f) of the Act as alleged in the citation and order?

FINDINGS OF FACT

1. MSHA inspectors arrived at the operator's O'Donnell No. 20 Mine on April 24, 1980, to perform an inspection requested by the United Mine Workers of America (UMWA), the collective bargaining representative of the miners.

2. Also arriving at the mine that day were members of the International UMWA Safety Division who identified themselves as representatives of the miners for walkaround purposes under section 103(f) of the Act. The operator had been informed the previous day that the mine safety committee wanted these individuals to accompany the MSHA inspectors.

3. The operator refused to permit the International Safety Representatives to accompany the inspectors because their names were not listed on the document filed with the operator on September 20, 1979 entitled "Employees Who Travel With Inspectors While at Mine 20."

4. A letter dated March 22, 1978, entitled "Certificate of Representation" filed by the UMWA with MESA (predecessor of MSHA) under Part 81 of the Federal Coal Mine Health and Safety Act of 1969. A copy was sent to Applicant. This letter designated by title, but not by name, the representatives of the miners in the subject mine, including "authorized Representatives of the UMWA Safety Division * * *." No subsequent document concerning miner representatives at the subject mine was filed with MSHA.

5. I conclude that the UMWA did not comply with the filing requirements in 30 C.F.R. Part 40.

6. Because of the refusal of the operator to permit International Union Safety Representatives to accompany the inspection party, a federal inspector issued a citation and an order on April 24, 1980, for a violation of section 103(f) of the Act. The order was terminated on April 28, 1980.

DISCUSSION

The operator in this case sought immediate review of the citation and order issued on April 24, 1980. In Energy Fuels Corp. v.

MSHA, 1 FMSHRC 299 (May 1, 1979), it was held that an operator served with a citation for a violation that has been abated may immediately contest the allegation of violation in that citation. Respondent UMWA, by motion filed April 28, 1980, challenged the operator's right to review of the citation, stating that the violation had not yet been abated. However, the parties stipulated on May 12, 1980, that the violation had been abated on the day of Respondent's motion, April 28, 1980. Applicant therefore is entitled to a review of the citation.

The parties have not raised the issue whether representatives of miners are entitled, under section 103(f), to accompany an inspector during a walkaround inspection of a mine conducted pursuant to section 103(g). In MSHA v. Helen Mining Co., 1 FMSHRC 1796 (November 21, 1979) the Commission was divided on whether an operator must pay a miners' representative for time spent accompanying an inspector during a section 103(i) "spot" inspection. But all members agreed that, despite the language in section 103(f) limiting the walkaround right to inspections "made pursuant to the provisions of subsection (a)," the legislative history unmistakably reveals that the walkaround right under section 103(f) applies to any inspection under the Act. Therefore, walkaround rights in the present case are governed by section 103(f).

The operator's principal defense to the citation is that the International representatives were not "representatives of miners" entitled to accompany the inspector during the walkaround since they had not complied with the filing requirements for representatives of miners in 30 C.F.R. Part 40, or former Part 81. Both Part 40 and Part 81 (its predecessor) require representatives of miners to file with MSHA and serve upon the relevant operator certain identifying information. The purpose of the regulations, presumably, is to help both MSHA and the operators identify the proper representative of miners in order to forestall any arguments over representative status during inspections, or during proceedings before the Commission when representatives may elect party status. However, the failure to comply with whatever filing requirements may obtain in this case should not be permitted to strip representatives of the walkaround rights guaranteed in section 103(f).

Resolution of this case, of course, depends upon a proper interpretation of section 103(f) of the Act. The crux of the problem involves an inherent tension between two portions of that subsection. On the one hand, an inspector is authorized to permit more than one representative to accompany him if he believes this will aid the inspection. An Interpretative Bulletin issued by MSHA, 43 Fed. Reg. 17546 (April 25, 1978), elaborates on the discretion of the inspector in this area:

> Considerable discretion must be vested in inspectors in dealing with the different situations

> that can occur during an inspection. While every reasonable effort will be made in a given situation to provide an opportunity for full participation in an inspection by a representative of miners, it must be borne in mind that the inspection itself always takes precedence. The inspector's primary duty is to carry out a thorough, detailed and orderly inspection. The inspector cannot allow inordinate delays in commencing or conducting an inspection because of the unavailability of or confusion surrounding the identification or selection of a representative of miners.

On the other hand, section 103(f) states that it is "[s]ubject to regulations issued by the Secretary * * *." Thus, the operator here argues that failure to comply with the applicable filing requirements deprives a party of representative status under the Act.

I conclude that the walkaround right granted by the statute, and subject to control by the inspector, overrides the operator's convenience which would be served by strict compliance with the filing requirements. This conclusion is in accord with the discretion vested in compliance safety and health officers under the Occupational Safety and Health Act, 29 C.F.R. § 1903.8.

I reject Applicant's argument that the failure of the International Union to comply with the filing requirements deprives them of the status of representatives of the miners. First, it is difficult to believe that a right so central to the legislative scheme could be divested by the mere failure to comply with technical filing requirements. I am persuaded by the need to interpret the Act liberally for the sake of the miners' safety and health. Phillips v. IBMA, 500 F.2d 772, 782 (D.C. Cir. 1974). If the right of management to discipline its employees for just cause must yield to the walkaround right, Leslie Coal Mining v. MSHA, 1 FMSHRC 2022 (December 12, 1979), surely the applicable filing requirements must yield as well.

Second, it would be imprudent to rob the inspector of the discretion clearly intended to be his under the Act. A thorough, detailed and orderly inspection is indeed the first priority. If the walkaround right is to be sensibly applied it must be recognized that an inspector has the inherent authority to order reasonable actions in furtherance of his inspection. Cf. C.F. & I. Steel Corp. v. MSHA, 1 FMSHRC 672 (June 27, 1979). Here, the inspector determined, based on his experience and personal observations at the mine site, that the International safety representatives could aid him during the inspection. His determination should not be overturned absent proof that it constituted an abuse of discretion. This

is not to say that the failure to file as a representative may not be a factor in denial of the walkaround right. But the decision on this is for the inspector, not the operator.

Third, a decision that the applicable filing requirements do not necessarily affect walkaround rights accords with the latest interpretation of those requirements by MSHA, the agency which drafted them. Upon promulgation of 30 C.F.R Part 40, MSHA commented that "miners and their representatives do not lose their statutory rights under section 103(f) by their failure to file as representatives under this part." 43 Fed. Reg. 29508 (July 7, 1979). Considered in light of the foregoing discussion, I find this to be a logical interpretation of section 103(f).

It remains only to be decided whether the individuals denied entrance to the mine on April 24, 1980, were representatives of miners within the meaning of section 103(f). Again, the key is whether the inspector abused his discretion in finding that they were. In discussing walkaround pay, section 103(f) directs that "only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay * * *." Clearly, then, nonemployees may be representatives of miners. In this case, there is no doubt that the inspector acted within the bounds of his discretion. Admittedly, there was no collective bargaining agreement in effect between the operator and UMWA. But UMWA was, and is, the exclusive representative of the miners for collective bargaining and has a long history of representing the miners at the O'Donnell No. 20 Mine. It was well within the province of the inspector to decide that the International safety representatives could contribute certain insights and expertise beyond that to be expected from the safety committeemen employed at the mine. I find that in denying them entrance, contrary to the inspector's order, the operator violated section 103(f) of the Act.

CONCLUSIONS OF LAW

1. The operator has a right to immediate review of the citation and order issued in this case.

2. Miners and their representatives have the right under section 103(f) to accompany an inspector during a walkaround inspection conducted pursuant to section 103(g) of the Act.

3. The failure to file as a representative of miners under 30 C.F.R. Part 40, or former Part 81, does not entitle an operator to deny a representative of miners its right under section 103(f) to accompany an inspector during a walkaround inspection.

4. The operator in this case committed a violation of section 103(f) by refusing entrance to the O'Donnell No. 20 Mine on April 24,

1980, to members of the International UMWA Safety Division, contrary to the order of the inspector.

ORDER

The citation and order in this case having been properly issued, Applicant's notice of contest is hereby DISMISSED.

James A. Broderick
Chief Administrative Law Judge

Distribution:

Karl Skrypak, Esq., Consolidation Coal Co., 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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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

12 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	
	:	Docket No. PENN 79-60
Petitioner	:	A/O No. 36-03135-03003
v.	:	
	:	C and K Strips
C AND K COAL COMPANY,	:	
Respondent	:	

DECISION

ORDER TO PAY

Appearances: David Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner, MSHA; Bruno Muscatello, Esq., Brydon, Stepanian and Muscatello, Butler, Pennsylvania, for Respondent, C & K Coal Company.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by MSHA against the C and K Coal Company. A hearing was held on May 13, 1980.

Prior to the hearing the parties submitted joint stipulations which had been agreed to by counsel. At the hearing I accepted these stipulations (Tr. 4).

Both parties waived the filing of written briefs, and agreed to have a decision rendered from the bench after the presentation of oral argument (Tr. 20). A decision was rendered from the bench setting forth findings and conclusions with respect to the alleged violations (Tr. 20-24).

BENCH DECISION

The bench decision is as follows:

> This case is a petition for the assessment of civil penalties filed under section 110 of the Act. The petition contains nine citations. The parties have proposed a settlement in the amount of $90 for the first violation. This is the amount originally assessed. After review of this citation, I have determined that the proposed settlement is in accordance with the statutory criteria and is therefore approved.

The remaining eight citations which involve various mandatory standards have been the subject of detailed stipulations submitted to me by the Solicitor and operator's counsel. In these stipulations the parties agree, inter alia, that the conditions occurred as cited; that the conditions constituted a violation; that the violations were committed by employees of an independent contractor engaged by the operator to erect a drag line for the operator's use; that the independent contractor had sole control over its employees; that only the contractor's employees were exposed to the conditions cited in the petition except for one citation, Citation 619324, with respect to which respondent's maintenance employee was exposed; that the operator was not negligent with respect to any of these violations; that all but one of the violations were serious; that the operator has a small history; that the operator's ability to continue in business will not be affected by imposition of any penalties; that the violations were abated in good faith; and that the operator is medium in size. Finally, the stipulations set forth that the independent contractor had a separate identification number.

The issue for resolution is whether a penalty should be assessed against the operator for the violations committed by the independent contractor, and if so, the appropriate amount of such penalties.

On October 29th, 1979, the Commission in Old Ben Coal Company, Docket No. VINC 79-119, held that an operator could be held responsible without fault for the violations of the Act committed by its independent contractor. In addition, the Commission decided that the Secretary's determination to proceed against the operator for an independent contractor's violations was reviewable by the Commission. In reviewing the Secretary's determination to proceed against the operator, the Commission stated that the appropriate inquiry was to determine whether the Secretary's decision was made for reasons consistent with the purposes and policies of the Act. The Commission further set forth that the Secretary had represented at that time, i.e., last October, that the policy of enforcing the Act only against owners was an interim one pending adoption of regulations providing guidance to inspectors in the identification and citation of contractors. The Commission expressly noted that the interim policy of citing only owners was not in line with the view expressed by the Secretary in his proposed regulations of how best to enforce the 1977 Act. Nevertheless, the Commission recognized that it takes "some time" for the development of new policies and new procedures and therefore, the Secretary's decision in that case to proceed against the operator was held to be

grounded on considerations of consistent enforcement. Accordingly, the Commission upheld the citation. Finally, the Commission concluded that if the Secretary "unduly" prolonged the policy that prohibited direct enforcement against contractors he would be disregarding the intent of Congress.

Six and a half months have now elapsed since the Commission's decision in Old Ben. Nine months have elapsed since the Secretary issued his proposed regulations on this matter. During oral argument, the Solicitor advised that the Secretary has held hearings on the proposed independent contractor regulations. The record on these hearings was closed last November but no definitive action has yet been taken. It appears, therefore, that for a substantial period of time this matter has been before the Secretary.

Time is running out for the Secretary in this situation.

Citations of operators, especially where as here the independent contractor has his own identification number, does not advance effective enforcement of the Act. Rather it does just the opposite.

Action by the Secretary on this matter is overdue. I have determined not to dismiss this particular petition and vacate these citations. However, under the circumstances only a nominal penalty against the operator will be assessed.

The Secretary should realize that the day is not far distant when citations such as these will be vacated and when a petition such as this will be dismissed.

As already set forth, I approve a penalty of $90.00 for the first violation. A penalty of $1.00 is imposed for each of the eight remaining citations.

The operator is ordered to pay $98.00 within 30 days from the date of the issuance of the written decision confirming this Bench decision.

ORDER

The foregoing bench decision is hereby, AFFIRMED.

The operator is ORDERED to pay $98 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

13 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		CIVIL PENALTY PROCEEDING
Petitioner,		DOCKET NO. WEST 79-128-M
v.		MSHA NO. 24-00689-05003
THE ANACONDA COMPANY,		Mine: Weed Concentrator
Respondent.		

Appearances:

Phyllis K. Caldwell, Esq., Office of the Solicitor, United States Department of Labor, 1961 Stout Street, Room 1585, Denver, Colorado 80294
for the Petitioner,

Edward F. Bartlett, Esq., and Karla M. Gray, Esq., Anaconda Copper Company, P. O. Box 689, Butte, Montana 59701
for the Respondent.

Before: Judge John J. Morris

DECISION

In this civil penalty proceeding petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent, the Anaconda Company, violated safety regulations promulgated under authority of the Federal Mine Safety and Health Act of 1969 (amended 1977), 30 U.S.C. § 801 et seq.

Pursuant to notice, a hearing on the merits was held in Butte, Montana on March 11, 1980.

The parties waived their right to file post trial briefs.

ISSUE

The issue is whether the violation occurred.

ALLEGED VIOLATION

Citation 341994 alleges a violation of 30 C.F.R. § 55.16-9 which provides as follows:

> 55.16-9 Mandatory. Men shall stay clear of suspended loads

The evidence is evenly balanced.

MSHA's evidence is to the effect that the inspector observed a 300 to 400 pound cabinet being moved laterally as it was suspended by a crane. The cabinet was some 6 to 7 feet above the floor; the worker alongside of the cabinet had both hands beneath it. (Tr 9-14, 16-20, 193-194).

Anaconda's evidence shows that at all times the metal cabinet was no more than 8 to 10 inches above the floor. The worker was not under the load but he was moving it laterally (Tr 105-111).

DISCUSSION

The burden of proving all elements of an alleged violation rests with MSHA, 5 U.S.C. § 556(d). Brennan v. OSHRC, 511 F.2d 1139 (9th Cir. 1975), Olin Construction Company v. OSHRC, 575 F.2d 464 (2d Cir. 1975).

Where witnesses stand before the Court, equal in character, equal in interest, and equal in opportunity to know the facts, and they have made irreconcilable contradictory statements and neither is corroborated, there is no "preponderance." The party who has the burden to go forward, has failed to sustain his burden. Bishop v.Nikolas, 51 N.E. 2d 828 (1943),

and see Aluminum Co. of America v. Preferred Metal Products, 37 F.R.D. 218 (1965), aff'd 354 F.2d 658.

Since MSHA has failed to carry its burden of proof I conclude that Citation 341994 and all proposed penalties therefor should be vacated.

Inasmuch as the citation is to be vacated it is not necessary to consider Anaconda's motions at trial (Tr. 97-100).

SETTLEMENT

The parties further filed a stipulation and motion to approve a settlement agreement. In support of the motion the parties stated that the amount of the proposed settlement for all citations excepting No. 341994 is $661. The amount of the original proposed penalties was $1010.

The motion contains an analysis of the criteria to be followed in determining the appropriateness of the penalty. Documentation was sumbitted in support of the motion.

Having analyzed the operator's history of previous violations, the appropriateness of the penalty to the size of the business, the degree of negligence, the effect on the operator's ability to continue in business, and the good faith achievement of normal compliance after notification of violation, I conclude that the agreement should be, and it is APPROVED.

It is FURTHER ORDERED that respondent pay the agreed amount within 30 days of this order.

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

ORDER

1. Citation 341994 and all proposed penalties therefor are VACATED.

2. The following citations and the proposed amended penalties, as noted, are affirmed.

CITATION	AMENDED PENALTY
341981	$ 61
341984	56
341985	38
341988	130
341989	52
341992	44
341993	52
341961	72
341962	61
341965	52
341966	44

John J. Morris
Administrative Law Judge

Distribution:

Office of the Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294, Attention: Phyllis K. Caldwell, Esq.

Anaconda Copper Company, P.O. Box 689, Butte, Montana 59701, Attention: Edward F. Bartlett, Esq. and Karla M. Gray, Esq.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

1 3 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner,	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-136-M
v.		MSHA NO. 24-00689-05011
THE ANACONDA COMPANY,	Respondent.	Mine: Weed Concentrator

Appearances:

Phyllis K. Caldwell, Esq., Office of the Solicitor, United States Department of Labor, 1961 Stout Street, Room 1585, Denver, Colorado 80294
for the Petitioner,

Edward F. Bartlett, Esq., and Karla M. Gray, Esq., Anaconda Copper Company, P. O. Box 689, Butte, Montana 59701
for the Respondent.

Before: Judge John J. Morris

DECISION

In this civil penalty proceeding petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent, the Anaconda Company, violated safety regulations promulgated under authority of the Federal Mine Safety and Health Act of 1969, (amended 1977), 30 U.S.C. § 801 et seq.

Pursuant to notice, a hearing on the merits was held in Butte, Montana on March 11, 1980.

The parties waived their right to file post trial briefs.

ISSUES

The issues are whether the violations occurred.

CITATION 344173

alleges a violation of 30 C.F.R. § 55.15-4 which provides as follows:

> 55.15-4 Mandatory. All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

The evidence is conflicting and I find the following facts to be credible.

1. Upon entering the Anaconda pipe shop the federal inspector observed three workers not wearing safety glasses (Tr 30, Exhibit P-3).

2. The workers, who apparently use this area for work breaks, were near the main door (Tr 32-66).

3. The pipe shop lathe and grinding wheel carry 480 volts; the pipe threader carries 10 volts A.C. (Tr 33).

4. Metal filings can be thrown several feet by the machines (Tr 34-34).

5. Only the large pipe machine, a slow rotating device, was running when the inspector entered the pipe shop (Tr 135, 138, Exhibit R-4).

6. The pipe machine operator was wearing protective eye glasses (Tr 136).

DISCUSSION

Anaconda's exhibit (R-4) indicates the workers that were near the main door were at least twenty-two feet from the only machine that was operating. The operator of that machine was wearing protective eyeglasses (Tr 136).

I have placed more credence in the Anaconda exhibit which depicts the pipe shop than in the MSHA related exhibit (P-3, R-4). The Anaconda exhibit appears to be drawn to scale. MSHA's free hand drawing suffers in comparison. I place no credence in MSHA's evidence that the machines in the pipe shop could explode (Tr 33). That evidence is contradicted by Anaconda (Tr 186). In addition, there is no foundation for the witness to state such an opinion. Without a foundation I consider the evidence to be spectulative.

MSHA must prove a violation of the standard as well as exposure of the workers. No exposure to the workers exists here since the best that can be said about MSHA's evidence is that metal filing can be thrown "several" feet (TR 34-35). Since MSHA failed to prove that the Anaconda workers were exposed to the hazard involved here I conclude that Citation 344173 should be vacated.

CITATION 344168

alleges a violation of 30 C.F.R. § 55.15-4, cited above.

The evidence is conflicting and I find the following facts to be credible.

7. In the flotation cell area a worker was observed with his glasses off for four minutes (Tr 37-39).

8. The worker was holding the glasses in his hand (Tr 73, 126).

9. Anaconda policy is stricter than the federal regulation in that it requires that safety glasses be worn at all times in the plant (Tr 127).

The foregoing facts indicate a situation involving unpreventable employee misconduct. Here the employee momentarily deviated from established company policy. The employer could not have know of the violation nor could it have forseen it.

However, the Commission has ruled that a mine operator is liable without regard to fault. United States Steel Corporation v. Secretary of Labor Pitt 76-160-P, September 1979. The lack of fault on the part of an operator is a matter to be considered in assessing a civil penalty. In considering the statutory criteria in connection with the flotation cell area I conclude the citation should be affirmed and a penalty of $1 should be assessed.

SETTLEMENT

The parties further filed a stipulation and a motion to approve a settlement agreement. In support of the motion the parties stated that the amount of the proposed settlement for all citations excepting No. 344168 and 344173 is $693. The amount of the original proposed penalties not litigated herein was $860.

The settlement agreement indicates that Citation 344168 was settled. However, at trial the parties indicated the matters in that citation were to be heard (Tr 6). In view of the request of the parties the portion of the settlement agreement purporting to settle Citation 344168 is stricken.

The motion contains an analysis of the criteria to be followed in determining the appropriateness of the penalty. Documentation was submitted in support of the motion.

Having analyzed the operator's history of previous violations, the appropriateness of the penalty to the size of the business, the degree of negligence, the effect on the operator's ability to continue in business, and the good faith achievement of normal compliance after notification of violation, I conclude that the agreement should be, and it is, approved.

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

ORDER

1. Citation 344173 and all proposed penalties therefor are VACATED.

2. Citation 344168 is AFFIRMED and a civil penalty of $1 is assessed.

3. On the proposed settlement agreement the following citations and the proposed amended penalties, as noted, are affirmed.

CITATION	AMENDED PENALTY
344072	$ 61
344073	61
344074	16
344078	97
344079	78
344170	104
344172	78
342184	84
342186	114

Respondent is ordered to pay the agreed amount of the settlement agreement within 30 days of the date of this order.

John J. Morris
Administrative Law Judge

Distribution:

Office of the Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294, Attention: Phyllis K. Caldwell, Esq.

Anaconda Copper Company, P. O. Box 689, Butte, Montana 59701, Attention: Edward F. Bartlett, Esq and Karla M. Gray, Esq.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

13 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		CIVIL PENALTY PROCEEDING
	Petitioner,	DOCKET NO. WEST 79-137-M
v.		MSHA NO. 24-00689-05012
THE ANACONDA COMPANY,		Mine: Weed Concentrator
	Respondent.	

Appearances:

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for the Petitioner,

Edward F. Bartlett, Esq., and Karla M. Gray, Esq., Anaconda Copper Company, P. O. Box 689, Butte, Montana 59701
for the Respondent.

Before: Judge John J. Morris

DECISION

In this civil penalty proceeding petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent, the Anaconda Company, violated safety regulations promulgated under authority of the Federal Mine Safety and Health Act of 1969 (amended 1977), 30 U.S.C. § 801 et seq.

Pursuant to notice, a hearing on the merits was held in Butte, Montana on March 11, 1980.

The parties waived their right to file post trial briefs.

ISSUE

The issue is whether the violation occurred.

CITATION 342194

alleges a violation of 30 C.F.R. § 55.16-9 which provides as follows:

> 55.16-9 Mandatory. Men shall stay clear of suspended loads

The evidence is evenly balanced.

MSHA's evidence indicates workers were under a suspended load. One worker, on the side directly underneath the rod mill guard, was guiding it with the palm of his hand (Tr. 44, 45, Exhibit P-5). The guard was moved 12 feet laterally. It was 75 inches from the floor to the bottom of the guard (Tr. 46). The guard, weighing 400 to 600 pounds, measures 5 to 6 feet in length, 4 to 5 feet wide, and 3 to 6 feet high (Tr. 47, 81, 82).

Anaconda's evidence indicates its workers were in the process of replacing the hood cover on its number 6 rod mill. At the time of this incident the workers, with a crane, were beginning to lift the guard off the floor to place it on the trauma screen (Tr. 117, 121, R1). When it was lifted 4 feet above the floor a worker with his arms extended, turned it 10 degrees. No part of any worker's body was under the cover at any time (Tr. 121,124).

DISCUSSION

The burden of proving all elements of an alleged violation rests with MSHA, 5 U.S.C. § 556(d). Brennan v. OSHRC, 511 F.2d 1139 (9th Cir. 1975), Olin Construction Company v. OSHRC, 575 F.2d 464 (2d Cir. 1975).

Where witnesses stand before the Court, equal in character, equal in interest, and equal in opportunity to know the facts, and they have made irreconcilable contradictory statements and neither is corroborated, there is no "preponderance." The party who has the burden to go forward, has failed to sustain his burden. Bishop v. Nikolas, 51 N.E. 2d 828 (1943), and see Aluminum Co. of America v. Preferred Metals Producte, 37 F.R.D. 218 (1965), aff'd 354 F.2d 658.

Since MSHA has failed to carry its burden of proof I conclude that Citation 342194 and the proposed penalty therefor should be vacated.

SETTLEMENT

The parties further filed a stipulation and a motion to approve a settlement agreement. In support of the motion the parties stated that the amount of the proposed settlement for citation 344177 is $78. The amount of the original proposed penalty was $114.

The motion contains an analysis of the criteria to be followed in determining the appropriateness of the penalty. Documentation was submitted in support of the motion.

Having analyzed the operator's history of previous violations, the appropriateness of the penalty to the size of the business, the degree of negligence, the effect on the operator's ability to continue in business, and the good faith achievement of normal compliance after notification of violation, I conclude that the agreement should be, and it is approved.

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

ORDER

1. Citation 342194 and all proposed penalties therefor are VACATED.

2. Citation 344177 and the proposed amended penalty in the amount of $78 is AFFIRMED.

Respondent is directed to pay the agreed amount of the settlement within 30 days of the date of this order.

John J. Morris
Administrative Law Judge

Distribution:

Office of the Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294, Attention: Ann M. Noble, Esq.

Anaconda Copper Company, P.O. Box 689, Butte, Montana 59701, Attention: Edward F. Bartlett, Esq. and Karla M. Gray, Esq.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

13 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	)	CIVIL PENALTY PROCEEDING
	)	DOCKET NO. WEST 79-275-M
v.	)	ASSESSMENT CONTROL NO. 02-00826-05003
KENNECOTT COPPER CORPORATION, Respondent.	)	MINE: HAYDEN CONCENTRATOR

DECISION AND ORDER

STATEMENT OF THE CASE

This proceeding arose through initiation of an enforcement action brought pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) [hereinafter cited as "the 1977 Act" or "the Act"]. On April 28, 1980, Respondent, Kennecott Copper Corporation [hereinafter "Kennecott"], filed with the Commission its Motion for Summary Decision pursuant to Commission Rule 64, 29 CFR § 2700.64. Petitioner, the Secretary of Labor, Mine Safety and Health Administration (MSHA) [hereinafter "the Secretary"], responded by filing a brief on May 5, 1980. Kennecott, in turn, filed a reply brief with the Commission on May 7, 1980.

FINDINGS OF FACT

The parties agree, and I concur, that there is no issue in dispute as to any material fact. From the uncontroverted evidence, I find the following facts to be established:

1. Cimetta Engineering Construction Company, Inc. [hereinafter "Cimetta"] was engaged by Kennecott as an independent contractor to install a new ball mill in the reduction plant at Kennecott's Hayden Concentrator and in the course of such duties had a continuing presence at the mine.

2. On April 11, 1979, a flat bed truck owned and operated by Cimetta was observed by an MSHA inspector who subsequently determined that the truck's brake lights and signal lights were not operating, contrary to the provisions of 30 CFR § 55.9-2 1/

3. Citation No. 378845 was issued to Kennecott by the MSHA inspector for Cimetta's violation of the above-cited mandatory safety standard.

4. The Secretary issued a proposed rule setting forth criteria by which the Mine Safety and Health Administration would identify certain independent contractors as operators under the 1977 Act. The proposed rule was published on August 14, 1979 at 44 Fed. Reg. 47746 (1979).

5. No such final rule has, as of yet, been issued.

6. Respondent operates a large mining business.

7. In the twenty-four months prior to this inspection, Respondent had no history of previous violations.

8. The condition cited was corrected within the time specified for abatement in the citation.

9. Payment of the proposed penalty will not impair the ability of Respondent to continue in business.

ISSUES PRESENTED

The following issues are presented for determination:

1. Whether an owner-operator can be held liable for activities of an independent contractor which constitute a violation of regulations promulgated pursuant to the 1977 Act?

1/ Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

2. Whether the Secretary unduly delayed the issuance of a final rule permitting direct enforcement against an independent contractor for activities which constitute a violation of regulations promulgated pursuant to the 1977 Act?

3. Whether an owner-operator should be held liable for activities of an independent contractor which constitute a violation of regulations promulgated pursuant to the 1977 Act?

4. Whether the $40.00 penalty assessment proposed for Citation No. 378845 is reasonable and appropriate under the circumstances?

DISCUSSION

The first issue presented for discussion, that of owner-operator liability, has previously been addressed by the Federal Mine Safety and Health Review Commision. In Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Old Ben Coal Company, (Docket No. VINC 79-119, October 29, 1979) [hereinafter cited as "Old Ben"], the Commission decided that an owner-operator can be held responsible without fault for the violation of the Act committed by its independent contractor. The Commission elaborated:

> "When a mine operator engages a contractor to perform contruction or services at a mine, the duty to maintain compliance with the Act regarding the contractor's activities can be imposed on both the owner and the contractor as operators. This reflects a congressional judgement that, insofar as contractor activities are concerned, both the owner and the contractor are able to assure compliance with the Act. Arguably, one operator may be in a better position to prevent the violation. However, as we read the statute, this issue does not have to be decided since Congress permitted the imposition of liability on both operators regardless of who might be better able to prevent the violation." Old Ben at 1483.

Several other decisions of the Review Commission are in agreement. See also Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Republic Steel Corporation, (Docket No. IBMA 76-28, April 11, 1979); Secretary of Labor

Mine Safety and Health Administration (MSHA) v. Kaiser Steel Corporation, (Docket No. DENV 77-13-P, May 17, 1979); Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Monterey Coal Company, (Docket No. HOPE 78-469, November 13, 1979).

The second issue presented for discussion, that of undue delay in the issuance of a final rule regarding independent contractor-operators, may now be addressed. The Review Commission in its decision of Old Ben emphasized that the amendment of the definition of "operator" in the Act to include independent contractors makes it clear that contractors can be proceeded against and held responsible for their own violations. "Indeed, ... direct enforcement against contractors for their violations is a vital part of the 1977 Act's enforcement scheme." Old Ben at 1483.

To give full effect to that scheme, the Secretary issued a proposed rule setting forth criteria that would enable MSHA inspectors to proceed directly against independent contractors as operators for their violations of the Act. The due date for comments regarding the proposed rule was October 15, 1979. 44 Fed. Reg. 47746 (1979). Eight months have passed since that due date and no final rule has been issued.

In Old Ben the Secretary asserted that although Old Ben Coal Company "... was proceeded against in accordance with a Secretarial policy of directly

> enforcing the Act only against owners, this policy is an interim one pending adoption of regulations providing guidance to inspectors in the identification and citation of contractors." Old Ben at 1486.

However, the Commission noted:

> "... [T]here is no indication of when the interim policy will be replaced by a new one. If the Secretary unduly prolongs a policy that prohibits direct enforcement of the Act against

> contractors, he will be disregarding the intent of Congress. In view of the Secretary's express recognition of the wisdom and effectiveness of subjecting contractors to direct enforcement, continuation of a policy that forecloses such enforcement will provide evidence that the current policy is grounded on improper considerations of administrative convenience, a basis that would not be consistent with the Act's purpose and policies .... To use this tool as a mere administrative expedient would be an abuse." Old Ben at 1486-7.

As a matter of law, I cannot find by a preponderance of the evidence that the Secretary has unduly prolonged a policy that prohibits direct enforcement of the Act against independent contractors.

Eight months have passed since the due date for receipt of comment on the proposed rule. That is a long time. Twenty-seven months have passed since the effective date of the Act. That is an even longer time. The wheels of government turn slowly, but turn they must.

Unless he acts, the Secretary will soon cross the line and have taken too long In light of the Commission's reasoning in Old Ben, I rule that the Secretary has not unduly delayed the issuance of a final rule regarding independent contractors.

Based upon the foregoing conclusion, I must resolve the issue of whether an owner-operator should be held liable for contractor activities in the affirmative. Old Ben clearly establishes that the duty to maintain compliance with the Act regarding a contractor's activities can be imposed on both the owner and contractor as operators. As the Secretary has not unduly prolonged the interim enforcement policy of citing owners only, the owner-operator should be held liable for independent contractor activities which constitute a violation of the Act. Someone must be held responsible for the safety and health of miners. In this circumstance, that responsibility must rest with the owner-operator.

From the facts as found, it appears that Citation No. 378845 was properly issued for a violation of 30 CFR § 55.9-2. Respondent operates a large mining business and payment of the proposed penalty will not impair its ability to

continue in business. Respondent has no history of previous violations and exhibited good faith in the prompt correction of the condition cited. Kennecott's negligence was ordinary and the gravity of the situation created by that negligence was slight. Based on the foregoing discussion, the $40.00 penalty assessment proposed for this citation is considered by me to be a proper amount.

CONCLUSIONS OF LAW

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

2. The conditions found to exist on April 11, 1979, in Finding of Fact No. 2, constitute a violation of the mandatory safety standard contained in 30 CFR § 55.9-2.

3. Respondent can be held liable for the activities of its independent contractor constituting the violation found to exist in Conclusion No. 2 above.

4. The Secretary has not unduly delayed the issuance of a final rule permitting direct enforcement against an independent contractor for activities which constitute a violation of regulations promulgated pursuant to the 1977 Act.

5. Respondent is liable for the activities of its independent contractor which constitute the violation found to exist in Conclusion No. 2 above.

6. The $40.00 penalty assessment proposed for Citation No. 378845 is reasonable and appropriate under the circumstances.

ORDER

Based upon the foregoing findings of fact and conclusions of law, Citation No. 378845 and the proposed penalty assessment of $40.00 are hereby affirmed. Respondent shall pay the affirmed penalty within thirty days of the date of this Decision.

Jon D. Boltz
Administrative Law Judge

Distribution:

Patrick Wm. Paterson, Esq., FENNEMORE, CRAIG, von AMMON & UDALL, P.C., 1700 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003

Judith G. Vogel, Esq., Office of the Solicitor, United States Department of Labor, 11071 Federal Building, Box 36017, 450 Golden Gate Avenue, San Francisco, California 94102

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

13 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		CIVIL PENALTY PROCEEDING
	Petitioner,	DOCKET NO. WEST 79-316-M
v.		MSHA NO. 24-00338-05005
THE ANACONDA COMPANY,		Mine: Weed Concentrator
	Respondent.	

Appearances:

Phyllis K. Caldwell, Esq., Office of Henry Mahlman, Regional Solicitor, United States Department of Labor, 1961 Stout Street, Room 1585, Denver, Colorado 80294
for the Petitioner,

Edward F. Bartlett, Esq., and Karla M. Gray, Esq., Anaconda Copper Company, P. O. Box 689, Butte, Montana 59701
for the Respondent.

Before: Judge John J. Morris

DECISION

In this civil penalty proceeding petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent, the Anaconda Company, violated safety regulations promulgated under authority of the Federal Mine Safety and Health Act of 1969, (amended 1977), 30 U.S.C. § 801 et seq.

Pursuant to notice, a hearing on the merits was held in Butte, Montana on March 11, 1980.

The parties waived their right to file post trial briefs.

ISSUE

The issue is whether the violation occurred.

ALLEGED VIOLATION

Citation 342144 alleges a violation of 30 C.F.R. § 55.15-4 which provides as follows:

> 55.15-4 Mandatory. All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine plant where a hazard exists which could cause injury to unprotected eyes.

The evidence is conflicting and I find the following facts to be credible.

1. After entering the Anaconda primary crusher room, and upon approaching the crusher, the inspector observed a worker without glasses (Tr.48-89).

2. The worker, who was using a cherry picker to remove large pieces of rock material, left the platform and returned wearing his glasses (Tr. 88).

3. The operator was 12 feet from where rock hit the conveyor belt (Tr. 88-89).

4. The worker was exposed to various sizes of flying rock (Tr. 89).

DISCUSSION

Anaconda's evidence would tend to indicate that the inspector's ability to preceive the worker was severly limited by the lighting conditions and the distance he was from the worker (Tr. 169-178).

I am not persuaded by Anaconda's evidence. The inspector indicated he was 50 feet from the worker. As such he was closer than any of the Anaconda management witnesses. He further readily indentified an individual in the courtroom under similar lighting conditions.

Based on the facts I find to be credible I conclude that Citation 324144 should be affirmed. Further, in considering the statutory criteria I conclude the proposed civil penalty therefor should be affirmed.

SETTLEMENT

An order approving a proposed settlement for Citations 342130 and 343814 lodged in this case was entered by the undersigned on April 8, 1980 in cases consolidated under Docket No. WEST 79-315-M.

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

ORDER

Citation 342144 and the proposed penalty therefor are AFFIRMED.

John J. Morris
Administrative Law Judge

Distribution:

Office of the Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294, Attention: Phyllis K. Caldwell, Esq.

Anaconda Copper Company, P.O. Box 689, Butte, Montana 59701, Attention: Edward F. Bartlett, Esq. and Karla M. Gray, Esq.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

13 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING
v.	DOCKET NO. WEST 79-130-M
THE ANACONDA COMPANY, Respondent.	MSHA NO. 24-00689-05005
	Mine: Weed Concentrator

Appearances:

Phyllis K. Caldwell, Esq., Office of the Solicitor, United States Department of Labor, 1961 Stout Street, Room 1585, Denver, Colorado 80294
for the Petitioner,

Edward F. Bartlett, Esq., and Karla M. Gray, Esq., Anaconda Copper Company, P. O. Box 689, Butte, Montana 59701
for the Respondent.

Before: Judge John J. Morris

DECISION

In this civil penalty proceeding petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent, the Anaconda Company, violated safety regulations promulgated under authority of the Federal Mine Safety and Health Act of 1969 (amended 1977), 30 U.S.C. § 801 et seq.

Pursuant to notice, a hearing on the merits was held in Butte, Montana on March 11, 1980.

The parties waived their right to file post trial briefs.

alleges a violation of 30 CFR § 55.16-9 which provides as follows:

> 55.16-9 Mandatory. Men shall stay clear of suspended loads

The evidence is evenly balanced. MSHA's shows that the federal inspector observed a cart containing a tank of oxygen and acetylene. It was being lowered from the second floor to the first floor. Two workers, neither of them looking up, were directly under the load.

A fatality could result in these circumstances (Tr 21-28).

Anaconda shows that no workers were under the load at any time. One worker, on the second floor level, was feeding the tag line as the cart lowered to the first floor (Tr 112-116).

DISCUSSION

MSHA carries all the burden of providing all the elements of an alleged violation, 5 U.S.C. § 556(d). Brennan v. OSHRC, 511 F.2d 1139 (9th Cir. 1975), Olin Construction Company v. OSHRC, 575 F.2d 464 (2d Cir. 1975).

Where witnesses stand before the Court, equal in character, equal in interest, and equal in opportunity to know the facts, and they have made irreconcilable contradictory statements and neither is corroborated, there is no "preponderance." The party that has the burden to go forward, has failed to sustain his burden. Bishop v. Nikolas, 51 N.E. 2d 828 (1943), and see Aluminum Co. of America v. Preferred Metal Products, 37 F.R.D. 218 (1965), aff'd 354 F.2d 658.

Since MSHA has failed to carry its burden of proof I conclude that Citation 342176 and all proposed penalties therefor should be vacated.

Inasmuch as the citation is to be vacated it is not necessary to consider Anaconda's motions at trial (Tr. 97-100).

SETTLEMENT

The parties further filed a stipulation and a motion to approve a settlement agreement. In support of the motion the parties stated that the amount of the proposed settlement for all citations excepting Nos. 341867, 341869, and 342176 is $569. The amount of the original proposed penalties was $1020. MSHA moved to vacate citations numbered 341867 and 341869.

The motion contains an analysis of the criteria to be followed in determining the appropriateness of the penalty. Documentation was submitted in support of the motion.

Having analyzed the operator's history of previous violations, the appropriateness of the penalty to the size of the business, the degree of negligence, the effect on the operator's ability to continue in business, and the good faith achievement of normal compliance after notification of violation, I conclude that the agreement should be, and it is APPROVED.

It is FURTHER ORDERED that respondent pay the agreed amount within 30 days of this order.

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

ORDER

1. The following citations and all proposed penalties therefor are VACATED.

No. 341867
No. 341869
No. 342176

2. The following citations and the proposed penalties, as amended, are AFFIRMED;

CITATION	AMENDED PENALTY
342000	$ 30
342174	60
341862	48
341863	51
341864	48
341865	48
341866	61
341870	28
341871	47
341873	40
342175	38
342177	9
342178	61

John J. Morris
Administrative Law Judge

Distribution:

Office of the Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294, Attention: Phyllis K. Caldwell, Esq.

Anaconda Copper Company, P.O. Box 689, Butte, Montana 59701, Attention: Edward F. Bartlett, Esq. and Karla M. Gray, Esq.

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

JUN 16 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Application for Review of Discrimination
	:	Docket No. WEVA 80-159-D
ON BEHALF OF DELMAR WORKMAN, Complainant	:	Complaint No. CD 79-304
	:	Preparation Plant
v.	:	
KESSLER COALS, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Barbara K. Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Complainant; C. Lynch Christian III, Esq., Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia, for Respondent.

Before: Judge Stewart

The above captioned case is an application for review of discrimination brought pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., hereinafter referred to as the Act.

On December 19, 1979, the Secretary of Labor (MSHA) filed a complaint of discrimination on behalf of Delmar Workman. Respondent filed its answer on January 21, 1980.

At the commencement of the hearing on April 15, 1980, in Charleston, West Virginia, the parties announced the following agreement:

> The terms of the settlement agreement are these:
>
> That Kessler Coal Company will expunge from the employment record of Delmar Workman all references to his unexcused absence of September 14th, 1979, and that his absence of September 14th, 1979, be considered an excused absence.
>
> As part of this agreement, Kessler Coal Company agrees that any discipline based on unexcused absences occurring subsequent to September 14th, 1979, be adjusted accordingly.

Respondent further agrees to post a notice in a conspicuous place for a period of fourteen days. The terms of that notice to be as follows:

Pursuant to an agreement between the Mine Safety and Health Administration and Kessler Coals, Inc., Kessler Coal Company agrees that no person shall be discharged or in any manner discriminated against or caused to be discharged because such miner, representative of miners, or applicant for employment (1) 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, including a complaint notifying the operator or the operator's agent or the representative of the miners at the coal mine of an alleged danger or safety or health violation in a coal or other mine or; (2) is a subject of medical evaluations and potential transfer under a standard published pursuant to Section 101 or; (3) has instituted or caused to be instituted any proceeding under or related to this act or; (4) has testified or is about to testify in any such proceeding or; (5) because of the exercise by such miner, representative of miners, or applicant for employment on behalf of himself or others of any statutory right afforded by this act.

The settlement agreement between the parties further stipulates that the complainant will withdraw its charge of discrimination.

* * * * * * *

The settlement agreement has been reached as a result of protracted discussion this morning in the spirit of compromise and to resolve disputed claims without the necessity of protracted litigation.

That further, the withdrawal of the discrimination complaint indicates and * * * states the position that no further action on the events described in the complaint will be pursued by the Mine Safety and Health Administration. * * *

The one other point that might be clarified for the record is the adjustment of the disciplinary action. The matter involved in this case was a verbal warning. A subsequent written warning will now be adjusted to a verbal warning, according to the settlement agreement. * * *

[T]he subsequent warning has already been withdrawn, so that there is currently, pursuant to the settlement agreement, no verbal warning for unexcused absence.

At the conclusion of the hearing, this settlement agreement was read back by the court reporter and both parties expressed their satisfaction with its terms.

The agreement of the parties was approved from the bench and the proceeding was dismissed.

ORDER

The approval of the agreement by the parties and the dismissal of the proceeding are affirmed.

Forrest E. Stewart
Administrative Law Judge

Issued:

Distribution:

Barbara K. Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

C. Lynch Christian III, Esq., Jackson, Kelly, Holt & O'Farrell, P.O. Box 553, Charleston, WV 25322 (Certified Mail)

United Mine Workers of America, 900 Fifteenth Street, NW, Washington, DC 20005 (Certified Mail)

Delmar Workman, General Delivery, Sylvester, WV 25209 (Certified Mail)

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

JUN 16 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 80-74 A.O. No. 46-05206-03009 V
v.	:	No. 4 Mine
GREGOIRE COALS, INC., Respondent	:	

DECISION AND ORDER

The parties move for approval of a settlement of the two unwarrantable failure roof control violations charged at 50% of the $2,000 initially assessed.

Based on an independent evaluation and de novo review of the parties' excellent prehearing submissions and motion, I find the violations while serious occurred without the fault of the operator. They were in all probability the result of willfully reckless conduct on the part of certain disgruntled miners. In fact, on this record the operator makes out a prima facie case for a civil, if not criminal, investigation of the acts of sabotage that allegedly resulted in the violations charged.

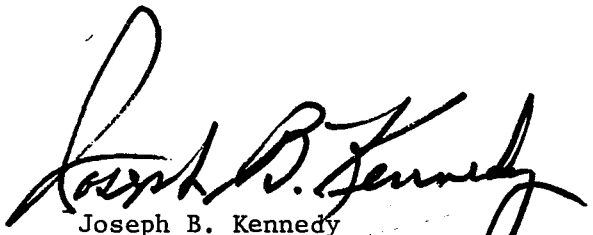
I have previously noted, Warner Co., PENN 79-161-M, 2 FMSHRC 972 (April 28, 1980); U.S. Steel Corp., PENN 79-123, 2 FMSHRC ___ (May 20, 1980), the absence of interest on the part of MSHA in investigating or filing charges against rank-and-file miners who either deliberately or through an inexcusable lack of safety consciousness endanger themselves or their fellow workers. In my opinion section 110(c) of the Act is not limited to supervisory employees but reaches every miner of whatever rank or pay classification. I believe that because all miners are statutory agents of the operator within the meaning of sections 3(e) and 110(c) of the 1977 Mine Act they are subject to the civil and criminal sanctions of the Act for knowingly willful violations of the mandatory safety standards.

It is my firm belief that if every miner was made aware of the fact that his occupational conduct is subject to the civil and criminal sanctions of the Mine Safety Law mine fatalities and disabling injuries would be sharply reduced. It is encouraging to note that my concern is shared by Congressman Gaydos, Chairman of the House Subcommittee on Health and Safety. Mr. Gaydos recently stated he is urging MSHA to take

administrative steps to require all miners to follow safe practices. 1 BNA Mine Safety and Health Reporter 564 (May 21, 1980).

With respect to the instant case, I conclude the settlement proposed is clearly appropriate and in accord with the purposes and policy of the Act. This is true without even considering the financial impairment claimed.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the amount of the penalty agreed upon, $1,000, on or before Monday, June 30, 1980, and that subject to payment the captioned matter be, and hereby is, DISMISSED.



Joseph B. Kennedy
Administrative Law Judge

Distribution:

Catherine M. Oliver, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

David Romano, Esq., Young, Morgan & Cann, Suite One, Schroath Bldg., Clarksburg, WV 26301 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

17 JUN 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceedings	
MINE SAFETY AND HEALTH	:		
ADMINISTRATION (MSHA),	:	Docket Nos.	A.C. Nos.
Petitioner	:		
v.	:	LAKE 79-101-M	21-00249-05004
	:	LAKE 79-102-M	21-00249-05005
THE HANNA MINING COMPANY,	:	LAKE 79-103-M	21-00807-05003
Respondent	:	LAKE 79-104-M	21-00807-05004
	:	LAKE 79-134-M	21-00807-05005
UNITED STEELWORKERS OF AMERICA,	:	LAKE 79-135-M	21-00807-05006
Representatives of the miners	:	LAKE 79-136-M	21-00814-05002
	:	LAKE 79-137-M	21-00814-05003
	:	LAKE 79-138-M	21-00814-05004
	:	LAKE 79-139-M	21-00814-05005
	:		
	:	National Steel Pellet Co.	
	:	Butler Taconite Mill	

DECISION

Appearances: William C. Posternack, Esq., and Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Richard A. Williams, Esq., Hvass, Weisman & King, Minneapolis, Minnesota, for Respondent;
Harry Tuggle, United Steelworkers of America, Safety & Health Department, Pittsburgh, Pennsylvania, for Representative of the Miners.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

The above cases were commenced by the filing of petitions for the assessment of civil penalties for alleged violations of various mandatory safety standards in two of Respondent's mines. Prior to the commencement of the hearing, Petitioner submitted motions seeking approval of settlement agreements for certain of the violations and seeking to vacate certain other citations. The motions were supplemented by statements of counsel on the record at the commencement of the hearing.

Pursuant to notice, the citations and violations alleged therein, not covered by the settlement agreement, were heard on the merits in Minneapolis, Minnesota, on April 23, 24 and 25, 1980.

Leon Mertesdorf and Francis R. Bye, Federal mine inspectors and Martin Stimac testified for Petitioner. Wallace Choquette and William Waite testified for Respondent. Counsel agreed that, provided they be given the opportunity to orally state their respective positions on the record following the evidence with respect to each of the contested citations, they would waive their rights to file written proposed findings and briefs. Accordingly, I issued a decision from the bench following the receipt of the evidence on each citation and the arguments of counsel. The rulings from the bench are set out below following a discussion of the proposed settlement agreements.

SETTLEMENT AGREEMENT

Docket No. LAKE 79-101-M

Citation No. 29403 was originally assessed at $114. The parties agreed to settle the matter for the payment of $90 on the grounds that both gravity and negligence were very low and had been overevaluated by the Assessment Office. Citation No. 293420 was originally assessed at $84. Petitioner moved to have it vacated on the ground that further investigation of the facts disclosed that the alleged violation did not occur. Citation No. 293421 was originally assessed at $78. The parties agreed to settle the matter for the payment of $60 on the grounds that gravity and negligence were low and Respondent took immediate action to correct the condition. Citation No. 293423 was originally assessed at $470. The parties agreed to settle the matter for the payment of $235. I stated on the record that I was not satisfied with the reasons given for the reduction in the assessed amount, and subsequently the parties stated that it was agreed that Respondent would pay the assessed amount, $470.

Based upon the representations of counsel, the documents submitted in support of the motion, and a consideration of the criteria in section 110(i) of the Act, the motion to approve the settlement agreement is GRANTED.

Docket No. LAKE 79-102-M

Citation No. 293405 was originally assessed at $98, and the parties agreed to settle the matter for the payment of $98. Citation No. 293412 was originally assessed at $106, and the parties agreed to settle the matter for the payment of $106. Citation No. 293413 was originally assessed at $130. The parties agreed to settle the matter for the payment of $90, on the grounds that the gravity of the violation was overevaluated by MSHA, and the operator immediately abated the

condition. Citation No. 293416 was originally assessed at $160. Petitioner moved to have it vacated on the ground that further investigation revealed that the violation charged did not occur. Citation No. 293419 was originally assessed at $130. The parties agreed to settle the matter for the payment of $100 on the grounds that the gravity and negligence were minimal and had been overevaluated.

Based upon the representations of counsel, the documents submitted in support of the motion, and a consideration of the criteria in section 110(i) of the Act, the motion to approve the settlement agreement is GRANTED.

Docket No. LAKE 79-103-M

Citation No. 290182 was originally assessed at $98. Petitioner moved to have it vacated on the ground that further investigation revealed that the violation charged did not occur. Citation No. 290183 was originally assessed at $130. The parties agreed to settle the matter for the payment of $90, on the ground that the gravity and negligence were low, and that the condition was abated immediately. Citation No. 290184 was originally assessed at $140. The parties agreed to settle the matter for the payment of $100, on the grounds that the gravity and negligence of the violation were low, and the condition was abated immediately. Citation No. 290185 was originally assessed at $98, and the parties agreed to settle the matter for the payment of $98. Citation No. 290186 was originally assessed at $72. The parties agreed to settle the matter for the payment of $50, on the ground that gravity and negligence were very low. Citation No. 290187 was originally assessed at $72. Petitioner moved to have it vacated on the ground that the violation charged did not actually occur. Citation No. 294620 was originally assessed at $72. The parties agreed to settle the matter for the payment of $66, on the grounds that the violation was not serious and was abated immediately.

Based upon the representations of counsel, the documents submitted in support of the motion, and a consideration of the criteria in section 110(i) of the Act, the motion to approve the settlement agreement is GRANTED.

Docket No. LAKE 79-104-M

Citation No. 290199 was originally assessed at $98. Petitioner moved to have it vacated on the ground that the violation charged did not occur.

Based upon the representations of counsel, the motion is GRANTED.

Docket No. LAKE 79-134-M

Citation No. 294639 was originally assessed at $160. The parties have agreed to settle the matter for the payment of $120, on the

grounds that the gravity and negligence of the violation were very low and Respondent abated the condition in less than one half of the time permitted in the citation. Citation No. 294640 was originally assessed at $140. The parties have agreed to settle the matter for the payment of $110, on the same grounds as were set forth concerning the citation immediately preceding this. Citation No. 294643 was originally assessed at $140. Petitioner moved to have it vacated on the ground that it was erroneously issued and the charged violation did not occur. Citation No. 294677 was originally assessed at $122. Petitioner moved to have it vacated on the ground that the condition found did not constitute a violation of the safety standard cited.

Based upon the representations of counsel, the documents submitted in support of the motion, and a consideration of the criteria in section 110(i) of the Act, the motion to approve the settlement agreement is GRANTED.

Docket No. LAKE 79-135-M

Citation No. 294625 was originally assessed at $150. Petitioner moved to have it vacated on the ground that the alleged violation did not occur.

Based upon the representations of counsel, the motion is GRANTED.

Docket No. LAKE 79-136-M

Citation No. 294649 was originally assessed at $84. The parties have agreed to settle the matter for the payment of $56, on the grounds that the gravity and negligence of the violation were very low and the condition was immediately abated. Citation No. 294673 was originally assessed at $98. The parties have agreed to settle the matter for the payment of $70 on the same grounds as were set forth concerning the citation immediately preceding. Citation No. 294680 was originally assessed at $106. Petitioner moved to have it vacated on the ground that the citation was issued in error, and the violation charged did not occur. Citation No. 294688 was originally assessed at $72. Petitioner moved to have it vacated on the ground that it was issued in error and the violation charged did not occur.

Based upon the representations of counsel, the documents submitted in support of the motion, and a consideration of the criteria in section 110(i) of the Act, the motion to approve the settlement agreement is GRANTED.

Docket No. LAKE 79-137-M

Citation No. 294694 was originally assessed at $106. The parties have agreed to settle the matter for the payment of $106. Citation No. 294697 was originally assessed at $84. The parties have agreed

to settle the matter for the payment of $70 on the grounds that the gravity and negligence were both very low. Citation No. 294700 was originally assessed at $78. The parties have agreed to settle the matter for the payment of $40, on the ground that the gravity of the violation was overevaluated by MSHA. Citation No. 294701 was originally assessed at $114. Petitioner moved to have it vacated on the ground that further investigation revealed that the condition did not constitute a violation of the safety standard cited. Citation No. 294702 was originally assessed at $78. The parties have agreed to settle the matter for the payment of $60 on the grounds that the gravity and negligence were very low and the condition was abated immediately. Citation No. 294709 was originally assessed at $84. Petitioner moved to have the citation vacated, on the ground that it is unable to establish that the violation charged actually occurred. Citation No. 294715 was originally assessed at $66. The parties have agreed to settle the matter for the payment of $36 on the grounds that the gravity and negligence were very low and the condition was abated immediately. Citation No. 294716 was originally assessed at $84. The parties have agreed to settle the matter for the payment of $50 on the grounds that the gravity and negligence were very low.

Based upon the representations of counsel, the documents submitted in support of the motion, and a consideration of the criteria in section 110(i) of the Act, the motion to approve the settlement agreement is GRANTED.

Docket No. LAKE 79-138-M

Citation No. 294721 was originally assessed at $84. The parties have agreed to settle the matter for the payment of $50, on the grounds that gravity and negligence had been overevaluated by MSHA.

Based upon the representations of counsel, the documents submitted in support of the motion, and a consideration of the criteria in section 110(i) of the Act, the motion to approve the settlement agreement is GRANTED.

CONTESTED CITATIONS

Prior to testimony being received, Petitioner introduced MSHA Exhibit 1, the history of prior violations and entered into the following stipulation as to the size of Respondent:

> MR. POSTERNACK: Okay. At this time also with respect to the factors in assessing the penalty, the parties were able to reach a stipulation that with respect to the size of the Butler Taconite Mine, that it had annual man hours of 520,515; that as far as production is concerned, it's production approximated 2.6 million tons. The parties further are in agreement that this mine when compared to other taconite operations would be considered a small mine.

With respect to the size of National Steel, the mine involved in Citation, in Case 79 Lake 102, the parties have stipulated that with respect to man hours of production, the man hours of production were 927,035; that it's projected production in terms of tonnage was 6.0 million tons; and that when compared to other taconite operations, this mine would be an average size mine.

Based on the stipulation and on the information in Exhibit 1, I find that Respondent is a medium-sized operator, and its history of prior violations is not such that penalties should be increased because of it.

BENCH DECISION

The contested citations were decided from the bench following the presentation of evidence and argument on each citation the decisions are set out below as they appear in the transcript.

Docket No. LAKE 79-102

[Citation No. 293409]

JUDGE BRODERICK: Although I have some doubt as to whether the condition cited was properly cited as a violation of 55.11-12 or should have been cited as a violation of 55.11-2, I do find that the evidence establishes that the condition cited was a violation of 55.11-12. I find that the evidence shows that there was an opening near a travelway around the drill in question, and that the standard requires that that opening be protected by a railing. In fact it was not protected by a railing or other barrier.

Because of the condition testified to by Mr. Mertesdorf that the, there was a slippery footing on the walkway, that other conditions could cause further slippery footing, I find that the violation was serious, because had a person using this travelway slipped and fallen through the opening, he could have sustained serious injury.

The condition was clearly known to the operator. I find that the danger should have been known to the operator. However I would not charge the operator with serious negligence, because the condition obviously was built into the piece of equipment by the manufacturer of the equipment.

I find further that the condition was abated by the operator in accordance with the citation in good faith by the establishment of a chain across the opening.

Considering the stipulation of facts with respect to the citation with respect to the size of the operator, may I ask Mr. Posternack whether there in the MSHA Exhibit No. 1 are there, is there a previous history of violations of this standard?

MR. POSTERNACK: The clerical assistant in our office is going through that. And I think review of the Exhibit 1 would show that there have been seven assessed violations of Standard 55.11-12.

JUDGE BRODERICK: Over a period of how long?

MR. POSTERNACK: I would assume it's the two-year period covered by the printout.

JUDGE BRODERICK: And that has to do with all the operations of the Company?

MR. POSTERNACK: I believe it was all that we were provided, so I would have to say yes.

JUDGE BRODERICK: I will consider that the history of prior violations is not such that the penalty should be increased because of the history.

Considering all of the factors, all of the criteria set out in Section 110(i) of the Federal Mine Safety and Health Act, I will assess a penalty for this violation of $200.

Docket No. LAKE 79-103

JUDGE BRODERICK: I will find that on January 23rd, 1979 the berm at the dumping site of the Buttler Taconite Mine described in Citation 290181 was not sufficient to prevent overtravel or overturning. The evidence does not establish that other means were provided to prevent overtravel or overturning at the site in question. Therefore a violation of 30 CFR 55.9-54 was established by the evidence.

I find that the violation was moderately serious, because it could have resulted in an injury to the operator of the vehicle used at the dumping site. I find that the operator should have known of the inadequacy of the berm in question. I find that the violation was abated by the operator in good faith. And I will assess a penalty of $100 for the violation.

JUDGE BRODERICK: With respect to Citation 294619, I find that the evidence does not establish a violation of the mandatory standard cited, namely 30 CFR 55.9-2. All of the safety standards under section 55.9 refer to loading, hauling, and dumping, and the vehicles, roadways, and equipment used in connection with loading, hauling, and dumping. The evidence does not establish here that the equipment involved, namely the wire rope sling, is equipment used in connection with loading, hauling, or dumping.

I do not believe that this standard is intended to cover the situation testified to. If MSHA wishes to cite for a general duty standard, a regulation applying such a standard should be promulgated by proper rule-making procedures. Therefore I conclude that the violation charged was not shown, and I will vacate the citation.

JUDGE BRODERICK: With respect to Citation No. 294628, I find that on January 25th, 1975 guards on the head pulley of the pellet loadout belt were not secured in their mounting brackets. I find that a violation of the mandatory standard in 30 CFR 55.14-6 was established. I am inferring based upon the testimony of Mr. Bye that pellets had been loaded out on the day of the inspection. And from his testimony with respect to the lack of footprints in the dust in the area adjacent to the guards, I am inferring that the guards were not in place while the belt was being operated. There is no evidence that testing was being done at or about the time of the inspection.

I further find that the operator should have known of this condition and therefore was negligent in permitting it to have occurred. I find that the violation was not a serious violation, that the chance of an employee being injured as a result of the condition was remote. I will assess a penalty in the amount of $75 for the violation found.

JUDGE BRODERICK: With respect to Citation No. 294629, the evidence, I find that the evidence establishes that there was a means of access to a working place in the tail pulley area of the housing for the pellet loadout belt which was not a safe means of access because of the lack of a guard on an overhead belt. I conclude that this shows a violation of 30 CFR 55.11-1, even though there was another means of access to the same working place which was safe.

I find that the operator knew or should have known of this condition prior to its being cited for it. I find

that the condition was not serious in that the possibility of an injury as a result of the violation was remote. The operator promptly abated the violation in good faith by installing an overhead guard. I will assess a penalty of $75 for the violation.

Docket No. LAKE 79-104-M

JUDGE BRODERICK: With respect to Citation No. 290189, I find that on January 23rd, 1979 in a shovel house on the premises of the Butler Taconite Mine the guard on the V-belt drive assembly connected with an air compressor was not securely in place because of a missing bolt and loose bolts. I infer from the testimony of Mr. Bye that this condition had existed while the machinery had been in operation. While the machinery in fact was not in operation at the time of the inspection, there is no evidence that the machinery was being tested at the time of the inspection. Therefore I conclude that the evidence shows a violation of 30 CFR 55.14-6.

The condition was such that the Respondent by the exercise of ordinary care should have known of it before the inspector cited the condition. Based upon the testimony of Mr. Bye, I find that the condition was not serious, although Mr. Bye's conclusion that it was not serious seems to be solely based on the fact that it wasn't, the machinery was not in operation. However there is no evidence that it was in fact a serious condition. The evidence shows that the condition was abated in good faith within the time prescribed in the citation. I assess a penalty for this violation of $75.

JUDGE BRODERICK: With respect to Citation 290190, I find that on January 23rd, 1979 at the Butler Taconite Mine on a stairway to the top of a shovel there was a broken handrail. Evidence of rust at the site of the break indicates that the condition had been present for some time prior, for some days. The standard in question requires that stairways be provided with handrails and be maintained in good condition. The evidence establishes a violation of the standard, since the handrail to the stairway in question was not maintained in good condition.

This condition should have been known to the Respondent. As I said, the evidence establishes that it had been present for some time. The condition was moderately serious, because it could have resulted in an injury to an employee

using that stairway. It was abated promptly by the Respondent in good faith by securing the handrail by a weld in place. I assess a penalty of $150 for the violation established.

JUDGE BRODERICK: Could I see the photograph?

With respect to Citation 290192, on January 24, 1979 at the Butler Taconite Mine the access stairs to drill No. 7511 were distorted and loose. There was a decline to the right on each stair. The stairway did not completely retract because of this distortion, and this contributed to the fact that the bottom stair was at the time of the inspection twenty-four to twenty-eight inches from the ground. These conditions which I find exist constituted an unsafe means of access to this working place, namely the drill. The drill was in service and operating at the time of the inspection. It, the stairs were used by the drill operator, his helper, and any necessary maintenance personnel.

This condition obviously had existed for some time and should have been known to the operator. The condition was moderately serious. The probability of an injury was relatively small resulting from this condition. The operator abated the condition by repairing the stairway and did so promptly. I will assess a penalty of $100 for the violation which I find.

JUDGE BRODERICK: With respect to Citation 290200, I find that on January 24, 1979 a safe means of access was not provided to the Harrison pit pump station on the property of the Butler Taconite Mine, in that there was a path down an earthen bank without stairs or railing or rope to prevent a slip or fall; and that this was the means of access to the pit pump station, which was a working area. The bank was not as steep as Inspector Bye testified, but the, there, it was at an incline and the danger of slipping and falling still existed. Therefore I conclude that a violation of 30 CFR 55.11-1 was established by the evidence.

Since the area is regularly visited by Respondent's agents and employees, Respondent should have known of the condition. The condition was moderately serious, in that an employee could have been injured by slipping or falling on the bank. It was abated promptly by Respondent in good faith within the time set in the citation. I will assess a penalty of $100 for this violation.

Docket No. LAKE 79-136-M

JUDGE BRODERICK: With respect to Citation 294681, I find that the evidence fails to establish that the condition cited constituted a violation of 30 CFR 55.9-11. A replacement, the evidence shows that a replacement windshield had been ordered because of the existing crack in the windshield. And the evidence does not show that the dirt and dust on the windshield and windows impaired the vision of the driver. For these reasons a violation of this standard was not shown, and the citation is vacated.

JUDGE BRODERICK: With respect to Citation 294684, I find on the basis of the evidence presented that there was a missing section of handrail around the sump pump in the secondary basement of the concentrator building and another section of the handrail in need of repair. I find however on the basis of the definition of a travelway in 30 CFR 55.11-12 that this is not an opening near a travelway through which men may fall. Therefore a violation of 30 CFR 55.11-12 was not established, and the citation is vacated.

Docket No. LAKE 79-137-M

JUDGE BRODERICK: With respect to Citation 294696, I think the most difficult issue is whether in fact this constitutes a travelway. And I conclude that it does, because the area is used regularly if infrequently as a way for persons to go from one place to another. The evidence clearly establishes that there was an opening near this travelway. I conclude that if a person could fall into or through such an opening or materials could fall into or through such an opening, that the standard requires that this opening be protected by railings, barriers, or covers. I further conclude that the toeboard around the opening in question here does not constitute a sufficient protection in contemplation of the standard. Therefore I conclude that a violation of 30 CFR 55.11-12 was established.

The condition obviously had existed for some time and was, was or should have been known to the operator. The condition was moderately serious, because it could have resulted in injury to a workman. The operator abated the condition within the time limit of the citation. I would assess a penalty of $150 for the violation found.

JUDGE BRODERICK: With respect to Citation 294707 that charges a violation of 30 CFR 55.11-27, which requires that

scaffolds and working platforms shall be provided with handrails, I do not believe that the system testified to, whereby a travelway handrail was taken off and used as a handrail for a working platform when the working platform was in use, complies with the standard. Therefore I conclude that a handrail was not provided on the elevated work platform described in the citation. I conclude therefore that the evidence shows a violation of 30 CFR 55.11-27.

The condition was such that the operator was aware of the lack of the handrail or should have been aware of it. The condition cited was moderately serious because of the possibility of a workman using this platform slipping and falling from a height of approximately three feet. The condition was promptly abated with the time limits set in the citation. I assess a penalty of $150 for this violation.

Docket No. LAKE 79-138-M

JUDGE BRODERICK: With respect to Citation 294723, the evidence shows that the, a metal ladder in the reclaim area of the subject mine had its second and third rungs bent and distorted down and slightly inward. I believe that this condition is a violation of 55.11-3, which requires that ladders be maintained in a good condition.

The evidence does not show that the Respondent was negligent or that his negligence caused this condition. The evidence does not indicate that the violation was serious. The violation was abated by immediately taking the ladder out of use. I will assess a penalty of $50 for the violation found.

Docket No. LAKE 79-139-M

JUDGE BRODERICK: With respect to Citation 294645, I find that a barrel of lubricant or more than a single barrel of lubricant was or were present on the fourth floor of the screen house in the Butler Taconite plant. I find that for whatever reason, the seal had been broken and lubricant had been dispensed from the barrel. I find that this constitutes a rather low level of fire or explosion hazard. There was no sign posted warning against smoking or open flame in this area. Therefore a violation of 30 CFR 55.4-2 was established.

The evidence establishes that the condition was not due to Respondent's negligence. It further establishes that the

condition was not serious. The violation was abated immediately by the Respondent. I will assess a penalty of $50 for this violation.

JUDGE BRODERICK: Respecting Citation No. 294653, I find that the extension ladder which was being in, used in the screen house and is shown on MSHA Exhibit 44(b) had two bent rungs, one rather seriously bent. I further find that the same ladder had a distorted stringer. Because of these conditions, the ladder was not maintained in good condition.

I further find that the evidence does not establish that the ladder shown in MSHA Exhibit 44(a) was not maintained in good condition.

Therefore with respect to the ladder shown in MSHA Exhibit 44(b), the evidence establishes a violation of 30 CFR 55.11-3. This condition was obvious and should have been known to Respondent. The condition was moderately serious, in that it could have caused an injury to a person using that ladder. The condition was abated immediately in good faith by the Respondent. I assess a penalty of $100 for this violation.

JUDGE BRODERICK: With respect to Citation No. 294654, I find that there was an accumulation of ice on the bottom stairway leading from the bottom floor of the screen house in the subject mine. I find that this was a regularly used travelway. It's not clear from the evidence how long this condition had existed. But in view of the cause of the accumulation, namely from a drip or a spray from a pipe above, and in view of the time of the inspection, which was more than three hours after the beginning of the shift, I infer that the accumulation had been there for some time, and that therefore it was not cleared of the ice as soon as practicable.

The evidence shows that the condition was due to Respondent's negligence, but the negligence was minimal in view of the extraordinary temperature conditions. The condition was not serious and was abated immediately by the Respondent. I will assess a penalty of $50 for the violation found.

JUDGE BRODERICK: With respect to Citation 294660, I find that on the seventh floor of the concentrator building on the, what was described as the ruffer drum line, there were a number of couplings on drive shafts which had exposed studs or screws. Some of these couplings, three or four had guards preventing anyone from exposure to these studs, and

some of them did not. The shafts were approximately five and a half feet in height. They were adjacent to a regularly used walkway and were approximately eighteen inches in from that walkway. I find that this condition constituted exposed moving machine parts which could be contacted by persons and could cause injury. Therefore I find a violation of 30 CFR 55.14-1.

This condition should have been known to Respondent, especially since some of the couplings had already been guarded. The condition was relatively nonserious because of the fact that the exposed moving parts were considerably in from the walkway and the likelihood of injury was relatively low. The Respondent abated the condition promptly and in good faith. I will assess a penalty of $75 for this violation.

JUDGE BRODERICK: With respect to Citation 294667, I find that on February 15, 1979 on the second floor of the concentrator building of the subject mine there was a means of access to a working place covered with a large rock spill, that is a large spill of rock from an elevated walkway above. This rock had fallen from this walkway or been discharged from the walkway, and the material was still falling at the time of the inspection. These conditions, both the falling debris and the debris on the floor, made this an unsafe means of access to a working place. Therefore a violation of 30 CFR 55.11-1 was established by the evidence.

This is a condition which should have been known to Respondent prior to the inspection. The condition was relatively serious, because it could have resulted in injury, either by workmen being struck by falling debris or by a workman slipping and falling as a result of the unsure footing caused by the debris on the floor. The condition was relatively serious as stated. It was abated immediately by Respondent in good faith by the barricading of the area against entry. I will assess a civil penalty in the amount of $100 for this violation.

The decisions from the Bench, set out above, are hereby affirmed.

RECAPITULATION

The penalties assessed herein by reason of my findings following the evidentiary hearing and by reason of my approval of settlement agreements, and the citations vacated are as follows:

Docket No. LAKE 79-101-M

Citation No.	30 CFR Standard	Penalty
293403	55.11-3	$ 90
293420	55.4-23	Vacated
293421	55.11-27	60
293423	55.14-26	470

Docket No. LAKE 79-102-M

293405	55.20-3	98
293409	55.11-12	200
293412	55.11-27	106
293413	55.11-27	90
293416	55.11-1	Vacated
293419	55.11-1	100

Docket No. LAKE 79-103-M

290181	55.9-54	100
290182	55.12-26	Vacated
290183	55.11-1	90
290184	55.11-1	100
290185	55.4-23	98
290186	55.9-11	50
290187	55.11-1	Vacated
294619	55.9-2	Vacated
294620	55.9-2	66
294628	55.14-6	75
294629	55.11-1	75

Docket No. LAKE 79-104-M

290189	55.14-6	75
290190	55.11-2	150
290192	55.11-1	100
290199	55.12-26	Vacated
290200	55.11-1	100

Docket No. LAKE 79-134-M

294639	55.14-6	120
294640	55.11-2	110
294643	55.9-7	Vacated
294677	55.4-4	Vacated

Docket No. LAKE 79-135-M

294625	55.12-6	Vacated

Docket No. LAKE 79-136-M

294649	55.14-6	56
294673	55.11-12	70
294680	55.9-2	Vacated
294681	55.9-11	Vacated
294684	55.11-12	Vacated
294688	55.12-8	Vacated

Docket No. LAKE 79-137-M

294694	55.11-2	106
294696	55.11-12	150
294697	55.12-13(e)	70
294700	55.14-1	40
294701	55.11-1	Vacated
294702	55.14-1	60
294707	55.11-27	150
294709	55.14-8(b)	Vacated
294715	55.11-1	36
294716	55.11-2	50

Docket No. LAKE 79-138-M

294721	55.14-1	50
294723	55.11-3	50

Docket No. LAKE 79-139-M

294645	55.4-2	50
294653	55.11-3	100
294654	55.11-16	50
294660	55.14-1	75
294667	55.11-1	100

ORDER

In accordance with the above findings, Respondent is ORDERED to pay the sum of $3,786 within 30 days of the date of this decision.

James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

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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

17 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
v.	:	Docket No. HOPE 79-3-P A.C. No. 46-04988-03001
E & J COAL CORPORATION, Respondent	:	Docket No. HOPE 79-95-P A.C. No. 46-04988-03002
	:	Docket No. WEVA 79-246 A.C. No. 46-04988-03007
	:	Docket No. WEVA 79-247 A.C. No. 46-04988-03008
	:	Docket No. WEVA 79-302 A.C. No. 46-04988-03009
	:	Docket No. WEVA 79-303 A.C. No. 46-04988-030 10
	:	Docket No. WEVA 79-390 A.C. No. 46-04988-03012V
	:	Docket No. WEVA 79-391 A.C. No. 46-04988-03013
	:	Docket No. WEVA 79-392 A.C. No. 46-04988-03014V
	:	Docket No. WEVA 79-458 A.C. No. 46-04988-03015V
	:	Docket No. WEVA 79-459 A.C. No. 46-04988-03016
	:	Docket No. WEVA 80-37 A.C. No. 46-04988-03018
	:	No. 3 Mine

DECISION

Appearances: Barbara Krause Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
George S. Bennett, Esq., Charleston, West Virginia, for Respondent.

Before: Administrative Law Judge Melick

These consolidated cases are before me upon proposals for assessment of civil penalties under section 110(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., hereinafter referred to as the "Act"). Since E & J Coal Corporation (E & J) admits the violations charged in the citations and orders before me, the only remaining issues to be determined are the appropriate civil penalties that should be assessed under section 110(i) of the Act. The penalties proposed by MSHA in these cases total $35,082.

In determining the amount of a civil penalty assessment, section 110(i) 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) the effect on the operator's ability to continue in business, (4) whether the operator was negligent, (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. The parties have reached factual stipulations regarding the latter three of these criteria, i.e.: the negligence of the operator, the gravity of the violations and the operator's good faith in attempting to achieve rapid compliance. I accept those stipulations which are attached hereto as an appendix and I incorporate them herein as my findings. There is, in addition, no disagreement regarding the operator's history of violations. Based on the evidence submitted, I find that it is a significantly bad history, including an extraordinary number of section 104(b) withdrawal orders. 1/

Two specific considerations remain, i.e., the appropriateness of the penalty to the size of the operator's business and the effect of the penalty on the operator's ability to continue in business. The evidence shows that E & J's annual production in 1978 when it had about 30 employees was about 50,000 tons. At the time of hearing on March 24, 1980, it had no production and no employees. E & J does, however, retain a coal lease for 400 acres containing an estimated 250,000 tons of coal and which was recently offered

1/ Withdrawal orders are issued pursuant to section 104(b) only after a violation has been cited under section 104(a) and has not thereafter been timely abated.

for sale at $400,000. I also note that E & J is controlled by the Saunders Coal Corporation which, in turn, owns two other coal companies. 2/ According to the information made available at hearing, none of these companies was actively engaged in the mining of coal although it was represented that one had recently applied for a state coal-mining permit. All of these factors relating to size have been considered in arriving at the appropriate penalties.

MSHA contends that since the operator is admittedly not in business and has not been since February 1979, and since it is not likely to resume business, the amount of penalty would have no effect on its ability to stay in business and argues, therefore, that this criterion is irrelevant to the instant proceeding. I agree. The generally accepted justification for adjusting penalties to permit continuing coal production and employment of miners is not applicable under the circumstances of this case where the company has not been in the coal producing business for more than a year and the evidence warrants a conclusion that it would not resume such business whether or not penalties were imposed. Robert G. Lawson Coal Co., 1 IBMA 115 (1972) and Secretary v. Davis Coal Company, 2 FMSHRC 619 (1980) are therefore distinguishable.

E & J urges that its financial condition should nevertheless be considered in mitigation of the penalties. The financial evidence submitted is, however, totally inadequate. There are no certified audits nor even current tax returns. The affidavit and testimony of E & J president George Jarroll is essentially worthless in this regard inasmuch as he admitted at hearing that he had no specific personal knowledge of the Company's financial condition. Moreover the evidence of depleted bank accounts, creditors' suits and 2-and 3-year old tax returns does not provide essential information of current net worth and the current market value of unencumbered assets such as its coal reserves. While I recognize that collection of the penalties may be difficult in these cases because of the apparent nonliquidity of E & J's prime asset, I do not consider this to be an appropriate ground for reducing the penalties in these cases.

In summary, the evidence in these cases demonstrates that the operator has been guilty of numerous serious violations resulting from its negligence and that it has frequently failed to achieve appropriate and timely abatement of these violations. There is, on the other hand, little justification for reduction of penalties. The penalties must be sufficient to deter those who control the corporate network of which E & J is but a part as well as others who may be similarly situated. Under the circumstances, I find that the following penalties are appropriate and Respondent is ordered to pay these amounts, totaling $29,375, within 30 days of this decision:

2/ Saunders Coal Corporation owns 80 percent of the voting stock of E & J and Mr. and Mrs. Rob Saunders own the remaining 20 percent. The Saunders, in turn, own 100 percent of the Saunders Coal Corporation. Rob Saunders is vice president, secretary and treasurer of E & J and the evidence shows that he made significant operational and financial decisions for E & J.

Citation or Order Number	Penalty
Docket No. WEVA 79-246	
53383	$ 175
53384A	700
B	200
C	700
D	700
E	300
F	300
G	200
53385	100
53386	200
53387	200
53388	150
53389	150
53390	200
53393	150
53394	150
53395	200
53396	300
53397	100
53398	150

Citation or Order Number	Penalty
Docket No. WEVA 79-247	
53399	$ 100
55096	150
55097	200
55098	200
55099	300
55100	150
55101	100

Citation or Order Number	Penalty
Docket No. WEVA 79-302	
55104	$ 100
55669	200
55670	150
55671	150
55673	100
55674	200
55675	150
55676	200
55677	150

55678	200
55679	200
55682	100
55683	150
55684	300
55685	150
55686	300
55687	150
55688	300
55689	400
55690	100

Citation or Order Number	Penalty
Docket No. WEVA 79-303	
55691	$ 200
55692	100
55693	500

Citation or Order Number	Penalty
Docket No. WEVA 79-390	
55668	$ 800
55672	800
55681	800

Citation or Order No.	Penalty
Docket No. WEVA 79-391	
55563	$ 200
55564	100
55565	200
55567	100
55570	100
55571	150
55572	200
55573	100
55574	150
55576	150
55577	100
55578	100
55579	150
55580	150

Citation or Order Number	Penalty
Docket No. WEVA 79-392	
53391	$ 500
53392	700
Citation or Order Number	**Penalty**
Docket No. WEVA 79-458	
55566	$ 700
55568	700
55569	700
Citation or Order Number	**Penalty**
Docket No. WEVA 79-459	
55562	$ 200
55575	100
Citation or Order Number	**Penalty**
Docket No. WEVA 80-37	
9908524	$ 100
559941	150
Citation or Order Number	**Penalty**
Docket No. HOPE 79-3-P	
7-0095	$ 200
7-0096	200
7-0097	200
7-0098	200
7-0099	200
43361	150
43362	200
43363	200
43365	300
43366	200
45741	200
45742	400
45744	200
45745	300
45746	200
45747	150
45748	300

45749	200
45750(A)	400
45750(B)	500
46294	300
46295	500

Citation or Order Number	Penalty
Docket No. HOPE 79-95-P	
43367	$ 100
43368	300
43530	100
43531	100
43532	100
43533	200
43534	300
43535	150
43536	300
43537	200
43538	300
43540	100
43542	400
43543	400
43544	200
45743	200
46297	150
46298	200
46299	300
46300	300
Total	$ 29,375

Gary Melick
Administrative Law Judge

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APPENDIX

Docket No. WEVA 79-246 - Citation No. 53383

1. The intake air course entry was not separated from the belt conveyor haulage entry as a permanent type brattice had been knocked out in the third crosscut. This is a violation of 30 C.F.R. § 75.326.

2. This constitutes low negligence. Although it should have been detected and noted during the onshift examination, the brattice had been taken down only for the purpose of replacing the water pump. The operator had planned to replace the brattice.

3. There is a moderate probability of occurrence as any time the air courses are not separated there is a possibility that fire can spread from one entry to another.

4. The possible occurrence from this condition is smoke or fire travelling between the air courses.

5. Eight employees were on the section affected by this citation.

Order No. 53384

This order is an imminent danger order consisting of seven different violations. As to each of these violations, stipulations have been reached as follows:

1a. Dangerous accumulations of loose coal and coal dust had accumulated along the entire length of the No. 1 belt conveyor (1,000 feet) and the No. 2 belt conveyor (300 feet). Float coal dust had accumulated in the No. 1 entry return air course from 400 inby the main fan to the one right coal producing section. This is a violation of 30 C.F.R. § 75.400.

b. This constitutes high negligence. A very large area was affected by these accumulations and the operator is charged with keeping the area as clean as possible. Accumulations are difficult to control at the belt.

2a. Twelve bottom rollers were missing and twenty top and bottom rollers were frozen in violation of 30 C.F.R. § 75.1403-5.

b. This condition constitutes moderate negligence as the equipment in question had been placed there only thirty days before.

3a. The 250 volt direct current feeder wire was in contact with combustible materials in three locations in violation of 30 C.F.R. § 75.516.

b. This constitutes high negligence particularly when coupled with the following violation as the operator must take extra care to insure that live wires are not in contact with combustibles.

4a. The 250 volt direct current feeder wire outer jacket was damaged in three areas that exposed the power wires in violation of 30 C.F.R. § 75.517.

b. This constitutes high negligence when coupled with the prior violation as the operator must take extra care to keep energized cables away from combustibles particularly where the inner power wires are exposed.

5a. The deluge type water fire suppression system provided for the No. 2 belt conveyor head was not being maintained in an operative condition as seven water sprays were broken off and only 37 feet of the fire resistent belt was protected instead of 50 feet as the law requires. This is a violation of 30 C.F.R. § 75.1101.

b. The operator was moderately negligent as most of the sprays were operative and most of the belt was adequately protected.

6a. Overload and short circuit protection was not provided for the No. 2 belt conveyor head. The fuse nip was being bypassed and the cable was connected directly onto the 250 volt direct current feeder wire. No further stipulation has been agreed to as to this particular citation. The parties are conducting further investigation to determine the extent of this violation.

7a. 100 feet of the No. 2 belt conveyor flight was not provided with water lines and a fire hose outlets. This is a violation of 30 C.F.R. 75.1100-2b.

b. The operator was moderately negligent. The belt had been moved during the night and the lines were not yet adequately extended although the belt was in operation.

8a. The probability of occurrence in each of the above conditions, when taken together, creates an imminent danger.

b. The possible occurrences from these conditions include fire, smoke or explosion.

c. These conditions should have been detected through either electrical or onshift examinations.

d. An imminent danger existed as the conditions or practices observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the affected area of the coal mine before the dangerous condition was eliminated.

e. There were eight employees on the working section affected by this violation.

Citation No. 53385

1. The coupling between the motor and speed reducer was not guarded to prevent a person from coming in contact with moving parts. This is a violation of 30 C.F.R. § 75.1722-A.

2. This constitutes low negligence as the coupling was provided with a factory guard.

3. There is a moderate probability of occurrence as men do travel in the area affected by this citation.

4. The probable occurrence from this condition is pinching or loss of limbs.

5. One employee would be affected by this condition.

Citation No. 53386

1. The conveyor tail pulley on the belt conveyor flight was not guarded to prevent a person from being caught between the belt and the pulley. This is a violation of 30 C.F.R. § 75.1722-B.

2. This constitutes low negligence as a factory guard was provided but the guard was two inches above the mine floor to allow for cleaning of the tail pulley.

3. There is a moderate probability of occurrence as men do travel in this area.

4. The possible occurrence from this condition is pinching or loss of limbs.

5. One employee would be affected by this condition.

Citation No. 53387

1. The drive sprocket chain on the No. 2 belt conveyor drive was not guarded in violation of 30 C.F.R. § 75.1722-A.

2. This constitutes low negligence as a factory guard was supplied on three sides. The only possible contact would be by lying down and reaching in from the opposite side.

3. The probability of occurrence is moderate as men were working in the area of the drive sprocket.

4. The possible occurrence is pinching or loss of limbs.

5. One employee would be affected by this condition.

Citation No. 53388

1. The sequence and slippage switch provided for the No. 2 belt conveyor drive was not frame grounded to protect a person in the event the frame would become energized. This is a violation of 30 C.F.R. § 75.703.

2. This constitutes moderate negligence as the weekly examination had been conducted and should have noted this condition.

3. There is a moderate probability of occurrence as the frame was not energized.

4. The possible occurrence from this condition is electrocution.

5. One employee would be affected.

Citation No. 53389

1. The 250 volt direct current power cable entering the frame of the remote control switch on the No. 2 belt conveyor head was not provided with a proper fitting in violation of 30 C.F.R. § 75.515.

2. This constitutes low negligence as the operator considered this to be an armored cable with built-in protection not requiring a fitting within the meaning of 30 C.F.R. § 75.515.

3. There is a low probability of occurrence as the cable did have built-in protection and was in good shape.

4. The possible occurrence from this condition is electrical shock.

5. One employee would be affected by this condition.

Citation No. 53390

1. The drive chain on the chain conveyor being used on the one right section was not guarded to prevent a person from coming in contact with moving parts. This is a violation of 30 C.F.R. § 75.1722-A.

2. There is low negligence in this case as a factory guard was provided.

3. There is a moderate probability of occurrence as men were working in this area.

4. The probable occurrence is pinching or loss of limbs.

5. One person would be affected by this condition.

Citation No. 53393

1. The mining machine being used inby the last open crosscut was not maintained in permissible condition. A cable roller was damaged exposing bare metal to the trailing cable. Also, the front headlight was not securely bolted to the frame. This is a violation of 30 C.F.R. § 75.503.

2. The operator was moderately negligence as these conditions should have been observed during the weekly electrical examination. The fact that more than one problem existed with this equipment indicates that the examination was not adequately performed.

3. It is improbable that an accident would occur as no methane had ever been found in this mine.

4. The possible occurrence from this condition is fire or smoke inhalation.

5. Eight employees were on the working section affected by this citation.

Citation No. 53394

1. Loose coal and coal dust ranging from 1 to 3 inches had accumulated on the frame of the miner in violation of 30 C.F.R. § 75.400.

2. This constitutes moderate negligence. The miner is regularly cleaned and accumulations gather through the course of normal mining operations.

3. This constitutes moderate probability since the roller was damaged and the headlight was not securely bolted on the same piece of equipment.

4. The possible occurrence from this condition is a fire.

5. Eight employees were on the working section affected by this citation.

Citation No. 53395

1. The trailing cable provided for the loading machine being used inby the last open crosscut contained three permanent splices exposing inner power conductors in violation of 30 C.F.R. § 75.604B.

2. The operator was moderately negligent as this should have been observed during the weekly electrical examination.

3. There is a moderate probability of occurrence as people work in this area and handle this equipment.

4. The possible occurrence from this condition is a fire or electrical shock.

5. One person would be affected by this condition.

Citation No. 53396

1. The trailing cable provided for the mining machine being used inby the last open crosscut contained two damaged permanent splices which exposed the inner power conductors in violation of 30 C.F.R. § 75.604-B

2. This constitutes moderate negligence as it should have been detected during the weekly examination.

3. There is a moderate probability of occurrence as men work in the area and handle this equipment.

4. The possible occurrence from this condition is shock or fire.

5. One employee would be affected by this condition.

Citation No. 53397

1. The automatic fire sensor system provided for the No. 1 & 2 underground belt conveyor flights was not maintained in an operative condition as the sensor cable was broken in two about 50 feet inby the belt entry portal. This is a violation of 30 C.F.R. § 75.1103-4.

2. This condition constitutes low negligence. The cable was nicked by a small rock and the sensor alarm went off. The men were preparing to repair the nick when the citation was written. This was not within control of the operator.

3. There is a low probability of occurrence. The condition existed for a very short time and men were monitoring the area at the time the citation was written.

4. The possible occurrence from this condition is a belt fire.

5. Eight employees were on the working section affected by this condition.

Citation No. 53398

1. The guard provided for the No. 1 belt head drive rollers was damaged and a person could become caught between the belt and drive rollers. This is a violation of 30 C.F.R. § 77.400C.

2. This constitutes low negligence. The belt head was protected with a factory guard which was designed for this head and properly in place.

3. There is a moderate probability of occurrence. However, the top of the belt is six feet high and it is unlikely that contact would occur.

4. The accident which could occur from this condition is the loss of limbs.

5. One employee would be affected by this condition.

Docket No. WEVA 79-247 - Citation No. 53399

1. The number 1 underground belt conveyor head was not provided with a slippage switch in violation of 30 C.F.R. § 75.1102.

2. The operator's negligence was low as the belt conveyor was being repaired because of a damaged bearing and the belt was without a switch for approximately one hour.

3. There is a low probability because no ignition source existed in the area. The belt was not moving and no methane had ever been found in this mine.

4. The possible occurrence from this condition is fire or ignition.

5. There were ten employees on the working section affected by this citation.

Citation No. 55096

1. The feeder cable provided for the No. 2 belt conveyor head was of an incorrect size in that the belt head was provided with a size 4 cable instead of a size 3 that is correct for the 25 horse power motor. This is a violation of 30 C.F.R. § 75.513.

2. The operator was moderately negligent as this should have been detected during the weekly examination.

3. The probability of occurrence is low. Although it is incorrect to use a number 3 wire, the operator was using two number 3 wires yielding greater than the requirement for overload protection. Therefore, it is unlikely that an accident would occur.

4. The possible occurrence due to this condition is a fire due to an overload.

5. Three employees were on the working section affected by this citation.

Citation No. 55097

1. Overload and short circuit protection were not provided for the chain conveyor section being used as a dumping point. This unit was provided with 250 volt direct current. This is a violation of 30 C.F.R. § 75.518. The operator should have known from its preshift and onshift examination of this violation. Thus, this constitutes high negligence.

2. There is a moderate probability of occurrence as the chain conveyor was otherwise in good condition.

3. The possible injury which could occur is shock or an ignition.

4. Depending on the occurrence, one to eight people would be affected.

Citation No. 55098

1. The No. 2 belt conveyor flight was not provided with a remote control circuit for the entire length of 350 feet. Thus, there is no automatic way to stop or start the belt conveyor in violation of 30 C.F.R. § 75.520.

2. The operator was moderately negligent as this should have been detected on the weekly examination.

3. There is a high probability of occurrence because this could [be] turned off only at the belt head. Thus, someone 350 feet from the belt head could be affected by this violation and have no way to turn off the belt conveyor.

4. The hazard caused by this condition are smoke inhalation, fire or loss of limbs.

5. Depending on what occurred, one to eight people would be affected.

Citation No. 55099

1. The outer jacket of the trailing cable provided for the loading machine used on the one right section was damaged in fifteen places that exposed the inner power conductors in violation of 30 C.F.R. § 75.517.

2. The operator was moderately negligent as this should have been noted on the preshift or weekly examination.

3. There is a moderate probability of occurrence as the inner insulation was intact not exposing the wires themselves.

4. The possible occurrence from this violation is electrocution.

5. One employee would be affected.

Citation No. 55100

1. The drive chain on the loading machine was not guarded to prevent a person from coming in contact with moving parts. This is a violation of 30 C.F.R. § 75.1722.

2. This violation constitutes low negligence although it should have been detected on the onshift examination. The guard was inadvertently torn off during the working shift without knowledge of the operator.

3. There is a low probability of occurrence as the guard was missing on the side opposite from which the operator worked.

4. The possible occurrence from this condition is loss of limbs.

5. One employee would be affected by this violation.

Citation No. 55101

1. The coupling between the motor and pump on the dewatering pump was not guarded to prevent a person from coming in contact with moving parts. This is a violation of 30 C.F.R. § 75.1722A.

2. The operator was moderately negligent as this should have been detected during the onshift examination.

3. There is a low probability of occurrence as the pump was not energized and there were no moving parts at the time the citation was issued.

4. The possible injury which could occur is a loss of limbs.

5. One employee would be affected by this condition.

Docket No. WEVA 79-302 - Citation No. 55104

1. The loading machine serial number 8565 being used inby the last open crosscut on the one right section was not being maintained in permissible condition in that a hole had been burned one-half inch into the flame path of the plane flange joint of the right side of the tram motor in violation of 30 C.F.R. § 75.503.

2. This violation constitutes low negligence as it is difficult to detect an opening this small. However, it could have been seen on the weekly electrical examination.

3. There is a very low probability of occurrence as no methane has ever been found in this mine.

4. Eight (8) employees were on the working section where this violation occurred.

5. The probable occurrence is smoke inhalation or fire.

Citation No. 55669

1. The slippage switch cover was missing and the energized power leads were exposed on the No. 2 main belt conveyor head in violation of 30 C.F.R. § 75.520.

2. The operator's negligence was low as the No. 2 belt was temporarily out of service during repairs. No power was turned on although the belt could have been energized. This could have been detected in the required electrical examination.

3. There is a low probability of electrocution occurring as the No. 2 belt was temporarily out of service for repairs.

4. The possible accident which could occur is electrocution.

5. One (1) employee would be affected.

Citation No. 55670

1. No guard was provided for the coupling connecting the speed reducer to the motor on the No. 2 belt head in order to prevent a person or persons from coming in contact with moving parts in violation of 30 C.F.R. § 75.1722-A.

2. The operator was moderately negligent as this condition should have been detected during the onshift exam.

3. There is a low probability of occurrence as not many people travel in this area.

4. The possible injury which could occur is the loss of limb.

5. One (1) employee would be affected.

Citation No. 55671

1. The water type deluge fire suppression system provided for the No. 2 underground belt conveyor head was not being maintained in an operative condition in that four of the water sprays were broken off and the lever that activates the system was blocked out so the system could not operate in violation of 30 C.F.R. § 75.1101-1(a).

2. There is a moderate probability of occurrence as the moving parts on the belt could cause an ignition. However, no methane has ever been found in this mine and the area was rockdusted.

3. The operator was moderately negligent as this condition should have been seen during the onshift examination.

4. The probable occurrence from this condition is fire or smoke inhalation.

5. Ten (10) miners were on the working section where this violation occurred.

Citation No. 55673

1. A feeder cable was not being hung on insulators for a distance of 75 feet on the No. 1 right section chain conveyor head to prevent contact with combustible materials. This violates 30 C.F.R. § 75.516.

2. The operator was moderately negligent as the condition should have been noted during the weekly electrical examination.

3. There is a low probability of occurrence as the feeder cable itself was well insulated with no exposed parts.

4. The possible accident which could occur is a fire.

5. Ten (10) employees were on the working section affected by this citation.

Citation No. 55674

1. The frame ground for the 250 volt direct current chain conveyor head was not securely clamped to the main return wire at the nipping station as proper connections were not used to insure mechanical and electrical efficiency in violation of 30 C.F.R. § 75.514.

2. The operator was moderately negligent as this should have been seen during the weekly electrical examination.

3. There was a moderate probability of occurrence as it was necessary for people to handle this wire from time to time.

4. The possible injury which could occur is shock or electrocution.

5. One (1) employee would be affected.

Citation No. 55675

1. A guard was not provided for the No. 2 main belt tail piece to prevent contact with moving parts in violation of 30 C.F.R. § 75.1722B.

2. There is a low negligence as the guard was only temporarily removed for cleaning and was, in fact, provided by the operator.

3. There is a low probability of occurrence as the No. 2 belt was temporarily out of service.

4. The possible injury is a loss of limb.

5. One employee would be affected.

Citation No. 55676

1. The No. 2 underground belt conveyor entry was not separated from the intake entry with permanent sealed stoppings at three points. This violates 30 C.F.R. § 75.326.

2. The operator was moderatley negligent as this should have been detected during the onshift examination.

3. There is a moderate probability of occurrence. If a fire would occur on the belt conveyor, the smoke could go directly to the intake air entry for the one right section.

4. There were ten (10) employees on the working section affected by this citation.

5. The possible injury is smoke inhalation.

Citation No. 55677

1. The methane monitor being used on the joy loader was not maintained in a permissible manner. When the energized test switch was tried, the test switch would not deenergize the machine in violation of 30 C.F.R. § 75.313-1.

2. The operator was moderately negligent as this should have been detected at the beginning of the shift before the loader was used.

3. There is a low probability of occurrence as no methane has ever been found in this mine.

4. The probable accident which could occur is a fire.

5. Ten (10) employees were on the working section affected by this citation.

Citation No. 55678

1. Only 7,875 cubic feet a minute of air was reaching the last open crosscut between the No. 1 and No. 2 rooms in violation of 30 C.F.R. § 75.301.

2. There is low negligence as two mine foremen took readings at the beginning of the shift and the ventilation was all right. The reduction occurred between their reading and the time the inspector took his reading.

3. There is a moderate probability of occurrence as it is necessary to maintain sufficient air in order to guarantee that the miners are not subjected to too much coal dust.

4. The possible occurrence from this violation is smoke or dust inhalation.

5. Ten (10) employeees were on the working section affected by this citation.

Citation No. 55679

1. Loose coal and coal dust had accumulated along the shuttle car roadway and the ribs and floor of the No. 1 through 6 rooms

and connecting crosscuts for a distance of 90 feet from the working faces. The accumulations ranged in depth from 0 to 12 inches. This is a violation of 30 C.F.R. § 75.400.

2. The operator was moderately negligent as he does have a cleanup plan requiring him to control the accumulations. However, the operator does clean these places on a regular basis and it is difficult to control.

3. There is a moderate possibility of occurrence as moving equipment goes through this area which could possibly cause a spark leading to an ignition.

4. The possible injury which could occur is smoke inhalation.

5. Ten employees were on the working section affected by this order.

Citation No. 55682

1. The joy loader was not maintained in permissible condition in that there was more than .005 inches in the plane flange joint of the right and left tram motors and contractor box in violation of 30 C.F.R. § 75.503.

2. The operator's negligence is low as this is a difficult violation to detect. However, it should have been seen during the weekly electrical examination.

3. It is improbable that any accident would occur as no methane has ever been found in this mine and this regulation is designed to prevent methane accumulations in the boxes protected by the joints.

4. The possible injury is a fire.

5. Ten employees were on the working section affected by this violation.

Citation No. 55683

1. The trailing cable provided for the loading machine contained three permanent splices as the outer jacket was damaged so that it would not exclude moisture in violation of 30 C.F.R. § 75.604-B.

2. The operator was moderately negligent as this should have been detected during the weekly examination.

3. There was a low probability of occurrence as the inner insulation was intact.

4. The possible injury which could occur is electrocution.

5. One employee would be affected by this violation.

Citation No. 55684

1. The outer jacket of the trailing cable on the loading machine was damaged in six areas and exposed the inner power conductor in violation of 30 C.F.R. § 75.517.

2. The operator was moderately negligent as this condition should have been detected during the weekly electrical examination.

3. There is a low probability of occurrence as the inner insulation was fully intact.

4. The possible injury which could occur is electrocution or shock.

5. One employee would be affected by this condition.

Citation No. 55685

1. The 250 volt direct current feeder wires were not substantially bushed with insulated bushings where they entered the metal frames of the main breaker box. This violates 30 C.F.R. § 75.515.

2. The operator was moderately negligent as this condition should have been detected during the weekly electrical examination.

3. There is a low probability of occurrence as the feeder wire itself was in good condition and not likely to cause a shock.

4. The possible injury which could occur is electrocution or shock.

5. One employee would be affected by this violation.

Citation No. 55686

1. The trailing cable provided for the cutting machine contained three permanent splices that were damaged and would not exclude moisture. This violates 30 C.F.R. 75.604B.

2. The operator was moderately negligent as this condition should have been detected during the weekly electrical examination or an onshift examination.

3. There is a moderate probability of occurrence as the fact that the cable was damaged raises the probability. The splices were however in good condition.

4. The possible injury which could occur is shock or smoke inhalation from a fire.

5. One employee would be affected by this violation.

Citation No. 55687

1. The mining machine was not maintained in permissible condition as the front headlight was missing and the power leader for the headlight was exposed in violation of 30 C.F.R. § 75.503.

2. There is low negligence although this could have been detected in the weekly examination.

3. There is low probability of occurrence as no methane has been detected in this mine.

4. The possible occurrence from this violation is an explosion.

5. Ten employees were on the working section affected by this citation.

Citation No. 55688

1. The outer jacket of the trailing cable on the cutting machine was damaged and the inner power conductors were exposed in violation of 30 C.F.R. § 75.517.

2. The operator was moderately negligent as this condition should have been noted during the weekly electrical or the onshift examination.

3. There is a moderate probability of occurrence as the inner conductors were insulated.

4. The possible injury which could occur is electrical shock.

5. One employee would be affected by this condition.

Order No. 55689

1. A shuttle car was not maintained in a safe operating condition as the brakes were inoperative because of leakage from the brake liner. The shuttle car was being operated without brakes on a graded area. This violates 30 C.F.R. § 75.1725-A.

2. This condition constitutes an imminent danger. The condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the affected area of the mine before the dangerous condition was eliminated.

3. The probability of occurrence is imminent as the shuttle car was being operated when the citation was issued.

4. The operator's negligence was high as the condition was known to the operator and had been reported.

5. A collision could happen from this condition existing.

6. One employee would be affected by the existence of this condition.

Citation No. 55690

1. The shuttle car was not maintained in permissible condition as the cable roller was damaged and bare metal was visible and exposed to the cable. The headlight was not securely bolted to the frame. This violates 30 C.F.R. § 75.503.

2. The operator's negligence was low. However, this could have been detected during weekly examination. It was however difficult to detect.

3. There is a low probability of occurrence as no methane has ever been found in this mine.

4. The possible occurrence from this condition is an explosion or fire.

5. Ten employees were on the section affected by this violation.

Docket No. WEVA 79-303 - Citation No. 55691

1. The frame ground of the trailing cable was not connected to the frame of the roof bolter in violation of 30 C.F.R. § 75.503.

2. The operator was moderately negligent as work was being done in the area and the electrical examination should have revealed this condition.

3. There is a low probability of occurrence as the frame was not energized and diode grounding was provided.

4. The possible accident which could occur is electrocution or shock.

5. One person would be affected by this violation.

Citation No. 55692

1. The shuttle car being used inby the last open crosscut was not in permissible condition in violation of 30 C.F.R. § 75.503. The plane flange joint of the panel box had an opening greater than .005 inches.

2. The operator's negligence was low as this was difficult to see.

3. The probability of occurrence is low as no methane has ever been found in this mine and the standard is designed to protect against methane explosions.

4. The possible accident which could occur is a methane explosion.

5. Ten employees were on the working section affected by this violation.

Order No. 55693

1. The number 1 through 5 entries and the number 6 room had been advanced to between 100 feet and 200 feet from an adjacent abandoned mine that could not be inspected. The abandoned mine could contain dangerous accumulations of water or gases and no test bore holes were drilled at least 20 feet in advance of the faces of each entry of the No. 5 room and also no test bore holes were drilled at the back ribs more than 8 feet apart in these entries. This is a violation of 30 C.F.R. § 75.1701 and an imminent danger.

2. An imminent danger existed as the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the affected area of the coal mine before the dangerous condition was eliminated.

3. The probability of a methane accumulation in an abandoned mine is great. This is why the probability of occurrence is imminent.

4. The operator was moderately negligent. There is some question as to the exact distances which had been driven in each of the entries in the No. 6 room. In some instances, the area was close to 200 feet from the adjacent abandoned mine. The cited standard does not require bore holes be drilled when mining is more than 200 feet from the adjacent area.

5. The possible injury which could occur is drowning or gas inhalation.

6. Ten employees were in the working section affected by this order.

Docket No. WEVA 79-390 - Order No. 55668

1. Loose coal, coal dust and float coal dust were found to have accumulated in the No. 1 underground belt conveyor entry for a distance of 1,000 feet. The accumulation ranged in depth from 0 to 3 inches and the float dust was black in color. The accumulation was intermittent along this 1,000 foot area. This violates 30 C.F.R. § 75.400.

2. The operator was moderately negligent as accumulations are difficult to control at the conveyor belt.

3. This violation constitutes an unwarrantable failure as the operator knew or should have known of the condition because it was visible and should have been detected during daily onshift examinations.

4. The possible injury to be expected from this condition is an explosion, smoke inhalation or burns.

5. An injury of the type stated above is possible. However, no methane has ever been found in this mine.

6. Ten employees work on the working section affected by this order.

Order No. 55672

1. The operator violated 30 C.F.R. § 75.518 in that no overload or short circuit protection was provided on the power cable from the feeder wire to the chain. This condition existed at the conveyor motor. Also, there was no fuse at the nip or circuit breaker.

2. The above cited condition constitutes an unwarrantable failure as the operator knew or should have known of this condition because it was visible and should have been detected during the weekly electrical examination.

3. The possible injury that could occur from this condition is electrocution or a fire.

4. An occurrence is possible as the power cable was energized.

5. Ten employees were at work on the working section affected by this order.

Order No. 55681

1. The operator violated 30 C.F.R. § 75.603 by allowing a trailing cable to exist with three temporary splices.

2. This condition constitutes an unwarrantable failure as the operator knew or should have known that it existed as it was visible and should have been detected during the weekly electrical examination.

3. The possible injury from this condition is electrocution.

4. An accident of the type described above is probable because men were working in the area and could have come in contact with the splices.

5. Ten employees were on the working section affected by this order.

Docket No. WEVA 79-391 - Citation No. 55563

1. The operator violated 30 C.F.R. § 75.1103-1(a)(b) by failing to provide an automatic warning or fire sensors on two belts.

2. Ten employees were on the working section affected by this order.

3. There is a low probability of any accident happening from this condition. A fire could spread without warning.

4. The operator was moderately negligent because he was not informed by the miners on this section of the failure of the automatic warning device.

Citation No. 55564

1. The operator violated 30 C.F.R. § 75.514 as no suitable connectors were supplied on the cable for the conveyor motor where it was spliced onto the main power feeder wire.

2. Two employees were affected by this condition.

3. The possible injury occurring from this condition is shock.

4. There is a low probability of occurrence because the main power feeder wire was well insulated thus lowering the possibility of shock.

5. The operator was moderately negligent as a certified electrician had done this work and the operator, reasonably, relied on him to do it correctly.

Citation No. 55565

1. The operator violated 30 C.F.R. § 75.518 as no overload or short circuit protection was provided on the conveyor cable. The cable was twisted on the power feeder wires and no circuit breakers were provided.

2. The operator was moderately negligent as a certified electrician was assigned to do the job and the operator, reasonably, relied on him to do it correctly.

3. Ten employees were working on the section affected by this condition.

4. The possible injury resulting from this condition is fire or shock.

5. There is a low probability of occurrence as the area was dry.

Citation No. 55567

1. The operator violated 30 C.F.R. § 75.701 by failing to provide framed ground protection for the conveyor belt drive unit.

2. This condition constitutes low negligence.

3. One employee would be affected by this condition.

4. The possible injury which could occur is shock.

5. There is a low probability of occurrence as the section was dry and not a good conductor.

Citation No. 55570

1. The operator violated 30 C.F.R. § 75.518 as no short circuit or overload protection was provided on the cable for the pump.

2. There is no probability of occurrence as the pump was not energized.

3. The operator was only moderately negligent as he had deenergized the pump.

4. No hazard was created by the failure to provide short circuit protection.

5. No employees would be affected by this condition.

Citation No. 55571

1. The operator violated 30 C.F.R. § 75.903 by failing to provide a disconnect device at the distribution center. A person could not visibly see if the power was disconnected and could thus cause electrical shock to another individual.

2. This situation constitutes low negligence as the operator believed it had provided adequate disconnect devices at the distribution center.

3. The probability of occurrence is low as very few people have access to the distribution center and these people are the same people who are aware of whether or not the power is disconnected.

4. The possible occurrence from this condition is electrical shock.

5. One employee would be affected by this condition.

Citation No. 55572

1. The operator violated 30 C.F.R. § 75.503. The coal cutting machine was not in permissible condition. The headlight conduit was cut and split in three places, the cable guide wire going into the metal frame and methane detector conduit was cut in two places.

2. The operator was moderately negligent because it cannot be determined how long the impermissible conditions had existed. It is difficult to detect the headlight conduit's condition.

3. There is a moderate probability of occurrence. However, no methane has ever been found at this mine.

4. Ten employees were working on the section affected by this citation.

5. The possible injury which could occur is electrical shock.

Citation No. 55573

1. The operator violated 30 C.F.R. § 75.603 as the trailing cable to the roof bolter contained inadequate splices.

2. This condition constitutes low negligence by the operator as the splices could have come loose during operation of the bolter.

3. There is very low probability of occurrence as the section was dry and there were no conductors.

4. The possible injury which could occur is shock.

5. One employee would be affected by this condition.

Citation No. 55574

1. The operator violated 30 C.F.R. § 75.603. The shuttle was not in permissible condition as two lock washers were missing, the conduit was split for ten inches on the pump motor and the front headlight was not secured to the frame.

2. The operator was moderately negligent as these conditions were difficult to detect and would have occurred since the last weekly electrical examination.

3. The possible injury occurring from this condition is electrical shock.

4. There is a low probability of occurrence as it is unlikely that anyone would be touching these areas. Also, the area was dry.

5. One employee would be affected by these conditions.

Citation No. 55576

1. The operator violated 30 C.F.R. § 75.516 by failing to provide adequate installation for support of the power wire for a distance of 100 feet.

2. The operator was not negligent in this instance as the feeder line was temporary and placed on well insulated J hooks.

3. There is a low probability of occurrence as the temporary insulation was in good condition.

4. Fire or shock could occur.

5. Ten employees were on the section affected by this order.

Citation No. 55577

1. The operator violated 30 C.F.R. § 75.515. No proper fitting was supplied on the main power cable for the 250 volt direct current motor to the conveyor drive unit.

2. The operator was not negligent. The equipment supplied by the operator was in factory condition.

3. There is a low probability of occurrence as the main power cable was well insulated.

4. The possible injury which could occur is electrical shock.

5. One employee would be affected by this condition.

Citation No. 55578

1. The operator violated 30 C.F.R. § 75.515 by failing to supply a proper fitting where the cable entered the metal frame of the stop/start switch.

2. An injury is improbable as the cable passes through plastic casing and does not touch the metal. Also, this is an AC current cable thus not as dangerous as a DC current and lowering the probability.

3. This condition constitutes low negligence as the operator believed that the fact that the cable passed through plastic casing eliminated a need for a fitting.

4. The possible injury which could occur is fire.

5. One employee would be affected by this condition.

Citation No. 55579

1. The operator violated 30 C.F.R. § 75.701-3-b by failing to frame ground the power motor.

2. The operator was moderately negligent.

3. There was a moderate probability of occurrence as the section was dry and all of the cables on the power motor were insulated and unexposed.

4. The possible injury which could occur is electrical shock.

5. One employee would be affected by occurrence.

Citation No. 55580

1. The operator violated 30 C.F.R. § 75.1101 as no water was present when the deluge water sprays were activated.

2. The operator was not negligent in this case. The condition existed because of frozen pipes which were being replaced at the time. This condition was not within control of the operator.

3. The possible occurrence from this condition is fire.

4. There is a moderate probability of occurrence as the condition was being corrected at the time the citation was issued. The condition existed for a very short time.

5. Ten employees were on the working section affected by this citation.

Docket No. WEVA 79-392 - Order No. 53391

1. The operator violated 30 C.F.R. § 75.316. The ventilation methane and dust control plan was not complied with. The third crosscut outby the face did not have a permanent stopping and three other stoppings were damaged. All conditions were between the intake and return. There was missing and damaged brattice.

2. There is a low probability of occurrence. No methane has ever been found in this mine.

3. The operator knew or should have known of this condition and thus it constitutes an unwarrantable failure.

4. The operator was moderately negligent as the material was there which was to be used to erect the permanent stopping in the crosscut. The operator had just begun work on this stopping.

5. Eight employees were on the section affected by this order.

6. The possible injury from this condition is dust or smoke inhalation.

Order No. 53392

1. The operator violated 30 C.F.R. § 75.301 as no air movement could be detected in the last open crosscut between the intake and return. Thus, there was inadequate ventilation to the faces.

2. This condition constitutes an unwarrantable failure to comply as the operator knew or should have known that this condition existed. The foreman was present in the area which is subject to preshift and onshift examinations.

3. The operator's negligence was high for the same reasons as stated above in stipulation No. 2.

4. The probability of occurrence is high as men were producing coal at the time and had inadequate ventilation to their working place.

5. Eight men were in the working section affected by this order.

6. The possible occurrence from this condition is dust or smoke inhalation.

7. The probabability of occurrence is only moderate. The standard is designed to prevent methane accumulations. However, no methane has been recorded at this mine.

Docket No. WEVA 79-458 - Order No. 55566

1. Accumulations of loose coal and coal dust existed for one to four inches under and along the No. 1 right belt conveyor and crosscuts right and left for the entire length. Water and rock dust were not provided for fire fighting. The deluge water spray system was inoperative on the No. 1 belt conveyor as no water was available and fourteen sprays were missing or broken.

2. Ten employees were on the working section affected by this order.

3. This condition indicates a high degree of negligence by the operator because the conditions were obvious and, should have been detected during the onshift examinations.

4. There is a moderate probability of occurrence. Although the accumulation existed over a large area of the mine, it was along the belt conveyor and thus very difficult to control.

5. The possible injury which could occur from this condition is an ignition.

Order No. 55568

1. Coal dust, float coal dust and loose coal dust were accumulated in the active workings on the last open crosscut in the No. 1 through 5 entries for 0 to 10 inches.

2. Ten employees were on the working section affected by this order.

3. This condition indicates a high degree of negligence. However, it should be considered that the operator was just beginning mining in a new area and simply had not yet begun to clean the accumulations.

4. The possible injury which could occur is an ignition or smoke inhalation.

5. There is a moderate probability of occurrence as the mine in this area was damp.

Order No. 55569

1. Loose coal and coal dust had accumulated for 0 to 6 inches along the No. 1 belt conveyor and its crosscuts right and left for the entire length. This violates 30 C.F.R. § 75.400.

2. This condition indicates moderate negligence by the operator.

3. There is a moderate probability of occurrence as the condition was wet thus lowering the possibility of an ignition.

4. Ten employees were on the working section affected by this order.

5. The possible injury which could occur is an ignition.

Docket No. WEVA 79-459 - Citation No. 55562 and Order No. 55575

1. The No. 3 intake escapeway was not maintained in a safe condition as water had accumulated 6 to 14 inches in depth 200 feet inby the entry for a distance of 80 feet and five crosscuts inby the right belt conveyor drive unit for 75 feet. This violates 30 C.F.R. § 75.1704.

2. The operator was issued a 104b order for this condition and did not correct it within the time set for abatement or a reasonable time thereafter.

3. This condition indicates a high degree of negligence as it should have been corrected within a reasonable time.

4. There is a low probability of occurrence. The escapeway has high clearance and the amount of water in the escapeway would not seriously impede egress. Also, two other escapeways were safe and travelable.

5. Ten employees were working on the section affected by this order.

6. The hazard existing from this condition is a slip and fall possibility.

Docket No. WEVA 80-37 - Citation No. 9908524

1. The operator violated 30 C.F.R. § 70.220(a)(3) as required respirable dust samples were not collected every production shift for the position of shot firer.

2. The operator was not negligent. The mine was temporarily abandoned and the operator simply failed to file a status change. Thus, the citation was issued but the shot fire was not working.

3. There is no probability of occurrence as the shot fire was not employed.

4. The possible hazard which could occur were respirable dust samples not submitted is inhalation. However, in this case, no hazard existed.

5. No employee was affected by this condition.

Citation No. 59941

1. The operator violated 30 C.F.R. § 75.1102. The slippage switches for the No. 1 belt conveyor were inoperative and would not control the belt.

2. Ten employees were on the working section affected by the citation.

3. This condition indicates moderate negligence. The citation was issued in January and the slippage switches had frozen from the weather conditions. This was not within control of the operator.

4. The possible hazard caused by this condition is an ignition.

5. There is a low probability of occurrence. The area was damp and cold thus lowering the possibility of an ignition.

Docket No. HOPE 79-3-P - Notice No. 7-0095, Notice No. 7-0096, Notice No. 7-0097, Notice No. 7-0098, Notice No. 7-0099

1. Cables or canopies were not provided for the following equipment:

   a. roof bolting machine
   b. coal cutting machine
   c. loading machine
   d. standard drive shuttle car
   e. off-standard drive shuttle car

   Each of these constitutes a violation of 30 C.F.R. § 75.1710-1(a)(4).

2. In each of these situations the operator was moderately negligent. The coal bed had an average height of 45 inches and the operator should have known that cabs or canopies were required in this area.

3. There is no probability of occurrence at the time the citation was issued. At that time, this area of the mine had been abandoned but the abandonment had not been reported. Also, the area had strong roof.

4. The possible occurrence from these conditions is crushing.

5. One employee would be affected by failure to provide a cab or canopy at each location.

Citation No. 43361

1. The 250 volt direct current dewatering pump was not provided with the stop and start switch of safe design. A fuse nip was used for this purpose. This is a violation of 30 C.F.R. § 75.520.

2. The operator was moderately negligent as this should have been detected during the weekly examination.

3. There is a low probability of occurrence as the pump was not operational and there was no power going to it.

4. The possible occurrence from this condition is shock or fire.

5. One employee would be affected.

Citation No. 43362

1. The 250 volt direct current feeder wire was lying on the mine floor and was not installed on insulators at two locations. This is a violation of 30 C.F.R. § 75.516.

2. There is a moderate probability of occurrence as this was a wet area but the cable was not otherwise damaged.

3. The operator was moderately negligent as this should have been detected during the weekly examination.

4. The possible occurrence from this condition is a fire or ignition.

5. One employee would be affected.

Citation No. 43363

1. The program approved by the Secretary for the searching of miners for smoking materials was not being adequately maintained. A cigarette butt was observed on the mine floor about 100 feet inby the No. 2 portal in the No. 1 conveyor belt entry. This is a violation of 30 C.F.R. § 75.1702.

2. This constitutes low negligence. Only one cigarette butt was found. It is quite difficult for the operator to check every person at all times for cigarettes. Also, there is a possibility that this cigarette butt could have been carried into the mine on the belt conveyor from the outside.

3. There is a low probability of occurrence. Even though there is float coal dust, it is unknown whether this miner was smoking inside or outside of the mine.

4. The possible occurrence from this condition is a mine fire.

5. One or more employees up to nine could be affected by this condition.

Citation No. 43365

1. The roof was inadequately supported at one location where it was cracked and drummy and broke away from the permanent supports. This is a violation of 30 C.F.R. § 75.200, the approved roof control plan.

2. This constitutes low negligence as this condition was out of the operator's control and had been adequately supported in the beginning.

3. There is a moderate probability of occurrence as one man does work in this area.

4. The possible occurrence from this condition is a roof fall.

5. One employee was in the area of this condition.

Citation No. 43366

1. The automatic fire sensor and warning device systems for the No. 1 and 2 main belt conveyors were not installed properly. There was only one continuous sensor line for both belt conveyors and would not provide identification of a fire within each belt flight. This is a violation of 30 C.F.R. § 75.1103-4A.

2. The operator's negligence was low. The line provided monitors nine different areas and the operator is able to detect which area is affected.

3. There is a moderate probability of occurrence as there was no ignition source in the areas subject to this citation.

4. The possible occurrence from this condition is spreading of a fire.

5. One employee works in the area of the belt affected by this citation.

Citation No. 45741

1. The approved roof control plan was not being followed in that the torque wrench provided for the roof bolting machine in use was not maintained in a workable condition. Part of the wrench socket was missing. This is a violation of 30 C.F.R. § 75.200.

2. The operator was moderately negligent. Although the operator is charged with knowledge of its roof control plan, the equipment operator had not reported this condition to management.

3. There is low probability of occurrence as the machine was not in use due to a production strike.

4. The possible occurrence from this condition is a roof fall.

5. Six employees work on the section affected by this citation but none were working at the time it was issued.

Citation No. 45742

1. Coal and coal dust had accumulation up to six inches deep along the ribs at various locations from the fifth crosscut outby the face of the No. 1 entry extending inby for a distance of about 350 feet and from the shuttle car dump inby the Nos. 2 through 7 entries at a distance of about 250 feet in violation of 30 C.F.R. § 75.400.

2. This condition constitutes high negligence as the operator failed to adequately enforce its cleanup plan.

3. There is a low probability of occurrence as no methane has ever been found in this mine and there was no ignition source.

4. The possible occurrence is an ignition or an explosion.

5. Six employees work in the area affected by this condition.

Citation No. 45744

1. Firefighting equipment provided for the belt conveyor was not adequate as the water supply was not provided. This is a violation of 30 C.F.R. § 75.1100-2B.

2. The operator's negligence was low. Due to a work stoppage, this belt was not in use and the water was turned off. However, the water supply was available.

3. There is low probability of occurrence as there is no ignition source and no methane.

4. The possible occurrence from this condition is fire.

5. One employee works in the area of the belt conveyor.

Citation No. 45745 and 104(b) Order No. 46295

1. The head roller and drive chain of the conveyor drive were not adequately guarded. The guards that were provided had partially torn in an area where miners regularly walked. This is a violation of 30 C.F.R. § 75.1722-A.

2. The operator was moderately negligent. The guards had been provided and torn away without the operator's knowledge.

3. There is a moderate probability of occurrence from this condition. However, at the time the citation was issued the belt was not in operation due to a work stoppage. Also, at that time no one was in the area.

4. The possible occurrence from this condition is loss of limbs.

5. One employee would be affected.

6. The operator did not exercise good faith in abating this condition within the time set for abatement or a reasonable time thereafter. Therefore, a 104(b) order was appropriate.

Citation No. 45746 and 104(b) Order No. 46294

1. The deluge type water spray system provided for the belt conveyor was not maintained in a usable and operative condition. The sensor line was not hooked up and a water supply was not provided. Sprays were broken and missing and the direction of the sprays was not adequate to spray the top and bottom of the top belt and the top surface of the bottom belt. This is a violation of 30 C.F.R. § 75.1100-3.

2. The operator was moderately negligent.

3. There is a low probability of occurrence as there were no ignition sources or methane in the area.

4. The possible occurrence from this condition is fire or ignition.

5. One employee works in the area of the belt.

Citation No. 45747

1. Proper fittings were not adequate at two locations where power cables entered the metal frame of the No. 2 belt conveyor drive unit control box. The fittings that were provided were too large and permitted movement of the power cables. This is a violation of 30 C.F.R. § 75.515.

2. The operator was moderately negligent. Fittings had been provided and had loosened without control of the operator.

3. There is a low probability of occurrence as the cable was intact when the citation was issued.

4. The possible occurrence from this condition is a fire or ignition.

5. One employee works in the area of the conveyor belt.

Citation No. 45748

1. Loose coal and coal dust and float coal dust had been deposited on rock dusted surfaces and had accumulated along the belt conveyor at various locations for 500 feet. The loose coal and coal dust ranged up to four inches. This is a violation of 30 C.F.R. § 75.400.

2. The operator was moderately negligent as accumulations are very difficult to control at the belt. When the citation was issued, the operator was working on the condition and not producing coal.

3. There is a moderate probability of occurrence. Although a belt has electrical parts, there was no methane in the area thus lowering the probability.

4. The possible occurrence from this condition is fire.

5. Two employees were in the area.

Citation No. 45749

1. The firefighting equipment provided for the belt conveyor was not adequate in that a water supply was not provided for the water lines. This is a violation of 30 C.F.R. § 75.1100-2.

2. The operator was moderately negligent as water had been supplied but turned off due to a work stoppage.

3. There is a low probability of occurrence as there was no ignition source, the belt was not working and no methane has been found in this mine.

4. The possible occurrence from this condition is fire or ignition.

5. One employee works in the area of the belt.

Order No. 45750

1. This order was appropriately issued under Section 107(a) of the Act as an imminent danger existed. The condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the affected area of the coal mine before the dangerous condition was eliminated.

2. The operator violated 30 C.F.R. § 75.516. An energized dead end branch line power conductor about 45 feet in length was installed on the wet mine floor.

3. This constitutes high negligence as the operator must hang energized cables and must keep them away from wet areas.

4. The operator violated 30 C.F.R. § 75.517. The outby end of the power conductor contained an exposed bare energized lead about four inches in length and two exposed ground conductors.

5. This constitutes high negligence. The operator must keep its energized wires above the mine floor, in good condition and out of water.

6. The probability of occurrence is imminent.

7. The possible occurrence from this condition is electrocution or fire.

8. One employee would be affected by electrocution. Twenty-five employees were working in the mine and could be affected if a fire occurred.

Docket No. HOPE 79-95-P

Citation No. 43367

1. The power conductor conducting 10 volt alternating current electrical power to the light installed in the shaker building entered through the metal frame of the light switch box and was not provided with a proper fitting. This is a violation of 30 C.F.R. § 77.505.

2. This constitutes moderate negligence as the operator should have detected this condition and corrected it.

3. There is a moderate probability of occurrence as the switch is used regularly.

4. The possible occurrence from this condition is an electrical shock or electrocution.

5. One employee could be affected by this condition.

Citation No. 43368

1. Quantities of loose coal and coal dust ranging from 1 to 6 inches in depth was accumulated on the floor, on the beams and on and around the electrical equipment on both levels of the shaker building. This is a violation of 30 C.F.R. § 77.1104.

2. This constitutes moderate negligence as it is very difficult to control coal accumulations in the shaker building. The coal falls off of the belts and, even a regularly maintained clean-up plan cannot keep the building clear of loose coal at all times.

3. There is a low probability of occurrence. The shaker building is located outside on the surface therefore there is no methane and the probability of occurrence is greatly reduced.

4. The possible occurrence from this condition is fire or explosion.

5. One employee would be affected.

Citation No. 43530

1. An up-to-date record was not being kept of the required monthly calibration checks of the methane monitors installed on the mining machine. This is a violation of 30 C.F.R. § 75.313-1.

2. This constitutes low negligence as there was a work stoppage and the operator had not made its monthly checks since the mine was not producing coal.

3. There is no probability of occurrence since no men were in the mine and no mining was being conducted.

4. No hazard was involved.

5. No employees were affected.

Citation No. 43531

1. A mine cleanup plan was not provided in violation of 30 C.F.R. § 75.400.

2. This constitutes moderate negligence. Due to the strike, the operator had not submitted a plan. However, he was still required to do so under the Act.

3. It is improbable that anything would occur because of the failure to supply this plan as no production was occurring and no men were in the mine.

4. No hazard was created by this violation.

5. No employees were affected.

Citation No. 43532

1. The operator did not maintain a list of all certified and qualified persons designated to perform duties under Part 75. This is a violation of 30 C.F.R. § 75.159.

2. The operator was moderately negligent as he should have provided such a list in compliance with the Act.

3. It is improbable that any accident would occur due to this purely technical violation.

4. No hazard was created by failing to supply the list.

5. No employees were affected.

Citation No. 43533

1. There were two partially dislodged timbers at a point approximately 100 feet inby the main intake drift entry on the left side travelling inby. These timbers were supporting a wooden header that was supporting some loose rock over the roadway. This is a violation of 30 C.F.R. § 75.202.

2. The operator was moderately negligent and should have noted this condition during its preshift examination. However, the operator had initially supported this area adequately.

3. There is a moderate probability of occurrence. This area is travelled by persons entering the mine every day and is used as a mantrip travelway.

4. The possible occurrence from this condition is a roof fall leading to a fatality or disability.

5. One to seven people could be affected by this condition.

Citation No. 43534

1. There were numerous dislodged timbers along the main intake airway roadway which is used as a mantrip travelway beginning 100 feet inby the drift opening and extending inby on both sides for approximately 700 feet. These timbers were installed as additional roof support due to excessive width. This is a violation of 30 C.F.R. § 75.202.

2. The operator was moderately negligent as this condition should have been observed during the preshift examination. However, the area was initially adequately timbered.

3. There is a moderate probability of occurrence as the area had been driven excessively wide.

4. This condition could lead to a roof fall causing a disability or fatality.

5. One to seven employees would be affected by this condition.

Citation No. 43535

1. The 250 volt direct current feeder wire was not adequately installed on insulators. Some of the insulators were the wrong size and the feeder wire was laying on top of the insulator at several locations. In other locations it was installed on "J" hooks and was in contact with a coal rib for three feet at the mouth of one heading. This is a violation of 30 C.F..R § 75.516.

2. The operator was moderately negligent and should have detected this condition during his preshift examination.

3. There is a moderate probability of occurrence. The condition could allow the feeder wire to dislodge thus coming in contact with the grounding conductor.

4. This condition could cause a variety of hazards including a minor shock or a mine fire.

5. Depending on what occurred, one to seven people would be affected.

Citation No. 43536

1. The 250 volt direct current feeder wire insulation contained one location where the insulation was damaged and the wiring exposed in violation of 30 C.F.R. § 75.517.

2. The operator was moderately negligent as this should have been detected during the weekly examination and the operator should have kept this in good condition.

3. There is a low probability of occurrence as this was a ground wire without electric current running through it.

4. The possible occurrence from this condition is electrical shock.

5. One employee would be affected by this occurrence.

Citation No. 43537 and Order No. 43542

1. The operator violated 30 C.F.R. § 75.200 by failing to comply with its approved roof control plan. Entries and connecting crosscuts were driven to excessive widths in several locations.

2. This condition constitutes ordinary negligence although it should have been discovered during the preshift examinations.

3. The probability of occurrence from this condition is moderate as the roof was good and there was no history of rib rolls or roof falls in this mine.

4. From one to seven people would be affected by this occurrence.

5. The possible occurrence from this condition is a fall of the roof or of the ribs.

6. The operator did not exercise good faith in abating this condition within the time set for abatement or a reasonable time thereafter. This condition should have been remedied immediately and was not.

7. The action taken to terminate this condition was to pull out of the area. The operator made this a return air course and no one worked in the area anymore. It was no longer an active area.

Citation No. 43538 and Order No. 43543

1. The operator violated 30 C.F.R. § 75.400 as quantities of loose coal and coal dust ranging from one to nine inches had accumulated in various locations.

2. This condition was the result of the operator's ordinary negligence as men were not in this area and could not have detected the condition.

3. The probability of occurrence is only moderate as there were no ignition sources present and no history of methane in the mine.

4. From one to seven people were on the working section and could have been affected by this condition.

5. The possible occurrence from this is an explosion or propagation of a fire.

6. The operator did not exercise ordinary good faith in abating this condition within the time set for abatement or reasonable time thereafter. Therefore, 104(b) order No. 43543 was issued.

7. The action to terminate this citation and this order was abandonment of the section affected by them. Therefore, people were no longer exposed to the hazard.

Citation No. 43540 and 104(b) Order No. 43544

1. The operator violated 30 C.F.R. § 75.316 by failing to comply with its approved ventilation and methane and dust control plan. In certain rooms, air was blowing where it should have been exhausting.

2. This condition constitutes ordinary negligence as no foreman was on the section and could have been aware of this condition.

3. The probable occurrence from this condition is propagation of a fire into the active working sections.

4. The probability of occurrence is low in this instance as no men were working in the area affected by this citation.

5. The operator did not exercise good faith in abating this condition within the time set for abatement or within a reasonable time thereafter and therefore 104(b) order No. 43544 was issued.

6. The action to terminate this citation was permanent abandonment of the area affected by it.

Citation No. 45743

1. Firefighting equipment provided for the two left off south main section was not adequate. A water supply was not provided for the water line nor were alternatives for water or chemical firefighting equipment provided. This is a violation of 30 C.F.R. § 75.1100-2(a)(2).

2. This constitutes low negligence as there was a work stoppage and the operator had not turned on the water. However, water was available.

3. There is a moderate probability of occurrence as, even though the area was not producing coal, coal is potentially explosive.

4. The possible occurrence from this condition is a fire or explosion.

5. Six employees normally work on the section affected by this citation. However, no one was working at the time it was issued.

Citation No. 46297

1. The operator failed to comply with 30 C.F.R. § 75.200 as torque checks were not made on at least one out of every ten roof bolts.

2. This condition constitutes ordinary negligence as the foreman was not on the section at the time this condition took place.

3. The probability of occurrence is low as men were not in this area when the citation was issued.

4. It is improbable that any accident would occur from this. However, this condition can lead to roof falls.

5. No men were in the area, therefore no one was subject to possible injuries from these conditions.

Citation No. 46298

1. The 250 volt direct current feeder wire was not adequately insulated at one location where the feeder entered the underground area of the mine at the No. 2 drift. The outer insulation was torn for a distance of 2 inches and the energized conductor was exposed. This feeder wire conducts electrical power to the two left off south main's section mining equipment. This is a violation of 30 C.F.R. § 75.517.

2. This constitutes low negligence. The feeder wire is extremely long and it is difficult to detect.

3. There is a low probability of occurrence. However, an exposed nail was driven in this area and appeared to have been used as a power connector.

4. Electrocution could occur from this condition.

5. One employee would be affected.

Citation No. 46299

1. The power cable conducting 440 volt alternating current electrical power to the No. 1 fan contained one splice which was not insulated as an outer jacket was not provided. This is a violation of 30 C.F.R. § 77.504.

2. This constitutes moderate negligence. This occurred immediately following a strike at which time production was not being conducted. Loose rock on the high wall had fallen and torn down the power wire to the ventilation fans. The inner cable was insulated.

3. There is a low probability of occurrence as the cable was approximately ten feet above the ground and no one would come in contact with it.

4. The possible occurrence is electrical shock.

5. No employees were in the area of the cable as a strike was going on when this violation occurred.

Citation No. 46300

1. The power cable conducting 250 volt direct current to the dewatering pump was not supported on well insulated insulators in that the cable was lying on the mine floor. The area was wet. This is a violation of 30 C.F.R. § 75.516.

2. The operator was moderately negligent. This occurred during a strike and was not known by the operator.

3. There is a moderate probability of occurrence. However, due to to the production stoppage the pump was not operational or energized. However, the area was wet.

4. The possible occurrence from this condition is electrocution.

5. One employee would be affected.

GENERAL STIPULATION AS TO ALL CASES

In addition to the above stipulations it was agreed that with respect to all citations and orders except the section 104(b) orders the operator exercised normal good faith, in abating the conditions within the time set for abatement or a reasonable time thereafter. Section 104(b) of the Act provides for the issuance of withdrawal orders when the operator fails to timely abate a violation described in a citation issued under section 104(a) of the Act. The orders here involved are No. 55575 in Docket No. WEVA 79-459, Nos. 46294 and 46295 in Docket No. HOPE 79-3-P and Nos. 43542, 43543 and 43544 in Docket No. HOPE 79-95-P.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

1 9 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. CENT 79-32
Petitioner	:	A.O. No. 14-00236-03003V
v.	:	
	:	No. 25 Strip
CLEMENS COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Robert J. Lesnick, Attorney, U.S. Department of Labor, Kansas City, Missouri, for the petitioner;
Jesse M. Lee, Pittsburgh, Kansas, for the respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent through the filing of a proposal for assessment of civil penalties 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 two alleged violations of certain mandatory safety standards promulgated pursuant to the Act.

Respondent filed a timely answer and requested a hearing. The matter was scheduled for hearing in Wichita, Kansas, April 23, 1980, along with several other dockets heard that week. When this docket was called, the parties advised me that they proposed a settlement pursuant to 29 C.F.R. § 2700.30, and they were permitted to present their arguments in support of the proposed settlement disposition on the record. A bench decision was rendered, and the decision is herein reduced to writing and served on the parties. The citations, initial assessments, and the proposed settlement amounts are as follows:

Citation	Date	30 C.F.R. Standard	Assessement	Settlement
390730	10/10/78	77.205(a)	$1,800	$1,100
390731	10/10/78	77.400(a)	900	250
			$2,700	$1,350

Discussion

The conditions or practices cited by the inspector in this proceeding are as follows:

Citation No. 390730, 10/10/78, 30 C.F.R. 77.205(a). "A safe means of access was not maintained to the lower walkway to the bottom conveyor on the north side of the tipple in that the floor of the travelway (expanded metal) was loose and would not support any weight."

Citation No. 390731, 10/10/78, 30 C.F.R. 77.400(a). "The fan inlets to the blades on the 36 in. fan in the bathhouse was not guarded to keep person from contacting exposed moving parts."

In support of the settlement disposition of this matter, petitioner made the following arguments and presented information concerning the six statutory criteria set forth in section 110(i) of the Act.

Size of Business

Petitioner asserted that at the time of the citations were issued, respondent's strip mining operations at the mine in question were small, and that annual production was 87,257 tons of coal. Petitioner also indicated that the mine is no longer in operation. Respondent confirmed this fact and indicated that during the relevant times in question, 40 miners were employed at the mine and one mine superintendent was in charge of the operation.

Prior History of Violations

Petitioner asserted that the respondent has an exeptional good safety record and prior history of violations and that it operated some 74,000 man-hours of production with no lost-time accidents.

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

Although the mine in question is no longer operational, respondent is still in the coal-mining business, and the parties agreed that the civil penalties assessed in this matter will not adversely affect its ability to remain in business.

Good Faith Compliance

Petitioner asserted that respondent exhibited exceptional good faith in achieving rapid compliance and correcting the conditions cited.

Negligence

With regard to Citation No. 390731, concerning the unguarded fan, petitioner argued that the condition resulted from ordinary negligence and that the lack of a guard should have been known to the respondent.

With regard to Citation No. 390730, petitioner asserted that the alleged hazardous condition of the walkway was first brought to the attention of mine management by the mine safety committee. Respondent's safety director looked into the matter, and after inspecting the walkway, concluded that it was safe and not hazardous. This difference of opinion as to the alleged hazardous condition was subsequently resolved when MSHA inspector Lester Coleman issued the citation after an inspection of the walkway. In these circumstances, petitioner's counsel advanced the argument that the citation resulted from gross negligence. I advised the parties that absent any further testimony or evidence indicating deliberate or reckless disregard for safety on the part of the respondent, I could not conclude that the fact that the asserted hazardous condition was brought to the attention of mine management by the mine safety committee per se constitutes gross negligence. Since reasonable men may differ on the gravity of any violation, absent further facts, I can only conclude that this citation resulted from ordinary negligence.

Gravity

With regard to the gravity of the walkway citation, petitioner asserted that the condition cited was serious. Although two employees were initially thought to be exposed to the hazard presented, in fact, only one employee a day would be using the walkway and would be exposed to a possible falling hazard of some 10 feet from the walkway. I find the violation was serious.

With regard to the gravity of the fan citation, petitioner asserted that the fan in question was located some 5 feet off the floor and was recessed into the wall. Further, the fan was actually only in use once a month when one or two employees had ocassion to use the bathhouse where the fan was located in one corner of the building. Petitioner also indicated that the factor of gravity was overevaluated by MSHA when the initial proposed assessment was computed. I find the violation was nonserious.

In addition to the foregoing arguments in support of the proposed settlement, petitioner's counsel stated he has consulted with Inspector Coleman, who was present in the courtroom, and that the inspector was in accord with counsel's analysis of the circumstances surrounding the citations, including the arguments advanced by counsel with regard to the statutory criteria set forth in section 110(i) of the Act. Respondent's representative also expressed agreement with the proposed settlement.

Conclusion

After careful consideration of the arguments presented in support of the proposed settlement, and taking into account my findings and conclusions made in this matter, I conclude that the proposed settlement is reasonable and in the public interest. Accordingly, pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, petitioner's motion is granted and the settlement is approved.

ORDER

Respondent is ordered to pay civil penalties in the amount of $1,350 in satisfaction of the two citations in question within thirty (30) days of the date of this decision and order. Upon receipt of payment by MSHA, this matter is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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19 JUN 1980

UNITED STATES STEEL CORPORATION, Contestant	:	Contest of Order
v.	:	Docket No. WEVA 79-172-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 0675872 May 2, 1979 Gary No. 20 Mine

DECISION

Appearances: Louise Q. Symons, Esq., U.S. Steel Corporation, Pittsburgh, Pennsylvania, for Applicant;
David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Stewart

Contestant United States Steel Corporation filed a timely contest of Order No. 675872, pursuant to provisions of section 105(d) 1/ of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act). MSHA and the

1/ Section 105(d) of the Act reads as follows:

"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modifcation, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

United Mine Workers of America (UMWA) subsequently filed answers denying the allegations set forth in the contest of order. MSHA and United States Steel Corporation appeared and participated in the hearing in this matter which was held on October 16, 1979, in Charleston, West Virginia. On February 11, 1980, these parties filed posthearing briefs. Proposed findings of fact and conclusions of law inconsistent with this decision are rejected.

Inspector James Christian issued Citation No. 675868 pursuant to section 104(a) of the Act on May 1, 1979. The citation, which alleged a violation of 30 C.F.R. § 75.1722, described the pertinent condition or practice as follows:

> The guards installed on the Grapevine Mains belt conveyor tail pulley and the 3rd Right Grapevine Mains 002 Section belt conveyor drive and tail pulley did not extend a distance sufficient to prevent persons from reaching behind the guards and becoming caught in between the belt and pullies and the existing guards were not secured to the equipment.

On the following day, May 2, 1979, the inspector issued Order of Withdrawal No. 675872, pursuant to section 104(b) 2/ of the Act. He alleged the following therein: "The belt conveyor drive and tail pulleys were not guarded as required by Citation No. 0675868 issued 05-01-79 at 1015 hrs. after the expiration of time as originally fixed."

The primary issue presented is whether Order of Withdrawal No. 675872 was properly issued under section 104(b) of the Act.

In Citation No. 675868, the inspector noted three locations at which he observed alleged violations of section 75.1722. One of these locations was the tail pulley of the Grapevine Mains belt conveyor. The other locations were along the 3rd right conveyor belts at its belt drive and tail pulley.

2/ Section 104(b) of the Act reads as follows:

"(b) If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (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."

Grapevine Mains Belt Conveyor

With regard to the Grapevine Mains tail pulley, the testimony of the witnesses for Petitioner and Respondent is somewhat at odds. Inspector Christian testified that the guard at the back of the Grapevine Mains was unsecured and leaning against the framework of the tailpulley at an angle. The side of the Grapevine Mains conveyor nearest the 3rd right conveyor was at least partially guarded. The cyclone fencing on the 3rd right provided some protection but it had been pulled back in this area, thereby exposing that side of the tail pulley. The side of the Grapevine Mains conveyor farthest from the 3rd right conveyor was unguarded.

Robert Hatfield, Respondent's mine inspector for the No. 20 Mine, testified that the guarding on the back of the Grapevine Mains tailpiece was comprised of three or four strips of metal which were each 5 inches wide. The largest opening which he found in this portion of the guarding was a 1-1/2-inch gap at the top of the guard. He stated, however, that the guards on the sides of this tailpiece were loose, or not securely fastened. The guards on the sides were made of expansion metal. One was secured with a single bolt; the other was lying loose against the tailpiece.

The inspector was of the opinion that the guards on the tailpiece did not extend a sufficient distance to keep a person from reaching behind the guards and becoming caught between belt and pulley. Robert Hatfield testified that if a person was "intent on getting into it to injure (himself)," he could get his hand between the guarding and moving machinery on the side secured with a single bolt. He testified as to the other side of the tailpiece that "there's no way you could get into it on the side, it has to be from the back."

3rd Right Belt Conveyor

The drive pulley on the 3rd right conveyor was partially guarded by a cyclone fence; however, a gap existed in this fence adjacent to the pulley. Estimations of the distance from fence to pulley ranged from 1 to 3 feet. The inspector believed that a person could reach through the opening and become caught between belt and pulley. His description of the gap was essentially a vertical opening in the fencing ranging in width from one to more than 4 inches. The opening was 4 to 4-1/2 inches at the pulley.

Dallas Runyon, Respondent's mine foreman, testified that the hole in the fence at the drive pulley existed to allow passage of a power conductor to the belt motor. He admitted that a person could reach through the fence and contact the roller.

Finally, the inspector was concerned with the absence of guarding at the tailpiece of the 3rd right conveyor. On May 1, 1979, the feeder was discharging coal onto the tailpulley, thereby guarding the top of the belt. However, the sides, back, and lower bottom of the tail pulley were unguarded.

The inspector believed that a person could become caught between belt and pulley. The exposed area was approximately 1-1/2 by 3 feet. In order to gain access, an employee would have to be on hands and knees.

Violation

Section 75.1722 reads as follows:

> (a) 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.
>
> (b) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.
>
> (c) Except when testing the machinery, guards shall be securely in place while machinery is being operated.

The guarding at the Grapevine Mains tailpiece was in violation of all three paragraphs of the standard. Even though the testimony of the inspector and that of Mr. Hatfield conflicted in detail, the testimony of each taken by itself would establish that the guarding was not sufficient to prevent injurious contact with the tail pulley. It is clear that the guarding at the tailpiece did not extend a sufficient distance to prevent a person from reaching behind it and becoming caught. Moreover, it was established that the conveyor had been in operation while certain of the guards were not securely in place. The conveyor drive pulley and the tail pulley on the 3rd right conveyor were in violation of the mandatory standard in that portions of each were unguarded or inadequately guarded. Although confusion exists as to the precise configuration of the hole in the fence at the belt drive, both Dallas Runyon and the inspector testified that contact could be made with the adjacent pulley. With regard to the tailpiece of the 3rd right section, the testimony of the inspector is accepted. When the feeder was in place, the belt and tail pulley could be contacted at the sides and bottom.

The record establishes a violation of section 75.1722. Citation No. 675868 was properly issued.

Order of Withdrawal

Section 104(b) of the Act requires that an inspector shall issue an order when he finds that a violation described in a citation issued pursuant to section 104(a) has not been totally abated within the time specified and that the time for abatement should not be further extended. The test as to whether a 104(b) order was properly issued was enunciated by the Board of

Mine Operations Appeals in United States Steel Corporation, 7 IBMA 109, 116 (1976). It was stated therein that "the inspector's determination to issue a section 104(b) order must be based on 'facts confronting the inspector at the time he issued the subject withdrawal order regarding whether an additional abatement period should be allowed.'" The critical question is whether the inspector acted reasonably in failing to extend the time for abatement and in issuing the subject order.

Citation No. 675868 was issued at 10:15 a.m. on May 1, 1979. The inspector specified that the condition was to be corrected by 8 a.m. on May 2, 1979. The inspector reentered the area of the Grapevine Mains and 3rd right conveyors at approximately 12 noon on May 2, 1979. He observed the condition as previously cited, and issued 104(b) Order No. 675872. The parties stipulated that Order No. 675872 caused the shutdown of the entire section until the order was terminated. At the hearing, the inspector testified that he issued the closure order because Contestant had ample opportunity to correct the condition but failed to do so.

The order was orally modified at 12:30 p.m. to allow use of the Grapevine Mains conveyor. After this modification, mine management decided to remove the 3rd right conveyor from service. The inspector was notified of management's decision after he issued Order No. 675872 and the subsequent modification, but before he put them into writing. He put the orders into writing after proceeeding to the surface. Contestant spent 7 hours dismantling the 3rd right conveyor. The inspector terminated the entire order on the following morning, May 3, at 9:30 a.m.

When the inspector arrived in the affected area on May 2, the following problems remained:

(a) Guards had been installed on the Grapevine Mains conveyor tailpiece but openings still existed at the sides of the tailpiece through which a person could contact and become caught in belt and pulley. The installed guards did not extend far enough to prevent the possibility of this occurrence.

(b) The gap still existed in the cyclone fence at the belt drive of the 3rd right conveyor. To abate the condition, Contestant need only have wired the fence together.

(c) Some guarding had been installed on the 3rd right conveyor tailpiece but there was still no guarding on the sides. A person could still reach into and become caught in between the belt and the pulley.

Dallas Runyon testified that work had been done on the guarding throughout the second shift on May 1, and completed during the early part of the first shift on May 2. He also testified that the guarding on the Grapevine Mains tailpiece had been installed and removed on a number of occasions because of two separate malfunctions, the second of which occurred on the morning of May 2.

It is clear that the length of time set by the inspector for abatement was adequate. The Grapevine Mains tailpiece could have been sufficiently guarded within the time set. The condition was abated with respect to this tailpiece 20 minutes after the order was issued. The gap in the fence by the belt drive needed only to be wired together. Finally, Contestant had installed a guard at the 3rd right conveyor tailpiece, but left an opening of approximately 18 inches. Adequate guarding clearly could have been installed by 8 a.m., the next day, the time set by the inspector for abatement.

Given the facts with which the inspector was confronted at the time he issued Order No. 685872, extension of the time set for abatement would have amounted to condonation of Contestant's failure to abate. The inspector arrived in the affected area 3 hours after the time set for abatement had expired, yet he observed substantially the same conditions which gave rise to Citation No. 675868. Some effort to abate had been made, but the effort was inadequate. No extenuating circumstances were communicated to the inspector which would have warranted the failure on the part of the Contestant to abate the violation. It was not demonstrated that the two malfunctions were sufficiently serious to have excused this failure. Moreover, there is no indication on the record that the malfunctions had any relationship to Contestant's failure to comply with the mandatory standard as regards the hole in the cyclone fence at the 3rd right belt drive or the gaps which existed at the 3rd right tailpiece. It may have been improbable that an accident would have occurred due to Contestant's failure to adequately guard parts of the conveyors but it cannot be said that no safety hazard was presented. In view of the adequacy of the time originally set for abatement, the existence of some safety hazard, and the absence of extenuating circumstances, it is found that the inspector acted reasonably in refusing to extend the time for abatement and in issuing Order No. 675872.

Contestant also asserted that the inspector abused his discretion in failing to terminate Order No. 675872 when he learned of the operator's plan to abate the order by physically removing the 3rd right conveyor belt. It was reasoned that the operator had eliminated the hazard which the standard was intended to prevent because it had shut down the conveyor and put in motion its efforts to remove the conveyor from service.

The operator did not initiate efforts to abate the order with respect to the 3rd right conveyor prior to the time the inspector left its immediate vicinity. The inspector was first notified that the operator would remove the conveyor to abate the violation after he had proceeded to an area one break from the conveyor. Dallas Runyon proposed its removal in response to the inspector's requirement that an area one break down from the tailpiece be cleaned to eliminate a slipping hazard.

The actual dismantling of the conveyor began only after the inspector left the area to proceed out of the mine. The record does not contain more than a general indication of the relevant sequence of events. Contestant has

not established that the condition had been abated before the inspector proceeded out of the mine; nor did Contestant establish the time at which abatement actually occurred. In this instance, the inspector was not unreasonable in refusing to terminate the order, notwithstanding his knowledge of Contestant's intent to abate the violation by removing the conveyor.

ORDER

It is ORDERED that the above-captioned contest of order is hereby DISMISSED.

Forrest E. Stewart
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

JUN 19 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. CENT 79-40-M
	:	A.O. No. 14-00521-05002
v.	:	
	:	Oatville Sand & Gravel Dredge
OATVILLE SAND & GRAVEL COMPANY,	:	
	:	Docket No. CENT 79-41-M
VIC'S SAND & GRAVEL COMPANY, Respondents	:	A.O. No. 14-00550-05002
	:	
	:	Vic's Sand & Gravel Co. Pit

DECISIONS

Appearances: Robert J. Lesnick, Attorney, U.S. Department of Labor, Kansas City, Missouri, for the Petitioner; Victor B. Eisenring, pro se, Witchita, Kansas, for the Respondents.

Before: Judge Koutras

Statement of the Proceedings

These consolidated civil penalty proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for a total of 19 alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations.

Respondent filed timely answers in these proceedings contesting the citations and requesting a hearing. Hearings were convened pursuant to notice in Wichita, Kansas, on April 22, 1980, and the parties appeared and participated fully therein. With regard to Docket No. CENT 79-41-M, testimony and evidence was taken on the record and pursuant to Commission Rule 65, 29 C.F.R. § 2700.65, and at the request of the parties, a decision was rendered from the bench and is herein reduced to writing as required by section 2700.65(a) of the Rules. With regard to Docket No. CENT 79-40-M, the parties proposed a settlement of the citations in question, and pursuant to Rule 30, 29 C.F.R. § 2700.30, were afforded an opportunity to present their supporting arguments on the record, settlement was approved, and my decision in this regard follows herein.

Docket No. CENT 79-41-M

This docket concerns four citations issued by MSHA inspector David P. Lilly on August 8, 1978, all alleging violations of the provisions of 30 C.F.R. § 56.9-87, which provides as follows:

> 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 conditions or practices cited by Inspector Lilly in each of the citations in question are as follows:

Citation No. 181495

> The stockpile 966 front-end loader was not equipped with a working audible backup alarm to warn persons in the area when the unit was backing up.

Citation No. 181498

> The heavy haul truck, a new International dump, was not equipped with an audible backup alarm to warn persons in the area when the unit was backing up.

Citation No. 181499

> The heavy haul truck, a Mack No. A-4, was not equipped with a working audible backup alarm to warn persons in the area when the unit was backing up.

Citation No. 181500

> The heavy haul truck, a 1972 Mack dump, was not equipped with a working audible back-up alarm to warn persons in the area when the unit was backing up.

Stipulations

The parties stipulated that the mines in question were sole proprietorships owned and operated by Mr. Victor Eisenring at the time the citations were issued, that the sand and gravel pit in question employed six employees and had an annual production of 16,416 man-hours, and that the mine had no previous history of prior citations under the 1977 Act.

Testimony and Evidence Adduced by the Petitioner

MSHA inspector David P. Lilly, testified that he has 14 years' experience in surface and underground mining, has taken several MSHA training courses at the Beckley, West Virginia, Academy, and indicated that his prior experience includes the operation of heavy-duty mobile equipment. He confirmed that he inspected respondent's sand and gravel mining operation on August 8, 1978, and while mine operator Victor Eisenring was not on the premises during his inspection, he was accompanied by his representative.

Inspector Lilly confirmed that he issued the citations in question after determining that the equipment cited was not equipped with audible backup alarms. With regard to the front-end loader (Citation No. 181495), he stated that the loader had an alarm installed, but it was inoperative and would not sound when the loader operated in reverse. With regard to the remaining citations concerning respondent's haulage trucks, he testified that he inspected the trucks and could find no backup alarms installed. In addition, he indicated that he observed the trucks in operation, and that when they were operated in reverse during the loading process, he heard no audible sounds.

Inspector Lilly stated that he believed the respondent was negligent because he was aware of the requirements for audible backup alarms and admitted as much to him. The inspector also testified that he granted extensions for the abatement of the citations after being advised that the backup alarms had been ordered. The citations were subsequently abated by another MSHA inspector after the mining property and equipment were sold by operator Victor Eisenring. Mr. Lilly did not know whether the alarms were actually installed on the cited equipment since Mr. Eisenring sold the property.

Inspector Lilly testified that he determined that there was an obstructed view to the rear of all four vehicles cited through observation, inspection, and the fact that he had operated identical equipment in the past. He also indicated that the size and configuration of the vehicles contributed to his determination that the view to the rear was obstructed, and he saw no one present acting as an observer.

With regard to the gravity of the loader citation, Mr. Lilly testified that in addition to the loader operator, one truck driver was nearby sitting in his truck, and another driver was out of the truck standing around. He observed no one else in the vicinity of the loading operations, but did indicate that the hazard presented by the lack of backup alarms is the fact that someone could be seriously injured or killed if a vehicle backed over him without sounding a warning alarm. Although Mr. Lilly alluded to similar hazards being present with respect to the three truck citations, he indicated that one of the trucks was away from the loading area ready to drive in when he inspected it, and a second truck was parked nearby the loading area awaiting its turn to be loaded. He candidly conceded that the chances for a serious injury to occur on the day in question was somewhat remote due to the fact that he observed no miners in the immediate vicinity of the

loading operations other than the truck drivers. As a matter of fact, he testified that the mine employed a total of six employees, and in addition to the drivers, two employees were in the mine office.

Testimony and Evidence Adduced by the Respondent

Victor Eisenring, testified that at the time the citations were issued he was the owner and operator of the mine in question, but sold the land and equipment in November 1978, and that he is no longer in the sand and gravel mining business. He testified that he was not present when Inspector Lilly conducted his inspections, and while conceding that the loader had an inoperable backup alarm, Mr. Eisenring contended that the three trucks cited by the inspector were factory-equipped with alarms which were activated when the truck transmissions were placed in reverse. He confirmed the circumstances surrounding the granting of the extensions of the abatement time by the inspector on the ground that alarms were ordered for the trucks, but attributed that to someone from his office. He also indicated that it was possible that Mr. Lilly could not hear the audible alarms since at times they are rendered inoperable by mud and dirt which may clog the alarm-sounding device.

Mr. Eisenring disputed the inspector's contention that the view to the rear of the trucks was obstructed and he indicated that the operator can see to the rear by using the rear-view mirrors installed on the trucks, and he contended that the chances of someone being run over were remote.

Findings and Conclusions

Fact of Violations

I conclude and find that the petitioner has established by a preponderance of the evidence the fact that the equipment cited was not provided with audible backup alarms as required by section 57.9-87. I find the testimony of the inspector to be credible and respondent has presented no evidence to rebut the inspector's findings as to the conditions which he found and cited on the day in question. Mr. Eisenring was not present during the inspection and he produced no additional evidence or testimony to rebut the inspector's findings or testimony concerning the facts and circumstances surrounding the issuance of the citations. Under the circumstances, the citations are AFFIRMED.

In addition, considering the entire record adduced in these proceedings, I make the following findings and conclusions.

Respondent is a small operator with no prior history of violations issued under the Act.

Although respondent is no longer in the mining business, I cannot conclude that he is unable to pay the civil penalties assessed by me in these proceedings, or that the penalties will adversely affect his ability to remain in business.

The violations resulted from ordinary negligence. That is, I conclude that respondent failed to exercise reasonable care to prevent the conditions cited and that he should have been aware of those conditions.

The evidence and testimony adduced in these proceedings reflects that respondent exercised normal good faith attempts at compliance once the citations issued.

Although I consider the lack of workable backup alarms on heavy-duty equipment to be serious, on the facts presented in this case, I am not convinced that anyone was exposed to any serious injuries by the lack of backup alarms on the day the citations were issued, and the inspector candidly admitted as much.

Taking into account the totality of the circumstances presented on the day the citations issued, and in particular respondent's size, no prior history of violations, and the fact that he is no longer in the mining business, I believe that the following civil penalty assessments are warranted in this proceeding:

Citation No.	Date	30 C.F.R. Section		Assessment
181495	08/08/78	56.9-87		$ 25
181498	08/08/78	56.9-87		30
181499	08/08/78	56.9-87		25
181500	08/08/78	56.9-87		20
			Total	$100

ORDER

Respondent is ordered to pay civil penalties in the amount of $100 for each of the citations which have been affirmed in this proceeding, as indicated above, payment to be made within thirty (30) days of the date of this decision, upon receipt of payment by MSHA, this proceeding is dismissed.

Docket No. CENT 79-40-M

The citations, standards cited, initial proposed assessments, and the proposed settlement amounts in this docket are as follows:

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
181530	09/07/78	56.12-47	$ 44	$ 30
181532	09/07/78	56.12-8	38	20
181533	09/07/78	56.12-8	38	20
181534	09/07/78	56.12-8	38	20
181539	09/07/78	56.4-10	32	30
181540	09/07/78	56.12-8	38	20
181543	09/07/78	56.12-8	38	20
181544	09/07/78	56.4-2	28	25

181545	09/07/78	56.12-8	38	20
181546	09/07/78	56.12-8	38	20
181547	09/07/78	56.12-8	38	20
181548	09/07/78	56.9-87	60	20
181549	09/07/78	56.9-87	60	20
181550	09/07/78	56.15-1	40	30
181553	09/07/78	109(a)	20	10
			$588	$325

Discussion

In support of the proposed settlement disposition of this matter, petitioner's counsel furnished information concerning the size of the respondent's mining operation, gravity, good faith compliance, prior history of violations, negligence, and asserted that the payment of the proposed settlement amounts will not adversely affect respondent's ability to continue in business.

Size of Business

At the time the citations were issued, respondent was operating a sand and gravel operation known as the Oatville Sand and Gravel Dredge and that its annual production man-hours was 22,605. I conclude and find that this constitutes a relatively small mining operation.

Prior History of Violations

Petitioner asserted that respondent has no prior history of violations under the Act, and I adopt this as my finding in this matter.

Negligence

Petitioner argued that each of the violations resulted from the failure by the respondent to exercise reasonable care to prevent the conditions cited and that respondent knew or should have been aware of the requirements of the cited safety standards. Petitioner concluded that all of the citations resulted from ordinary negligence, and I adopt this as my finding in this matter.

Good Faith Compliance

Although the record reflects that MSHA terminated the citations on November 22, 1978, when the respondent sold his mining property, petitioner asserted that respondent exhibited good faith attempts at compliance and there is no evidence to the contrary. In the circumstances, I cannot conclude that there was a lack of good faith compliance on the part of the respondent with respect to the periods subsequent to the issuance of the citations in question.

Gravity

Petitioner asserted that the gravity factor was overevaluated by MSHA when the citations were initially assessed. After consulting with the inspector who issued the citations and who was present in the courtroom, counsel asserted that on the day the citations were issued the mine was not at full-operating capacity, that mining of sand and gravel was not taking place, and that only routine maintenance functions were being performed. Under these circumstances, counsel asserted that any miner exposure to the hazards resulting from the conditions cited was miminal.

In conclusion, petitioner argued that the proposed settlement is reasonable and appropriate, is in the public interest, and will serve to effectuate the deterrent purposes of the Act. Respondent expressed accord and agreement with the proposed settlement disposition advanced by the petitioner and expressed a desire to pay the settlement amounts in satisfaction of the citations in question.

Conclusion

After careful review and consideration of the arguments advanced by the petitioner in support of the proposed settlement, and taking into account the fact that the respondent is no longer in the mining business, I conclude and find that the proposed settlement is reasonable, and pursuant to 29 C.F.R. § 2700.30, it is APPROVED.

ORDER

Respondent is ordered to pay a civil penalty in the amount of $325 in satisfaction of the 15 citations issued in this matter as enumerated above, payment to be made within thirty (30) days of the date of this decision. Upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUN 19 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Complaint of Discrimination
	:	Docket No. VA 79-81-D
On behalf of:	:	Virginia Pocahontas No. 5 and No. 6 Mines
LARRY D. LONG, Applicant	:	
v.	:	
ISLAND CREEK COAL COMPANY,	:	
and	:	
LANGLEY AND MORGAN CORPORATION, Respondents	:	

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, for Applicant;
Marshall S. Peace, Esq., Lexington, Kentucky, for Respondent Island Creek Coal Company;
James Green, Jr., Esq., Harlan, Kentucky, for Respondent Langley and Morgan Corporation.

Before: Judge William Fauver

This proceeding was brought by the Secretary of Labor on behalf of Larry D. Long (Applicant), under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for review of alleged acts of discrimination.

The case was heard at Bluefield, West Virginia. All sides were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript.

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

FINDINGS OF FACT

1. At all pertinent times:

(a) Applicant, Larry Long, was employed by Respondent, Langley and Morgan Corporation, as a Grade B classified carpenter.

(b) Respondent Island Creek Coal Company was the operator of the Virginia Pocahontas No. 5 ("V.P.-5") and No. 6 ("V.P.-6") Mines in Buchanan County, Virginia. Both mines produced coal for sales in or substantially affecting interstate commerce.

(c) Respondent Langley & Morgan was an independent contractor engaged by Island Creek to construct buildings and other structures at the V.P.-5 and V.P-6 Mines. Langley & Morgan worked primarily for the coal industry building coalhandling facilities. In the fall of 1978, Langley & Morgan employed about 15 people at the Virginia Pocahontas Mines and about 130 people in all.

2. The contract between the Respondents required Langley & Morgan to furnish labor and supervision for the construction at the Virginia Pocahontas Mines, including road construction, erection of small buildings, excavation work and miscellaneous construction work. Work assignments would vary from day to day and could last anywhere from a couple of hours to a few weeks, or longer. Overall construction of the mines was under the control of Island Creek because Langley & Morgan was only one of several contractors engaged by Island Creek, the others being larger than Langley & Morgan and performing mostly foundation and concrete work.

3. Langley & Morgan employed one general superintendent with authority over all of its employees.

4. Normally, Island Creek's superintendent would contact Langley & Morgan's superintendent in the latter part of the day to inform him what needed to be done the next day. The contract also provided in part:

> The Contractor [Langley & Morgan] recognizes that the requirements of the Company [Island Creek] may necessitate assignment of jobs from time to time. It is, therefore, agreed that the Company may designate the jobs to be performed and the order of performance. The Contractor, however, shall have full control of the methods employed to complete said jobs and will supervise the work force. The Company will not direct the work force.

5. During the fall of 1978, Langley & Morgan was a signatory to the National Coal Mine Construction Agreement (Agreement). Article III of the Agreement provided:

> This agreement is not intended to interfere with, abridge or limit the employer's right to manage its construction operations. It is agreed that the management of said operations, including the direction and scheduling of the work force, the right to hire and discharge, the right to make reasonable rules of conduct, the direction, management and control of business, and other functions and responsibilities which heretofore been vested in the management, are and shall remain vested exclusively in the employer provided these rights are not in conflict with any provisions of this agreement.

6. Langley & Morgan imposed no limitation on its superintendent's discretionary authority to reassign employees from one job to another, except that he could not assign a man to a job in which he had no experience or to one with a classification requiring more pay. However, management generally permitted him to assign employees to a lower classified job without loss of pay.

7. Further restrictions on assignments of employees outside of their classifications were governed by Article XVIII of the Agreement. Section (c) provided:

> Every reasonable effort shall be made to keep an employee at work on the job duties normally and customarily a part of his regular job, and to minimize, to the extent practicable, the amount of temporary assignments of particular individuals to other jobs out of the employee's classification. However, where a senior employee has expressed a desire to improve his ability to perform a job to which he wishes to be promoted, to the extent practicable, he shall be given a preference in filling temporary assignments in regard to that job.

Section (d) provided: "In no case may the Employer make temporary assignment of work outside the employee's classification for the purpose of disciplining or discriminating against an employee."

8. In mid-October, 1978, Ray Harris temporarily replaced Nathan Meade as Langley & Morgan's superintendent at the Virginia Pocahantas Mines. Ray Harris had worked for Langley & Morgan in a supervisory capacity for about 2 years. He did not inquire of management as to the full scope of his authority with respect to job assignments of the employees. He was told the duties of each man but there was no discussion with respect to the location or assignment rights of the employees and there was no understanding that employees had a right or choice to work at one mine rather than another.

9. In late October, Island Creek was preparing to construct a parking lot at V.P.-6. Trucks used to haul away fill material were borrowed either from V.P.-5, which was 8 to 15 miles away depending on the route, or from other mines operated by Island Creek. No trucks were needed at V.P.-6 on a

permanent basis because the main highway that went through this project was in the process of being relocated. All the trucks used by Langley & Morgan were owned by Island Creek.

10. Cline trucks and Dart trucks were generally used to haul fill and muck. They were almost identical except for the manufacturer.

11. A Grade B Cline or a Dart truck operator would receive the same pay as a Grade B carpenter; however, the employees generally considered operating such equipment to be cleaner and more desirable than general carpentry work.

12. An employee would normally work in his classification and would be kept there if practical. If assigned to operate a piece of equipment outside his classification on a temporary basis, e.g., vacancy or illness, he could be removed from the equipment and reassigned to work in his regular classification when needed. On a seniority basis, he would be entitled to return to the equipment, if there were a vacancy, when he was no longer needed for his classification of work.

13. Beginning in October 1978, Applicant was assigned to drive a Cline truck as a result of a grievance he filed on September 1, 1978. The grievance was settled during the third step of the arbitration process on September 19, 1978. The settlement provided: "Mr. Meade will consider Larry for temporary assignments on equipment. Larry's seniority will be considered in such assignments when practical."

14. On Monday, October 30, 1978, Applicant was assigned temporarily to drive a Cline truck at V.P.-6, hauling muck from the B shaft area to the land area near the A shaft. There were no Langley & Morgan supervisors at V.P.-6. Activities and employees at that mine were under the active supervision of Island Creek's project manager, Bill Turley, his assistant Bill Hall, and the field manager, Ed Fletcher.

15. On that date, as Applicant approached the A shaft in the Cline truck, at about 2:30 p.m., he observed Ed Fletcher hauling four boxes of powder and one box of blasting caps in a small pickup truck not equipped to handle explosives. Applicant stopped his truck and complained to Ed Fletcher about the danger of using the pickup to carry explosives and of hauling explosives on a public road.

16. About a half-hour before the end of his shift on that date, Applicant complained to Bill Turley about the incident and said, "Bill, if you don't do something about the explosives around here you are going to get everybody on the job site killed." Applicant then dumped his load and proceeded to refuel for the next morning.

17. At the fuel tank, Applicant told Donnie Philips, a lead dozer operator for Langley & Morgan, that he was going to request a 103(g) inspection at the local UMW office. Section 103(g) of the Act provides in part:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.

18. At the end of his shift on October 30, 1978, Applicant went to the UMW Office and filed a grievance with his father, Edward Long, Jr., the international union's safety coordinator, and requested a government safety inspection. The grievance stated that Ed Fletcher was carrying powder and caps in a truck not equipped to haul explosives, that he did not have any signs on the truck, that he was hauling it across the highway, and that he was endangering his fellow workers.

19. An inspection was subsequently conducted by MSHA. The company admitted that the truck was being used to transport powder and caps; however, no violation was charged.

20. The next day, October 31, Applicant went to an arbitration meeting and did not report for work. At home that evening, he prepared a written grievance under the Agreement. It read:

> I'm asking for one shift's pay under Art. II, Section (c) (classified work), because on October 30, 1978, Ed Fletcher went to #5 and brought back (powder and caps) to #6 in a truck that is <u>not</u> equipped to transport explosives. Ed Fletcher is an engineer on the job and is exempt from doing classified work.

21. On the morning of November 1, 1978, Applicant filed the grievance with Ray Harris and continued operating the Cline truck.

22. The grievance was ultimately settled on December 19, 1978. The settlement provided: "The Company [Langley & Morgan] agrees to pay Local Union 6843 one (1) shift of pay to settle the above. This payment in no way indicates that the company is guilty of any contract violations and the payment does not set a precedent for settlement in future cases of this nature."

23. Following Applicant's complaint about the explosives truck, Bill Turley told Ray Harris to have a truck outfitted in compliance with federal regulations for hauling explosives. Bill Turley did not request anyone in particular to perform the work. About 15 minutes before the end of the shift on November 1, Ray Harris told Applicant to refuel the truck and to report to V.P.-5 in the morning with his carpenter tools to outfit a truck in compliance with federal regulations for hauling explosives and to build a powder box according to state and federal laws. Applicant had not completed

hauling muck in the Cline when the instructions were given to him. When Ray Harris instructed applicant to outfit an explosives truck, he appeared angered at Applicant and his tone of voice became harsh. He told Applicant: "You know enough [about explosives trucks] to make a complaint." Other carpenters in Applicant's classification were available to perform the reassignment given to Applicant on November 1.

24. Although the assignment was within Applicant's carpenter classification, he had no experience outfitting trucks to carry explosives. Andy Keene, a lead carpenter, and Ray Harris instructed Applicant as to the procedure for carrying out the assignment. Applicant began working on the truck and powder box on November 2, 1978, and continued working on the truck on November 3 and on Monday, November 6.

25. When Ray Harris assigned Applicant to V.P.-5 on November 1, he knew that Applicant had a history of filing grievances and he knew of Applicant's safety complaint involving Ed Fletcher.

26. On November 2, 1978, most of the Langley & Morgan crew was at V.P.-5 except for a few equipment operators who were at V.P.-6. Donald Church, a cement finisher, and two Grade A carpenters, Glen Dawson and Andy Keene, who usually performed more specialized jobs, were helping to lay asphalt, which included cutting trees and leveling the land.

27. After his reassignment to outfit the explosives truck, Applicant did not file a written grievance under the Agreement.

28. On Monday, November 6, 1978, Terry Gabbert replaced Ray Harris as superintendent for Langley & Morgan until N. C. Meade returned. During orientation, Ray Harris mentioned to Gabbert that Applicant had a history of filing grievances against the company.

29. That morning, the crew was waiting outside the office for Ray Harris to unlock the door and begin the weekly safety meeting, known as a "tool box" meeting. Applicant said, "Good morning," to Terry Gabbert, his new supervisor. Ray Harris looked over to the new supervisor and said, "Do you know that punk?".

30. About 9 a.m., Ray Harris apologized to Applicant, saying that he did not mean to call him a "punk" earlier that morning. However, Harris did not seek to correct the adverse impression he had conveyed to Applicant's new supervisor, Terry Gabbert.

31. After Applicant finished working on the explosives truck that morning, Ray Harris assigned him to cleaning rope clamps and painting the hoist house floor. He continued cleaning rope clamps and painting on November 7 and November 8. Cleaning rope clamps was essential to the safe operation of man hoists and keeping them clean was a difficult job.

32. On Thursday, November 9, Applicant worked on an asphalt assignment. On Friday, November 10, Applicant piloted a Cline truck to V.P.-6, and on Monday, November 13, Applicant was assigned to V.P.-6 to operate a Dart truck.

33. On November 2, 3, and 6, when Applicant was outfitting the pickup truck to carry explosives, he was working within his job classification. On November 7, 8, and 9, when Applicant was assigned to cleaning rope clamps, painting and working in asphalt, he was working outside his work classification; however, cleaning rope clamps was not a classified job. At no time did Applicant suffer a loss in pay.

34. On November 13, Applicant reported to V.P.-6 to operate the Dart truck. The cab on the Dart truck was positioned on the lefthand side and had room for one person. It had windows on three sides--in the front, on the left, and to the right; however it had no mirrors, the horn did not work, and the brakes were soft.

35. As Applicant prepared to dump a load over an embankment, which was about 25 feet above another level, he saw Bill Turley and Ed Fletcher below. He told Bill Turley: "Bill, this truck's unsafe. It's got soft brakes on it. It don't have any mirrors on it. It don't have a horn on it. You couldn't warn nobody if you was going down there and somebody walked out in front of you." Applicant was then told by Bill Turley to park the truck. This occurred near the start of the morning shift.

36. At about 8 a.m., Applicant parked the truck and waited for another assignment. Ed Fletcher and Bill Turley drove past him several times that day while he was standing next to the truck but not until about 20 minutes to 3, near the end of his shift, did Ed Fletcher tell him to report back to V.P.-5 the next day. There was no Langley & Morgan supervisor at V.P.-6 that day.

37. On November 14, Applicant worked at V.P.-5 and was assigned to paint floors and a pipeline, and to perform other miscellaneous work under the supervision of Terry Gabbert. Applicant also worked at V.P.-5 on November 15, 16 and 17. From November 14 through November 17, the work assignments given to Applicant were outside his classification. Applicant did not file a grievance under the Agreement, and suffered no loss of pay. He did not work the week of November 20 through November 24, when he was on vacation. On November 27, Applicant reported to V.P.-6 to drive a coal truck.

38. Beginning in 1974, and through July 6, 1979, Applicant filed 17 of the 42 grievances filed with Langley & Morgan under Article IV(p) of the Agreement.

39. After Applicant's complaints on October 30 and November 1, 1978, a number of hostile statements were made to him and about him, including the following: Bill Turley, Island Creek's project manager, threatened Applicant

that if Applicant did not stop calling in federal inspectors the job would have to be shut down; N. C. Meade told the rest of the crew that no overtime work was being provided because of the complaints filed by Applicant; Danny Johnson, a co-worker, told him that he was mentally retarded; Bill Harman, another member of the crew accused Applicant of taking food from his family's table; as found above (Finding 29), his outgoing supervisor, Ray Harris, told his new supervisor, Terry Gabbert, on November 6, 1978, that he was a "punk;" and on several occasions Ed Fletcher and Bill Turley asked Donald Philips, a dozer operator for Langley & Morgan, to tell Applicant that if he continued to call in federal inspectors the job would have to be shut down.

40. In December, 1978, Applicant complained to MSHA about the hostility that had been directed at him. Al Goode, a special investigator for MSHA, arranged a meeting, at Applicant's request, between Applicant's union representatives and management on January 10, 1979. The following were present: Floyd T. Mullins, district safety coordinator for the UMWA; Lee James, president of Local 6843; Charlie Van Dyke, Danny Johnson, Bill Harman, employees for Langley & Morgan; N. C. Meade, superintendent for Langley & Morgan; Doug Cottrell, public relations man for Langley & Morgan; Dewey Rife and Donnie Stallard, special investigators for MSHA. There were no representatives from Island Creek.

41. At the above meeting, Meade said that he believed Applicant was (mentally) sick and in need of help, and that Applicant had caused overtime work to stop because of his grievances. Meade also told the group that Applicant had placed a call to Langley & Morgan's president, Jack Langley, and complained that overtime should be cut out because everyone else was receiving overtime work but him. Applicant had placed a call to Langley but had not asked to stop overtime work.

42. Hostile statements made by some of Respondents' supervisors, as found above (Finding 39),generated hostility in fellow workers against Applicant and could reasonably be foreseen to cause such hostility and to cause considerable distress and fear in the Applicant. Employee meetings in November, including some attended by Fletcher or Turley, became so tense that Applicant could reasonably fear for his safety.

DISCUSSION WITH FURTHER FINDINGS

The basic issues in this case are (1) whether Applicant's complaints on October 30 and November 1, 1978 (oral complaint to Ed Fletcher, followed by a section 103(g) complaint to MSHA through UMW, and by written grievance), and on November 13, 1978 (oral complaint to Bill Turley in the presence of Ed Fletcher), were protected activities under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1977 Act), and, if so, (2) whether the job reassignments following the complaints, were discriminatory within the meaning of section 105(c) of the Act.

Section 105(c)(1) of the Act provides in part:

> 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 * * * has instituted or caused to be instituted any proceeding under or related to this Act * * *.

One of the purposes of the legislation is to ensure that a miner will not be inhibited in exercising his rights afforded by the Act, in particular, making safety complaints. The Report of the Senate Committee on Human Resources stated:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. S. Rpt. No. 95-181, 95th Cong., 1st Sess. 31 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 623 (1978) (hereinafter "Senate Report").

The drafters of section 105(c) intended that "[w]henever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." Senate Report at 36, reprinted at 624. The Report also stated:

> It is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses and rates of pay, or changes in pay and hours of work, but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal. It should be emphasized that the prohibition against discrimination applies not only to the operator but to any other person directly or indirectly involved. Senate Report at 36, reprinted at 624. [Emphasis added.]

Section 105(c) is intended to provide full protection to a miner who files or makes a complaint "under or related to this Act," including notifying his foreman or union representative of an alleged danger or safety violation. See Phillips v. Interior Board of Mine Operation Appeals, 500 F.2d

772 (D.C. Cir. 1974), cert. denied sub nom. Kentucky Carbon Coal Corp. v. Interior Board of Mine Operation Appeals, 420 U.S. 938 (1975) (interpreting section 110(b) of the 1969 Act), approved in Senate Report at 36, reprinted at 624.

The Act also affords the miner the right to obtain an immediate safety inspection by notifying the Secretary or his authorized representative of an alleged safety violation. Section 103(g) provides in part:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.

The scope of protected activities under section 105(c) includes the exercise of complaint rights under section 103(g). Senate Report at 35, reprinted at 623.

I. Whether Applicant's safety complaints were protected activities

This question is answered in the affirmative.

In the Phillips case, supra, the Court of Appeals stated that a miner brings "himself within the penumbra of the [1969] Act by notifying his foreman of defective equipment creating dangerous working conditions." 500 F.2d at 774. The court reasoned that "[s]uch safety violations, followed by worker notification to management and an ensuing disagreement, are not to be equated with a simple labor dispute; safety violations bring Section 110(b) [the predecessor to section 105(c)] of the [1969] Act into operation." Id.

Congress adopted and expanded the holding in Phillips in the 1977 Act. Section 105(c). I therefore conclude that Applicant's safety complaints to management, the union, and the Government were protected activities under the Act.

II. Whether the job reassignments following the safety complaints violated section 105(c)

On November 1, 1978, and on November 14, 1978, Applicant received work reassignments while he was operating a piece of equipment, a Cline truck in the first instance and a Dart truck in the second. The first reassignment followed his safety complaints of October 30 and November 1, 1978. The second followed his safety complaints of October 30, November 1, and November 13, 1978. The first reassignment, to outfit a pickup truck to carry explosives, was within Applicant's Grade B carpenter classification. Following completion of this job, Applicant was not reassigned to the Cline

but, instead, was assigned to perform miscellaneous work both within and outside his classification as a carpenter. He suffered no loss in pay. The second reassignment, involving painting and asphalt work, was not within Applicant's carpenter classification. It involved no loss in pay.

The Secretary of Labor argues that the two reassignments violated section 105(c) because they were motivated by a retaliatory intent by both Respondents to penalize Applicant for his prior safety complaints and to deter future safety complaints. The Secretary argues that Respondents' animus towards Applicant was manifested in threats and the use of abusive language by Applicant's supervisors and his co-workers who were told by management that overtime was discontinued because of Applicant's complaints and that the job would be shut down unless Applicant ceased making complaints. Such direct and indirect pressure by Respondents, the Secretary contends, created a tense atmosphere at the safety meetings, which caused Applicant (and other employees) to fear for his safety and was intended to deter him from making safety complaints in the future. The Secretary argues that the evidence of animus towards Applicant affirmatively shows that the reassignments were motivated by Applicant's participation in protected activities.

The Secretary of Labor asserts that proof of tangible injury or damages is not an element of proving discrimination within the meaning of section 105(c). The gravamen of the violation, the Secretary argues, is not a tangible injury; rather, it is the character of the motivation of the persons committing the acts and the discriminatory or interfering nature of such acts. The Secretary argues that once interference with safety complaint rights is found, injury to both the individual and to the public interest is presumed.

The Secretary asserts that Island Creek as much as Langley & Morgan discriminated against Applicant. The Secretary points to evidence that establishes that Island Creek's management was aware of safety complaints by Applicant, that Island Creek supervised activities at V.P.-6 and, on occasion, at V.P.-5 and that its supervisory personnel threatened employees with closing down the job because of Applicant's filing of safety complaints.

Respondents argue that Applicant frequently filed written grievances under the collective bargaining agreement, but none were directed primarily to safety violations. They contend that under the Agreement an employee could be assigned to perform duties below his work classification without a change in the rate of pay, and if an employee were exercising his right of seniority to obtain temporary work assignments to upgrade his experience, he could be taken off the temporary job to perform needed work within his job classification. They argue that an employee dissatisfied with work assignments outside the scope of his work classification must avail himself of the procedures in Article III of the Agreement.

Respondents assert that Applicant was treated no differently than other employees, some of whom had Grade A capenter classifications. They contend

that the two work reassignments were based on legitimate employment needs and that everyone was required, from time to time, to work at various jobs both within and outside his job classification.

They argue that the two reassignments did not violate the Agreement, but even assuming they did, Applicant neither protested the reassignments nor filed a grievance as he had done on other occasions when dissatisfied with an assignment.

Island Creek also argues that once Respondents have shown that the reassignments were within the framework of the Agreement, the burden should shift to Applicant to show that he suffered more than a perceived injury or perceived interference flowing from otherwise lawful acts. Island Creek argues that to prove a violation of section 105(c), there must be a tangible injury, loss or interference, judged by objective standards, that would reasonably inhibit future exercise of rights afforded by the Act.

Finally, Island Creek argues that the two reassignments were made solely by Langley & Morgan supervisors with no participation by Island Creek's supervisors. Island Creek asserts that even if its supervisors had on occasion requested Langley & Morgan employees to perform certain jobs, that fact is immaterial to the present case.

To prove a violation of section 105(c), Applicant must show that the work reassignments or either of them "disciminate[d] against [him] * * * or otherwise interfere[d] with the exercise of [his] statutory rights." Whether or not the reassignments violated the Act ultimately turns on whether they were motivated by an intention to penalize Applicant for a prior safety complaint or to inhibit Applicant from making future safety complaints.

Respondents' arguments that the question of job reassignments should have been left for arbitration under the Agreement begs the question of whether the reassignments were discriminatory. If it is found that Applicant was engaged in protected activity and that the reassignments were discriminatory, then Applicant is properly before this Commission and the grievance-remedy argument falls. If no discrimination is found, there is neither jurisdiction nor need to consider the grievance-remedy argument.

I find that a preponderance of the evidence establishes that the first reassignment, on November 1, 1978, was discriminatory and motivated by an intent to penalize Applicant for prior safety complaints and to discourage Applicant from making safety complaints in the future. I find that both Respondents engaged in this discrimination.

In Shapiro v. Bishop Coal Company, 6 IBMA 28 (March 2, 1976), a discharge case, the Interior Board of Mine Operations Appeals considered a factual aspect of the case similar to the instant case. The Board found that two incidents involving safety complaints led to management animus towards the complaining miner. In one of the incidents, the miner complained to MESA (the predecessor to MSHA) that the company was not properly maintaining

sanding devices on mantrip buses. Following an inspection by MESA, the miner was assigned to clean the sanding devices, which was within his work classification. The Board found significant that at the time of the assignment, the foreman told the miner that since he was the one who made the complaint, he would be the one to clean the devices. Accepting the miner's testimony over that of the foreman, the administrative law judge found, and the Board agreed, that there was sufficient evidence to support a finding of a discriminatory intent in making such assignments. 6 IBMA at 52.

In the instance case, Harris knew Applicant had filed a complaint about the pick-up truck used to haul explosives and Donald Phillips testified that Harris appeared angry with Applicant when he assigned him to build a truck in compliance with federal regulations. There was also testimony, which I also credit, that Harris said to Applicant: "You know enough [about explosives trucks] to make a complaint." As noted, the Interior Board was of the opinion that the retaliatory bad faith of a work assignment was established when the foreman told the complaining miner that since he was the one to make the complaint he would be the one to abate the safety hazard.

The hostile statements by Respondents' supervisors made to and about the Applicant after his complaints on October 30 and November 1 (see Findings 39-42), confirm a retaliatory and discriminatory intent by Respondents toward Applicant because of such safety complaints. A preponderance of the evidence establishes a reasonable inference that supervisors of both Respondents acted in concert in showing retaliatory and discriminatory intent toward Applicant and that the November 1 reassignment was a product and manifestation of their animus towards him.

I find that, regardless of the legitimate nature of the November 1 work reassignment, the motivating cause was the safety complaints on October 30 and November 1, and this establishes a violation of section 105(c).

I also find that the second reassignment, on November 14, 1978, was discriminatory and intended to penalize Applicant for prior safety complaints and to discourage Applicant and others from making future safety complaints. Applicant was removed from the Dart truck on November 13 after he complained that it was unsafe; however, instead of reassigning him to another job at V.P.-6 or to V.P.-5, Bill Turley (in the presence of Ed Fletcher) told him to park the truck, with no other directions. On several occasions that day, both men observed Applicant standing idly by the truck with nothing to do. I find this treatment of Applicant by Island Creek was contrary to and inconsistent with the normal procedures at the mine and exhibited a retaliatory and discriminatory intent towards Applicant because of the safety complaint. The testimony of witnesses establishes that Island Creek actively supervised and controlled all work assignments carried out at V.P.-6. Letting Applicant stand around for nearly one shift before giving him an assignment, clearly in disregard of the established practice at the mine, exhibited an intent to punish Applicant for having made a safety complaint earlier that morning and to discourage him from making safety complaints in the future. I find that this "coventry" treatment of Applicant on November 13 was an integral part of

Applicant's reassignment on November 14, 1978, to perform miscellaneous work outside his work classification, and that the November 14 reassignment was discriminatory and intended to penalize Applicant and to discourage him from making future safety complaints. A preponderance of the evidence establishes a reasonable inference that Terry Gabbert was aware that Applicant had voiced a safety complaint about the Dart truck and that he purposely assigned him to less desirable work to penalize him and to discourage future safety complaints.

Congress "emphasized that the prohibition against discrimination applies not only to the operator but to any other person directly or indirectly involved." Senate Report at 36, reprinted at 624. I find that supervision of construction activities at the Virginia Pocahontas Mines was not exclusively under the control of Langley & Morgan but was under the joint control of both Respondents. The construction agreement between the Respondents was in the nature of a service contract in which Island Creek requisitioned men and materials for a particular job on a day-to-day basis. Under this arrangement, men were used interchangeably at both mines, sometimes moving back and forth in a single day, and the jobs lasted from a few hours to a few weeks, or longer. Fletcher and Turley, or another Island Creek superintendent, generally directed work activities at V.P.-6 and one of the Langley & Morgan superintendents (Meade, Harris or Gabbert) generally directed work activities at V.P.-5 so that whether Island Creek or Langley & Morgan exercised control over a particular employee depended on whether he was working at one mine or the other. I find unconvincing Island Creek's argument that it was far removed from the day-to-day activities at the mines. I find that the procedure used by Island Creek was to notify Langley & Morgan's management, usually at the end of the day, as to what needed to be done the following day. When necessary, Island Creek would specify the details of the job and, if it involved hauling dirt or other material, would supply the trucks. The procedure was informal and not intended to preclude Island Creek from exercising control.

When Applicant was working at V.P.-6 on November 13, he was under the control of Island Creek so that if a problem arose, such as the condition of the Dart truck, Applicant was expected to notify Turley or Fletcher. If the truck were not safe to operate, they would be expected to reassign Applicant to another truck or to another job. Instead, they let Applicant languish next to the parked truck for nearly an entire shift as punishment for making the safety complaint and to discourage Applicant from making complaints in the future.

Given the joint nature of supervision of work activities at the mines, I find that Applicant's assignment to miscellaneous work outside his classification by Superintendent Gabbert on November 14 was discriminatory and integrally related to the "coventry" treatment on November 13. In this instance, as with the reassignment on November 1 following the safety complaints about the explosives truck, a preponderance of the evidence establishes a cause and effect relationship between the complaint about the Dart truck and the

reassignment to miscellaneous work. Congress intended a broad sweep of section 105(c)'s protection against discrimination so that "[w]henever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." Senate Report at 36, reprinted at 624 (emphasis added).

The drafters of the 1977 Act explicitly rejected limiting the reach of section 105(c) to "common forms of discrimination," and intended its prohibition against retaliatory conduct to include "more subtle forms of discrimination." Senate Report at 36, reprinted at 624. I find that Respondents' treatment of Applicant following both safety complaints was a sustained form of psychological interference intending to punish Applicant and deter him and others from making future safety complaints. The effect and intent of their harassing techniques were evidenced in the weekly safety meetings, which Donald Phillips described as becoming increasingly hostile and dangerous to Applicant, as well as in specific demeaning remarks made by Respondents' supervisors to and about Applicant. When supervisors direct intentionally demeaning statements to an employee, incite hostility against him, and give him assignments to do less desirable work, all with a retaliatory intent (punishing Applicant for filing safety complaints and discouraging future safety complaints), a violation of the Act is proved.

The record is replete with evidence of management animus toward Applicant because of his safety complaints. Island Creek Coal supervisors frequently told Applicant's co-workers that Applicant's safety complaints to management, the union, and the federal government threatened them with a loss of work and overtime. Langley & Morgan supervisors were similarly angered by Applicant's safety complaints and threatened to close down the job if Applicant continued to make safety complaints and called in the federal government again. They subjected him to abusive language and held him up to public ridicule and contempt before his co-workers. The hostility they directed at him and generated in his co-workers resulted in such tension in Applicant's relations with such supervisors and co-workers that he could reasonably fear for his safety. I find that the underlying motive behind the reassignments was a retaliatory intent that violated the Act.

I find unconvincing Island Creek's argument that even if Applicant was discriminated against, he suffered no injury in fact. Although Applicant suffered no loss in pay and was not discharged, both reassignments were to do less desirable work; the operation of heavy equipment was generally preferred as better, cleaner work than normal carpenter work. This was especially true as to Applicant, who had filed and won a grievance to exercise his seniority right to operate heavy equipment when available and he was not needed for his classification.

In summary, with further specific findings, while Applicant and other Langley and Morgan employees were working at the V.P.-6 Mine, they were actively supervised by Island Creek supervisors, including Ed Fletcher and Bill Turley. Each reassignment in issue occurred while Applicant was working at the V.P.-6 Mine. In each case he made a safety complaint to Fletcher

or Turley and Langley & Morgan management had actual or clearly implied knowledge of it. In each case he was shortly reassigned from heavy equipment work to do less desirable work. After the first safety complaint, on October 30, 1978, and extending beyond the complaint on November 13, 1978, supervisory personnel of both Respondents showed increasingly harsh and retaliatory animus toward Applicant because of such complaints. Taken as a whole, I find that the preponderance of the evidence shows that the Respondents acted as joint supervisors of Applicant in connection with the two reassignments in issue, that the reassignments were discriminatory, retaliatory, and intended to penalize Applicant for prior safety complaints and to deter him and others from making safety complaints in the future, and that the retaliatory acts of Respondents' supervisors combined to cause and resulted in such reassignments. The Respondents are jointly and equally responsible for these discriminatory reassignments, which constitute violations of section 105(c) of the Act.

As relief, Applicant requests the following:

1. An order directing Respondents to cease and desist in discriminatory harassment of Applicant.

2. An order directing Respondents to pay, in accordance with section 105(c)(3) of the Act, all costs and expenses reasonably incurred by Applicant for and in connection with the institution of this proceeding.

3. A civil penalty assessed against Langley & Morgan for $5,000.

4. A civil penalty assessed against Island Creek for $7,000.

The authority for assessing a civil penalty against an operator for a violation of section 105(c) of the Act is found in sections 105(c)(3) and 110(a). Section 105(c)(3) provides in part: "Violations by any person of [section 105(c)(1)] shall be subject to the provisions of sections 108 and 110(a)." Section 110(a) provides in part: "The operator of a coal or other mine in which a violation of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary * * *."

CONCLUSIONS OF LAW

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

2. At all pertinent times, each Respondent was an "operator" of the V.P.-5 Mine and of the V.P.-6 Mine within the meaning of section 3(d) of the Act.

3. Respondents, Langley & Morgan Corporation and Island Creek Coal Company, as joint supervisors of Applicant, violated section 105(c) of the

Act (1) by reassigning Applicant to outfit an explosives truck on November 1, 1978, and (2) by reassigning Applicant to miscellaneous work outside his work classification on November 14, 1978.

ORDER

PENDING FINAL ORDER, Applicant shall have 7 days to submit a proposed order for relief, with service on Respondents. Respondents shall have 7 days from such service to file any response to the proposed order.

William Fauver
WILLIAM FAUVER, JUDGE

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2 0 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
Petitioner	:	Docket No. CENT 79-152-M
v.	:	A.O. No. 39-00049-05004
AMERICAN COLLOID COMPANY,	:	Mine: American Colloid Belle Fourche Mill
Respondent	:	

DECISION

Appearances: Phyllis K. Caldwell, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Max Brooks, Corporate Manager for Industrial Relations, American Colloid Company, Belle Fourche, South Dakota, for Respondent.

Before: Judge Edwin S. Bernstein

STATEMENT OF THE CASE

In accordance with Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), I held a hearing in this case on May 8, 1980, in Rapid City, South Dakota. At the hearing, the parties stipulated and I find:

1. This case comes within the jurisdiction of the Federal Mine Safety and Health Act of 1977, and I have jurisdiction.

2. The citations here were properly served by duly authorized representatives of the Secretary of Labor.

3. Respondent is a medium size operator with approximately 90 employees.

4. There was good faith abatement of all citations.

5. The penalties proposed would not adversely affect Respondent's ability to remain in business.

6. Respondent has a medium to low history of previous violations.

FINDINGS AND DECISION FOR ORDER NO. 328549

Petitioner alleged that Respondent violated the mandatory standard at 30 C.F.R. § 55.15-5, which reads: "Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

Two witnesses testified for each party. The inspector, Guy Carsten, testified for Petitioner. Alfred Williams and Bill Reitz testified for Respondent. Keith Campbell testified for Petitioner as a rebuttal witness.

Petitioner's witnesses contended that at the time Inspector Carsten visited the facility, there were two men on Respondent's conveyor belt. One was on the belt about 10 to 12 feet above the ground; the other was in a hopper about four to five feet above the ground. Respondent's witnesses contended that the only man on the site was in the hopper and since he was only four or five feet off the ground, there was very little danger of injury through falling.

Inspector Carsten testified that when he visited Respondent's facility on March 13, 1979 in the company of Keith Campbell, an MSHA trainee, he noted two men on Respondent's conveyor belt system. One was 10 to 12 feet off the ground on the conveyor belt itself, and the other man was in the hopper. The

man on the conveyor belt was not wearing a safety belt. The inspector verified this when he approached the belt, and immediately issued an imminent danger order under Section 107(a) of the Act. The violation was abated within 20 minutes by having the man put on a safety belt.

Mr. Carsten stated that the conveyor belt was approximately three feet wide, 40 feet long, and on a 40-degree angle. He was told that the conveyor belt was frozen and was in the process of thawing. There was some bentonite 1/ on the conveyor belt. Mr. Carsten testified that the bentonite was wet, making the belt slippery. He concluded that there was a great danger of the man falling from the slippery conveyor belt. If this had occurred, the man would have fallen about 10 to 12 feet onto the frozen ground. Mr. Carsten felt that this could result in a fatality or serious injury, such as a head injury or a broken neck. He based this conclusion on a somewhat similar case where a man fell only seven feet and was killed even though he was wearing a hardhat. Mr. Carsten therefore concluded that this was an imminent danger situation. He also stated that Respondent was negligent because the conveyor could be seen from the windows of Respondent's office.

Alfred Williams, Respondent's plant manager, testified that he saw a man in the hopper, but he did not see a man on the conveyor belt when the inspector visited the office. He testified that from the hopper area, a man would have fallen approximately five feet into a soft unpacked pile of bentonite,

1/ Bentonite is a type of clay which Respondent produces.

and would not have been injured. He added that he was unaware at the time that a withdrawal order was being issued.

Bill Reitz, Respondent's maintenance superintendent, testified that he saw a man in the hopper, but not on the conveyor belt. He agreed with Mr. Williams that if a man fell from the hopper, he would fall only three to four feet into a pile of soft bentonite. In his opinion, there was very little danger of injury if the man had fallen from the hopper.

On cross-examination, however, Mr. Reitz stated that there could have been two men on the conveyor belt, and the second one may have been on the conveyor further up from the hopper. He stated that he would not contradict the inspector's testimony that he saw a man on the conveyor belt in addition to the man in the hopper. He further testified that because of Mr. Carsten's concern he immediately instructed the men to put on safety belts. He also stated that he did not remember whether he received the imminent danger order, but again he would not dispute Inspector Carsten's testimony.

Keith Campbell testified for Petitioner as a rebuttal witness. He stated that he accompanied Inspector Carsten on March 13, 1979, as an inspector trainee. Mr. Carsten told Mr. Campbell that he could run the inspection while Mr. Carsten observed. Mr. Campbell testified that he saw one man on the belt and one man on the hopper. He had no difficulty observing and he carefully watched the men on the conveyor belt for about a minute. He had no doubt that there were two men and that one man could have fallen approximately 12 to 15 feet.

I find that Respondent violated the mandatory safety standard at 30 C.F.R. § 55.15-5 and that the imminent danger order was proper in that there was a man on the conveyor belt between 10 and 15 feet above the ground who was in imminent danger of falling, was not wearing a safety belt, and did not have a line attached to him.

Although there seems to be a conflict between the testimony of Petitioner's two witnesses on the one hand, and Respondent's two witnesses on the other, I am persuaded there was a man on the conveyor belt in addition to a man in the hopper. The Government witnesses testified unequivocally and without inconsistencies, and I found them to be extremely credible. Mr. Reitz's testimony did not directly conflict with the inspectors' testimony. He indicated that although he did not observe two men on the conveyor belt, this could have been the case and he would not contradict the inspectors' testimony to that effect. As for Mr. Williams, he indicated that he was approximately 250 feet away from the conveyor. There are two explanations for his conflicting testimony. Either his ability to observe was impaired and he observed incorrectly, or he testified falsely. It is not necessary to determine that he testified falsely. I prefer to give him the benefit of the doubt and conclude that his ability to observe was not as good as that of Petitioner's witnesses.

Additionally, it is important to remember that Mr. Campbell was a trainee who was being double-checked by Mr. Carsten. This substantiates their credibility, for it seems less likely that where one man was double-checking another, and they both testified that they observed the same thing, they would observe or testify to something that was incorrect.

I also find that the imminent danger order was properly served upon Respondent. I accept the Petitioner's witnesses' testimony on this point, which similarly was not contradicted by Mr. Reitz.

Turning to the criteria in Section 110(i) of the Act, I find that the risk of injury was extremely great. The conveyor belt was slippery and on a 40-degree angle. Had the man slipped and fallen, he probably would have been seriously injured or killed. Respondent was negligent because this situation was within view of its office. I assess a penalty of $900 for this violation.

FINDINGS AND DECISION FOR CITATION NO. 328552

Petitioner alleged a violation of the mandatory standard at 30 C.F.R. § 55.4-4, which reads: "Flammable liquids shall be stored in accordance with standards of the National Fire Protection Association or other recognized agencies approved by the Mine Safety and Health Administration. Small quantities of flammable liquids drawn from storage shall be kept in appropriately labeled safety cans."

Inspector Carsten testified that when he visited Respondent's facility on March 13, 1979, he found gasoline being stored in a plastic, one-gallon milk container. 2/ The container was unmarked, approximately one-half full, and located on a walk platform near an elevator. Mr. Carsten testified that he determined the contents of the container to be gasoline by smelling it.

2/ The parties stipulated that the milk container was not depicted as an appropriately labeled safety can in the National Fire Protection Association Handbook.

He stated that there were maintenance men in the area, and that even though the container was covered, it could have fallen and caused a fire or explosion.

Mr. Reitz, testifying for Respondent, stated that he had not seen the container before the inspector showed it to him, and that it was unusual for gasoline to be on that level; usually oil or diesel fuel would be used there. He stated that people traversed this area about once a day to grease some bearings. Mr. Reitz testified that the substance smelled like gasoline to him. Nevertheless, Respondent attempted to argue that the container held diesel fuel or oil, rather than gasoline.

Based upon the testimony of both Inspector Carsten and Mr. Reitz, I find that the liquid in the container was gasoline, and that there was a violation of the standard. Respondent's negligence was slight. Respondent's employees apparently were not in the area very often, and thus would not easily observe the container. I find the gravity to be slight, in that a closed container did not present a great risk of injury. I assess a penalty of $50 for this violation.

FINDINGS AND DECISION FOR CITATION NO. 328957

Petitioner alleged a violation of the mandatory standard at 30 C.F.R. § 55.12-18, which reads: "Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location."

Iver Iverson, Petitioner's inspector, testified that on March 12, 1979, while making an inspection, he found a No. 2 dryer control panel with eight disconnect switches which were not properly labeled. There was dust covering some of the switches, and either the labeling could not be seen or was not legible. 3/

Charles Johnson, the electrical supervisor at Respondent's plant, testified that there was dust on the boxes, and that although the inspector might not have been able to read them, Johnson could read them. He stated that this was an out-of-the-way area, and most people in the area knew how the boxes were labeled.

I find that the standard was violated as alleged. I accept the inspector's testimony that the boxes were not properly labeled to show which units they controlled. If they were labeled, the labeling was illegible. Although Mr. Williams or someone who was extremely experienced as an electrician might have been able to read the labels, I believe that other workers who were in the area might not have been able to read them. I further find that the negligence and the gravity were slight. Therefore, I assess a penalty of $45 for this violation.

ORDER

The withdrawal order is AFFIRMED. Respondent is ORDERED to pay $995 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge

3/ The parties stipulated that the boxes were labeled, but that an issue remained as to their legibility.

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23 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceeding Docket No. DENV 79-530-PM A.O. No. 34-00282-05003-I
v.		
ST. CLAIR LIME COMPANY,	Respondent	Marble City Mine

DECISION

Appearances: David S. Jones, Attorney, U.S. Department of Labor, Dallas, Texas, for the petitioner;
Steven F. Dunlap, Sallisaw, Oklahoma, 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), seeking an assessment of a civil penalty for one alleged violation of the provisions of mandatory safety standard 30 C.F.R. § 57-15-5. The alleged violation was served on the respondent in a section 104(a) Citation No. 166181, issued by MSHA inspector Russell E. Smith on April 26, 1978.

Respondent filed a timely answer contesting the alleged violation and requested a hearing. A hearing was held on April 15, 1980, in Ft. Smith, Arkansas, and the parties appeared and participated fully herein. Post-hearing briefs and proposed findings and conclusions were waived by the parties, but they were afforded an opportunity to present oral arguments on the record at the hearing. Those arguments have been considered by me in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

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

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

ISSUES

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

DISCUSSION

The section 104(a) citation issued by the inspector in this case describes the following condition or practice which the inspector believed constituted a violation of 30 C.F.R. § 57.15-5:

> Two men were working from a scaling rig raised 18 feet from the underground mine floor and were not wearing safety belts. A large scale was scaled from the rib and hit the basket breaking it loose from the boom. The men fell from the basket to the floor.

Petitioner's testimony and evidence.

MSHA supervisory inspector Russell Smith testified as to his mining background and experience, confirmed that he conducted a mine inspection on April 25 and 26, 1978, at Respondent's underground limestone mine and he indicated that the inspection was in conjunction with an accident investigation that he was conducting. Two men were injured when they fell from a scaling rig basket after it was struck by a falling rock. He issued the citation in question on April 26, 1978, citing a violation of 30 C.F.R. § 57.15-5, after he concluded his investigation of the accident, and he determined that the two men were not wearing safety belts or using safety lines as required by the cited safety standard (Tr. 6-16). In his opinion, had the men been wearing safety belts, they would not have fallen from the basket when it was struck by the rock. He measured the distance from the floor of the basket to the railing, and determined that it was 41 inches, or "waist high" to a 5-foot 7-inch body. A sudden slip or added weight to the basket would cause it to tip. He believed the men in the basket were exposed to a falling hazard while they were scaling rock because something could go wrong with the hydraulic lift device, and any sudden shifting or slipping while using the scaling bars could cause the basket to tip and spill the men out of the basket to the mine floor below (Tr. 18-19).

Inspector Smith testified that during his investigation, he determined that the mining height at the scene of the accident was some 25 feet, and that the men fell 18 feet from the basket to the floor below. The maximum operating height of the scaling rig was 30 feet, and it was designed so that two men could scale a wall from inside the basket using 7-1/2 foot scaling bars. According to an eyewitness, the two men were reaching out in a sideway position attempting to scale down a large boulder. While attempting to position themselves above the boulder, they moved the basket in front of it so as to obtain better leverage, and the boulder broke and tilted out "like a falling tree" and caught the bottom edge of the basket breaking the bolts holding the basket to the self-leveling head. This caused the basket to tip and dump the men to the floor below. The men were wearing hardhats, but his investigation detemined that there were no safety belts or lines on the scaling rig (Tr. 42, 46-50, 60-70).

Inspector Smith testified that the two men who were injured were the only two exposed to a hazard, and he believed that the condition cited was readily observable since the basket was constructed of angle-iron, was "open", and the men could be observed from the mine floor below (Tr. 19). He also indicated that the probability of an accident occurring in similar circumstances would depend on the experience of the individuals performing scaling, and a more experienced miner would have a tendency to be more cautious. In addition, the severity of any injuries would increase in proportion to the height at which scaling is being performed (Tr. 20). Abatement was achieved within 45 minutes and the respondent installed safety belts secured to the basket railing by ropes. Respondent also installed a shear-pin shaft through the basket self-leveling head which would permit the basket to drop only 6-inches (Tr. 20-21). Photographs of the scaling rig, including the installation of the shear-pin, were received in evidence (Exhs. R-1 through R-5).

Respondent's testimony and evidence.

Gary Griffin, testified that he has been employed by the respondent for 13 years as Quality Control Director and Safety Director. He identified the two employees who were injured when they fell from the scaling basket, and their employment applications reflect that one of the men was 6 feet tall and the other 5 feet 9 inches tall. He also identified a sketch of the aerial basket in question, which includes its dimensions indicating that it is 60 inches long by 41 inches wide and has a 42-inch height from the metal floor to the top of the railing which encloses the basket. He also identified an organizational chart of key mine personnel which reflects that he is in a staff position reporting directly to the works manager and has no authority or responsibilities placed upon him by the quarry superintendent (Tr. 77-79, Exhs. R-10 through R-13).

On cross-examination, Mr. Griffin stated that he has served as quality control director since 1967 and as safety supervisor since 1971 (Tr. 82). At the present time he spends about 75 percent of his time on safety matters. He indicated that the mine has a written safety program and that safety rules and regulations are issued to new employees and they are enforced, including employee discharges. He denied that he ever told Inspector Smith that employees are not safety conscious and that he can

only act in an advisory capacity on matters of safety. However, he conceded that he cannot tell the works manager what to do on safety matter, but can only advise him. He utilizes "safety cards" to advise employees about safety infractions and believes this method to be effective (Tr. 84-89; Exh. R-14).

In response to further questions, Mr. Griffin stated that he is an MSHA certified safety trainer and that mine management has specifically given him authority to immediately correct unsafe conditions by shutting down equipment when he finds such conditions (Tr. 97-98). He also indicated that when men are scaling the walls they sometimes have to reach out and around the walls while attempting to position themselves to scale the rocks (Tr. 101). He believed the accident in question was a "freak" one (Tr. 101). He stated that he would feel comfortable scaling a 25 foot wall from the scaling rig without a safety belt because he has no fear of falling from the basket with the 42 inch high railing and he likened it to walking down a catwalk. He also indicated that he did not want to be strapped to the basket and would want to be able to get away if it tipped. In his judgement, he would feel more comfortable in the scaling basket without a safety belt attached (Tr. 102).

Findings and Conclusions

Fact of Violation

Respondent is charged with a violation of 30 C.F.R. § 57.15-5, which provides as follows: "Safety belts and lines shall be worn when men work where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

In this case, I believe that it is clear from the evidence adduced that the two men who were injured as a result of falling from the aerial bucket when it was struck by a rock which they were attempting to scale down while working from the bucket which was raised some 25 feet off the mine floor were not tied off by any safety lines or belts. It is also clear and without any doubt that no safety belts or lines were in the bucket for the men to use, and respondent has presented no testimony or evidence to rebut the findings of the inspector in support of the citation which he issued. Respondent's defense to the citation rests on its assertion made at closing arguments during the hearing that the aerial basket in question was of good design, and that since its purchase in 1975 it had never been cited before for lack of safety belts, even though MSHA conducted some 27 inspections at the mine. Respondent asserted further that the use of safety belts on the scaling rig increases the likelihood of injuries because in the event of a fall from the basket the basket itself may fall on the men if they were attached to it by belts or they could be left dangling in mid-air from the basket. Respondent also asserted that it exhibited good faith by rapidly installing the belt as well as a support shaft pin within 45 minutes of the accident and that on the day of the accident the men were as high as they would ever be in the mine (Tr. 104-105).

The initial question presented is whether the men who were working in the aerial bucket suspended above the mine floor were in any danger of falling. On the facts presented in this case, I believe the question

necessarily must be answered in the affirmative. Although the scaling rig bucket in question is constructed in such a manner as to afford employees some protection by means of the railing which encloses them inside the bucket, that railing is only 42 inches high, which is approximately waist high to one of average height. A description of the scaling process carried on by two men in such a raised aerial bucket, including the use of scaling bars, clearly indicates to me that the men performing this work are not always stationery and merely performing a simple chore such as changing a light bulb. They are constantly moving about the bucket, leaning over and around walls and rocks which they are attempting to scale down. In this process, they are constantly shifting their weight and position in the bucket while attempting to best manuever themselves so that proper leverage may be obtained with their scaling bars, and respondent's own safety director conceded as much during his testimony. In such circumstances, I conclude that there is always a danger of someone falling from the bucket while leaning out and shifting his weight, and, as happened in this case, there is always a danger of a falling rock striking the suspended bucket and causing it to tip over. I conclude further that the cited standard required that safety belts or lines be provided and worn by the men while they were performing such scaling duties from the scaling rig in question. The fact that the men are not too enchanted with such devices or that the safety director himself was of the view that he personally feels more comfortable without a safety belt is irrelevant. Further, I have given little weight to the safety director's testimony in this regard since there is no evidence that he performed scaling duties suspended from such a rig and respondent presented no competent testimony or evidence from anyone performing such duties that the use of safety belts in such situations was in itself a hazard. Based on the testimony and evidence of record, I am convinced that the use of safety belts or safety lines on the day in question could have prevented the two men who were injured from falling out of the bucket to the floor below after it was struck by the falling rock which they were attempting to dislodge. Respondent's defense is rejected and the citation is AFFIRMED.

Gravity

In clarifying his prior written inspector's statement concerning the gravity of the citation in question, Inspector Smith conceded that it was not likely that two men in question would have been working higher than 25 feet from the mine floor on the day of the accident, but that in other areas of the mine where the mining heights reach 30 or 40 feet, any scaling work being performed at those heights would increase the severity of any injury resulting from a fall from the scaling rig (Tr. 50-51). However, the fact remains that in this case the two men who were injured when they fell from the basket in question received serious injuries. Under the circumstances, I conclude and find that failure to provide safety belts or lines constitutes a serious violation.

Negligence

Inspector Smith identified Exhibit P-5 as a copy of a previous citation issued by him at the mine on July 15, 1971, citing the respondent with a violation of section 57.15-5 for failure to provide an underground scaling basket with safety belts. Mr. Smith stated that he discussed this prior

citation with safety supervisor Gary Griffin at the conclusion of his April 1978, inspection, and that Mr. Griffin advised him that the men wore safety belts for awhile, but since they felt the belts impeded their progress while in the scaling basket they quit wearing them (Tr. 30). Mr. Smith also confirmed that Mr. Griffin was the safety director in 1971 when the previous citation was issued (Tr. 31).

Inspector Smith identified Exhibit R-6, pg.3, as his inspector's report, and when asked to explain the circumstances which led him to state on that report that "the condition or practice cited could not have been known or predicted; or occurred due to circumstances beyond the operator's control," he stated that at the time of the 1978 inspection, a new mine superintendent had been hired and he was not familiar with the safety belt requirements of section 57.15-5, and was not aware of the previous citation issued in 1971 (Tr. 41-42).

Aside from the question as to whether the specific scaling rig in question was previously cited for failure to equip it with safety belts, which I find is not the case here, and aside from the fact that other inspectors may not have cited the rig in question, which I find is no defense to the citation, the fact remains that the respondent should have been aware of the fact that the two men working high above the mine floor from the scaling rig in question were exposed to a potential falling hazard. It seems obvious to me that this is not the first time the subject of safety belts on such a rig has come up at the mine in question. Inspector Smith testified that he discussed a prior citation involving the old rig with safety director Griffin during the conference held after the citation here in question was issued, and Mr. Griffin conceded that the men did not want to wear safety belts because they felt it restricted their movements. It seems to me that such decisions should not be left to the workforce or to the judgment of each individual miner, but rather, to a responsible company safety official. Once a hazard of falling is identified, then I believe it is incumbent on a mine operator to insure that safety standards, such as the one in issue here, are strictly enforced. Under the circumstances, I conclude and find that the violation resulted from respondent's failure to exercise reasonable care to prevent the conditions cited and that respondent should have reasonably known that safety belts and lines were required. Accordingly, I find that the citation resulted from ordinary negligence by the respondent.

Good Faith Compliance

The evidence establishes, and I find, that the respondent exercised rapid good faith compliance in correcting the conditions cited and this fact has been taken into consideration by me in the assessment of the civil penalty in this case.

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

At the time the citation was issued the underground limestone mine and associated mill were working two shifts, employing approximately 28 men on the day shift, and approximately 10 men on the evening shift (Tr. 14).

Quality control director Griffin testified that current mine production is about 1,800 tons a day on a 5-day week and one crushing shift basis (Tr. 81). Under these circumstances, I conclude that the respondent is a medium-to-small operator.

Respondent stipulated that the assessment of a civil penalty in this matter will not adversely affect its ability to remain in business (Tr. 106).

History of Prior Violations

Exhibit P-3 is a computer printout itemizing respondent's mine inspection and violation history for the period January 1972 to March, 1980. Exhibit P-4 is a summary of notices and orders issued at respondent's three mining locations, namely the Sallisaw Lime Plant, and the Marble City Lime Plant, Mill and quarry (Tr. 26-27). That summary reflects that since the passage of the 1977 Act, 64 citations were issued at, and charged to, respondent's Marble City Lime Plant and quarry (Tr. 28). Although Inspector Smith alluded to the fact that he had issued a prior citation in 1971 at the mine citing section 57.15-5 for failure to have safety belts on a scaling rig, he was not sure whether this citation was for "the old scaling rig" or the one he cited in 1978 (Tr. 35-36). However, he further clarified his position by specifically stating that the "new scaling rig," that is, the one which he issued Citation No. 0166181 against, was only previously cited for a violation of section 57.9-2, for failure to have additional counterbalance weights, and that it had never been cited for lack of safety belts (Tr. 51). Further, after reviewing previous inspection reports produced by the respondent (Exhs. R-7, R-8, and R-9), he conceded that the "old" scaling rig was removed from the mine sometime during December 1975 (Tr. 52-54

Respondent' history of prior violations includes a number of citations issued under the now repealed Federal Metal and Nonmetallic Mine Safety Act, and I take note of the fact that under that law, no civil monetary penalty assessments were levied against mine operators for infractions of mandatory safety standards. Although the language of section 110(i) of the 1977 Act simply refers to "history of previous violations" as one of the six statutory criteria to be considered in assessing penalties, without regard to whether civil penalties were assessed, the former Interior Board of Mine Operations Appeals has consistently held that "prior history" means all violations which have been assessed against and paid by a mine operator, and section 110.3(a), of Part 100, Title 30, Code of Federal Regulations, petitioner's assessment regulations, treats "prior history" in terms of assessed violations.

In this case, the citation which issued on April 26, 1978, was issued a little over a month after the effective date of the 1977 Act on March 9, 1978, and according to the computer printout, this appears to be the first citation issued after the new Act became effective. However, I cannot overlook the fact that the respondent's history of prior violations, are reflected by Exhibits P-3 and P-4, for an operation of its size and scope, is not particularly good, and I have considered respondent's total prior history as reflected in these exhibits in assessing the civil penalty in this matter.

Penalty Assessment

On the basis of the foregoing findings and conclusions made in this proceeding, including consideration of the six statutory criteria set forth in section 110(i) of the Act, I find that a civil penalty assessment in the amount of $1,200 is appropriate in this case for a violation of 30 C.F.R. § 57.15-5, as stated in Citation No. 166181, issued on April 26, 1978.

Order

Respondent is ORDERED to pay the civil penalty assessed by me in this matter, in the amount of $1,200 within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge

Distribution:

David S. Jones, Esq., U.S. Department of Labor, Office of the Solicitor, 555 Griffin Square, Suite 501, Dallas TX 75202 (Certified Mail)

S. F. Dunlap, General Manager, St. Clair Lime Co., P.O. Box 569, Sallisaw, OK 74955 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

24 JUN 1980

HARRISON-PELTRON, A Joint Venture, Applicant,	APPLICATION FOR REVIEW
v.	DOCKET NO. WEST 80-121-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	ORDER NO. 387143
	MINE: NEWLIN CREEK

DECISION

Appearances:

Phyllis K. Caldwell, Esq., Office of the Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294, for the Respondent.

Darrel J. Skelton, Esq., 4380 Harlan, Wheatridge, Colorado, 80033, for the Applicant.

Richard L. Fanyo, Esq., 1100 United Bank Center, Denver, Colorado 80290, for the Applicant.

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

This proceeding was filed by the Applicant pursuant to section 107(e) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) [hereinafter cited as "the Act" or "the 1977 Act"], seeking review of an order of withdrawal issued by the Respondent pursuant to section 107(a). *

* Section 107(a) of the 1977 Act, 30 U.S.C. § 817(a), reads:

> "If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized respresentative 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),

In accordance with a stipulated motion to expedite and pursuant to notice, a formal hearing was held in Littleton, Colorado, on February 26, 27 and 28, 1980. The filing of the transcript, post hearing briefs and reply briefs was completed on April 23, 1980.

By his withdrawal order, the Respondent alleges that on November 15, 1980, an imminent danger existed in four areas of Applicant's mine due to the condition of the roof. The Applicant alleges that no imminent danger existed on November 15, 1979, and that the withdrawal order should be vacated.

ISSUE

The sole issue presented for determination is whether on November 15, 1979, an imminent danger existed as a result of roof conditions in the four cited areas of Applicant's Newlin Creek Mine.

GOVERNING PRICIPLES

Imminent danger is defined as "... the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 3(j) (1976), as amended, 30 U.S.C. § 802(b)(4)(1978). The test of imminence is objective and the inspector's subjective opinion need not be taken at face value. Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F. 2d 741 (7th Cir. 1974).

The Applicant has the burden of proof in a proceeding involving an imminent danger order. Thus, the Applicant must show by a pronderance of the evidence that

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Footnote Continued from Page 1.

> 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."

an imminent danger did not exist. Lucas Coal Company, 1 IBMA 138 (1972). Since withdrawal orders are "sanctions" within the meaning of Section 7(d) of the Administrative Procedure Act, 5 U.S.C. § 556(d) (1970), and may be imposed only if the government produces reliable, probative and substantial evidence which establishes a prima facie case, MSHA must bear the burden of establishing a prima facie case. Lucas Coal Company, supra, Carbon Fuel Company, 2 IBMA 42 (1973), Freeman Coal Mining Company, supra.

EVALUATION OF THE EVIDENCE AND FINDINGS OF FACT

Respondent's witness, a MSHA inspector, issued the contested withdrawal order on November 15, 1979, citing the following four areas of Applicant's mine:

(1) The No. 1 entry, from the 1st crosscut inby the portal to and including the 2nd crosscut for a distance of 165 feet.

(2) The No. 1 entry from the 8th crosscut to the face and including the connecting crosscuts, a distance of 200 feet.

(3) The No. 2 belt entry from the No. 8 crosscut to the face and including crosscuts, for a distance of 200 feet.

(4) The No. 3 intake entry from the portal to the face of the No. 3 entry and crosscuts for a distance of 1,360 feet.

To summarize the testimony of the MSHA inspector, generally, he observed loose, unsupported, cracked, drummy and separated roof in the cited areas, and, in the No. 1 entry from the 8th to the 9th crosscut, for a distance of 65 feet, he observed excessive widths measuring from 20 to 28 feet. The inspector had been in the mine the day before, on November 14, 1979, but did not notice any condition in the mine that would constitute an imminent danger.

Although subsequent modifications of the withdrawal order were made on November 27 and 29, 1979, the order was not terminated until December 10, 1979. Applicant did not conduct normal coal mining operations from November 15, 1979, to December 10, 1979. (TR. 425).

The immediate roof of the mine consisted of laminated shale of variable thicknesses. The ultimate roof of the mine was sandstone. (TR. 220-221). The mining sequence carried out by Respondent attempted to remove any of the immediate shale roof which might eventually fall.

Applicant's witnesses, including an independent expert witness who was a mining engineer and who first visited the mine on November 19, 1979, generally testified that some areas of the roof were loose, drummy or cracked, but that no imminent danger existed as to the condition of the roof due to the mining sequence which Applicant followed. The engineeer stated that after the continuous mining machine makes a cut (first approximately 8 feet along the left rib and then 8 feet along the right rib, each time backing out) the shale roof is allowed to fall or is cut down with the continuous miner. If it is necessary, safety posts are set and the roof is barred down. (TR. 217).

The mine inspector observed that workmen were scaling the top down when he made his inspection on November 15, 1979. (TR. 35). The mining engineer noticed that there was evidence of barring down throughout the mine. (TR. 218). Thus, as part of the mining sequence, miners were following practices to remedy the condition of the roof before other mine personnel began working under the roof. (TR. 177).

Although the mining engineer who testified for the Applicant did not inspect the mine until November 19, 1979, I conclude that the condition of the roof had not improved since the date of the closure order on November 15, 1979. The mine was still closed due to the outstanding withdrawal order. Some roof work was going on in an effort to have the order terminated. However, the mining engineer and several employees of Applicant testified that because they did not know why the imminent danger order issued, or what constituted the imminent danger, they found it difficult to abate the withdrawal order. (TR. 241, 366, 367, 389, 419).

The engineer inspected the two areas that were observed by the MSHA inspector as being overwide. Both areas had been timbered to proper widths with an extra row of timbers between the outer row and the rib. These timbers had been installed for some time as concluded from the observation of rock dust which had accumulated on them and from the observation that they were providing adequate support. (TR. 208, 211, 212).

There was evidence that the crack located in the roof of entry No. 2, beyond the 8th crosscut, was of long duration due to the accumulation of mud and iron stains in the chink. (TR. 213-214). There was no evidence that the roof would fall before the condition could be abated in this area.

The entire No. 3 entry was included in the order, a distance of 1,360 feet. It is difficult to comprehend how there could be no imminent danger in this area on November 14, 1979, and yet the next day, on November 15, 1979, the roof for the entire length of the entry was ready to fall. It is equally difficult to comprehend why a MSHA inspector and mining personnel of Applicant would walk through all three mine entries numerous times inspecting, and while the imminent danger order was still in effect, (TR. 142, 436), if the roof was "ready to cave in". (TR. 40). "... [E]very roof condition is not an imminent danger." Consolidation Coal Company v. Secretary of Labor, Mine Safety and Health Administration (MSHA), (Docket No. PENN 79-72, October 25, 1979) at 1692.

The mining engineer concluded that the roof consisted of competent sandstone. (TR. 264, 265). He testified that he found some pockets of shale which were drummy, loose or sagging slightly due to air slacking, but none which he considered to be an imminent danger because of the utilization of constant surveillance and the practice of barring down. (TR. 275, 313, 217, 218).

After an inspection on December 10, 1979, another MSHA inspector allowed the mine to reopen, but stated there would have to be a new roof control plan before the abatement was complete. (TR. 434).

All personnel intimately involved with the day to day operation of the mine agreed with the mining engineer that, although some isolated patches of shale may have been loose or drummy, no imminent danger existed in the mine on November 15, 1979. Likewise, attempts to support the shale were both futile and less safe than taking it down. These mine personnel included the manager, (TR. 411, 438), the mine superintendent, (TR. 364, 365), the swing shift foreman, (TR. 180, 182, 194), and the mine foreman. (TR. 334). The mine foreman also testified that after the closure order was issued more roof bolting took place than before, but he did not believe it added anything to the safety of the mine. (TR. 333). Apparently, the roof bolting was being done to assist in abatement of the order.

What is crucial in determining whether an imminent danger existed on November 15, 1979, is the time element. That is, whether the cited condition could be abated before the reasonable expectation of death or serious physical harm could occur. It may be that a different roof control plan would be more effective in controlling the potential risk of a roof fall in the mine, but that is not determinative in this imminent danger proceeding; time is.

The MSHA inspector who issued the order had been in the mine only once before November 14, 1979. His testimony is not as persuasive as the operator's witnesses, who possessed a far greater familiarity and knowledge of the area and the day to day condition of the roof. The continuous vigilence and mining sequence practiced by the operator allowed Applicant to abate any dangerous roof condition before death or serious physical harm might reasonably be expected to occur.

CONCLUSIONS OF LAW

1. The Applicant and its Newlin Creek Mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977.

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

3. The Applicant has sustained its burden of proof to a preponderance of the evidence that an imminent danger did not exist in its Newlin Creek Mine on November 15, 1979.

4. The withdrawal order should be vacated.

ORDER

Accordingly, Withdrawal Order No. 387143 is hereby VACATED.

Jon D. Boltz
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

2 4 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	)	CIVIL PENALTY PROCEEDING
	)	DOCKET NO. WEST 79-377-M
v.	)	A/O NO. 35-01003-05001
KINCHELOE AND SONS, INC., Respondent.	)	MINE: KINCHELOE QUARRY

Appearances:

Judith Vogel, Esq., Office of the Solicitor, United States Department of Labor, 11071 Federal Building, Box 36017, 450 Golden Gate Avenue, San Francisco, California 94102
for the Petitioner,

Mr. Mickey Kincheloe, Vice President, Kincheloe and Sons, Inc., P. O. Box 296, Myrtle Point, Oregon 07458
for the Respondent.

Before: Judge Virgil E. Vail

DECISION

The above-captioned civil penalty proceeding was brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Pursuant to notice, a hearing was held in Eugene, Oregon, on April 10, 1980.

The petitioner alleges that respondent violated mandatory safety standard 30 CFR 56.14-1 by failing to guard two conveyor self-cleaning tail pulleys on its premises. 1/ The burden, therefore, is on the petitioner to show by a preponderanc of the evidence that the unguarded machines created a safety risk to miners.

1/ 56.14-1 Mandatory. Gears, sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; saw-blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

The testimony of George A. Gipson, mine inspector for MSHA shows that the self-cleaning tail pulleys under the cone conveyor and under the bunker conveyor were unguarded. The facts are uncontroverted that said pulleys are both approximately 12 to 14 inches above ground level. Photographs taken by the respondent and admitted in evidence show that said pulleys involved herein are indeed only 12 to 14 inches off the ground and located within the frame-work of the conveyors (Exhibits R-1, R-2 and R-6). The petitioner argues that, because these are self-cleaning pulleys with blades on them, they are more hazardous than normal pulleys, for clothing can get caught in the blades dragging employees into the pinch points of the pulleys. Conceding that this is a possibility, the facts do not indicate that the location and height of the pulleys make such an occurrence likely. The standard requires guarding pulleys where they may be contacted by persons and may cause injury, but it seems highly unlikely in these two situations that a person would contact these pulleys or be injured by them.

In both cases, the petitioner failed to satisfy the burden of showing that a safety risk existed; rather, the facts support the respondent's position that the likelihood of an injury occurring was remote.

Therefore, it is Ordered that both citations are hereby vacated.

Virgil E. Vail
Administrative Law Judge

Distribution:

Mr. Mickey Kincheloe, Vice President, Kincheloe and Sons, Inc., P. O. Box 296, Myrtle Point, Oregon 07458

Judith Vogel, Esq., Office of the Solicitor, United States Department of Labor, 11071 Federal Building, Box 36017, 450 Golden Gate Avenue, San Francisco, California 94102

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

2 4 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. CENT 79-3-M
v.	)	A/O NO. 29-01580-05001
MORTON BROTHERS,	)	MINE: DONNA MOUNTAIN
Respondent.	)	

DECISION AND ORDER

Appearances:

Robert L. Sims, Esq., Office of the Solicitor, United States Department of Labor, Suite 501, 555 Griffin Square Building, Dallas, Texas 75202
for Petitioner

Wayne E. Bingham, Esq., PICKERING AND BINGHAM, 920 Ortiz, N.E., Albuquerque, New Mexico 87108
for Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

This proceeding arose through initiation of an enforcement action brought pursuant to section 105 of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 801 et seq. (1978) [hereinafter cited as "the 1977 Act" or "the Act"]. The matter came on for hearing, pursuant to notice, on May 13, 1980, in Albuquerque, New Mexico. Prior to hearing, the parties entered into a settlement agreement based upon stipulations. At the hearing, the parties read the stipulations into the record and moved for approval of the settlement agreement. I granted the motion from the bench and this Decision and Order is issued to affirm my prior bench decision.

DISCUSSION

In support of the proposed settlement the parties have taken into account, and submitted information concerning, the six statutory criteria set forth in section 110(i) of the Act.*

From the record, it appears that Respondent operates a nonmetallic open pit mine. In the year preceding the date of inspection, 5,255 production tons were mined at this particular mine. The production of the controlling company is 11,179 production tons per year. The record further discloses that Respondent does not have a history of previous violations. Additionally, the parties have stipulated that payment of the proposed penalties, or of the settlement figures, will not adversely affect the operator's ability to continue in business.

Citation No. 161094

This citation alleges a violation of 30 CFR § 55.11-12. That standard governs travelways and includes the mandate that openings near travelways through which men or materials may fall shall be protected. The citation alleges that such an opening, where a person could fall into a jaw crusher, was not protected. The parties stipulate that ordinary negligence on the part of the operator occasioned a potentially fatal hazard. The Secretary proposes that a penalty of $30 be assessed, reduced from $38, based upon the extraordinary good faith demonstrated by Respondent in correcting the cited condition.

---

* Section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(i), reads in pertinent part:

> "* * * 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. * * * "

Citation No. 161095

This citation alleges a violation of 30 CFR § 55.12-08. That standard governs electricity and includes the mandate that power wires shall be insulated adequately where they pass into or out of electrical compartments and that the holes shall be substantially bushed with insulated bushings. The citation alleges that energized power wires entering a certain motor were not passing through insulated bushings. The parties stipulate that ordinary negligence on the part of the operator occasioned a potentially debilitating hazard. The Secretary proposes that a penalty of $21 be assessed, reduced from $26, based upon the good faith demonstrated by Respondent in correcting the cited condition.

Citation No. 161096

This citation alleges a violation of 30 CFR § 55.9-87. That standard governs loading, hauling and dumping and includes the mandate that heavy duty mobile equipment shall be provided with audible warning devices and that where the operator has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm or an observer to direct travel. The citation alleges that a certain front end loader, from which the operator had a partially obstructed view to the rear, was not equipped with an automatic reverse signal alarm or an observer to direct travel. The parties stipulate that ordinary negligence on the part of the operator occasioned a potentially debilitating hazard. The Secretary proposes that a penalty of $30 be assessed, reduced from $40, based upon the good faith demonstrated by Respondent in correcting the cited condition.

Citation No. 161097

This citation alleges a violation of 30 CFR § 55.18-12. That standard governs safety programs and includes the mandate that emergency telephone numbers shall be posted at appropriate telephones. The Petitioner believes that this citation was not properly cited, based upon the facts available at the time of the inspection,

and moves for permission to withdraw this citation.

Citation No. 161111

This citation alleges a violation of 30 CFR § 55.5-50(b). That standard governs physical agents and includes the mandate that noise exposures in excess of specified limits shall be controlled by feasible administrative or engineering controls. The citation alleges that noise dosimeter readings in excess of the specified limits were not controlled by feasible administrative or engineering controls. The parties stipulate that ordinary negligence on the part of the operator occasioned a potentially permanent and disabling hazard. The Secretary proposes that a penalty of $30 be assessed, reduced from $34, based upon the good faith demonstrated by Respondent in Correcting the cited condition.

After careful review and consideration of the argument in support of the proposed settlement, and taking into account those factors required to be considered by section 110(i) of the Act, I conclude and find that the proposed settlement should be approved.

ORDER

Accordingly, the motion for approval of the settlement agreement granted from the bench is hereby AFFIRMED. It is ORDERED that Respondent shall pay the affirmed penalty of $111 within thirty days of the date of this Decision and Order.

Jon D. Boltz
Administrative Law Judge

Distribution:

Robert L. Sims, Esq., Office of the Solicitor, United States Department of Labor, Suite 501, 555 Griffin Square Building, Dallas, Texas 75202

Wayne E. Bingham, Esq., PICKERING AND BINGHAM, 920 Ortiz, N.E., Albuquerque, New Mexico 87108

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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24 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. WEVA 80-40
	:	A/O No. 46-02843-03025
v.	:	Madison Mine No. 1
KANAWHA COAL COMPANY, Respondent	:	Docket No. WEVA 80-78
	:	A/O No. 46-02844-03016
	:	Docket No. WEVA 80-83
	:	A/O No. 46-02844-03017
	:	Madison Mine No. 2

DECISION

Appearances: Barbara Krause Kaufmann, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Harold S. Albertson, Jr., Esq., Hall, Albertson and Jones, Charleston, West Virginia, for Respondent.

Before: Judge Edwin S. Bernstein

PRELIMINARY STATEMENT

Pursuant to Commission Rule 64, 29 C.F.R. § 2700.64, the parties each moved for summary decision 1/ with respect to Citation No. 09911015 (Docket No. WEVA 80-40), Citation No. 09911086 (Docket No. WEVA 80-78), and Citation

1/ Rule 64 provides in part as follows:
"(b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law."

No. 09911223 (Docket No. WEVA 80-83). 2/ The MSHA Assessment Office recommended that penalties of $305, $160, and $195, respectively, be assessed for alleged violations of 30 C.F.R. § 70.100(b). That mandatory health standard reads:

> Effective December 30, 1972, each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

Respondent argued that there is no valid and enforceable standard under the Federal Mine Safety and Health Act of 1977 (the 1977 Act). Petitioner argued that a valid respirable dust standard exists, and that based upon the stipulated facts, Respondent violated 30 C.F.R. § 70.100(b).

APPLICABLE STATUTES AND REGULATIONS

Section 202(e) of the Federal Coal Mine Health and Safety Act of 1969 (the 1969 Act) provided, prior to amendment:

> References to concentrations of respirable dust in this title means the average concentration of respirable dust if measured with an MRE instrument or such equivalent concentrations if measured with another device approved by the Secretary and the Secretary of Health, Education, and Welfare. As used in this title, the term "MRE instrument" means the gravimetric dust sampler with four channel horizontal elutriator developed by the Mining Research Establishment of the National Coal Board, London, England.

2/ On March 31, 1980, I issued an order which approved settlement motions for Citation No. 09911054 (Docket No. WEVA 80-78) and Citation No. 09910793 (Docket No. WEVA 80-83). Thus, the three citations listed above are the only ones which remain to be decided in these cases.

Section 318(k) of the 1969 Act provided, prior to amendment:

> For the purpose of this title and title II of this Act, the term -
>
> * * * * * * *
>
> (k) "respirable dust" means only dust particulates 5 microns or less in size * * *.

Section 202 of the Federal Mine Safety and Health Amendments Act of 1977 (the Amendments Act) reads:

> (a) Section 202(e) of the Federal Coal Mine Health and Safety Act of 1969 is amended to read as follows:
>
> "(e) References to concentrations of respirable dust in this title mean the average concentration of respirable dust measured with a device approved by the Secretary and the Secretary of Health, Education, and Welfare."
>
> (b) Section 318(k) of the Federal Coal Mine Health and Safety Act of 1969 is repealed.

Section 301(c)(2) of the Amendments Act reads:

> All orders, decisions, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges (A) which have been issued, made, granted, or allowed to become effective in the exercise of functions which are transferred under this section by any department or agency, any functions of which are transferred by this section, and (B) which are in effect at the time this section takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, revoked, or repealed by the Secretary of Labor, the Federal Mine Safety and Health Review Commission or other authorized officials, by any court of competent jurisdiction, or by operation of law.

Section 307 of the Amendments Act reads, in pertinent part:

> Except as otherwise provided, this Act and the amendments made by this Act shall take effect 120 days after the

date of enactment of this Act. * * * The amendment to the Federal Coal Mine Health and Safety Act of 1969 made by section 202 of this Act shall be effective on the date of enactment.

Section 202(b)(2) of the 1977 Act reads:

> Effective three years after the date of enactment of [the 1969] Act, each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

30 C.F.R. § 70.100(b) reads:

> Effective December 30, 1972, each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

FINDINGS OF FACT

The parties stipulated and I find:

1. Respondent, Kanawha Coal Company, is subject to the jurisdiction of the 1977 Act and I have jurisdiction over these proceedings.

2. The inspector who issued the citations is a duly authorized representative of the Secretary of Labor and properly served the citations upon Respondent.

3. Respondent mines 974,127 tons per year.

4. Any negligence by Respondent in connection with these citations constitutes ordinary negligence.

5. Payment of an appropriate penalty will not affect Respondent's ability to continue in business.

6. Respondent exercised good faith in abating all citations within the time set for abatement, or a reasonable time thereafter.

7. The number of violations assessed against Respondent during the 24-month period prior to issuance of each citation was 155 for Citation No. 9911086, 153 for Citation No. 9911223, and 276 for Citation No. 9911015.

8. The possible occurrence which could reasonably be expected is lost work days if exposure continued to exceed the statutory maximum of 2.0 milligrams per cubic meter of air, or if such overexposure frequently recurred.

9. The number of samples taken pursuant to 30 C.F.R. § 70.100(b) and cumulative concentration of respirable dust found with respect to each citation are:

Citation No.	No. of Samples	Cumulative Concentration (mg.)
9911086	10	24.9
9911223	7	24.5
9911015	10	25.7

10. Pursuant to Section 202(b)(2) of the 1977 Act and 30 C.F.R. § 70.100(b), the maximum allowable concentration of respirable dust in the mine atmosphere during each shift to which each miner can be exposed is 2.0 milligrams per cubic meter of air.

11. Respirable dust is defined in Section 202(e) of the 1977 Act to mean the average concentration of respirable dust measured with a device approved by the Secretaries. 3/

12. Provisions for approval of sampling devices are contained in 30 C.F.R. Part 74. At the time these citations were issued, devices were jointly approved by the National Institute for Occupational Safety and Health (NIOSH) (Department of Health, Education, and Welfare) and MSHA (Department of Labor). Before 1977, devices were approved by NIOSH and the Mining Enforcement and Safety Administration (MESA) (Department of the Interior).

13. Applications for approval of sampling devices are submitted to NIOSH for testing to determine if the performance standards set forth in 30 C.F.R. Part 74 are met. Applications for approval of the pump unit of a sampling device are submitted to MSHA. MSHA determines whether the pump unit is intrinsically safe in accordance with 30 C.F.R. § 18.68. After testing procedures, NIOSH may issue an approval for the sampling unit if MSHA has approved the pump unit of the device.

14. The respirable dust samples upon which all citations were based were taken with a Bendix Environmental Science Division Micron Air II permissible air sampling pump, Model No. 2417504-0001, which was approved by MESA as No. 2F-2120-0 on September 5, 1967. This approval was issued to Union Industrial Equipment Corporation (UNICO) and was extended by MESA as follows:

3/ The meaning of the term "Secretaries" is at issue and thus was not defined in the stipulations.

September 30, 1969	2F-2120-1	(UNICO)
March 6, 1970	2F-2120-2	(UNICO)
April 21, 1970	2F-2120-3	(UNICO)
January 17, 1972	2F-2120-4	(To Bendix Corporation, which bought the rights from UNICO)
July 24, 1974	2F-2120-5	(internal modification to MESA)
August 2, 1974	2F-2120-6	(Bendix)
January 17, 1975	2F-2120-7	(Bendix)

NIOSH initially approved the device as TC No. 74-018 micron air on April 16, 1975, revocation November 22, 1976, certification reissued May 20, 1977 under TC No. 74-025 micron air II.

I further find that the citations were issued on the following dates based upon respirable dust samples collected during the following time periods:

Citation No.	Citation Date	Time Period When Samples Were Taken
9911086	June 28, 1979	March 2-June 13, 1979
9911223	August 9, 1979	July 17-23, 1979
9911015	May 24, 1979	May 1-10, 1979

PRIOR LEGISLATIVE AND JUDICIAL BACKGROUND

The 1969 Act contained two definitions of respirable dust. Section 202(e) stated:

> References to concentrations of respirable dust in this title means the average concentration of respirable dust if measured with an MRE instrument or such equivalent concentrations if measured with another device approved by the Secretary and the Secretary of Health, Education, and Welfare * * *. 4/

4/ Section 3(a) of the 1969 Act defined "Secretary" as "the Secretary of the Interior or his delegate."

Section 318(k) of the 1969 Act stated, "'respirable dust' means only dust particulates 5 microns or less in size * * *."

In Eastern Associated Coal Corporation, Docket No. MORG 73-131-P et al. (December 16, 1974), the contractor challenged the dust program which had come into being under the 1969 Act on the ground that the statutory definitions were inconsistent. Eastern claimed that the MRE instrument and other instruments approved by the Secretaries and used as a basis for such citations did not screen out particulates larger than five microns in size. Judge Moore agreed and vacated the citations based upon his finding "that the instruments do collect particles larger than the statutory definition of respirable dust."

On appeal, the Interior Board of Mine Operations Appeals (IBMA) first reversed Judge Moore's decision (see 5 IBMA 185 (1975)), but then affirmed it upon reconsideration (see 7 IBMA 14 (1976)). The decision applied to the MRE instrument as well as two personal samplers approved by the two Secretaries. 5/

The Board stated:

5/ The Board noted that, "[u]nder section 202(e), the Congress approved the MRE instrument as a device for sampling dust, but the MRE is a large, bulky instrument, and on March 11, 1970, the two Secretaries approved usage of alternative personal sampler units conforming to requirements and conditions now codified at 30 CFR Part 74." 7 IBMA at 28. In describing the personal air sampler, the Board continued: "This device is a unit which is purchased by an operator and worn by the individual miner. Each device is supposed to duplicate the behavior of the human respiratory system which draws in air, filters larger particulates, and allows others to reach the lungs. Air is drawn into a sampler by a pump and battery-driven motor. It passes through a nylon cyclone 10 mm. in diameter which is supposed to separate the respirable from the non-respirable particulates." Id. at 30.

> On the basis of the record as described above, we find that MESA has been systematically ignoring the legislative definition of the term "respirable dust" as meaning "* * * only dust particulates 5 microns or less in size." * * * [I]t follows that the data memorialized in these notices, purporting to show alleged concentrations of "respirable dust," represent as well the weight of some particulates which are oversize if the legislative 5-micron definition is applicable. [Emphasis by the Board.]

7 IBMA at 34.

The Eastern Associated decision prompted quick congressional action. Section 202 of the Amendments Act of 1977 repealed the five-micron definition and rewrote Section 202(e) of the 1969 Act to define respirable dust as "the average concentration of respirable dust measured with a device approved by the Secretary and the Secretary of Health, Education, and Welfare."

The Senate Report on the 1977 Act contained the following explanation of these changes:

> Respirable Dust
>
> Section 318 of the Federal Coal Mine Health and Safety Act of 1969 is amended by deleting subsection (k) which defines respirable dust in terms of dust particles 5 microns or less in size. The new definition in subsection (e) defines respirable dust in terms of average concentration, a method of determining the amount of dust in a mine atmosphere on the basis of weight. Since all devices approved by the Secretary and the Secretary of Health, Education and Welfare measure respirable dust on the basis of weight, arther [sic] than particle size, this amendment is necessary to make the definition of respirable dust conform to the approved method of sampling.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 51 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 639 (1978).

DECISION

The pivotal issue in this case involves the interpretation of Section 202(e), as amended. The statute defines respirable dust as dust measured by "a device approved by the Secretary and the Secretary of Health, Education, and Welfare." If this phrase is read as meaning "a device to be approved by the Secretary of Labor and the Secretary of Health, Education, and Welfare subsequent to the effective date of this section," the citations must be vacated. This is because there were no such approvals as of the dates the citations were issued. On the other hand, if the statute means "a device approved since the effective date of the 1969 Act by the Secretary of the Interior and the Secretary of Health, Education, and Welfare," the citations must be affirmed.

Respondent's argument is based upon three recent decisions in which Judge Moore concluded that, "there is not and never has been a valid enforceable respirable dust program * * *." MSHA v. Olga Coal Co., Docket No. HOPE 79-113-P (June 28, 1979); MSHA v. B.B.W Coal Co., Docket No. PIKE 76-149-P (January 9, 1979); and MSHA v. Alabama By-Products, Docket No. SE 79-110 (February 12, 1980).

In Olga and B.B.W., Judge Moore held: "As far as I have been able to determine, the Secretary of Labor has not joined the Secretary of Health, Education and Welfare in approving devices for the collection of respirable dust. If that is true, there has been no effective standard

since November 9, 1977." 6/ While I have great respect for Judge Moore, an able and articulate judge, I respectfully disagree with his conclusions on this issue. 7/

It is a fundamental rule of statutory construction that a statute should not be interpreted to defeat its obvious intent. In Wilson v. United States, 369 F.2d 198, 201 (D.C. Cir. 1966), the court stated, "[t]he literal meaning of a statute cannot be followed where it leads to a result contrary to legislative intention as revealed by the legislative history or other appropriate sources." In Perry v. Commerce Loan Company, 383 U.S. 392, 400 (1966), the Supreme Court stated: "Frequently, * * * even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." This cannon of statutory interpretation has even been applied in criminal cases. In United States v. Braverman, 373 U.S. 405, 408 (1963), the Supreme Court stated: "We have considered the statute before us in light of the salutary rule that criminal statutes should not by interpretation be expanded beyond their plain language. But neither can we interpret a statute so narrowly as to defeat its obvious intent."

6/ The Commission granted the Secretary of Labor's petition for review of the Olga case on August 7, 1979, and the Secretary of Labor's petition for review of the Alabama By-Products case on March 5, 1980. However, neither case has been decided.

7/ As stated by Commission Rule 73, 29 C.F.R. § 2700.73, "[a]n unreviewed decision of a judge is not a precedent binding upon the Commission." Therefore, although I accord considerable weight to a fellow judge's views, where I disagree, I am not bound by his decision.

Another canon of statutory interpretation is that remedial statutes are to be liberally construed to advance the remedies intended. 8/ It is clear that an essential purpose of the 1969 Act and the 1977 Amendments Act was to protect miners against coal workers' pneumoconiosis, commonly known as "black lung," which is caused by the inhalation of respirable coal dust particles. Thus, Section 2 of the 1969 Act, as amended, states that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner," and stresses the need to prevent occupational diseases originating in the mines. The balance of Section 2 also stresses the importance of protecting the health of miners, and Title IV, dealing with black lung benefits, specifically provides benefits to miners who are disabled by coal workers' pneumoconiosis.

Finally, Section 201(b) of the 1969 Act stated:

8/ See 3 Sands, Sutherland Statutory Construction § 60.01. In St. Mary's Sewer Pipe Company v. Director of the United States Bureau of Mines, 262 F.2d 378, 381 (3rd Cir. 1959), the court made the following comments concerning the 1952 Federal Coal Mine Safety Act:

> The statute we are called upon to interpret is the outgrowth of a long history of major disasters in coal mines * * *. It is so obvious as to be beyond dispute that in construing safety or remedial legislation narrow or limited construction is to be eschewed. Rather, in this field liberal construction in light of the prime purpose of the legislation is to be employed.

Similar statements were made by the courts under the 1969 Act. See Reliable Coal Co. v. Morton, 478 F.2d 257, 262 (4th Cir. 1973); Phillips v. IBMA 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975); Freeman Coal Mining Company v. IBMA, 504 F.2d 741, 744 (7th Cir. 1974); International Union, UMWA v. Kleppe, 532 F.2d 1403, 1406 (D.C. Cir. 1976), cert. denied, 429 U.S. 858 (1976).

> Among other things, it is the purpose of this title to provide, to the greatest extent possible, that the working conditions in each underground coal mine are sufficiently free of respirable dust concentrations in the mine atmosphere to permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupation related disease during or at the end of such period.

Thus, it is clear that one of the essential purposes of this legislation was to prevent miners from contracting pneumoconiosis as a result of inhaling respirable dust, and to require mine operators to maintain an atmosphere as free as possible from such dust.

Turning to the legislation in question, Section 202 of the Amendments Act reads:

> a. Section 202(e) of the Federal Coal Mine Health and Safety Act of 1969 is amended to read as follows:
>
> > "(e) References to concentrations of respirable dust in this title mean the average of concentration of respirable dust measured with a device approved by the Secretary and the Secretary of Health, Education, and Welfare."
>
> b. Section 318(k) of the Federal Coal Mine Health and Safety Act of 1969 is repealed.

As I read Section 202(e), the word "approved" is ambiguous and is subject to two possible definitions. It can mean, as contended by Respondent, devices <u>to be approved</u> in the future. Alternatively, it can mean devices which <u>have been approved</u> as well as devices which may be approved in the future. Since either meaning is plausible, I interpret this language to have the meaning which would effectuate the purposes of Congress and maintain the continuity of a respirable dust program which Congress considered so important.

Respondent argued that the word "Secretary," as used in Section 202(e), means the Secretary of Labor because Section 102(b)(1) of the Amendments Act amended Section 3(a) of the 1969 Act to read: "For the purpose of this Act, the term Secretary means the Secretary of Labor or his delegate." Prior to amendment, "Secretary" meant "the Secretary of the Interior or his delegate."

Section 307 of the Amendments Act stated:

> Except as otherwise provided, this Act and the amendments made by this Act shall take effect 120 days after the date of enactment of this Act * * *. The amendment to the Federal Coal Mine Health and Safety Act of 1969 made by section 202 of this Act shall be effective on the date of enactment.

Thus, although the amendments in Section 202 of the 1977 legislation were made effective immediately, the change in definition of "Secretary" from "Secretary of the Interior" to "Secretary of Labor," as well as the balance of the Act, did not become effective until 120 days later. When Section 202(e) was enacted, the "Secretary" was the Secretary of the Interior and not the Secretary of Labor and, as indicated, the Secretary of the Interior had approved the device involved in this case. The fact that the effective date of all other sections of the Act was delayed 120 days, while this section was made effective immediately, further convinces me that Congress intended that there be a valid and enforceable respirable dust program immediately upon enactment of the statute.

A further indication of Congress' intent to avoid the "lapse situation" urged by Respondent is Section 301(c)(2) of the Amendments Act. That provision preserves all "orders, decisions, determinations, rules, regulations,

permits, contracts, certificates, licenses, and privileges" which were in effect when the enforcement functions were transferred from the Department of the Interior to the Department of Labor. I do not feel that this provision could have been drafted with any greater clarity, breadth, or decisiveness. This savings clause preserved the approvals of dust devices which were made under the 1969 Act until MSHA ruled otherwise.

Therefore, I find that there is, and has been since the enactment of the Amendments Act, an enforceable respirable dust program. The Bendix Environmental Science Division Micron Air II in this case was "approved by the Secretary and the Secretary of Health, Education, and Welfare" when the citations were issued.

Respondent violated 30 C.F.R. § 70.100(b) with respect to each citation. As indicated in Stipulation No. 9, in Citation No. 9911086, the average concentration of respirable dust was 2.49 milligrams per cubic meter of air based upon a cumulative concentration of 24.9 milligrams in 10 samples; in Citation No. 9911223, the average concentration was 3.5 milligrams, based upon a cumulative concentration of 24.5 milligrams in seven samples; and in Citation No. 9911015, the average concentration was 2.57 milligrams, based upon a cumulative concentration of 25.7 milligrams in 10 samples. Thus, with respect to each citation, Respondent exceeded the allowable average concentration of 2.0 milligrams.

I further find (1) Respondent is a large operator; (2) its actions constituted ordinary negligence; (3) payment of an appropriate penalty will not effect its ability to continue in business; (4) Respondent

exercised ordinary good faith in abating all citations within the time set for abatement or a reasonable time thereafter; (5) it had a large number of previous violations; and (6) the gravity was small in that the possible occurrence which could reasonably be expected is lost work days if exposure continued to exceed the statutory minimum. Upon consideration of the foregoing, I assess a penalty of $150 for each violation.

ORDER

Respondent is ORDERED to pay $450 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

24 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. BARB 79-311-PM
Petitioner	:	A/O No. 09-00155-05001
v.	:	
	:	Speer-Thor Mine
THOR MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Larry A. Auerbach, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Jeffrey J. Yost, Esq., Thor Mining Company, Berkeley Springs, West Virginia, for Respondent.

Before: Judge Cook

I. Procedural Background

On April 26, 1979, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty 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 seven violations of various provisions of the Code of Federal Regulations. Thor Mining Company (Respondent) filed its answer on May 23, 1979. On August 16, 1979, the case was assigned to Assistant Chief Administrative Law Judge Paul Merlin. The case was subsequently transferred to the undersigned Administrative Law Judge on December 4, 1979.

Notices of hearing were issued on December 13, 1979, and February 11, 1980, scheduling the case for hearing on the merits on February 28, 1980, in Valdosta, Georgia. The hearing was held as scheduled with representatives of both parties present and participating.

During the hearing, Petitioner moved to dismiss the proceeding as relates to Citation No. 97920, October 25, 1978, 30 C.F.R. § 55.12-8 on the grounds that the available evidence would not sustain the violation as alleged. The motion was granted (Tr. 11). Additionally, the parties moved for approval of settlement as relates to Citation No. 97925, October 25, 1978, 30 C.F.R. § 55.12-32 (Tr. 105-108). Approval of the proposed settlement is set forth in Part VI of this decision.

A schedule for the submission of posthearing briefs was agreed upon following the presentation of the evidence. Both parties filed posthearing briefs on April 14, 1980, and both parties filed reply briefs on April 30, 1980.

II. Violations Charged

Citation No.	Date	30 C.F.R. Standard
97919	October 25, 1978	55.14-1
97920	October 25, 1978	55.12-8 1/
97921	October 25, 1978	55.11-2
97922	October 25, 1978	55.14-1
97923	October 25, 1978	55.12-8
97924	October 25, 1978	55.11-12
97925	October 25, 1978	55.12-32 2/

III. Witnesses and Exhibits

A) Witnesses

Petitioner called as its witnesses Kenneth Pruitt and Charles Pittman, MSHA inspectors.

Respondent called as its witness Richard Allgyer, its plant manager.

B) Exhibits

1) Petitioner introduced the following exhibits into evidence:

M-1 is a drawing pertaining to Citation No. 97919, October 25, 1978, 30 C.F.R. § 55.14-1.

M-2 is a photograph.

M-3 is a drawing pertaining to Citation No. 97922, October 25, 1978, 30 C.F.R. § 55.14-1.

2) Respondent introduced the following exhibits into evidence:

O-1 is a photograph pertaining to Citation No. 97919, October 25, 1978, 30 C.F.R. § 55.14-1.

O-2 is a drawing prepared by Mr. Allgyer pertaining to Citation No. 97924, October 25, 1978, 30 C.F.R. § 55.11-12.

1/ As noted previously, a motion to dismiss was granted as relates to this citation.

2/ As noted previously, a settlement was proposed as relates to this citation.

3) The following exhibits are drawings produced by various witnesses during the hearing:

X-1 was drawn by Inspector Pruitt and pertains to Citation No. 97921, October 25, 1978, 30 C.F.R. § 55.11-2.

X-2 was drawn by Inspector Pruitt and pertains to Citation No. 97922, October 25, 1978, 30 C.F.R. § 55.14-1.

X-3 was drawn by Inspector Pruitt and pertains to Citation No. 97924, October 25, 1978, 30 C.F.R. § 55.11-12.

X-4 was drawn by Mr. Allgyer and pertains to Citation No. 97919, October 25, 1978, 30 C.F.R. § 55.14-1.

IV Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the subject regulations 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 mine had 18 employees who were working three 8-hour shifts per day (Tr. 5).

2) In terms of the penalty considerations promulgated at 30 C.F.R. § 100, the mine rated a 3 on a scale of 0 to 10 and it had between 30,000 and 60,000 hours of work per year, and the company rated a 0 on a scale of 0 to 10 and it had under 60,000 hours of work per year (Tr. 5).

3) The mine has no history of previous violations for the 24-month period prior to the inspection (Tr. 5).

4) Respondent is subject to the provisions of the 1977 Mine Act (Tr. 10-11).

B) Citation No. 97919, October 25, 1978, 30 C.F.R. § 55.14-1

Occurrence of Violation

The allegations contained in the citation and incorporated into the petition for assessment of civil penalty allege a violation of mandatory

safety standard 30 C.F.R. § 55.14-1 in that "[t]he head pulley on the cool clay conveyor belt was not guarded." The cited mandatory safety standard provides as follows: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

The head pulley was located approximately 4 to 5 feet above the ground (Tr. 22, 125). One side of the head pulley was completely guarded since it abutted an adjacent building (Tr. 27, Exh. 0-1). The evidence presented at the hearing reveals that the other side of the head pulley was adequately guarded except in one area located to the right of the expanded metal V-belt guard providing access to the pinch point formed where the conveyor belt initially achieved contact with the upper portion of the head pulley (Tr. 23, 28-32, 35). An individual making contact with the pinch point could sustain physical injury (Tr. 28-29, 40).

Respondent argues that Petitioner has failed to prove a violation because the evidence presented establishes that the pulley was guarded (Respondent's Posthearing Brief, p. 2). I disagree. The evidence presented shows that an employee could have achieved contact with the pinch point because the existing expanded metal V-belt guard extended only approximately 6 inches to the right of the pinch point (Tr. 114). Guarding should have been installed to a point approximately 2 feet past the pinch point (Tr. 42). Therefore, the existing guard was insufficient to provide adequate protection within the meaning of the regulation.

Additionally, Respondent attacks the citation as insufficient to provide adequate notice of the violation charged (Respondent's Posthearing Brief, p. 2). I disagree.

Section 5(b)(3) of the Administrative Procedure Act, 5 U.S.C. § 554(b)(3) 1978), requires that "[p]ersons entitled to notice of an agency hearing shall be timely informed of * * * the matters of fact and law asserted." Adequate notice is necessary to enable a mine operator "to determine with reasonable certainty the allegations of violations charged so that it may intelligently respond thereto and decide whether it wishes to request formal adjudication." Old Ben Coal Company, 4 IBMA 198, 208, 82 I.D. 264, 1974-1975 OSHD par. 19, 723 (1975). However, an inquiry into whether notice is adequate need not be confined to the four corners of the citation so long as the operator is sufficiently apprised to permit abatement of the condition and preparation of an adequate defense. Jim Walter Resources, Inc., 1 FMSHRC 1827, 1979 OSHD par. 24,046 (1979).

A review of all evidence submitted reveals that Respondent was accorded notice sufficient to abate the condition and prepare an adequate defense (see, e.g., Tr. 125). In this regard, it is significant to note that Respondent did not request a continuance when evidence was introduced at the hearing delimiting the extent of the inadequate guarding. Instead, Respondent defended on the merits by presenting evidence addressed to the pinch

point issue and raised the question of inadequate notice only in its post-hearing brief. Accord, Jim Walters Resources, Inc., 1 FMSHRC at 1829. In view of these considerations, it cannot be concluded that Respondent was prejudiced by the description of the condition as set forth in the citation.

In view of the evidence submitted, it is found that a violation of 30 C.F.R. § 55.14-1 has been established by a preponderance of the evidence. 3/

3/ Section 104(a) of the 1977 Mine Act authorizes the issuance of citations when the mine operator violates a mandatory safety standard. Respondent argues that the duly authorized representative of the Secretary of Labor was not empowered to issue a citation for the condition existing on October 25, 1978, because the condition falls within the definition set forth in 30 C.F.R. § 55.14-3, a standard which was not mandatory at the time of the inspection (Respondent's Reply Brief, pp. 5-6).

A proper evaluation of Respondent's position requires an assessment of both 30 C.F.R. § 55.14-3 and the Secretary of Labor's interpretation of the interrelationship between that regulation and 30 C.F.R. § 55.14-1.

On October 25, 1978, 30 C.F.R. § 55.14-3 was a nonmandatory safety standard providing as follows: "Guards at conveyor-drive, -head, and -tail pulleys should extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley." The regulation was subsequently revised and made mandatory, effective November 15, 1979, pursuant to a final rule published in the August 17, 1979, issue of the Federal Register, 44 Fed. Reg. 48518 (1979), and currently provides as follows: "Mandatory. Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley."

On March 17, 1980, the Mine Safety and Health Administration published a program directive designed to provide guidance to Federal mine inspectors in enforcing 30 C.F.R. § 55.14-3 stating as follows:

"New mandatory standard 55/56/57.14-3 requires that the guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley. This standard is to be cited when there is a guard at such locations, but it does not extend a distance sufficient to prevent persons from accidentally reaching behind the guard and becoming caught.

"The new standard is to be distinguished from standard 55/56/57.14-1 which requires guarding of certain moving parts (such as drive, head, tail and takeup pulleys) which may be contacted by, and cause injury to, persons. Standard 55/56/57.14-1 is to be cited in those instances when there is no guard at the conveyor-drive, conveyor-head, or, conveyor-tail pulleys." [Emphasis added.]

1 BNA Mine Safety and Health Reporter 485 (1980).

The Secretary of Labor's interpretation of both 30 C.F.R. § 55.14-3 and its relationship to 30 C.F.R. § 55.14-1, as set forth in the March 25, 1980, program directive, does not preclude a finding that Respondent violated 30 C.F.R. § 55.14-1 on October 25, 1978 because 30 C.F.R. § 55.14-1 was the

Gravity of the Violation

The pinch point was located approximately 54 inches above the ground (Tr. 125). It was partially guarded by a cover positioned approximately 2 to 3 inches above the conveyor belt (Tr. 22-23, Exh 0-1), by the electric motor and V-belt drive (Tr. 32) and by the expanded metal V-belt guard which extended approximately 6 inches to the right of the pinch point (Tr. 31-32, 115). In order to achieve contact with the pinch point, an individual would have to reach at an angle into the 12-inch opening between the belt frame and the underside of the belt (Tr. 154-156). The testimony of Mr. Allgyer indicates that an individual would have to extend his reach approximately 17 inches in order to contact the pinch point (Tr. 126-127), while the testimony of Inspector Pruitt indicates that an individual would be required to extend his reach only 12 to 14 inches (Tr. 156-157).

Inspector Pruitt testified that an individual could, under the proper conditions, make contact with the pinch point (Tr. 24, 40). The circumstances ranged from a "slip and fall" occurrence in which the individual would instinctively reach out and grab for something to stabilize himself and thereby accidentally become entangled in the pinch point (Tr. 24, 157), to simply walking in close proximity to the belt and extending a hand for some reason (Tr. 40). Mr. Allgyer disagreed, testifying that in his judgment an individual would have to make a "concerted effort" to put his hand in there (Tr. 125).

The evidence reveals that individuals would pass within 3 feet of the area (Tr. 34-35) but that no one was assigned to the head pulley on a permanent basis (Tr. 32-33). Additionally, the condition was outdoors and it should be noted that Fuller's earth material becomes very slick when wet (Tr. 24). 4/ Inferences drawn from the testimony indicate that such material was processed at the Speer Thor Mine.

In view of the foregoing, it is found that an occurrence of the event against which the standard is directed was improbable. However, if an accident occurred, one individual could reasonably be expected to sustain serious injury (Tr. 28-29, 36, 40).

The violation was moderately serious.

Negligence of the Operator

Inspector Pruitt testified that the condition looked as though it had existed for some time (Tr. 46). The plant manager informed him that more

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fn. 3 (continued)
sole mandatory safety standard addressing the condition existing on that date. The fact that the Secretary of Labor subsequently revised and made mandatory 30 C.F.R. § 55.14-3 and thereafter issued a program directive to guide Federal mine inspectors in enforcing these mandatory safety standards which will require future citations to be issued under 30 C.F.R. § 55.14-3 is not controlling in the instant case.

4/ Fuller's earth material is a clay product used for making oil absorbents and kitty litter (Tr. 52).

extensive guards had never been present (Tr. 46-47). Management personnel would have passed within 10 feet of the area daily since it was near the entrance to the plant (Tr. 46). Accordingly, it must be concluded that Respondent knew or should have known of the condition.

However, mitigating factors are present. The description of the condition provided by the witnesses reveals that reasonable minds could differ as to need to extend the guard an additional 2 feet to the right. In view of this, it is found that Respondent demonstrated a low degree of ordinary negligence.

Good Faith in Attempting Rapid Abatement

The citation alleges 4 p.m. October 30, 1978, as the termination due date. The violation was abated on Saturday, October 28, 1978 (Tr. 110). Accordingly, it is found that Respondent demonstrated good faith in attempting rapid abatement.

C) Citation No. 97921, October 25, 1978, 30 C.F.R. § 55.11-2

Occurrence of Violation

The allegations contained in this citation and incorporated into the petition for assessment of civil penalty allege a violation of mandatory safety standard 30 C.F.R. § 55.11-2 in that "[t]here was no handrails around outer edge of the top of the storage tank. Occasionally, a person has to go out on top of the tank." The cited mandatory safety standard provides as follows: "Crossovers, elevated walkways, elevated ramps, and stairways, shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided."

The top of the storage tank was described as a galvanized metal roof approximately 20 feet square (Tr. 51, 55). The edge of the roof was approximately 30 feet above the ground (Tr. 50, Exh. M-2). Access to the top of the storage tank was provided by a vertical ladder attached to an adjacent bucket elevator. A short, handrail equipped walkway, which terminated at the edge of the top of the tank, served as the connection between the ladder and the top of tank. However, the handrails did not extend beyond the edge of the short walkway and handrails were not present around the outside edge of the tank (Tr. 48-49, 57, Exh. X-1). An inspection cover, or plate, was located approximately in the center of the roof (Tr. 55, Exh. X-1). The plant manager informed Inspector Pruitt that occasionally an individual was required to go atop the storage tank and proceed to the cover plate in order to determine the amount of material in the bin (Tr. 49, see also Tr. 129). Accordingly, an individual would have been required to traverse the distance between the end of the short walkway and the cover plate without the protection afforded by handrails.

Respondent argues that the regulation does not apply to the storage tank since it is not a crossover, elevated walkway, elevated ramp or stairway (Respondent's Posthearing Brief, p. 4). I disagree. The function performed at the top of the tank governs the determination as to whether the regulation applies, and the function performed there brings it within the definition of an elevated walkway.

Accordingly, it is found that a violation of 30 C.F.R. § 55.11-2 has been established by a preponderance of the evidence.

Gravity of the Violation

Inspector Pruitt testified that the roof had a slight elevation in the center (Tr. 51), and the testimony of Mr. Allgyer indicates that the center of the roof was probably not more than 5 inches higher than the outside edge (Tr. 129-130). According to the inspector, a dusting of Fuller's earth material gets on the roof and the material is very slippery when wet (Tr. 51-52). An individual falling from the roof would sustain injuries ranging from lost work days to death (Tr. 54). In this regard, it is significant to note that a concrete slab was present on one side of the storage tank (Tr. 54), and that at one point an individual would be within 2 feet of the edge of the tank (Tr. 60). One person would have been exposed to injury (Tr. 54).

Accordingly, it is found that the violation was serious.

Negligence of the Operator

Respondent knew that individuals were required to perform periodic checks at the cover plate and also knew or should have known that handrails had not been provided. It can be inferred that the condition had existed for a substantial period of time. Additionally, the height of the storage bin and the dimensions and physical characteristics of the roof give clear indication to a reasonable mind that handrails were necessary to protect the individuals atop the tank. Accordingly, it is found that Respondent demonstrated gross negligence.

Good Faith in Attempting Rapid Abatement

The citation alleges 4 p.m., October 31, 1978, as the termination due date. The violation was abated on Saturday, October 28, 1978 (Tr. 130). Accordingly, it is found that Respondent demonstrated good faith in attempting rapid abatement.

D) Citation No. 97922, October 25, 1978, 30 C.F.R. § 55.14-1

Occurrence of Violation

The allegations contained in the citation and incorporated into the petition for assessment of civil penalty allege a violation of mandatory safety standard 30 C.F.R. § 55.14-1 in that "[t]he tail pulley on the long conveyor belt on the bottom floor of the screen house was not guarded."

The evidence presented at the hearing reveals that guards were present on both sides of the tail pulley (Tr. 63). The citation was issued because the guards were inadequate to prevent contact with the pinch point formed where the lower portion of the conveyor belt initially achieved contact with the lower portion of the tail pulley (Tr. 63). The bottom of the belt was

49 inches above the floor (Tr. 130). The guards extended below the pinch point but just barely came to the bottom of the belt (Tr. 67). A 10- or 12-inch space was present between the inside of each guard and the belt (Tr. 67-68). In order to achieve contact with the pinch point, an individual would be required to enter this space from the underside of the belt and bring his hand or other object above the belt and into the pinch point (Tr. 67-68).

Cleanup operations were perfomed in this area and, according to Mr. Allgyer, a person would have to pass under the belt at the cited location at a certain stage of the cleanup operation (Tr. 131). A person making contact with the pinch point could sustain physical injuries (Tr. 63-64, 70).

Respondent raises the same adequacy of notice argument set forth in connection with Citation No. 97919, October 25, 1978, 30 C.F.R. § 55.14-1, supra (Respondent's Posthearing Brief, p. 6). The argument is rejected for the reasons set forth previously in this decision. The testimony of Mr. Allgyer, the plant manager, is of particular significance to this determination. He testified that a piece of expanded metal was placed on the underside of the belt frame in the approximate area designated by Inspector Pruitt (Tr. 13). Thus, it must be concluded that the citation sufficiently apprised the Respondent of the condition constituting the alleged violation.

In view of the foregoing, it is found that a violation of 30 C.F.R. § 55.14-1 has been established by a preponderance of the evidence.

Gravity of the Violation

An occurrence of the event against which the standard is directed would have been probable in the event an individual shoveled under the belt (Tr. 65). As noted previously, cleanup operations were performed in this area and an individual would be required to pass under the belt at the cited location during cleanup operations (Tr. 131). An individual was working in the area of the conveyor belt on the day of the inspection (Tr. 63). An individual could get pulled into the pinch point by a shirtsleeve, broom handle or other object achieving contact with it (Tr. 63-64, 70-71) and injuries could range from death to the loss of an arm (Tr. 65, 71). One person would have exposed to the hazard (Tr. 65).

Accordingly, it is found that the violation was serious.

Negligence of the Operator

The condition was not readily visible in that it could not be seen while examining the belt from a side view (Tr. 64). However, one of Respondent's supervisory personnel could have discovered the condition by looking up from the underside of the belt (Tr. 64-65).

Accordingly, it is found that Respondent demonstrated a slight degree of ordinary negligence.

Good Faith in Attempting Rapid Abatement

The citation alleges 12 noon, October 30, 1978, as the termination due date. Abatement was accomplished on Saturday, October 28, 1978 (Tr. 131). Accordingly, it is found that Respondent demonstrated good faith in attempting rapid abatement.

E) Citation No. 97923, October 25, 1978, 30 C.F.R. § 55.12-8

The allegations contained in the citation and incorporated into the petition for assessment of civil penalty allege a violation of mandatory safety standard 30 C.F.R. § 55.12-8 in that "[t]he motor junction box was missing on the electric motor for the screw conveyor." The cited mandatory safety standard provides as follows:

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

The motor in question was enclosed by a metal casing (Tr. 78). A junction box is approximately 6 inches square and fastens onto the side of the motor (Tr. 78). Inside the junction box, the wires from the electrical cable running from the power source are connected to the motor's lead wires (Tr. 82-83). The junction box serves to protect the wiring at this connection point (Tr. 81-82). In the instant case, the junction box was missing and the wires were fastened together and taped with electrical tape (Tr. 78). The lead wires entered the side of the motor through a 2-1/2-inch opening (Tr. 78, 80-82). No form of bushing was present at the point of entry (Tr. 78,85). Inferences drawn from Inspector Pruitt's testimony indicate his belief that proper bushings would reasonably be expected to be installed in connection with the installation of a junction box (Tr. 83-84).

The Respondent argues that the citation fails to allege a violation of the cited regulation because the allegations contained in the citation make no reference to the absence of bushings, but are confined to the absence of a junction box when the regulation fails to make mandatory the installation of such junction boxes (Respondent's Posthearing Brief, p. 7; Respondent's Reply Brief, pp. 7-8). I agree. The citation clearly fails to describe a violation by failing to make reference to the absence of the required bushings.

The record developed at the hearing reveals the absence of such bushings and contains expert testimony indicating that they would have been present had the junction box been installed. However, the fact remains that the citation contains no allegation to this effect. As noted previously in this decision, an operator is entitled to notice sufficient to determine with reasonable certainty the nature of the violation charged so as to permit abatement of the condition and preparation of an adequate defense.

The citaton was clearly inadequate to apprise the operator that installation of insulated bushings was necessary to abate the condition, as demonstrated by the testimony of Mr. Allgyer. The condition was abated by installation of a junction box as required by the inspector, not through the installation of bushings (Tr. 133-134).

The allegations were clearly inadequate to permit preparation of an adequate defense as relates to the absence of bushings since there is no indication that the Respondent was ever apprised that such absence formed the basis for the charge. Additionally, it cannot be found that the issue has been tried with the implied consent of the parties. The Respondent's case clearly centered around disproving any notion that 30 C.F.R. § 55.12-8 requires the use of junction boxes.

Accordingly, the petition for assessment of civil penalty will be dismissed as relates to Citation No. 97923, October 25, 1978, 30 C.F.R. § 55.12-8.

F) Citation No. 97924, October 25, 1978, 30 C.F.R. § 55.11-2

Occurrence of Violation

The allegations contained in the citation and incorporated into the petition for assessment of civil penalty allege a violation of mandatory safety standard 30 C.F.R. § 55.11-12 in that "[t]here was an opening at the fines pump sump that a person could fall into. The sump was about 5 feet deep." The cited mandatory safety standard provides as follows: "Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed."

The uncovered pump sump opening was approximately 2-1/2 feet by 2-1/2 feet and 5 feet deep (Tr. 86). The opening was surrounded by a curb approximately 2 to 3 inches in height (Tr. 87, 91). Inspector Pruitt testified that no railings, barriers or covers were present and that it would be possible for someone to pass through the opening (Tr. 87). The testimony of Mr. Allgyer reveals that the sump pump motor and a 2 to 3 inch diameter pipe partially covered the opening, but that an individual could still fit through it (Tr. 138-139).

The pertinent language of 30 C.F.R. § 55.11-12 requires openings near travelways through which men or materials may fall to be protected by railings, barriers or covers. The testimony as relates to the steps taken to abate the condition reveals that it was practical to install such protective devices (Tr. 140). 30 C.F.R. § 55.2 defines a "travelway" as "a passage, walk or way regularly used and designated for persons to go from one place to another." Accordingly, the condition cited by Inspector Pruitt constitutes a violation only if the uncovered pump sump opening was near a passage, walk or way regularly used and designated for persons to go from one place to another.

The testimony of Inspector Pruitt reveals the absence of signs designating walk areas (Tr. 88). The testimony of Mr. Allgyer reveals that a dry cyclone, a wet cyclone and a fan and motor were located in the vicinity of the pump sump (Exh. 0-2). He testified that an individual visiting these three pieces of equipment "normally" would not go near the sump (Tr. 137-138). Inspector Pruitt expressed a contrary opinion, testifying that the equipment in the area has to be serviced and that from a practical standpoint the shortest distance between given points would take an individual near the opening (Tr. 87-88). However, notwithstanding this disagreement, it is significant to note that the pump motor experienced frequent breakdowns (Tr. 144) and that an individual would periodically check the pump on a regular basis to determine whether it was running (Tr. 138). Respondent experienced enormous problems with the system and people were required to travel to the pump to affect repairs (Tr. 146). An employee servicing the pump would come to within 2 feet of the sump.

Petitioner argues that Respondent, by its acts and omissions, designated the entire area as a travelway. In support of its argument, Petitioner asserts that Respondent was aware that its employees regularly traveled in the area, that it never claimed to have prohibited or even discouraged employees from traveling near the opening, and that it did not delineate the area as unsafe for employee travel or in any way restrict employees to areas it believed safe for travel (Petitioner's Posthearing Brief, p. 13). I agree. By failing to designate safe areas for travel, Respondent tacitly designated the entire area as a "way . . . for persons to go from one place to another." The need to conduct regular inspection and repair activities at the sump pump establishes that it was regularly used. Accordingly, it is found that the area was a travelway within the meaning of 30 C.F.R. § 55.2. The need to perform regular inspections and work as relates to the pump motor establishes that the pump sump opening was near a travelway.

Accordingly, it is found that a violation of 30 C.F.R. § 55.11-2 has been established by a preponderance of the evidence.

Gravity of the Violation

An occurrence was improbable. In the event of an occurrence, a broken arm or leg resulting in lost work days would be the likely injury. One person would have been affected (Tr. 88-89).

Accordingly, it is found that the violation was of moderate gravity.

Negligence of the Operator

The condition was plainly visible and it can be inferred that it had existed for a substantial period of time. Therefore, Respondent should have known of the condition.

Accordingly, it is found that Respondent demonstrated a high degree of ordinary negligence.

Good Faith in Attempting Rapid Abatement

The condition was abated by fabricating a guard to fit over the lip on the sump (Tr. 140). Abatement probably occurred on Saturday, October 28, 1978, (Tr. 140), i.e., prior to the October 31, 1978, termination due date alleged in the citation.

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

G) History of Previous Violations

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

H) Size of the Operator's Business

The parties stipulated that the size of Thor Mining Company is rated at less than 60,000 annual manhours of work, and that the size of the Speer-Thor Mine is rated between 30,000 and 60,000 annual manhours of work (Tr. 5).

Counsel for Respondent stated to the Judge that Thor Mining Company is a subsidiary of Pennsylvania Glass Sand Corporation which operates 12 mines in addition to Thor (Tr. 6). Pennsylvania Glass Sand Corporation is owned by International Telephone and Telegraph Corporation which owns other mining operations (Tr. 8-9).

Consideration will be confined to the size of Thor Mining Company and its Speer-Thor Mine in assessing civil penalties in the instant case because no evidence was presented establishing the size of Pennsylvania Glass Sand Corporation's and International Telephone and Telegraph Corporation's other mining operations.

I) Effect on Operator's Ability to Continue in Business

No evidence was presented establishing that the assessment of any penalty in this proceeding will affect Respondent's ability to continue in business. The Interior Board of Mine Operations Appeals has held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI Approval of Settlement

During the hearing, the parties moved for approval of a settlement as relates to Citation No. 97925, October 25, 1978, 30 C.F.R. § 55.12-32. The $34 settlement figure represents 100 percent of the assessment proposed by

the Mine Safety and Health Administration's Office of Assessments. As noted previously in the decision, the parties entered into stipulations as relates to the number of employees at the mine, to the size of the mine and controlling company in terms of the number of manhours worked per year, and to the absence of a history of previous violations. Counsel for the parties set forth on the record the following reasons in support of the proposed settlement:

> MR. YOST: Yes, Your Honor. At this time, we would like to move that you approve a settlement of citation 097925. This citation was issued because the junction box cover was missing on the fines sump pump motor and we have agreed with the Solicitor to pay the full amount of the assessed penalty and to admit that the violation did exist.
>
> The agreement takes into account the fact that there were no previous violations at Thor Mining prior to this inspection; that there were no exposed wires in the junction box, all the wires were insulated or properly taped so that there was no exposed -- exposed wires.
>
> Because there were no exposed wires, the gravity or probability of injury would be improbable and the -- there was a covering on order for several electrical equipment -- pieces of electrical equipment were on order at the time of the inspection and a cover was included in that order; and, it was corrected at least two days before the termination due date.
>
> JUDGE COOK Are you agreeing to those facts, Mr. Auerbach?
>
> MR. AUERBACH: Yes, Your Honor, except for the abatement date which we don't have direct knowledge of. We don't question it or disagree with it, but only couldn't stipulate it as a fact and we don't have direct knowledge of it. Everything else we would stipulate that we would agree with it.
>
> JUDGE COOK: All right. Now, however, as it relates to negligence, I realize that you did say, of course, that this was on order, but has either of you reached some understanding as to what is the kind of negligence that is involved in this?
>
> MR. YOST: I'm sorry, Your Honor, I omitted that. Based on the assessment that was proposed by the Mine Safety and Health Administration, they found this to involve ordinary negligence and we have stipulated that it did involve ordinary negligence.
>
> JUDGE COOK: Is that agreeable, Mr. Auerbach?

MR. AUERBACH: Yes, Your Honor.

JUDGE COOK: All right. Is there anything further you want to present on it?

MR. YOST: No, Your Honor.

MR. AUERBACH: Nothing, Your Honor.

(Tr. 106-107)

The reasons given by counsel for the parties in support of the proposed settlement have been reviewed in conjunction with the information submitted as to the six statutory criteria contained in section 110(i) of the 1977 Mine Act. After according this information due consideration, it has been found to support the proposed settlement. It therefore appears that approval of the settlement will adequately protect the public interest.

The parties' stipulation that Respondent demonstrated ordinary negligence in connection with the violation is deemed of particular significance to approval of the settlement.

VII. Conclusions of Law

1) Thor Mining Company and its Speer-Thor Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

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

3) MSHA inspector Kenneth Pruitt was duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the citations which are the subject matter of this proceeding.

4) Citation No. 97923, issued on October 25, 1978, fails to allege a violation of 30 C.F.R. § 55.12-8.

5) The violations charged in Citation Nos. 97919, October 25, 1978, 30 C.F.R. § 55.14-1; 97921, October 25, 1978, 30 C.F.R. § 55.11-2; 97922, October 25, 1978, 30 C.F.R. § 55.14-1; and 97924, October 25, 1978, 30 C.F.R. § 55.11-12 are found to have occurred.

6) All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.

VIII. Proposed Findings of Fact and Conclusions of Law

Both parties submitted posthearing briefs and reply briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed

in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

IX. Penalties Assessed

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

Citation No.	Date	30 C.F.R. Standard	Penalty
97919	10/25/78	55.14-1	40.00
97921	10/25/78	55.11-2	130.00
97922	10/25/78	55.14-1	50.00
97924	10/25/78	55.11-12	75.00
97925	10/25/78	55.12-32	34(settlement)

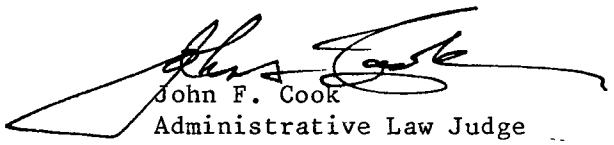
ORDER

IT IS ORDERED that the oral determination made at the hearing granting Petitioner's motion to dismiss as relates to Citation No. 97920, October 25, 1978, 30 C.F.R. § 55.12-8 be, and hereby is, AFFIRMED.

IT IS FURTHER ORDERED that the settlement outlined in Part VI, supra, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that the petition for assessment of civil penalty be, and hereby is, DISMISSED as relates to Citation No. 97923, October 25, 1978, 30 C.F.R. § 55.12-8.

IT IS FURTHER ORDERED that Respondent pay civil penalties in the amount of $329.00 within 30 days of the date of this decision.



John F. Cook
Administrative Law Judge

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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

25 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. KENT 79-149
	:	Assessment Control No. 15-04456-03003-H
v.	:	
MARGIN COAL COMPANY, INC., Respondent	:	No. 6 Strip Mine

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Clinton Robbins, Superintendent, East Bernstadt, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 26, 1980, a hearing in the above-entitled proceeding was held on April 23, 1980, in Barbourville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 63-74):

> This hearing involves a Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-149 on June 14, 1979, alleging five violations of the mandatory health and safety standards by Margin Coal Company.
>
> The issues raised by the Petition for Assessment of Civil Penalty are whether those five alleged violations occurred and, if so, what penalties should be assessed based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.
>
> The testimony in this proceeding by both the respondent's witness and MSHA's witness shows that the violations alleged in Order No. 149242 occurred. The respondent does not contest that the violations occurred and it asked for a hearing primarily to emphasize that its financial condition is not very

good, and that it thought the assessments that should be made should take that into consideration to a greater degree than apparently was done by the Assessment Office.

Inasmuch as the violations are conceded as having occurred, it is unnecessary for me to make any findings on whether they occurred, because we can find by stipulation that they did occur. It is, of course, necessary for me to discuss the six criteria in connection with the alleged violations.

There were some stipulations made by the parties at the outset of the hearing. One of those is that Margin Coal Company is subject to the jurisdiction of the Act and that respondent operates the No. 6 Strip Coal Mine. There was a stipulation also that respondent at the time the violations occurred would be considered a medium-sized company, but because of certain facts that I shall discuss subsequently the respondent could now be classified as a small company.

The facts concerning respondent's financial condition should be considered at the same time that we are considering the size of the company. At the time these violations occurred, respondent was selling coal under two contracts with East Kentucky Power Company and South Carolina Gas and Electric Company. Respondent was selling approximately 9,000 tons a month to both purchasers, but it lost its contract with East Kentucky in November of 1979, and its contract with South Carolina Gas and Electric in September of 1979. Since January of 1980, the company has sold only 69 cars of coal for a total of about 5,000 tons. Consequently, respondent's sales have gone down from about 9,000 tons a month to about 2,500 tons a month. Respondent estimates that it costs about $21 a ton to produce coal and yet the coal sold since January of 1980 has been sold for from $20 a ton to $22.50 a ton, with some small amount of the coal having been sold for as much as $31.50 a ton.

Those figures indicate that respondent is a marginal operation at the present time. The evidence concerning respondent's financial condition would, of course, have been enhanced considerably if respondent had introduced some documentary evidence in the form of income tax returns, or profit and loss statements, or balance sheets, or something to indicate its exact financial condition.

In addition to the facts which have just been noted, the evidence shows that respondent is a subsidiary of Glasgow, Incorporated, which is engaged in road construction. We do not have in the record anything to show how much money

Glasgow, Incorporated, makes on a yearly basis and since this is a company which is owned by another one, I think it would be improper for me to find that payment of penalties would necessarily cause this company to discontinue in business.

Nevertheless, I think I should not ignore the fact that the company is now operating one strip mine as opposed to the six which were being operated at the time the order was written or that it was employing 80 miners in May of 1978, whereas it is now employing 24 miners.

So I think the evidence will support taking into consideration the fact that respondent is certainly a marginal operation at the present time. And some consideration should be given to both its size and financial condition. But I don't think payment of even a fairly substantial penalty in this particular instance would be the factor that would cause it to discontinue in business. Nevertheless, the company's inability to sell its coal readily is an item that erodes the profitability of the company at the present time.

The next criterion that ought to be considered is respondent's history of previous violations. In connection with that, Exhibit P-4 lists some of the same violations that are alleged in this case. All of the violations alleged in this proceeding occurred on May 2, 1978. Since the violations listed in Exhibit P-4 occurred on May 2, 1978, they either are the same violations involved in this proceeding or they are not previous violations. Exhibit 4 does not show that there has been a previous violation of the sections of the regulations which are involved in this case. Additionally, there have been very few violations of any sections of the regulations by this particular company. Therefore, any penalties assessed in this case should neither be increased nor decreased under the criterion of history of previous violations.

The next criterion to be considered is negligence. According to respondent's testimony it did have a program under which it did check with its employees on a periodic basis to make sure that explosives were being handled in a proper manner. This periodic checking was done about every 10 days, and respondent's witness said it had been done about 10 days before the violations here involved occurred. It appears that the situation that occurred in this instance was an isolated matter because none of these violations had previously occurred and it doesn't appear that any of them have occurred since the order involved here was written on May 2, 1978. The testimony I have just discussed supports my finding that the violations were the result of ordinary negligence.

The major consideration in assessing penalties in this case relates to the fact that the violations were very serious. The inspector's order was issued under section 107(a) which is the portion of the Act pertaining to imminent danger. The violations are overlapping in some respects because they all deal with failures to follow certain safety procedures with respect to the handling of explosives, except for one violation involving a fire extinguisher.

In order that my decision will be clear as to the criterion of gravity, it is necessary for me to discuss briefly what the alleged violations were that are described in imminent danger Order No. 149242.

The order first alleged a violation of section 77.1302(d). That section provides that other materials or supplies shall not be placed on or in the cargo space of a conveyance containing explosives. There are additional provisions in that subsection, but that is the primary portion of the section which was violated. The violation of section 77.1302(d) was based on the allegation that was there was an area between the cab of the truck and the first magazine situated on the truck which contained twelve boxes of electric blasting caps. The blasting caps were piled in an area where there were a metal box containing cans of oil, a metal reel, an electric blasting cable, and a blasting battery.

The same conditions described above were also alleged by the inspector to be a violation of section 77.1303(c), which provides that substantial nonconductive, closed containers shall be used to carry explosives, other than blasting agents, to the blasting site.

The two violations were serious because it would have been possible for the truck, which had to travel over rough terrain, to cause this reel to bang against the metal box and produce a spark which might have ignited the blasting caps which, in turn, could have set off a tremendous explosion of the other explosives which were being transported on the truck.

In view of the serious nature of this combination of violations, I find that a penalty of $1,000 should be assessed for each violation of sections 77.1302(d) and 77.1303(c).

The next violation alleged in the inspector's order is of section 77.1302(e). That section provides that explosives and detonators shall be transported in separate vehicles unless separated by four inches of hardwood or the equivalent.

The inspector believed that section 77.1302(e) had been violated because in the first magazine there were blasting caps. In fact, the magazine contained 18 boxes of electric blasting caps, one-half box of fuse caps, one box of primer cord, Class A, 2,000 feet, and one box of primer cord, Class C, 2,000 feet. The inspector's testimony indicates that while those caps and primer cords should have been separated or should have been in different magazines, it was not as likely that they would have produced an explosion by themselves, since they were inside the magazine, as the materials that were between the cab and the first magazine. Consequently, I find that the violation of section 77.1302(e) should be assessed at $500.

The fourth violation was another violation of section 77.1303(c), which has to do, as I've indicated, with transporting explosives in something other than a nonconductive, closed container. In this instance, the inspector cited a second magazine which was directly behind the first one. The second magazine contained three boxes of 2-1/2 by 16 dynamite and was not lined on two sides with nonconducting material. Here again, the inspector's testimony indicates that the dynamite in the nonconductive magazine was not as dangerous a source of explosion as the materials between the cab and first magazine. Therefore, I conclude that a penalty of $500 would be appropriate for that particular violation.

The final violation was of section 77.1110. That provision states that firefighting equipment shall be continuously maintained in a usable and operative condition. The section also provides that fire extinguishers are to be examined at least once every six months and the date of such examination is to be recorded on a permanent tag attached to the extinguisher.

The order states that the fire extinguisher on the explosives truck was discharged and did not have an examination date. The inspector's testimony indicates in addition to the things I have just discussed, that some oil had been spilled on the truck bed, and he considered the likelihood of a fire occurring as a potential hazard. He further believed the fire extinguisher might well be the difference between preventing a major explosion from any fire that might start, and not having a major problem. So I would consider that there might have been a larger degree of negligence in connection with the discharged fire extinguisher than there was with the way some of the explosives were hauled in the truck. I conclude that a penalty of $300 is warranted in this instance. I don't normally assess a penalty that large for

failure to have a fire extinguisher, but I think the conditions described in the inspector's testimony requires that a rather large penalty be assessed for that.

The total of all the penalties that I have assessed is $3,300. In assessing that much, I am giving considerable weight to the fact that the company's financial condition is not very good at this time; otherwise, I would have assessed a larger amount than I have.

I think I also overlooked discussing the good faith effort to achieve rapid compliance. On that, there was a very good effort made by respondent to achieve rapid compliance. The order was written at 10:30 a.m. and the inspector wrote a termination at 2 p.m. So the result was the company did immediately take care of the matter and restored its truck to a very safe conditon in a short time. I've taken that into consideration in assessing penalties. Although I did not discuss it at the beginning of the decision, I had it in mind when I went off the record and prepared the specific assessments.

WHEREFORE, it is ordered:

Within 30 days from the date of this decision, respondent shall pay penalties totaling $3,300.00 which are allocated to the respective violations as follows:

Order No. 149242 5/2/78 § 77.1302(d)	$ 1,000.00
Order No. 149242 5/2/78 § 77.1303(c)	1,000.00
Order No. 149242 5/2/78 § 77.1302(e)	500.00
Order No. 149242 5/2/78 § 77.1303(c)	500.00
Order No. 149242 5/2/78 § 77.1110	300.00
Total Penalties in Docket No. KENT 79-149	$ 3,300.00

Richard C. Steffey

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

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Mr. Clinton Robbins, Superintendent, P.O. Box 156, East Bernstadt, KY 40729 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

25 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
Petitioner	:	Docket No. KENT 79-4
v.	:	Assessment Control No. 15-04567-03002
ELY FUEL COMPANY,	:	Fields Preparation Plant
Respondent	:	

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Mr. Frank Stewart, Pineville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 26, 1980, a hearing in the above-entitled proceeding was held on April 23, 1980, in Barbourville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 37-43):

> The Petition for Assessment of Civil Penalty was filed in this proceeding on May 14, 1979, in Docket No. KENT 79-4. The issues raised by any Petition for Assessment of Civil Penalty are whether a violation 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.
>
> The citation involved in this case is No. 126517 and it alleges a violation of 30 CFR 77.400. The condition or practice set forth in the citation which is Exhibit P-2 in this proceeding, reads as follows: "Guards were not provided on a conveyor beltline to haul the coal from the tipple to the crusher and to the cars where men were exposed to the hazard while the tipple was being operated."

The testimony of both respondent's witness and the inspector indicated that the condition or practice, as I have just quoted it from the citation, was somewhat inexact in that what the inspector really was citing was the failure of the company to have a guard at the tailpiece of the conveyor belt which transported coal from the tipple to the railroad cars.

The inspector's testimony showed there were guards on another conveyor belt and that the only place there was a lack of guard was at this tailpiece. The testimony of both respondent's witness and the inspector indicates that a violation of section 77.400 occurred because there was not a guard at this tailpiece. Section 77.400 does provide that gears, sprockets, chains, drives, head, tail, and take-up pulleys, flywheels, couplings, shafts, sawblades, fan inlets, and similar exposed moving machine parts which may be contacted by persons and which may cause injury to persons shall be guarded. Having found that a violation of section 77.400 occurred, I must now assess a civil penalty based on the six criteria which I have just mentioned.

The first criterion is the size of the operator's business. It has been stipulated that this is a small company.

The second criterion is whether the payment of penalties would cause respondent to discontinue in business. It has been stipulated that payment of penalties would not cause respondent to discontinue in business.

The third criterion is the history of previous violations. There was submitted as Exhibit P-1 in this proceeding a computer printout which indicates respondent has not previously violated section 77.400. It has been my practice in all of my decisions to increase a civil penalty otherwise assessible under the other five criteria if I find that respondent has violated the same section of the regulations which is involved in the case before me. Inasmuch as there has been no previous violation of section 77.400, I find that the penalty should neither be increased nor decreased under the history of previous violations brought to my attention in this proceeding.

The fourth criterion is whether the respondent demonstrated a good faith effort to achieve rapid compliance after being advised of the violation of section 77.400. The inspector's citation gave the respondent a period of approximately two weeks, or from November 27, 1978, to December 11, 1978, within which time to correct the violation.

The inspector testified that he went back on December 11, and found that the guard had been installed. And he therefore terminated the violation as shown in Exhibit P-3. The inspector did not know whether the respondent had corrected the violation quite a few days before the expiration of the time which had been given.

Respondent's witness testified that on the same day the citation was written, that is, November 27, 1978, he ordered from J. R. Hoe and Son, the company which built the tipple which they were using, a guard for this tailpiece. The guard became available on the next day which would have been November 28, 1978, and respondent picked up the guard on November 28, and installed it the next day; which would mean that he achieved compliance within 3 days, although respondent had been given about 2 weeks to achieve compliance. I find under those conditions that that was an outstanding effort to achieve compliance and that the respondent should be given considerable credit for that rapid compliance in the assessment of a penalty.

We come to the question of negligence and the former Board of Mine Operations Appeals has held that a company is absolutely required to be aware of all safety regulations. So any time a company fails to comply with a regulation, even if it is one that he says he didn't know about, the law still says he should have known about it.

So I must necessarily find that there was ordinary negligence in the failure to have the guard on the tailpiece. There are some extenuating circumstances however. For example, Mr. Smith, the respondent's witness and who was foreman of this tipple, stated that he had operated an older tipple at the same site for 23 years and during that period of time he did not have a guard on this tailpiece and yet he was not cited for failure to have a guard. And he said if he had known he was supposed to have a guard he would certainly have had one on there. So while I'm finding and must find there was ordinary negligence, I am taking into consideration that the respondent does have an excellent attitude toward safety and that he did operate for a long period of time under the erroneous impression that this particular tailpiece did not have to be guarded.

We come now to the criterion of gravity. There are quite a few extenuating circumstances on that. It is true as the inspector testified that it would be possible for a person to become caught in a pulley or wheel driving a belt and a person could lose a hand that way, and I suppose a person could even

be killed. So there's no doubt that any time there is an unguarded wheel that it's a possibility that someone could be injured.

So we have to find that this was a moderately serious violation. Of course, I am taking into consideration the fact that respondent's witness stated that the tailpiece is always deenergized when any greasing is done around the tailpiece. According to respondent's testimony the fact that this was a new tipple meant there would be very little coal spilled at this area, and there would be very few times and it would be a long period between times, when any cleaning around the tailpiece would be necessary. The inspector indicated that he saw no need for any cleaning to be done on the day the citation was written.

Under those circumstances, while the violation was moderately serious the fact remains there would be few times when anyone could be exposed to injury here, because people are very rarely in this area when the tailpiece is running. Finally, it should be noted that respondent has been operating a tipple for 23 years and has never had an accident, according to respondent's testimony.

With all those extenuating circumstances, I find that a penalty of $25.00 is appropriate.

WHEREFORE, it is ordered:

Within 30 days after the date of this decision, respondent shall pay a civil penalty of $25.00 for the violation of 30 C.F.R. § 77.400 alleged in Citation No. 126517 dated November 27, 1978.

Richard C. Steffey

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

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

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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

25 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PIKE 79-119-PM
	:	Assessment Control No. 15-09703-05002 F
v.	:	
	:	Belleview Plant
EATON SAND & GRAVEL COMPANY, Respondent	:	

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; David P. Faulkner, Esq., Benjamin, Faulkner, Tepe and Sack, Cincinnati, Ohio, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued March 21, 1980, a hearing in the above-entitled proceeding was held on May 13, 1980, in Cincinnati, Ohio, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 61-72):

> The Petition for Assessment of Civil Penalty in this proceeding was filed on June 15, 1979, in Docket No. PIKE 79-119-PM, seeking assessment of a civil penalty for an alleged violation of 30 C.F.R. § 56.3-5 by Eaton Sand & Gravel Company. In a civil penalty proceeding the issues are whether a violation of a mandatory health and safety standard 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. I shall make some findings of fact upon which my decision will be based. The findings will be set forth under numbered paragraphs.
>
> 1. On April 20, 1978, inspector John Hawkins was asked to go to the Belleview Plant of Eaton Sand & Gravel Company

to investigate the occurrence of an accident at that location. Upon arrival there, the inspector first talked to some people in respondent's office and then proceeded to the site of the accident.

2. The accident resulted when a front-end loader had broken down because of a problem with the universal joint and drive shaft so that the front-end loader could not be moved. A foreman, by the name of Robert Marcum, was advised by the operator of the end loader of its inoperable condition. Whereupon, the foreman ordered some replacement parts and proceeded down to the pit area to do some preliminary work on the end loader. At that time another employee, by the name of David Kelly, crawled under this machine and Mr. Marcum was in a position which situated his body between the two wheels of the machine, whereas Mr. Kelly was entirely under the machine and parallel with the wheels. After they had been working for a period of time, some material fell from the highwall and struck the bucket of the front-end loader, pushing it backwards so that Mr. Kelly, being entirely under the mahcine, was not hit by the wheels, but causing the end loader to come to rest on top of Marcum's body.

3. Other employees raised the bucket on the end loader so as to take the pressure of the wheel off of Mr. Marcum's body. He was taken to the hospital. Although he was alive when he arrived at the hospital, he died later that evening, approximately at 7:30 p.m. It is alleged by one of the witnesses in this proceeding, Mr. Setters, that he talked to Mr. Marcum on the way to the hospital. At that time, Mr. Marcum took full responsibility for what had happened, and said that he was at fault in not proceeding in a safe way to work on the equipment.

4. Inspector Hawkins issued an order and citation on April 20, 1978, after he had discussed the accident and collected the facts cited above. His Order No. 107451 alleges that a violation of section 56.3-5 occurred because two men had worked on the front-end loader near the pit wall.

The facts set forth above show that a violation of section 56.3-5 occurred because that section provides that "Men shall not work near or under dangerous banks. Over-hanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted." The testimony in this proceeding shows that Mr. Marcum did work on the machine in association with another employee without pulling it back from the highwall.

Respondent's testimony in this proceeding shows that respondent's General Manager, Mr. Roads, did instruct Mr. Marcum to pull the inoperable front-end loader back from the highwall before any work upon it was done. It is alleged that another front-end loader and a length of chain were taken to the pit area. It is assumed by the company and its employee, who testified in this proceeding, that Mr. Marcum intended to comply with the instructions to use the chain and other loader to pull the inoperable loader back from the highwall before any work on it was done.

It is also assumed that because Mr. Marcum was a nervous-type individual, that he went about this repair work in a very rapid manner as he was accustomed to doing all of his tasks. It is further assumed that when Mr. Marcum saw Mr. Kelly already under the machine, or about to get under it again after he already had taken bolts out of the drive shaft area, that Mr. Marcum decided to go ahead and work on the machine without pulling it back.

Even though Mr. Marcum was instructed to pull the machine back, the fact remains that it was not pulled back and work was undertaken while it was in a hazardous position. In short, the facts show that there was a violation of section 56.3-5. After a violation of a mandatory safety standard is found to have occured, the Act provides that a penalty shall be assessed.

In doing so, it is necessary that I consider six criteria. We have had stipulations of facts in this proceeding with respect to several of those criteria.

The first stipulation is that respondent is a small operator and that respondent had about nine employees at the Belleview Plant. Therefore, under the criterion of the size of respondent's business any penalty assessed in this proceeding should be in a low range of magnitude to the extent that size governs the penalty. It was also stipulated that respondent would not be caused to discontinue in business if a penalty were assessed in this proceeding.

As to the criterion of history of previous violations, there was introduced as respondent's Exhibit P-1, a two-page computer printout which shows that respondent has only been cited for two violations prior to May 20, 1978. Neither of those prior violations was of the section which has been found to have been violated in this proceeding. Therefore, no part of the penalty assessed in this proceeding will be based on the history of respondent's previous violations.

It was testified by the inspector that respondent showed an extraordinary good faith effort to achieve rapid compliance in that the employees were immediately assembled and a lecture or instructions were given to them about safety matters, particularly the necessity of putting equipment in a safe place away from the highwall before work is done upon it. Therefore, that criterion will be given full consideration in the assessment of the penalty.

The next two criteria are the most important ones in assessing penalties, apart from the criterion of size of respondent's business. There is no doubt but that the violation was very serious. Any time equipment is repaired close to a highwall, such as the one here involved, there is always a possibility of material falling. That was pointed out in the inspector's testimony in this proceeding, because he stated that the material here is a combination of rock and sand which is sufficiently soft to be susceptible to production entirely by a front-end loader. As the front-end loader digs into the base of the wall, the rock and sand crumble so as to form a slope. The wall is not sufficiently stable to produce overhanging material at the top of the wall. In other words, the wall has a tendency to crumble on a sort of continuous basis. Anytime equipment is left close to such a highwall when work is to be done on it, those who do that work must know that they are placing themselves in a hazardous position. Therefore, under the criterion of gravity, a high penalty should be assessed to the extent that a small operator is able to pay large penalties.

Then we come to the final criterion on negligence. Respondent's primary defense in this case is that it was not very negligent, or was not negligent at all. The defense under that criterion is primarily based on the fact that the general manager of the plant, Mr. Roads, did instruct Mr. Marcum, the deceased, to move the inoperable piece of equipment back from the highwall before any work was done on it. Despite those instructions, for reasons that only Mr. Marcum knows or knew, the equipment was not pulled back. It was Mr. Marcum's failure to carry out his instructions that the accident occurred and that Mr. Marcum's death resulted. We pass then to the question of whether an employee's failure to carry out his supervisor's specific instructions makes the negligence to be attributed to the operator any less severe than it would be if he simply failed to comply with an on-going and routine safety rule.

The facts in this proceeding are almost identical to a case decided by the Federal Mine Safety and Health Review

Commission early this year in Secretary of Labor v. Consolidation Coal Company, 2 FMSHRC 3 (1980). In that case, the Commission affirmed an administrative law judge's decision assessing a maximum penalty of $10,000 for a violation of section 77.1006 which prohibits persons from working near a dangerous highwall unless they are there to correct unsafe conditions. A foreman-trainee in that instance was killed by a landslide when he and the assistant superintendent were working near a spoil bank at which time a landslide occurred.

The instant case is also similar to the facts in another case decided by the Commission this year in Secretary of Labor v. Ace Drilling Company, Inc., 2 FMSHRC 790 (1980). In that case, the Commission stated that a foreman's failure to make sure a front-end loader was free of defects before putting it into service was a failure attributable to the operator as the foreman acts for the operator. Additionally, the Commission held that liability under the Act is not conditioned upon fault. Two other caess, U.S. Steel Corp., 1 FMSHRC 1306 (1979), and Peabody Coal Company, 1 FMSHRC 1494 (1979), decided by the Commission, would require that respondent be held fully liable in this proceeding under the criterion of negligence.

As in the Consolidation case cited above, Mr. Marcum's failure to carry out his instructions could have resulted in the death of Mr. Kelly, the employee whom he was supervising, just as easily as it resulted in his own death. And, if Mr. Kelly, instead of Mr. Marcum, had been killed, Mr. Marcum would have been held responsible and the company would have been equally liable. Under the Act, as the Commission has stated, an operator's liability is not conditioned upon fault. He is required to see that violations do not occur and if violations do occur, he is held liable. When it comes to making a finding as to the criterion of negligence, there is no doubt but that respondent was guilty of a high degree of negligence in this case because of its foreman's failure to carry out his instructions.

When it comes to assessment of a penalty, however, I am still required to consider the fact that we are dealing with a small operator. In the Consolidation case, supra, where the judge assessed a penalty of $10,000 for an almost identical violation, that company was one of the largest coal companies in the United States. I think that a maximum penalty for such a company is justified, but, in this instance, because a small company is involved, I believe a penalty of $3,000 is appropriate.

WHEREFORE, it is ordered:

Within 30 days from the date of this decision, respondent shall pay a civil penalty of $3,000.00 for the violation of section 56.3-5 cited in Order No. 107451 dated April 20, 1978.

Richard C. Steffey

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

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

25 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
Petitioner	:	Docket No. BARB 78-420-P
v.	:	Assessment Control No. 15-02502-02019
SHAMROCK COAL COMPANY,	:	No. 18 Mine
Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Neville Smith, Esq., Manchester, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 26, 1980, a hearing in the above-entitled proceeding was convened on April 22, 1980, in Barbourville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Instead of presenting evidence with respect to the 14 violations alleged in the Petition for Assessment of Civil Penalty, counsel for the parties entered into a settlement agreement under which respondent agreed to pay penalties totaling $1,203 instead of the total penalties of $1,805 proposed by the Assessment Office.

Counsel for the parties entered into the following stipulations (Tr. 3-4):

(1) Respondent, Shamrock Coal Company, is subject to the jurisdiction of the Act.

(2) Respondent operates a coal mine designated as No. 18 Mine.

(3) The inspector, Mike Detherage, is a duly authorized representative of the Mine Safety and Health Administration and in his official capacity inspected the No. 18 Mine in August and September of 1977.

(4) Respondent was properly issued the citations in question.

(5) Respondent is a large operator.

(6) The history of previous violations is reflected by the computerized history of previous violations and is designated as Exhibit P-1. That history was considered by the Assessment Office in determining its proposed assessments. The reductions in the proposed assessments under the parties' settlement agreement were made on the basis of the criterion of gravity and do not affect any amount derived under the criterion of history of previous violations.

(7) All of the violations were the result of ordinary negligence.

(8) Respondent demonstrated a normal good faith effort to achieve compliance with respect to all of the violations.

(9) The ability of respondent to continue in business will not be adversely affected by the payment of the negotiated penalty amounts.

The parties' stipulations set forth above show consideration of five of the six criteria in section 110(i). The one criterion remaining to be evaluated is that of gravity which will be discussed below as each of the violations is individually considered.

Notice No. 2 MDF (7-110) 8/22/77 § 75.316

The first one is No. 7-110 alleging a violation of section 75.316. The assessed amount was $125; the negotiated amount is $100, and that reduction is based on the fact that only 60 percent of the water sprays were inoperative on the continuous-mining machine. A certain amount of water was still sprayed on the coal so that some of the dust was alleviated. Any immediate harm was not great and any injury that might result from the violation would be related to a miner's possible exposure to respirable dust over a period of time sufficient for a miner to contract pneumoconiosis. Exposure to respirable dust was not great at the time the notice was written (Tr. 4-5).

Notice No. 2 MFD (7-112) 8/23/77 § 75.302

No. 7-112 alleged a violation of section 75.302. The Assessment Office proposed a penalty of $125 and respondent agreed to pay the full proposed amount of $125. No methane

was detected in the immediate return in an air sample bottle, but a minute amount of methane was detected at the face with a handheld methane detector. Because of the seriousness attributed by the inspector to the existence of any amount of methane, respondent agreed to pay the full proposed penalty of $125 (Tr. 5).

Notice No. 5 MFD (7-113) 8/23/77 § 75.514

No. 7-113 alleged a violation of section 75.514. The Assessment Office proposed a penalty of $140 and respondent agreed to pay a penalty of $110 because the gravity of the violation was reduced by the fact that the equipment was provided with ground protection, ground monitoring and an instantaneous circuit breaker for any overload or undercurrent (Tr. 6).

Notice No. 6 MFD (7-114) 8/23/77 § 75.1704-2(d)

No. 7-114 alleged a violation of section 75.1704-2(d). The Assessment Office proposed a penalty of $98 and respondent agreed to pay the full amount proposed. There was no up-to-date map posted in the section. Although an up-to-date map had been provided in the mine office, there was not one posted in the section as required by the regulations (Tr. 6).

Notice No. 2 MFD (7-116) 8/24/77 § 75.316

No. 7-116 alleged a violation of section 75.316. This notice relates in part to the very first violation alleged in Notice No. 7-110 discussed above. The penalty proposed by the Assessment office for the instant violation was $170 and respondent has agreed to pay a penalty of $140. A higher penalty for the instant violation of section 75.316 than was agreed upon for the violation of section 75.316, alleged in Notice No. 7-110, is justified because a greater amount of dust existed on August 24, 1977, when Notice No. 7-116 was written than existed on August 22, 1977, when Notice No. 7-110 was written (Tr. 6-7).

Notice No. 3 MFD (7-117) 8/24/77 § 75.400

No. 7-117 alleged a violation of section 75.400. The gravity here was reduced by the fact that no ignition source was immediately present in the area. The inspector said that if there had been an ignition source, he would have issued a withdrawal order. The inspector did not consider the violation to be as serious as the Assessment Office had when it proposed a penalty of $120. Respondent has also made note of the fact that the area had been rock dusted. Because the presence of the

rock dust also reduced the explosive possibility associated with the violation, counsel for the Secretary stated that he had agreed to accept respondent's offer of a reduced penalty of $90 (Tr. 7).

Notice No. 4 MFD (7-118) 8/24/77 § 75.400

No. 7-118 also alleged a violation of section 75.400. The Assessment Office proposed an amount of $110 and respondent agreed to pay a penalty of $90. Counsel for the Secretary agreed to accept respondent's offer as appropriate because, although the accumulation existed in a small area measuring only 3 by 2 feet, the accumulation was observed in a starter box where an ignition source was located in close proximity to the accumulation (Tr. 8).

Notice No. 6 MFD (7-120) 8/24/77 § 75.603

No. 7-120 alleged a violation of section 75.603. The Assessment Office proposed an amount of $110 and respondent has agreed to pay a reduced penalty of $100. Although each wire had been insulated, each wire had not been insulated against moisture to the extent that the other part of the cable had originally been insulated. Nevertheless, the violation was only moderately serious because there was ground protection, ground monitoring and instantaneous circuit breakers for overload or undercurrent protection (Tr. 8-9).

Notice No. 1 HS (7-123) 8/24/77 § 75.316

Notice No. 2 HS (7-124) 8/24/77 § 75.316-1

With respect to the two violations alleged in Notice Nos. 7-123 and 7-124, counsel for the Secretary moved to withdraw the Petition for Assessment of Civil Penalty, to the extent that civil penalties are sought for the violations alleged in those notices because the notices were written by an inspector who is no longer available to testify in support of the alleged violations. Since the Secretary's counsel did not think that he could prove that the violations had occurred, his request to withdraw the Petition as to Notice Nos. 7-123 and 7-124 is hereinafter granted (Tr. 10).

Notice No. 1 MFD (7-125) 9/13/77 § 75.515

No. 7-125 alleged a violation of section 75.515 for which the Assessment Office proposed a penalty of $145. Respondent has agreed to pay a reduced penalty of $110.

Although the violation involved high voltage which could have caused a serious shock hazard, there existed ground protection, ground monitoring, and instantaneous circuit breakers for overload and undercurrent protection. Counsel for the Secretary also believed a reduction in the proposed penalty was justified because the procedures which respondent was following had previously been acceptable, but were rendered illegal by an interpretive MSHA memorandum written in early 1977. The inspector wrote Notice No. 7-125 on the basis of that memorandum (Tr. 10-11).

Notice No. 2 MFD (7-126) 9/13/77 § 75.1710

No. 7-126 alleged a violation of section 75.1710 for which the Assessment Office proposed a penalty of $130. Respondent has agreed to pay a reduced amount of $100. The circumstances warranting a reduction in the penalty were that a canopy had been removed from a machine while it was located in an area which was so low that no canopy was required. When the section progressed beyond the low area into a height where a canopy was again required, the miners failed to reinstall the canopy. Counsel for the Secretary has agreed to accept respondent's offer of a reduced penalty because the mine roof was sound and did not appear to have exposed the machine operator to a roof-fall hazard (Tr. 11-12).

Notice No. 3 MFD (7-127) 9/13/77 § 77.205(a)

No. 7-127 alleged a violation of section 77.205(a) for which the Assessment Office proposed a penalty of $170 and for which respondent has agreed to pay a reduced penalty of $140. Although no miners were stationed near the loose materials on the highwall, the miners did pass by the area when they walked to the place where their cars were parked. Since no miners were exposed to the highwall on a continuous basis or at a time when their attention would be directed to work which might make them unaware of any materials that might fall into the travelway, the Secretary's counsel believed that a reduction in the proposed penalty was justified (Tr. 12-13).

Notice No. 2 MFD (7-130) 9/26/77 § 75.312

The last notice, No. 7-130, alleged a violation of section 75.312 for which the Assessment Office proposed a penalty of $170. Counsel for the Secretary moved to withdraw the Petition for Assessment of Civil Penalty insofar as it seeks assessment of a penalty for the alleged violation of section 75.312 because he said that section pertains to ventilation of a working place, whereas the area cited in the notice involved active mine workings. Inasmuch as the Secretary's counsel believed that the violation had been improperly cited, his request to withdraw the Petition with respect to the violation cited in Notice No. 7-130 is hereinafter granted (Tr. 13-14).

I find that counsel for respondent and the Secretary gave satisfactory reasons for approval of the penalties agreed upon in their settlement conference and that the settlement agreement hereinbefore discussed should be accepted.

Summary of Assessments

Based on the parties' settlement agreement, the following civil penalties should be assessed:

Notice No. 2 MFD (7-110) 8/22/77 § 75.316	$ 100.00
Notice No. 2 MFD (7-112) 8/23/77 § 75.302	125.00
Notice No. 5 MFD (7-113) 8/23/77 § 75.514	110.00
Notice No. 6 MFD (7-114) 8/23/77 § 75.1704-2(d)	98.00
Notice No. 2 MFD (7-116) 8/24/77 § 75.316	140.00
Notice No. 3 MFD (7-117) 8/24/77 § 75.400	90.00
Notice No. 4 MFD (7-118) 8/24/77 § 75.400	90.00
Notice No. 6 MFD (7-120) 8/24/77 § 75.603	100.00
Notice No. 1 MFD (7-125) 9/13/77 § 75.515	110.00
Notice No. 2 MFD (7-126) 9/13/77 § 75.1710	100.00
Notice No. 3 MFD (7-127) 9/13/77 § 77.205(a)	140.00
Total Settlement Penalties in Docket No. BARB 78-420-P	$1,203.00

WHEREFORE, it is ordered:

(A) The parties' request for approval of settlement is granted and the settlement agreement submitted in this proceeding is approved.

(B) Pursuant to the parties' settlement agreement, respondent shall, within 30 days from the date of this decision, pay civil penalties totaling $1,203.00 as set forth in the paragraph under "Summary of Assessments" above.

(C) The request by the Secretary's counsel to withdraw the Petition for Assessment of Civil Penalty in Docket No. BARB 78-420-P to the extent that it sought assessment of civil penalties for the violations listed below is granted:

Notice No. 1 HS (7-123) 8/24/77 § 75.316
Notice No. 2 HS (7-124) 8/24/77 § 75.316-1
Notice No. 2 MFD (7-130) 9/26/77 § 75.312

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
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

25 JUN 1980

UNITED STATES STEEL CORPORATION, Contestant	:	Contest of Citation and Order	
v.	:		
	:	Docket Nos.	Citation or Order No.	Date
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	WEVA 79-343-R	655331	7/12/79
	:	WEVA 80-81-R	655316	10/2/79
Respondent	:			
	:	Gary District No. 2 Mine		
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding		
	:	Docket No. WEVA 80-290		
Petitioner	:	Assessment Control		
v.	:	No. 46-01419-03026 V		
UNITED STATES STEEL CORPORATION, Respondent	:	Gary District No. 2 Mine		

DECISION

Appearances: Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Contestant;
David Street, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to an order dated February 28, 1980, as amended April 7, 1980, a hearing was held with respect to the issues raised in Docket No. WEVA 79-343-R on April 15, 1980, in Charleston, West Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Docket No. WEVA 79-343-R

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 164-174):

> The proceeding in Docket No. WEVA 79-343-R is based on a Notice of Contest of Citation No. 655331, and that Notice of Contest was filed on August 13, 1979.

I shall make a few findings of fact in the numbered paragraphs set forth below:

1. On July 12, 1979, Inspector Robbins traveled to the No. 2 Mine of United States Steel Corporation. He first went to the 011 Section and observed that there were some wide areas in the shuttle-car roadway. He made four measurements and found that the measurements ran from 17 feet at the narrowest place to 21 feet at the widest place. He thereupon wrote Citation No. 655331 citing the operator for failure to follow his roof-control plan.

2. On page 21 of the roof-control plan, there is a provision which states, "In areas where the width of the openings exceeds 18 feet, at least one row of posts shall be installed on either side on not more than 5-foot centers lengthwise, limiting the width of the roadways to 16 feet for one full pillar outby the pillar being mined."

3. The inspector testified that he felt the company was aware of the provision in its roof-control plan, and that it had failed to follow this provision; therefore, he felt it was an unwarrantable failure on the part of the company to comply with its roof-control plan. The inspector allowed an extremely long time for termination of the citation because he was scheduled to go for some training, and he knew that a considerable amount of time would elapse before he would be able to return to the mine to terminate the citation; therefore, he gave the company until August 6, 1979, within which to abate a citation which was written on July 12, 1979.

The company actually had installed the posts almost immediately after the inspector wrote his citation. The actual termination of the citation was written on August 7, 1979, and was received in evidence as Exhibit M-5. The company did demonstrate a good faith effort to achieve rapid compliance. The extremely long time that was given for compliance was related to the inspector's obligations rather than to the period of time it took to comply with the citation.

4. The inspector conceded during his testimony that MSHA has a specialist by the name of Si Gaspersich who primarily assists or confers with operators concerning the occurrence of mountain bumps in their mines. Inspector Robbins indicated that he had discussed the question with Mr. Gaspersich about the occurrence of mountain bumps in the No. 2 Mine, but no one advised the inspector that the roof-control plan should be waived to the extent that it might be advisable not to install posts in the roadway in a mine in which mountain bumps occur.

5. The company's witnesses have testified that they had an understanding with Mr. Gaspersich that it was unnecessary to install posts in a roadway to narrow it down to 16 feet because to install posts in a mine in which mountain bumps may occur increases the hazard to the miners by converting the posts into projectiles in case a mountain bump should occur. In general, a mountain bump has been described as a sudden outburst of coal from the ribs when pressures from the roof become so great that the coal is suddenly forced from the rib and into the roadway or entry.

I think that the above paragraphs are sufficient in the way of basic findings of fact. We have here under review a citation written under section 104(d)(1) of the 1977 Act. In order to support a citation under that section of the Act, an inspector must first of all determine that no imminent danger exists; and I am sure the testimony indicates that there was no imminent danger in the roadway.

If the inspector then finds there is no imminent danger, he is, of course, supposed to find that a violation occurred. On that question, I do not think there is any doubt but that a violation did occur because an operator is required to submit and follow a roof-control plan under section 75.200 of the regulations. And it is undisputed that the roof-control plan did require the installation of posts to narrow the entry down to 16 feet if areas existed which were 18 feet or more in width.

Testimony was given by Mr. Dalton, who was the section foreman on the evening shift from 4 p.m. to midnight on the shift preceding the day shift on which the inspector wrote Citation No. 655331. Mr. Dalton testified that he had stepped off the width of the roadway on his shift and that he did not find any areas that were in excess of 18 feet. I believe that I will have to take the inspector's statement that he measured these areas and found them to be in excess of 18 feet, because I think Mr. Dalton could easily have made a mistake of a couple of feet in stepping off an entry; and I do not think that I can accept an estimate as compared with an actual measurement, especially when the mine foreman, Mr. Blevins, agreed that the inspector had measured an area which was 21 feet wide at the most outby area of this roadway.

Now, the next step the inspector must take is that he must find the failure of the company to comply with this provision in the roof-control plan on page 21 is an unwarrantable failure. The former Board of Mine Operations Appeals, after having been reversed for some of its holdings on the strictness of the requirements for making a determination of

unwarrantable failure in International Union v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976), cert. denied, 429 U.S. 858, held in Alabama By-Products Corporation, 7 IBMA 85 (1976), that the finding of significant and substantial in an unwarrantable failure notice can be made so long as the inspector finds that something other than a technical violation has occurred. The Board said that the violation did not have to involve even serious bodily harm, much less the threat of death.

So, in the situation that prevailed at the time Citation No. 655331 was issued, under the Board's rationale in the Alabama By-Products case, the violation could be found to be significant and substantial because the inspector said the ribs showed there was weight being applied to them by the roof and that he felt in such circumstances that the roadway could not be considered safe until the supports had been installed. The Alabama By-Products case primarily considered the conditions under which a violation may be found to be significant and substantial.

The former Board in Zeigler Coal Company, 7 IBMA 280 (1977) at pages 295 to 296, stated that an unwarrantable failure can be defined as a condition or practice occurring which the operator knew or should have known existed and which it failed to correct because of a lack of due diligence or because of indifference or lack of reasonable care. The Board stated in that same decision that the inspector's judgment in this regard must be based on a thorough investigation and must be reasonable.

The roof-control plan which was in effect at the time the citation was written and which is Exhibit M-4 in this proceeding, provides that changes shall not be made in the mining system until the plan has been revised accordingly, so I am confronted with the fact that Mr. Dalton, who is the section foreman on the evening shift, stated that he knew that provision about the narrowing of the haulageway to 16 feet in areas in excess of 18 feet when encountered; and I am confronted with the testimony of Mr. Blevins, the mine foreman, who said he had not instructed the foremen or the miners to ignore the provision of the roof-control plan so that they could omit the installation of posts if the area were greater than 18 feet.

So, there is no doubt the company knew what the plan required; the company's own evidence shows that. Still these particular posts had not been installed, and Mr. Blevins stated that in his opinion the 21-foot area did not really look 21 feet wide and that he thought Inspector Robbins had

been pretty strict in measuring this area at the widest places and coming up with areas that were in excess of 18 feet, because in his opinion the roadway just did not look 18 feet wide.

Now, I think the company has presented some very appealing testimony which shows that Mr. Gaspersich had told the company that it was, in his opinion, hazardous to install these posts, particularly since the company rarely had an area wide enough to require the posts. As far as that goes, the inspector himself said that in periods prior to July 12, 1979, he had not seen any areas which appeared to be 18 feet or wider and therefore this was the first time he had encountered the failure to install the posts.

The courts have indicated that an inspector's findings should not be sustained only if it can be found that the inspector clearly abused his discretion. I cannot conclude, in view of the fact the roof-control plan does contain a provision requiring the roadway to be narrowed down to 16 feet in case there are areas that are 18 feet or more in width, that it is an abuse of discretion on his part to find it was unwarrantable failure when one takes into consideration the rather mild situations that have to prevail before an unwarrantable failure can be found to exist.

Now, counsel for contestant has stressed the fact that the inspector was actually requiring them to put up these posts in a shuttle-car runway which would not have been used except for about 15 or 20 minutes to mine a final pushout in the pillar which was then being recovered. The fact remains that the shuttle car runway would have been used at least for that period of time; and just as the operator cannot be sure when a mountain bump will occur, neither can the inspector be sure when a piece of roof will fall.

So, without an amendment to the roof-control plan permitting the company to have wider areas than 18 feet without installing posts, I cannot find that the inspector abused his discretion in this instance.

I perhaps should also discuss the fact that there was identified as Exhibit M-6 in this proceeding a roof-control plan which was in effect in August 1976; under that plan the company had some provisions which enabled it to take into consideration mountain bumps, but those provisions were removed from the plan in 1978, after a fatality occurred in which a miner was killed after being struck by a piece of rock which fell from the rib. Also, I should note the

present plan was revised so that those provisions no longer are in the plan and were not in the plan on the day the citation was issued.

There was testimony by the company's chief mine inspector, Mr. Dickinson, to the effect that within the last 6 weeks or month, a provision has been submitted to MSHA under which the roof-control plan would be amended to permit the company to have a roadway 20 feet wide before it is necessary to install posts to narrow the entry down to 18 feet, but that particular amendment has not been put in writing yet and, of course, was not a part of the roof-control plan on July 12, 1979, when Citation No. 655331 was written.

For the reasons given above, I find that Citation No. 655331 was properly written under section 104(d)(1) of the Act and should be affirmed, as hereinafter ordered.

Docket No. WEVA 80-290

The order providing for hearing with respect to the Notice of Contest filed in Docket No. WEVA 79-343-R consolidated all civil penalty issues which might subsequently be raised if the Secretary of Labor should file a petition seeking to have a civil penalty assessed for the violation of section 75.200 which had been alleged in Citation No. 655331 which was the subject of the Notice of Contest filed in Docket No. WEVA 79-343-R. The Secretary did file such a petition in Docket No. WEVA 80-290 on April 24, 1980, and a decision with respect to that petition is set forth below, based on the findings which were made above in my decision in Docket No. WEVA 79-343-R.

The petition in Docket No. WEVA 80-290 seeks assessment of a civil penalty for the violation of section 75.200 alleged in Citation No. 655331. The petition raises the usual issues which have to be considered in civil penalty cases, that is, whether a violation of section 75.200 occurred in this instance and, if so, what penalty should be assessed based on the six criteria set forth in section 110(i) of the Act. I have already found, in considering the Notice of Contest filed in Docket No. WEVA 79-343-R that a violation of section 75.200 occurred when United States Steel Corporation failed to install timbers in a roadway which was more than 18 feet in width. Therefore, the six criteria will now be considered in assessing an appropriate penalty.

It was stipulated at the hearing that U.S. Steel is a large operator and that payment of civil penalties will not cause it to discontinue in business. There is nothing in the record to show that respondent has such a significant history of previous violations as to warrant an increase in the penalty under the criterion of history of previous violations.

I found above in my decision under Docket No. WEVA 79-343-R that respondent demonstrated a good faith effort to achieve rapid compliance after the

violation was cited. That mitigating factor will be taken into consideration in assessing the penalty.

The violation was moderately serious. The roadway had been driven wider than 18 feet and posts had not been erected to narrow the roadway to a width of 16 feet as required by the roof-control plan then in effect. The inspector did not find any roof conditions which made it appear that the roof was likely to fall and the roadway would have been used for only a period of 15 or 20 minutes because the roadway was needed for the purpose of hauling coal from a pushout which was being mined at the time the violation was cited. Moreover, the inspector said that respondent rarely exceeded the 18-foot width and that the roadways were normally not wide enough to require installation of posts. In such circumstances, a relatively nominal penalty is warranted under the criterion of gravity.

The facts considered in my decision in Docket No. WEVA 79-343-R above support a finding that the violation was associated with a low degree of negligence because respondent's roof-control plan which had been in effect shortly before the violation of section 75.200 was observed permitted respondent to omit the installation of timbers to narrow roadways because of the occurrence of bumps in the mine here involved. Bumps occur when a large section of the rib pops off with sufficient force to convert posts near the ribs into projectiles which constitute hazards as great as a roof fall might be.

The evidence shows that respondent is currently seeking to have its roof-control plan amended so as to allow it to omit installation of posts in roadways where bumps are prevalent. In such circumstances, a nominal penalty under the criterion of negligence is warranted.

A penalty of $50 is appropriate under the six criteria of the size of respondent's business, the fact that payment of penalties will not cause it to discontinue in business, the fact that respondent demonstrated a good faith effort to achieve rapid compliance, the moderate gravity of the violation, the low degree of negligence involved, and respondent's history of previous violations.

Docket No. WEVA 80-81-R

A hearing with respect to the Notice of Contest in Docket No. WEVA 80-81-R was held in Charleston, West Virginia, on April 16, 1980, under section 105(d) of the Act. Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 154-163):

> Counsel for United States Steel Corporation filed on November 5, 1979, in Docket No. WEVA 80-81-R a Notice of Contest challenging Order No. 655316, which was issued on October 2, 1979, at its Gary District No. 2 Mine.

The following findings of fact provide the basis for my decision in this proceeding:

1. Two coal mine inspectors, namely Donald C. Simpkins and Tommy Robbins, went to U.S. Steel No. 2 Mine on October 2, 1979, and as they approached the No. 011 Section, they inspected the track haulageway. Inspector Simpkins issued Citation No. 656018 in which he alleged there was a violation of section 75.202 because loose, unsupported ribs existed at three locations along the track entry.

2. After the inspectors had continued on into the 011 Section here involved, Inspector Robbins became concerned about some loose ribs which he observed inby the loading point in a shuttle car haulageway. After appraising the situation, the two inspectors jointly issued Order No. 655316 under section 104(d)(1) of the Act.

That order cites the following condition or practice, "[l]oose, unsupported ribs were present on the left and right side of the active shuttle-car roadway, beginning approximately 68 feet inby the shuttle-car dumping point and extending inby for a distance of 32 feet on the right side and beginning approximately 50 feet inby the dumping point and extending inby for a distance of 14 feet on the left side."

3. The shuttle-car haulageway is a main travelway for shuttle cars and the inspectors also saw some men cleaning around the dumping point outby the area of the 32 feet and 14 feet, respectively, of loose ribs that were cited in their order.

4. Respondent demonstrated a good faith effort to achieve rapid compliance because the order was written at 9:45 a.m. and the inspector terminated the order at 11:15 a.m. It was testified by one of the contestant's witnesses that the actual abatement process occupied a period of from 30 to 45 minutes. The actual work taken to abate the violation of section 75.202 which was cited in the order, was the setting of five posts on the left side of the shuttle-car roadway. It was unnecessary to take down any of the loose ribs on the left side.

5. On the right side, one post was set at the corner on the most inby portion of the 32-foot area, some coal was pried down about the middle of the 32-foot area, and a little coal was taken down toward the outby part of the 32-foot area. A portion of loose roof on the rib at the corner had to be taken down with a scoop, because it could not be pried down with a bar, in view of the fact that there was a rib bolt holding that section of rib into the wall.

6. Exhibit D shows that there were rib bolts and boards spaced along the entire rib on an average of 6 feet apart. And the mine foreman, Mr. Grygiel, testified that the roof was in good condition and that the roof had been roof bolted on 4-foot centers or less.

7. The angle of repose on the 32-foot right side was toward the roof; that is, the rib was farther into the roadway at the bottom of the rib than it was at the top. On the 14-foot left side of the area cited in the order, the angle of repose was nearly vertical or perpendicular to the mine floor, but none of the rib was loose enough to require any of it to be taken down in order for the inspectors to terminate the order.

8. Section 75.202 to the extent here pertinent, provides "[l]oose roof and overhanging or loose faces and ribs shall be taken down or supported." A violation of section 75.202 was proven by both the contestant's evidence and MSHA's evidence because some of the coal was loose on the right side and was taken down, even though the quantity only amounted to from one-half to three-quarters of a ton.

9. For the civil penalty aspect of this case, I would like to note some stipulations entered into by the parties which will become pertinent when I receive the file containing the Petition for Assessment of Civil Penalty for this alleged violation of section 75.202. The first stipulation was that United States Steel Corporation is a large operator. The second stipulation was that United States Steel Corporation is subject to the jurisdiction of the Commission and the 1977 Act. The third stipulation was that payment of penalties would not affect the operator's ability to continue in business. The nine parapgraphs above constitute the findings of fact on which my decision will primarily be based.

In International Union, UMWA v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976), cert. denied, 429 U.S. 858, the court held that when a notice or citation is issued under section 104(c)(1) of the 1969 Act, which reads the same as section 104(d)(1) of the 1977 Act, there must be a finding that there was a violation which would significantly and substantially contribute to the cause and effect of a mine safety and health hazard, and be an unwarrantable failure violation. The court held, however, the equivalent that an order may be issued under section 104(c)(1) or section 104(d)(1) of the 1977 Act even if no finding as to gravity is made. In short, the court held that it is sufficient for the issuance of a 104(d)(1) order if the inspector only finds that there was an unwarrantable failure violation.

In this particular proceeding, therefore, since we are dealing with an order issued under section 104(d)(1) of the Act, we do not have to give any great consideration to the question of how grave this particular violation was. From the civil penalty aspect of the case, however, it might be sufficient or adequate or relevant for me to point out that the preponderance of the evidence in this case shows that this was not a serious violation. There was very little rib surface which was loose enough to require it to be taken down and there was little likelihood that any of these ribs would have fallen with sufficient force to cause any serious injury. So I would find that the violation was moderately serious.

Now we get to the question of whether the order was unwarrantable, that is, whether you could find that there was unwarrantable failure on the part of the operator in failing to take care of this problem before the inspectors observed it.

The former Board of Mine Operations Appeals, after being reversed on the holding about significant and substantial in the Kleppe case, which I just cited, stated in Zeigler Coal Company, 7 IBMA 280 (1977), at pages 295 and 296, that an unwarrantable failure to comply exists if the operator involved has failed to abate the condition or practices constituting the violation, and these conditions are such that the operator knew or should have known that they existed, or that the operator failed to abate them because of a lack of due diligence or because of indifference or lack of reasonable care.

We have the testimony in this proceeding of Inspectors Robbins and Simpkins and the testimony of two of the company's witnesses, one being a mine foreman and the other being an assistant foreman. A determination has to be made as to whether they knew or should have known, or whether their section foremen or preshift examiners, should have known about these loose ribs and should have done something about them before they were cited by the inspectors.

Inspector Simpkins' recollection of the facts was not very vivid because a lot of time had passed since this order was issued and because he had apparently not reviewed his notes before coming here today. He was, in fact, called as a witness by me instead of the Government. Consequently, I do not think his testimony is particularly useful in making a determination about the operator's knowledge or lack of knowledge in this area. So for all practical purposes, I have to balance the testimony of two mine officials with that of Inspector Robbins.

I was very much impressed with Mr. Grygiel's testimony and with the amount of effort he had made to preserve a record of the conditions that he found on October 2. I find that his knowledge of the area and what was done was much more full and complete than that of Inspector Robbins.

There must be a time in one of these cases when the company's testimony preponderates over that of the inspector, and I think this case is one in which a finding of that nature is justified. Exhibit D, which was prepared by Mr. Grygiel in great care and detail, shows that while there may have been some cracks in the areas cited in the inspector's order, Mr. Grygiel did not consider them sufficient to have attracted a preshift examiner's attention or section foreman's attention. Mr. Grygiel felt and, in fact, both of the contestant's witnesses felt that the areas outby those cited in the order looked the same as the actual areas cited in the order and both witnesses said that they would not have considered any of this area inby the loading point needed any special work.

The roof-control plan, which is Exhibit M-4 in this proceeding contains in Paragraph 18 a provision that rib bolts or posts shall be installed when the mining height exceeds 6 feet. According to Mr. Grygiel, every area in the mine exceeds 6 feet, so it is a requirement in this mine that rib supports be installed.

But that Paragraph 18 provides, "When rib supports have become ineffective because of weight or pressure conditions, the supports need not be replaced." The provision goes on to say "[h]owever, loose ribs or brows shall be taken down or supported according to federal and state mining laws."

Consequently, there is no doubt but that the roof-control plan would require contestant to take down loose ribs, if they are observed, but the question is whether contestant's employees should have observed these particular loose ribs and whether it was so obvious that they should have observed them that the inspector properly considered contestant's failure to take down these loose areas to be an unwarrantable failure.

After listening to the testimony of the company's witnesses and that of Inspector Robbins, I am of the opinion that these particular loose ribs were simply not so obvious and dangerous that a preshift examiner would have picked them out as something requiring special attention, or that a section foreman would have done so either.

I am extremely reluctant to find against an inspector. I have done it on very few occasions. I am sure he acted in good faith in this instance. It is certainly easier to review somebody else's actions in the calm and unhurried atmosphere of a hearing room than it is to make determinations pertaining to the difficult task of inspecting mines and making decisions about health and safety while examining an underground mine.

Nevertheless, I think in this instance, I shall have to find that this particular violation was not something which should have been considered an unwarrantable failure under the cases which I have cited above.

WHEREFORE, it is ordered:

(A) The Notice of Contest filed in Docket No. WEVA 79-343-R is denied and Citation No. 655331 dated July 12, 1979, is affirmed.

(B) Respondent in Docket No. WEVA 80-290 shall, within 30 days from the date of this decision, pay a civil penalty of $50.00 for the violation of section 75.200 alleged in Citation No. 655331 dated July 12, 1979.

(C) The Notice of Contest filed in Docket No. WEVA 80-81-R is granted and Order No. 655316 dated October 2, 1979, is vacated.

(D) The civil penalty issues consolidated in this proceeding with respect to Order No. 655316 are severed from this decision and will be decided in a separate decision when I receive the file in which the Secretary seeks assessment of a penalty for the violation of section 75.202 alleged in Order No. 655316.

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

(703) 756-6230

26 JUN 1980

ITMANN COAL COMPANY, Applicant	:	Application for Review
	:	Docket No. WEVA 80-7-R
v.	:	
	:	Itmann No. 3 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
and	:	
UNITED MINE WORKERS OF AMERICA, Respondents	:	
RAY MARSHALL, SECRETARY OF LABOR, Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 80-194
v.	:	A.C. No. 46-01576-03037H
ITMANN COAL COMPANY, Respondent	:	Itmann No. 3 Mine

DECISION

Appearances: Karl T. Skyrpak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Itmann Coal Company;
James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Secretary of Labor, Mine Safety and Health Administration;
Mary Lu Jordan, Esq., Washington, D.C., for United Mine Workers of America.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding arises out of the consolidation of an application for review of an imminent danger order of withdrawal and a civil penalty proceeding arising out of that order. On October 1, 1979, Itmann Coal Company

(hereinafter Itmann) filed an application for review of an order of withdrawal based upon imminent danger. On February 21, 1980, the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) filed a proposal for assessment of a civil penalty against Itmann for violation of 30 C.F.R. § 75.200. On March 28, 1980, I ordered these cases consolidated under Procedural Rule 12 of the Federal Mine Safety and Health Review Commission, 29 C.F.R. § 2700.12.

A hearing was held in Charleston, West Virginia, on April 16 and 17, 1980. Itmann's motion to dismiss the United Mine Workers of America (hereinafter UMWA) as a party was denied. James A. Bowman testified on behalf of MSHA. Arnold Rogers testified on behalf of the UMWA. Robert Crouse, John Zachwieja, and David Bailey testified on behalf of Itmann. Upon completion of the taking of testimony, all three parties submitted oral arguments.

DISMISSAL OF PETITION FOR ASSESSMENT OF CIVIL PENALTY FOR ORDER NO. 0657194

At the outset of the hearing, MSHA moved to withdraw the proposal for assessment of a civil penalty insofar as it related to Order No. 0657194. The reason for this motion was that the order was vacated in a review proceeding of that order before another judge. It was MSHA's position that there was no violation of the Act or a mandatory safety or health standard. Neither Itmann nor the UMWA opposed the motion to dismiss.

Therefore, MSHA's motion to dismiss the part of this proceeding concerning the petition for assessment of a civil penalty for Order No. 0657194 is granted.

ISSUES

The first general issue is whether the order of withdrawal due to imminent danger was properly issued. The second general issue is whether Itmann 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. § 75.200 provides in pertinent part as follows: "The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. * * * No person shall proceed beyond the last permanent support * * *."

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

The parties stipulated the following:

1. Itmann is the owner and operator of the Itmann No. 3 Mine, located in Wyoming County, West Virginia.

2. Itmann and the Itmann No. 3 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction of this case pursuant to section 107 of the 1977 Act.

4. The inspector who issued the subject order and termination was a duly authorized representative of the Secretary of Labor.

5. A true and correct copy of the subject order and termination were properly served upon the operator in accordance with section 107(d) of the 1977 Act.

6. Copies of the subject order and termination are authentic, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

7. The appropriateness of the penalty, if any, to the size of the operator's business, should be determined, based upon the fact that in 1979 the Itmann No. 3 Mine produced an annual tonnage of 535,357 and the controlling company, Itmann, had an annual tonnage of 1,627,963.

8. The history of previous violations should be determined based on the fact that the total number of assessed violations in the preceding 24 months is 382 and the total number of inspection days in the preceding 24 months is 832.

9. The alleged violation was abated in a timely manner and the operator demonstrated good faith in obtaining abatement.

10. The assessment of a civil penalty in this proceeding will not affect the operator's ability to continue in business.

SUMMARY OF THE EVIDENCE

Undisputed Evidence

The order of withdrawal in controversy here was issued on September 4, 1979, and provides as follows:

> A beltman working in Beetree No. 2 belt conveyor entry (active travelway) approximately two crosscuts outby the drive was observed traveling under unsupported roof in a fall area. A roof fall had occurred on the off side of the belt conveyor causing the supports in the area to be destroyed and ineffective leaving unsupported roof above the fall and the beltman traveled through the area exposing himself. The operator did not support or otherwise control the area to protect persons from falls of roof or rib.

The undisputed evidence indicated that a massive roof fall had occurred approximately 4 years before the date on which the order was issued. In the area in question, the roof had fallen through the crosscut rib to rib. The roof fall in question was described as being 17 to 20 feet wide, 40 to 48 inches high, and approximately 90 feet long. Since it was impossible for Itmann to remove this massive roof fall which covered the conveyor belt in question, it used dowty jacks to support the end of the rock which was protruding over the belt. After the edge of the rock had been elevated, the

belt was able to run under the roof fall. The rock in question did not block passage on the travel side of the belt but it did block passage on the off side of the belt. After the roof fell, no action was taken to support the roof or block persons on the off side of the belt from crossing over the roof fall and under unsupported roof.

On the day in question, Marty Bowers and another belt cleaner were assigned to clean the belt area in question. Bowers was not the regular belt cleaner in this area. The belt foreman was not in the vicinity of this area at the time of this occurrence. The area in question was traveled and belts were cleaned once a week unless there were spills or mechanical problems.

MSHA inspector James Bowman was accompanied by union safety committeeman Arnold Rogers and Itmann safety supervisor Robert Crouse. As Inspector Bowman approached the large rock, he saw Bowers travel over the roof fall under unsupported roof. Thereupon, he issued a section 107(a) imminent danger order of withdrawal. Thereafter, timbers and planks were erected on the roof fall to prevent any other miners from going over the fall and under the unsupported roof.

MSHA proposed that a civil penalty in the amount of $2,000 be assessed for the violation of 30 C.F.R. § 75.200.

Evidence by MSHA and UMWA

James A. Bowman testified that he has been a federal mine inspector for 6 years. At the time he issued the imminent danger order, he interviewed beltman Marty Bowers whom he saw crossing the roof fall under unsupported

roof. Bowers told him that he had crossed this area several times. The area had been freshly rock dusted approximately 2 days previously and the tracks through the rock dust indicated that it had been traveled over several times. Bowman believed that if normal mining operations continued, Bowers or some other belt cleaner would have crossed the area again. In the opinion of Inspector Bowman, there was a very real likelihood of injury or death if normal mining operations continued.

Inspector Bowman testified that he believed that Itmann should have known about the rock fall since it was required to check the belts three times a day. He further believed that miners were encouraged to cross this area because there was no off-on switch in the area and no cross-over was provided. A miner crossing the rock fall would go under approximately 12 feet of unsupported roof. Inspector Bowman believed that this was a serious violation because approximately half of the fatalities in underground mines are due to roof falls.

Inspector Bowman did not go under the unsupported roof but checked it visually from the travel side of the belt. He observed that the ribs were broken and the roof appeared to be cracked and unstable above the fall.

Inspector Bowman could not remember exactly when he issued the imminent danger order or whether the miner was under unsupported roof at the time. The primary factor he considered in issuing the imminent danger order was seeing the man on top of the roof fall.

Arnold Rogers testified that he has worked at the Itmann No. 3A Mine since 1960. He was the union safety committeeman who accompanied Inspector

Bowman on the day the order was issued. He was traveling approximately 6 to 7 feet behind the inspector at the time he saw a man on top of the rock that was protruding over the belt. He saw this man take two steps. When he got closer to the rock, he could see that it had been traveled over. In his opinion, one trip over this rock would not account for all the tracks he observed. He heard Marty Bowers say, "I've traveled several times before."

Mr. Rogers stated that he observed the unsupported roof from the travel side of the belt. It appeared to be broken and unstable. He had attended safety classes given by Itmann and had been told not to go under unsupported roof.

Evidence by Itmann

Robert Crouse was Itmann's safety supervisor at the time of this occurrence. He accompanied Inspector Bowman and Arnold Rogers on the day in question. At the time Marty Bowers crossed under the unsupported roof, Mr. Crouse was approximately 45 to 50 feet behind Inspector Bowman. He was running to catch up. Inspector Bowman told him, "You've just got a 107(a) order." Mr. Crouse testified that Marty Bowers said he knew better than to go under unsupported roof. Bowers further stated that this was not his regular work area and the belt foreman did not know it was his practice to cross this area. Robert Crouse further testified that the other belt cleaner who was working with Bowers at the time stated that the regular practice in this area was to turn off the conveyor belt, have the belt cleaner on the off side cross the belt to the travel side and walk around the rock, cross

the belt to the off side, and turn the belt on. Mr. Crouse stated that the off side of the belt was not used as a regular travelway. Rock dusting was performed from the travel side of the belt. However, Mr. Crouse conceded that the off side of the belt in the area in controversy could be traveled more than once a week in the event of spillage.

Mr. Crouse visually observed the unsupported roof in question and it appeared to be smooth, flat, solid sandstone. He had been through this area many times before with federal and state inspectors and no one had ever cited it. Mr. Crouse did not believe that an order of withdrawal was required since the condition would have been abated just as fast if a section 104(a) citation had been issued. Itmann management had no way of knowing that a miner would go under the unsupported roof. Mr. Crouse conceded that he did not think it was a safe practice to go under unsupported roof, but he did not think that Bowers was in any imminent danger while he was under the unsupported roof in question and that any imminent danger certainly did not exist after Bowers was out from under the unsupported roof.

John Zachwieja was the mine superintendent of the mine involved in this controversy. He did not go into the area on the day of the order. However, he testified that after abatement, he examined and sounded the roof. He testified that the sandstone did not form a complete arch but it was not smooth. While there appeared to be crack in the roof, it was firm on sounding. Mr. Zachwieja testified that in his opinion there was no imminent danger after the miner got off the rock.

David Bailey was the mine superintendent of the 3A Mine on the day in question. He was not in the area when the order was issued but the belt

cleaners were under his jurisdiction. He suspended Marty Bowers for 5 days without pay following this incident. Mr. Bailey testified that the rock in question had fallen in approximately 1975 and its condition was unchanged up to the day of this order. In Mr. Bailey's opinion, Marty Bowers was totally safe when he was on the rock even though he was under unsupported roof. This was so because the roof in question was solid and strong. In his opinion, there was no imminent danger. He suspended Mr. Bowers because Mr. Bowers did not know that the top was solid and the next time he went under unsupported roof he might be killed.

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of the parties have been considered. MSHA and the UMWA contend that the imminent danger order of withdrawal should be affirmed and that the civil penalty, as proposed, should be assessed. Itmann contends that the imminent danger order of withdrawal should be vacated or, in the alternative, modified to a section 104(a) citation. In the event a violation is established, Itmann argues that a civil penalty of approximately $150 would be appropriate.

One of the arguments advanced by Itmann is that the inspector chose the wrong remedy. Itmann argues that there was no need for a section 107(a) withdrawal order and that a section 104(a) citation would have accomplished the same result. The Interior Board of Mine Operations Appeals gave this type of argument short shrift in Eastern Associated Coal Corp., 2 IBMA 128, 137 (1973) as follows:

> We have considered and we reject Eastern's argument that the inspector exceeded his authority for the reasons that he could or probably should have taken alternative actions, such as issuing notices of violation or doing nothing, which in Eastern's view would have accomplished the same result. This argument could be raised in almost every case. However, we are not called upon here to decide whether the inspector chose the most appropriate of several alternatives, but rather we are called upon to decide whether the action he did take was a proper and lawful exercise of authority under the Act.

The Seventh Circuit Court of Appeals discussed the "precarious position" of the inspector and the test it applied to determine the validity of orders of withdrawal based upon imminent danger.

> Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb. On the other hand, the coal mine operator is principally concerned with dollars and profits. We must support the findings and the decisions of the inspector unless there is evidence that he had abused his discretion or authority. [Emphasis supplied.]

Old Ben Coal Corp. v. IBMA, 523 F.2d 25, 31 (7th Cir. 1975).

I agree with the determination of the Interior Board of Mine Operations Appeals that the issue in this case is the validity of the order in controversy and not whether some other remedy should have been chosen.

The evidence establishes that a belt cleaner employed by Itmann traveled over a roof fall and under approximately 12 feet of unsupported roof on the date in question. This occurrence was observed by the inspector and the union walkaround. The inspector determined that, based upon extensive tracks through the rock-dusted roof fall, it was the practice of miners to travel under this unsupported roof. This evidence was corroborated by the testimony

of the union walkaround. On this issue I find that the testimony of the inspector and union walkaround was more persuasive and credible than the testimony offered by Itmann that a different practice was followed in this area. The physical facts, the admission of the belt cleaner and the cumbersome procedure advanced by Itmann for belt cleaners to circumvent the roof fall support the finding that it was the practice of belt cleaners to travel under the unsupported roof.

On the issue of the validity of the imminent danger order of withdrawal, Itmann posits its defense on Old Ben Coal Co., 6 IBMA 256 (1976). In Old Ben, the Interior Board of Mine Operations Appeals affirmed a holding that imminent danger did not exist where a miner had been riding on top of the locomotive with his feet hanging over the side and the miner got off the locomotive prior to the issuance of the order. The Board held:

> These provisions of the Act make it clear that an imminent danger withdrawal order can be properly issued only if an imminent danger exists at the time of issuance. No provision is made for issuance where a danger is speculative, has subsided or has been abated. The mere existence of this policy, allowing men to ride on locomotives, did not constitute an imminent danger. Id at 261.

While the rationale of Old Ben may be faulted, I find that it is distinguishable from the instant case. This is so because Old Ben held that the practice of allowing men to ride on locomotives did not constitute an imminent danger and, hence, no imminent danger existed at the time the order was written. In the instant case, I find that it was the practice of miners to travel under unsupported roof in the area in question and that such practice could be expected to cause death or serious physical harm before

the practice could be abated. Hence, even though the miner was no longer under the unsupported roof at the time the order was issued, the practice of miners going under the unsupported roof constituted an imminent danger under the Act.

There was no support of the roof or other control to prevent miners from going under the unsupported roof. I find that the credible evidence of record establishes that the roof in question was cracked and unstable. I have considered the testimony presented by Itmann that the roof in question was sound and had stood for 4 years. However, the preponderance of the credible evidence supports the inspector's conclusion that persons going under this unsupported roof would be exposed to death or serious physical harm. This finding is based upon the testimony of Inspector Bowman, UWMA walkaround Arnold Rogers, and some of the testimony of Itmann superintendent John Zachwieja. The contrary testimony is rejected.

Since the roof in question was cracked and unstable, I find that the preponderance of the evidence establishes that the condition of the roof coupled with the practice of traveling under it could be expected to cause death or serious physical harm before the condition and practice could be abated. Therefore, I find that the order of withdrawal under section 107(a) due to imminent danger was properly issued in this case.

MSHA proposed the assessment of a civil penalty against Itmann for violation of 30 C.F.R. § 75.200 in that a miner traveled under unsupported roof and the operator did not support or otherwise control the area to protect persons from falls of roof or rib. Itmann does not dispute the fact

that the belt cleaner traveled under unsupported roof. While Itmann concedes that the roof was not supported, it contends that it had no knowledge that miners would go under such unsupported roof.

The fact that a miner employed by Itmann traveled under unsupported roof establishes a violation of 30 C.F.R. § 75.200. However, I have also found that the condition of this roof had been present for approximately 4 years and that it was the practice of belt cleaners to travel under this roof. Under these circumstances, I find that Itmann knew or should have known of this condition and practice. Itmann's failure to take action to prevent the violation in question amounts to ordinary negligence.

As I have previously noted, a roof fall could cause death or serious physical harm. One person would be exposed to such an occurrence. Stipulations 7 through 10 have been considered in assessing a civil penalty. 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 $2,000 should be imposed for the violation found to have occurred.

ORDER

Therefore, it is ORDERED that the motion to dismiss the part of this proceeding concerning the proposal for assessment of civil penalty for Order No. 0657194 is GRANTED.

It is FURTHER ORDERED that the application for review is DENIED and the subject withdrawal order is AFFIRMED.

It is FURTHER ORDERED that Itmann pay the sum of $2,000 within 30 days of the date of this decision for violation of 30 C.F.R. § 75.200.

James A. Laurenson

James A. Laurenson, Judge

Distribution by Certified Mail:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

27 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. WEVA 80-150
	:	A.O. No. 46-02843-03026
v.	:	
	:	Madison No. 1 Mine
KANAWHA COAL COMPANY,	:	
	:	Docket No. WEVA 80-154
BECKLEY COAL MINING COMPANY,	:	A.O. No. 46-03092-03033
Respondents	:	
	:	Beckley Mine

DECISION AND ORDER

Appearances: David E. Street, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for Petitioner; Harold S. Albertson, Jr., Esq., Hall, Albertson & Jones, for Respondents.

Before: Judge Kennedy

Statement of the Proceedings

In the interest of a just, speedy and inexpensive determination of these matters the parties waived an evidentiary hearing and filed cross motions for summary decision together with a stipulation of material facts not in dispute. The common question of law presented is whether evidence of two respirable dust violations gathered through the use of a personal sampler approved by the Secretary of the Interior and the Secretary of Health, Education and Welfare under the 1969 Coal Act (30 C.F.R. Part 74) is admissible to prove a violation of the mandatory health standard set forth in section 202(b), 30 U.S.C. § 842(b), in an enforcement proceeding brought under section 110(a), 30 U.S.C. § 820(a), of the 1977 Mine Health and Safety Act.

I

Coal workers' pneumoconiosis--black lung disease--affects a high percentage of American coal miners with severe, chronic, and crippling respiratory impairment. The disease, which in its advanced form is inevitably fatal is caused by long-term inhalation of respirable mine dust, including coal dust. Medically speaking, respirable dust consists of particulates of dust small enough to be taken into the terminal airways of the lungs, and large enough to trigger the replacement of healthy lung tissue with hard nodules formed in the scarring reaction of the body. As the disease progresses the lungs lose volume and breathing becomes progressively more difficult. In its advanced stages, the disease becomes a massive fibrosis that continues to grow even after the worker is removed from exposure. The complicated form of the disease produces lesions that gradually constrict the flow of blood through the pulmonary vessels, first causing enlargement of the right side of the heart and later causing death from congestive cardiac arrest.

Black lung disease is an occupational disease that afflicts the lives of thousands of miners and their families. Various studies show that between 10 and 30 percent of all working bituminous coal miners have some form of the disease. Every miner lives under the threat of black lung and thousands die of it every year. While 161 miners died in on-the-job accidents last year, the UMWA estimates approximately 4,000 miners died of black lung disease. Thus, more than 11 miners each day wheeze away their final breath as a result of black lung.

The Federal Coal Mine Health and Safety Act of 1969 recognized for the first time that black lung is an occupational disease. 1/ It mandated allowable dust concentrations and provided for compensation of disabled miners. Over 400,000 miners are presently receiving black lung benefits. 2/

In an effort to curb the incidence of black lung, Congress provided in Titles II and III of the Coal Act for limits on the amounts of dust to be permitted in the ambient air of coal mines. Thus, sections 202(b)(2), 202(e), and 318(k) of the Coal Act, 30 U.S.C. §§ 842(b)(2), (e), 878(k), provided that effective December 30, 1972, each operator of an underground coal mine was obligated to keep the weight of dust 5 microns or less in "size" in each cubic meter of air at or below 2 milligrams. Section 202(a) of the Coal Act further provided that:

> Each operator of a coal mine shall take accurate samples of the amount of respirable dust in the mine atmosphere to which each miner in the active workings of such mine is exposed. Such samples shall be taken by any device approved

1/ Recognizing the epidemic proportions to which the disease had grown in the nation's mines, Congress developed a mandatory health standard the purpose of which was:

"* * * to provide, to the greatest extent possible, that the working conditions in each underground coal mine are sufficiently free of respirable dust concentrations in the mine atmosphere to permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupation-related disease during or at the end of such period." Section 201(b), 30 U.S.C. § 841(b).

2/ See, President's Commission on Coal, The American Coal Miner, March 1980, at 125. Although the level of dust in the nation's mines has significantly decreased since the passage of the 1969 Act, the epidemiological studies being conducted by the National Institute of Occupational Safety and Health evaluating the effectiveness of dust suppression programs in preventing or lessening the progression of pneumoconiosis will not yield preliminary results until 1981.

> by the Secretary [of Interior] and the Secretary of Health Education and Welfare and in accordance with such methods, at such locations, at such intervals, and in such manner as the Secretaries shall prescribe in the Federal Register within sixty days from the date of enactment of this Act and from time to time thereafter.

In addition, section 202(e) of the Act provided that the weight per unit volume of the respirable dust collected in the approved devices was to be measured by equating it with that which would be obtained if the dust were collected with an MRE instrument. An MRE instrument was defined as "the gravimetric dust sampler with [a] four channel horizontal elutriator developed by the Mining Research Establishment of the National Coal Board, London, England." (See Appendix A).

With reference to the MRE instrument, the House Report on the Coal Act, 3/ stated:

> When reference in this report is made to dust readings which yield results in terms of milligrams per cubic meter of air (mg/m^3) such determinations are measured with an MRE instrument. As used in this title "MRE instrument" means the gravimetric dust sampler with four channel horizontal elutriator developed by the Mining Research Establishment of the National Coal Board, London, England.

Because the Board of Mine Operations Appeals ignored this definition it failed to appreciate that the particle size limitation, "5 microns or less in size," as found in section 318(k) was meaningless unless "size" was defined in terms of the weight of dust particulates aerodynamically separated and

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3/ H. Rep. 91-563, 91st Cong., 1st Sess. at 15 (1969); Legislative History of the Coal Mine Health and Safety Act of 1969 (Public Law 91-173) as amended through 1974 including Black Lung Amendments of 1972, Subcommittee on Labor of Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I at 1045 (1975).

collected by the MRE sampler. Assuming that the "5 microns or less in size" definition referred only to static or "linear" size, the Board found that definition to be incompatible with the gravimetric method of "size" measurement mandated by the statutory standard. 4/

4/ As the legislative history of the standard shows, the particle count per cubic centimeter system which the Board contended for was not only slow and tedious but unreliable because of the subjectivity involved in making the "size" and "count" determinations. Because of this and because recent medical evidence showed that the mass or weight of the dust sample, i.e., the "size" of the dust sample per cubic meter of air was the controlling causative factor, the MRE instrument which ultimately records the weight in milligrams per cubic meter of air was developed. The MRE instrument separates out (elutriates) and weights (gravimetrically) dust in the minus-7 micron equivalent aerodynamic size range. Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, pp. 576-579, 91st Cong., 1st Sess. (1969). The aerodynamic equivalency factor which the Board never understood is explained as follows. The MRE design is based on particle selection principles which simulate the behavior of the human respiratory tract in a dust cloud. Empirically speaking, respirable dust is any dust that can penetrate the respiratory system and deposit in the terminal airways of the lungs. Most commonly this is dust with a particle size of 5 microns or less in diameter, but may include particles as large as 200 microns where such particles have aerodynamic characteristics that cause them to behave in the pulmonary air flow like 5 micron dust. Eastern Associated Coal Corp., 7 IBMA 133, 140-142 (1976). It is important to understand exactly what the MRE device measures. The four channel horizontal elutriator removes from the airstream all particles with an aerodynamic equivalent diameter greater than 7.1 microns, lets pass approximately 50 percent of particles with an aerodynamic equivalent diameter of 5 microns, and lets pass approximately 98 percent of particles with an aerodynamic equivalent diameter of 2 microns. The term aerodynamic equivalent diameter refers to "the diameter of a spherical particle of unit density having the same falling velocity as the particle in question." See, Sampling and Evaluating Respirable Coal Mine Dust, Bureau of Mines, IC 8503, February 1971, at 3. A particle of unit density, or a density of one, has the same density as water, i.e., 1 gram per cubic centimeter. See, Dictionary of Mining, Mineral and Related Terms, Bureau of Mines, 1968, at 312. Thus, the MRE device sorts particles based on their aerodynamic performance characteristics rather than on their "linear size." Both the density and shape of particles affect their aerodynamic characteristics. For example, a sphere of dust 5 microns in diameter as measured with a microscope but with a density twice that of water would be removed from the airstream significantly sooner than a similar sphere of unit density, and would have an equivalent aerodynamic diameter in excess of 5 microns even though its "linear size" is only 5 microns. Similarly, the shape of a

This erroneous interpretation of the Congressional intent led the Board to declare the standard invalid and unenforceable. Eastern Associated Coal Corporation, 7 IBMA 14, 133 (1976). To prevent the complete repeal of the vital dust suppressant program, the Secretary of the Interior took the unprecedented step of personally intervening in the matter to stay the effectiveness of the Board's nullification order. Decision and Order of the Secretary of the Interior Staying Board of Mine Operations Appeals Decision, dated January 19, 1977.

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fn. 4 (continued)
particle also affects its aerodynamic performance. A 5 micron cube of unit density material would have an equivalent aerodynamic diameter in excess of that of a 5 micron sphere of unit density since it would be removed from the airstream sooner than the sphere. Applying these principles to the measurement of mine dust, it can be determined that a 5 micron cube of coal dust, the lightest constituent of mine dust having a density of 1.3, has an equivalent aerodynamic diameter of approximately 6.8 microns, and therefore only approximately 5 percent of such 5 micron cube particles would be deposited on the MRE filter. A 5 micron cube of limestone, a common constituent of mine dust with a density of 2.6, has an equivalent aerodynamic diameter of approximately 8.5 microns, and therefore would not be deposited at all on the MRE filter. These relationships can be determined by using the following formula: $(\text{size in microns})^3$ (density) = (pi/6) $(\text{size in microns})^3$ (unit density) where the left side of the equation describes the mass of the cube in question and the right side the size of an equivalent sphere of unit density. Thus, it is apparent that although the MRE device measures particles on the basis of their aerodynamic performance characteristics, it also effectively measures the respirable fraction of mine dust even if defined solely with regard to "linear size." This is the equivalency factor the Board could not understand. It is important to recognize, however, that the respirable dust standard was developed with reference to the MRE device and is expressed in terms consistent with the characteristics of that device. Any attempt to change the definition of respirable dust or the sampling method used would require a corresponding change in the standard. (See Appendix B).

II

After being made aware of the "Interior Board's misinterpretations of the respirable dust statutes," 5/ Congress took action to eliminate the "conflicting definitions * * * which have threatened to interfere with the civil penalty enforcement of the dust sampling program." 6/ Thus, section 202(b), 30 U.S.C. § 842(b), of the 1977 Mine Act repealed section 318(k) of the 1969 Coal Act, 30 U.S.C. § 878(k), which the Board had misconstrued, and amended section 202(e) so as to delete the reference to the MRE instrument. Section 202(a), 30 U.S.C. § 842(a), of the 1977 Mine Act. The latter was designed to ensure that the particle selection principle upon which the MRE instrument operates (separation of minus-7 micron dust particles from the dust cloud or atmosphere) could not be used to undermine once again the gravimetric method of measurement of deleterious concentrations of respirable dust. As the Senate Committee Report stated:

> Section 318(k) of the Federal Coal Mine Health and Safety Act of 1969 is amended by deleting subsection (k) which defines respirable dust in terms of dust particulates 5 microns in size or less. The new definition in subsection (e) defines respirable dust in terms of average concentration, a method of determining the amount of dust in a mine atmosphere on the basis of weight. Since all devices approved by the Secretary and the Secretary of Health, Education and Welfare measure respirable dust on the basis of weight, rather than particle size, this amendment is necessary to make the definition of respirable dust conform to the approved method of sampling. 7/

5/ Hearings Before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess., at 163 (March 1977).

6/ Conference Report on S. 717, S. Rep. 95-461, 95th Cong., 1st Sess. 63, reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 1341 (July 1978).

7/ S. Rep. 95-181, 95th Cong., 1st Sess. at 51, Leg. Hist., supra at 639.

To underscore the importance and urgency of this amendment the Mine Act further provided that the amendment to the definition of approved devices was to be effective on the date of enactment of the Mine Act (November 9, 1977), and not 120 days thereafter as was true of the remainder of the new Act. Section 307, 30 U.S.C. § 801, note.

Two months later, Secretary Andrus after tacitly accepting the Board's erroneous interpretation of the size particle definition of respirable dust undertook to vacate Secretary Kleppe's stay of a year earlier on the ground that the repeal of the 318(k) definition had mooted the issue for the future. 8/ This effectively compromised the enforcement of some 4,000 outstanding violations of the dust standard that occurred prior to November 9, 1977.

On March 24, 1978, some 4-1/2 months after Congress repealed section 318(k) of the Mine Act, the Department of Labor deleted 30 C.F.R. 70.2(i), the counterpart of section 318(k) which appeared in the Code of Federal Regulations. And on April 8, 1980, the Department of Labor finally deleted the 318(k) definition from 30 C.F.R. 75.2(k) of the mandatory safety standards.

III

In each of these cases the operator concedes it had respirable dust concentrations in excess of the 2 milligram standard--3.0 milligrams in the

8/ Order of the Secretary of the Interior Dissolving Secretarial Stay Order of January 19, 1977, issued January 3, 1978.

case of Kanawha and 2.1 milligrams in the case of Beckley. Despite this, it moves for summary decision in its favor on the authority of Judge Moore's decisions in Alabama By-Products Corporation, SE 79-110 (February 12, 1980), appeal pending; and Olga Coal Co., HOPE 79-113-P (June 28, 1979), appeal pending.

In Alabama By-Products Corporation and Olga Coal, Judge Moore concluded that (1) the repeal of the size particle definition by Congress in November 1977 was nullified by the failure of the Secretary of Labor to delete the definition from 30 C.F.R. § 75.2(k) of the mandatory safety standards and thus the standard was once again rendered unenforceable and (2) the failure of the Secretary of Labor and the Secretary of Health, Education and Welfare to issue a new Part 74 of the Code of Federal Regulations and thereby redefine respirable dust renders ineffective the gravimetric method of measurement reaffirmed in section 202(e) as amended in November 1977.

I must respectfully decline to follow the decisions of Judge Moore. First, I find it axiomatic that repeal of the statutory basis for the definitions set forth in 30 C.F.R. §§ 70.2(i) and 75.2(k) deprived them of all legal vitality and significance. In this connection, I note that in April 1980, the Department of Labor finally substituted the gravimetric definition set forth in section 202(e) 9/ for that in old 318(k). Despite the delay, I

9/ The gravimetric definition states:
"'Respirable dust' means dust collected with a sampling device approved by the Secretary and the Secretary of Health, Education and Welfare in accordance with Part 74 (Coal Mine Dust Personal Sampler Units) of this title. Sampling device approvals issued by the Secretary of Interior and Secretary of Health, Education and Welfare are continued in effect." 45 F.R. 24000, 24004.

find no rational basis for concluding the Department's laggardly approach to deletion of the so-called "linear" definition of respirable dust rendered unenforceable the mandatory health standard. 10/

I reject as unsound the view that an agency can administratively veto or render null, void and unenforceable an Act of Congress by allowing obsolete regulations to remain in the Code of Federal Regulations or that regulatory ineptitude is an acceptable alternative to effective enforcement of the Mine Safety Law. For these reasons, I conclude the "linear" definition of respirable dust has been a dead letter since at least November 9, 1977, and that the Secretary's failure to conform his regulations with the Congressional will was and is no bar to enforcement of the respirable dust standard set forth in Title II of the Mine Health and Safety Law. 30 C.F.R. Part 70, 30 U.S.C. § 841 et seq.

I further conclude that while the Board of Mine Operations Appeals never was able to comprehend the enforcement scheme mandated by the aerodynamic equivalency test, the fact is that the Bureau of Mines, MESA, MSHA and Congress always intended that for the purpose of enforcement of the respirable dust standard average concentrations were to be measured by whatever dust was collected by the MRE instrument or its equivalent as approved by the two Secretaries. 11/

10/ As we have seen the "linear" definition was deleted from the regulations implementing the Health Standards in March 1978. The violations here occurred in May and July 1979.

11/ Congress has never deviated from its statement that:
"When reference in this report is made to dust readings which yield results in terms of milligrams per cubic meter of air (mg/m^3) such determinations are measured with an MRE instrument." H. Rep. 91-563, 91st Cong., 1st Sess. at 15. See also 45 F.R. 23996 (1980).

Ever since April 3, 1970, 30 C.F.R. § 70.206 has provided that for the purpose of determining compliance, concentrations of respirable dust collected with an approved sampling device will be expressed in terms of "equivalent concentrations of respirable dust as measured with an MRE instrument." And ever since March 11, 1970, the approved sampling device has been a personal sampler unit, such as the Bendix Micron Air II units involved in these violations, built and maintained in accordance with the provisions of Part 74 of Title 30 of the Code of Federal Regulations. (See Appendix C).

Under Part 74, the National Institute of Occupational Safety and Health (vice the Secretary of HEW) is responsible for approving the efficiency and accuracy of the dust samplers and MSHA (vice MESA and the Secretaries of Interior and Labor) is responsible for approving the permissibility of the electric air pump. 12/ 30 C.F.R. § 74.3.

These permissibility standards are set forth in 30 C.F.R. § 18.68 and have been in effect since March 1968. 33 F.R. 4660. While they were initially promulgated by the Director of the Bureau of Mines they have been continued in effect ever since under successor authorities including section 301(c)(2) of the 1977 Mine Health and Safety Act, 30 U.S.C. § 961(c)(2).

Both Judge Moore and the Board seemed to recognize that Part 74 is not a mandatory health standard. See, section 202(a) of the Coal Act, 30 U.S.C.

12/ The National Bureau of Standards has found the personal sampler "is a 'state-of-the-art' instrument that has no proven peer in this application." See, An Evaluation of the Accuracy of the Coal Mine Dust Sampling Program Administered by the Department of the Interior, Report to the Senate Committee on Labor and Public Welfare, U.S. Department of Commerce, December 1975, at ii.

§ 842(a), as well as sections 202(e) and 508 of the Mine Act, 30 U.S.C. §§ 842(e), 957; Eastern Associated Coal Corp., 7 IBMA 14, 39-42 (1976). I agree. Consequently, the Solicitor's suggestion that the Commission and its judges are without power to review a claim of invalidity of Part 74 because of the provisions of section 101(d), 30 U.S.C. § 811(d), is not relevant or germane to this proceeding. 13/

What I find germane is the following:

1. Congress repealed section 318(k) and the reference to the MRE instrument not because the 5 micron size particle definition was incompatible with the particle selection principles of the MRE instrument but because the Board of Mine Operations Appeals could not understand that to the scientists who designed the MRE instrument and the medical doctors who deal with black lung "only 5 microns or less in size" means dust particles of unit density or those of aerodynamic equivalent diameter. The equivalent diameter of a particle is the diameter of a spherical particle of unit density having the same falling velocity in air as the particle being measured. IC 8458, 12-13 (1970); IC 8503, 3 (1971).

2. Congress repealed section 318(k) and the reference to the MRE instrument 120 days before the Secretary of the

13/ Part 74 which was promulgated on March 11, 1970 (35 F.R. 4326), is not only not an improved mandatory health or safety standard but was not promulgated under section 101, 30 U.S.C. § 811, of the Mine Safety Act, as amended in 1977. Because Part 74 only delegates to the administrative the authority to designate the devices approved for measuring compliance or noncompliance, use of an unapproved or impermissible device would be a violation of the Act or of the permissibility standard, a safety standard, but not a violation of the respirable dust health standard. The health standard is set forth in section 202(b)(1), (2) of the Mine Safety Act of 1969, as amended, 30 U.S.C. §§ 842(b)(1), (2), 30 C.F.R. § 70.100(b). While civil penalties may be imposed for violations of the Act, criminal penalties may be imposed only for violations of the mandatory health or safety standards. 30 U.S.C. §§ 820(a), (d). Compare, United States v. Consolidation Coal Co., 477 F. Supp. 283, 286-287 (S.D. Ohio 1979). It should be noted, however, that in section 303(b) of the Coal Act Congress authorized the Secretary to prescribe maximum respirable dust levels in intake air courses, 30 C.F.R. § 70.100(d), (e).

Interior's approval/enforcement authority was transferred to the Secretary of Labor. Section 307, 30 U.S.C. § 801 note.

3. Congress confirmed and ratified approvals of personal samplers that were outstanding on the effective date of its amendment of section 202(e) of the Coal Act, November 9, 1977. This occurred 120 days before the approval/enforcement authority was transferred to the Secretary of Labor at a time when the Secretary of the Interior was the only legal referent for the definition of "Secretary".

4. It is absurd to attribute to Congress an intent to validate use of the approved samplers on the one hand while suspending that approval for 120 days or until the Secretary of Labor could rubber stamp what Congress had decreed.

5. On March 9, 1978, the outstanding approvals of personal samplers under Part 74 were automatically continued in effect by virtue of the provisions of section 301(c)(2) of the 1977 Mine Act, 30 U.S.C. § 961.

6. There is no basis for concluding that by repealing section 318(k) and amending section 202(e) Congress intended to require the Secretary of Labor and the Secretary of HEW to "come up with a new defintion" of respirable dust. Such an expectation would be fatuous and akin to expecting the administrative to repeal the law of gravity. 14/

14/ The scientific, technical and medical facts relied upon in these findings and throughout this decision are derived from the official publications of the Bureau of Mines, MESA and MSHA that are cited, as well as the medical and scientific data set forth in the legislative history of Title II of the 1969 Coal Act. Section 7(d), 5 U.S.C. § 556(e), of the APA provides:

"* * * Where any agency decision rests on official notice of a material fact not appearing in evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." The Attorney General's Manual on the Administrative Procedure Act (1947) comments: "* * * the process of official notice should not be limited to the traditional matters of judicial notice but extends properly to all matters as to which the agency by reason of its functions is presumed to be expert, such as technical or scientific facts within its specialized knowledge . . . Agencies may take official notice of facts at any stage in a proceeding--even in the final decision--but the matters thus noticed should be specified and any party shall on timely request be afforded an opportunity to show the contrary. The matters thus noticed become a part of the record and, unless

Conclusion

I conclude that since all devices approved by the Secretaries and Congress measure respirable dust on the basis of weight, 15/ rather than particle size, the repeal of section 318(k) and the amendment of section 202(e) did not constitute a legislative repudiation of that method of measurement or necessitate a "new" definition of respirable dust. What the legislative action did accomplish was a repudiation of the Board's interpretation of respirable dust as only 5 microns or less in "linear" diameter. 7 IBMA 142.

I am asked to choose between interpretations of Congressional intent that on the one hand makes impossible enforcement of the respirable dust standard and on the other breathes life and vitality into a standard crucial to the well-being and longevity of over 150,000 working miners. It is time the dead hand of the Board of Mine Operations Appeals was lifted from the lungs of America's miners.

Where there is a conflict between a statutory interpretation that promotes occupational health and an interpretation that endangers health, the first must be preferred. UMWA v. Kleppe, 562 F.2d 1260, 1265 (D.C. Cir. 1977); Secretary v. Old Ben Coal Company, 1 FMSHRC 1954, 1957 (1979).

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fn. 14 (continued)
successfully controverted, furnish the same basis for findings of fact as does 'evidence' in the usual sense." (pp. 79-80). See also McDaniel v. Celebreeze, 331 F. 2d 426 (4th Cir. 1964); Rinaldi v. Ribicoff, 305 F. 2d 548 (2d Cir. 1962); Eastern Associated Coal Corporation, 5 IBMA 185, 204 (1975).

15/ Without use of the gravimetric devices measurement of respirable dust concentrations would be, practically speaking, impossible.

Accordingly, I find the respirable dust standard is enforceable and the evidence of noncompliance gathered by the personal samplers approved under Part 74 admissible to prove the fact of violation.

Based on the parties' stipulations as to the evidence of noncompliance I find the violations charged did, in fact, occur. After an independent evaluation and de novo review of the circumstances and after taking into consideration the other statutory criteria, I find the amount of the penalty warranted for the Kanawha violation is $200 and for the Beckley violation $100.

It is ORDERED, therefore, that the record in this matter remain open for 10 days to afford the parties an opportunity to request time to rebut the matters officially noticed. It is FURTHER ORDERED that if a timely request to rebut matters officially noticed is not received, the operators pay the penalties assessed on or before Friday, July 18, 1980 and that subject to payment the captioned matters be, and hereby are, DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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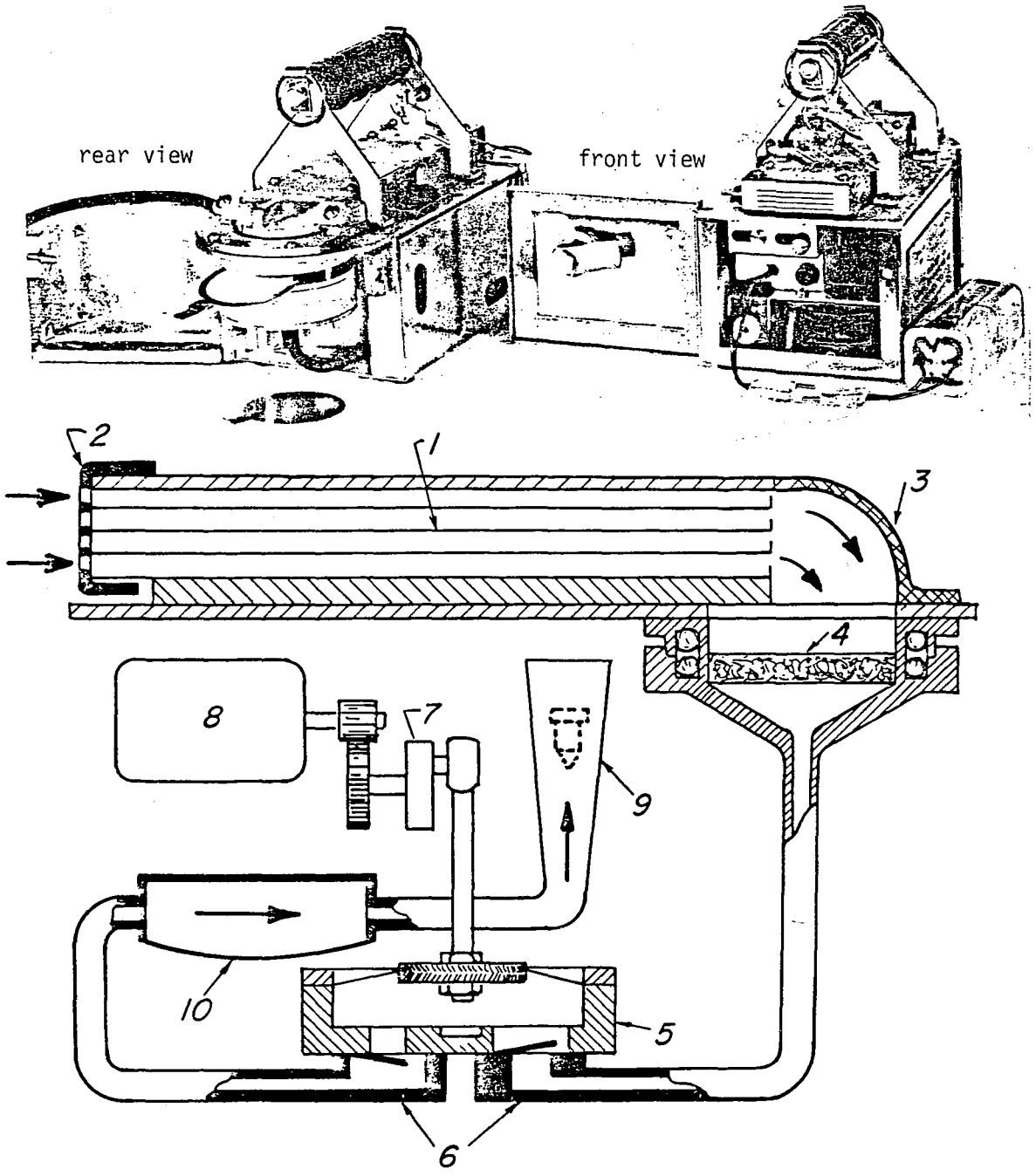
APPENDIX I - The MRE Device

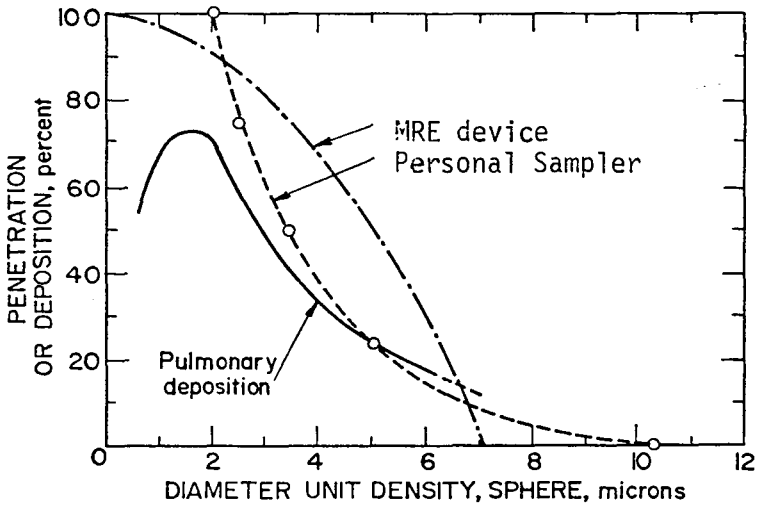


Schematic: (1) Four channel horizontal eleutriator; (2) nose restrictor; (3) transfer hood; (4) filter; (5) diaphragm pump; (6) flap valves; (7) pump output adjusting crank; (8) permissible electric motor; (9) flowmeter; (10) airflow smoothing device.

Sources: IC 8503, IC 8528, February 1971.

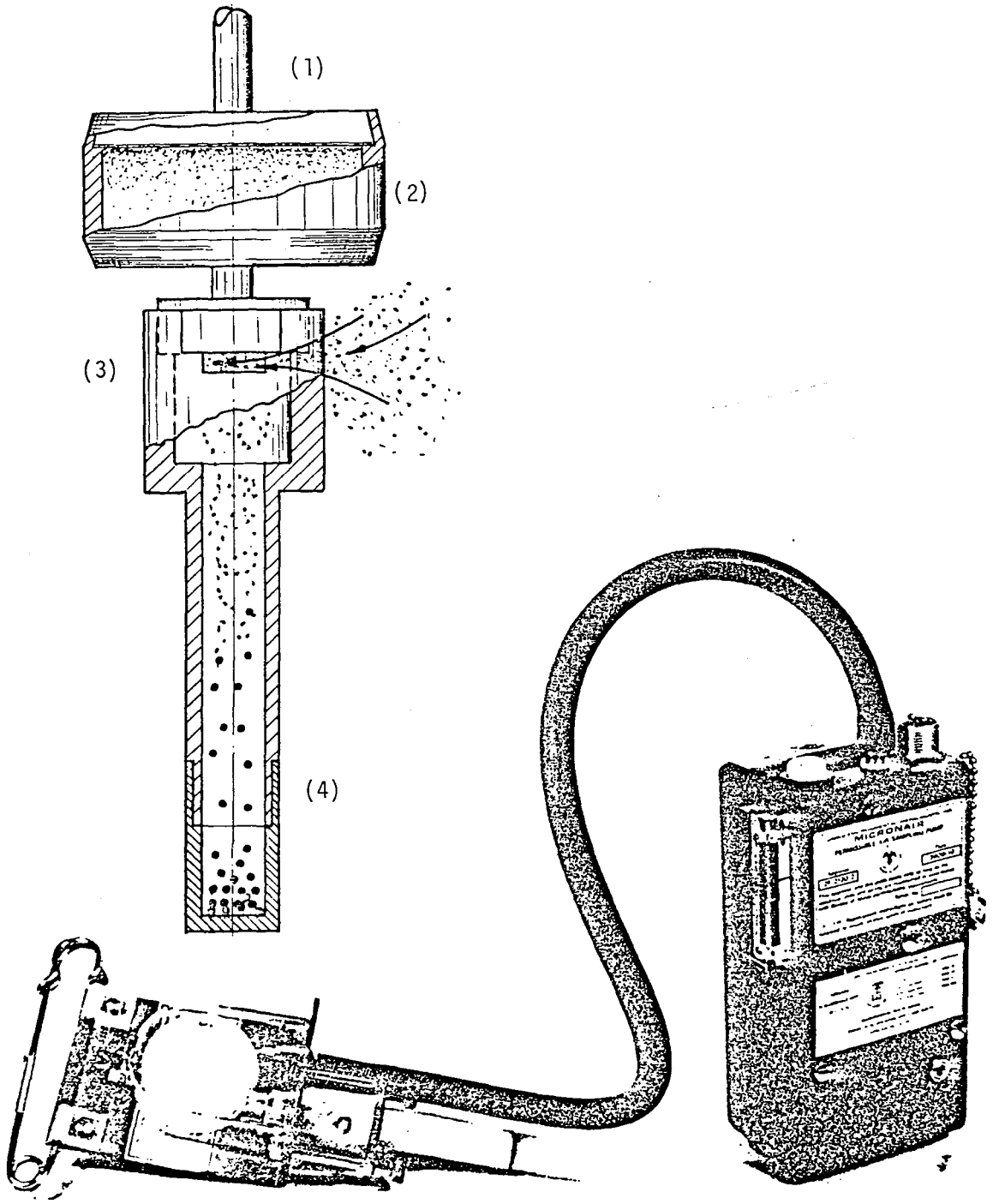
APPENDIX II

Comparison of sampling characteristics of the MRE device and the Personal Sampler device with the pulmonary deposition curve.



Source: IC 8503, February 1971

APPENDIX III - The Personal Sampler Unit



Schematic: (1) hose connection to permissible air pump; (2) filter; (3) cyclone dust separator, (4) grit pot to collect large particles.

Sources: IC 8503, IC 8528, February 1971

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

27 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		Civil Penalty Proceeding
	Petitioner	Docket No. YORK 79-104-M
v.		A.C. No. 30-01696-05003
NOTO EXCAVATING, INC.,		Noto Excavating, Inc., Mine
	Respondent	

DECISION

Appearances: William M. Gonzales, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner; Joseph Noto, Jr., Marlboro, New York, for Respondent.

Before: Administrative Law Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., hereinafter referred to as the "Act"). Petitioner filed a proposal for assessment of civil penalty on November 2, 1979, alleging three violations on June 19, 1979, of mandatory safety standards. An evidentiary hearing was held on May 28, 1980, in Kingston, New York.

Respondent (Noto) admits the violations and contends only that the civil penalties proposed by MSHA for those admitted violations were too high. In determining the amount of a civil penalty that should be assessed for a violation, section 110(i) of the Act requires that six factors be considered: (1) the history of previous violations, (2) the appropriateness of the penalty to the size of the operator's business, (3) whether the operator was negligent, (4) the effect of the penalty on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the operator's good faith in attempting to achieve rapid abatement of the violation.

Citation No. 204196 charges a violation of 30 C.F.R. § 56.11-12 (requiring that openings above, below or near travelways through which men or materials may fall shall be protected by railings, barriers or covers) because a 3-foot square opening existed at the bottom of a ladder used by employees several times daily. It is undisputed that there was a drop of 52 inches through the opening and that the hazard was in plain view.

There is no question that as a result of a slip or loss of balance by an employee injuries could be expected that would result in lost work days or restricted duty. The condition was corrected within the time specified for abatement by the operator placing a cover over the hole.

Citation No. 204197 charged a violation of 30 C.F.R. § 56.9-11 (requiring that cab windows be of safety glass or equivalent and be kept in good condition) in that the front-end loader being used by one of the owners had a badly shattered windshield. Since one of the owners himself was using the loader the operator in fact knew of the violative condition. It is undisputed that the windshield in that condition could result in glass falling onto the machine operator causing lacerations resulting in lost work days or restricted duty. The condition was corrected the same day as cited when the operator replaced the windshield with a $46 sheet of plexiglass.

Citation No. 204918 charged a violation of 30 C.F.R. § 56.9-22 (requiring berms or guards on the outer banks of elevated roadways) in that there was no berm along the outer portion of the main haul road to the plant. There was a high risk of a vehicle going over the 15-foot drop-off from the unbermed portion of the roadway. Resulting injuries from such a drop could be fatal or permanently disabling. The operator explained that he had difficulty maintaining the berms because of heavy rainfall and wash-outs. The condition was abated within the time specified.

The operator in this case is quite small in size having only five employees. All but one are family-related. It has a history of only one violation and that was of a minor nature. The operator admitted that the proposed penalties totaling $222 "are not going to break me" but he nevertheless submitted an unaudited financial statement as of March 31, 1979, for consideration in mitigation of penalties. While the weight that can be given to unaudited financial statements is minimal, even assuming, arguendo, the accuracy of the statements, it is clear that the penalties herein would have no impact on Respondent's ability to continue in business. I consider in this case, however, the extraordinary good faith shown by the operator in abating these violations almost immediately. I also give consideration to the fact that this is essentially a family business and therefore there is additional motivation to see that the employees are protected from health and safety hazards. Under the circumstances, I find that the following penalties are appropriate and Respondent is ordered to pay these amounts within 30 days of the date of this decision: Citation No. 204196: $50; Citation No. 204197: $50; Citation No. 204198: $70

Gary Melick
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

27 JUN 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WEVA 79-360
	:	A.C. No.
v.	:	
	:	Robinson Run 95 Strip Mine
KING KNOB COAL COMPANY, INC., Respondent	:	

DECISION

Appearances: Catherine Oliver, Esq., and James Swain, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Duane Southern, Esq., Fairmont, West Virginia, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., the "Act"). On October 5, 1979, Petitioner filed a proposal for assessment of civil penalty, for an alleged violation on January 29, 1979, of mandatory safety standard 30 C.F.R. § 77.410, charging that one of the operator's pickup trucks had no backup alarm. Respondent King Knob Coal Company, Inc. (King Knob), filed its answer on October 22, 1979, and an evidentiary hearing was held in Wheeling, West Virginia, on March 19, 1980.

The primary issues in this case are (1) whether Respondent has violated the provisions of the Act and implementing regulation as alleged in the petition for assessment of civil penalty filed herein, and, if so, (2) the appropriate civil penalty to be assessed for the alleged violation.

I. The Alleged Violation

The cited standard, 30 C.F.R. § 77.410, provides as follows: "[M]obile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an automatic warning device which shall give an audible alarm when such equipment is put in reverse." Clearly, pickup

trucks are "mobile equipment such as trucks" and therefore, under the standard, must be equipped with automatic backup alarms. Since King Knob concedes that the subject pickup truck did not have the specified warning device it is apparent that the violation is proven as charged.

By way of defense King Knob argues that MSHA had previously advised it that pickup trucks need not comply with the cited standard so long as the operator's view directly behind the vehicle is not obstructed. King Knob also contends, of course, that the truck at issue did not have an obstructed view to the rear and argues that MSHA should therefore be estopped from enforcing the standard against it. MSHA admits that it had such an enforcement policy and that it informed King Knob of that policy before the violation in this case had occurred. 1/

The argument presented by King Knob is essentially one of equitable estoppel. Generally stated, equitable estoppel is a doctrine for adjusting the relative rights of parties based upon a consideration of justice and good conscience. Small v. Robinson, Inc. v. United States, 123 F. Supp. 457, 463 (S.D. Cal. 1954) Peoples National Bank v. Manos, Inc., 84 SE.2d 857, 870, 45 ALR 2d 1070 (1954); 28 Am. Jun. 2d Estoppel and Waiver §28. The doctrine does not generally apply against the Government, however. Utah Power & Light Co. v. United States, 243 U.S. 389, 37 S.Ct. 387, 61 L.Ed 791 (1916); Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380, 92 LEd 10, 68, S.Ct. 1 (1947). Although these decisions have been somewhat eroded and, according to one commentator, 2/ have been "effectively overruled or superseded by lower court decisions" that erosion has occurred where the governmental action has involved a proprietary function but not where it has involved a sovereign function. Cf. United States v. Georgia Pacific Co., 421 F.2d 92 at pp. 100-101 (9th Cir. 1970) Davis, n. 2, supra, § 170.03 and cases cited therein. Enforcement of mine safety standards is clearly not a proprietary function but is a unique governmental function for the benefit of the public. Georgia Pacific, supra at p. 101. It is similar to the enforcement discretion of Federal prosecutors found in United States v. Wallace, 578 F.2d 735 (8th Cir. 1978) not to be a proper subject for judicial scrutiny. See also, United States v. Hayes, 589 F.2d 811 (5th Cir. 1979). Indeed even Professor Davis concludes that enforcement officers may safely issue nonenforcement or selective enforcement guidelines, without fear of conferring rights on private parties. Davis, Administrative Law Treatise, 2nd Ed. (1979), § 9:10. I conclude, therefore, without considering whether the facts herein would otherwise warrant application of the principles of equitable estoppel, that the doctrine can not be successfully invoked as a defense to violations of the Act and its implementing regulations. This

1/ While this apparent exception seems to have some substance, since in reality no pickup truck has a completely unobstructed view to the rear, a literal reading of the policy would mean that there is in fact no exception at all.

2/ Davis, Adminstrative Law of the Seventies, supplementing Administrative Law Treatise (June 1976), § 17.01.

conclusion does not mean, however, that due consideration will not be given to equitable factors present in any such case in determining negligence vel non, and the amount of penalty to be imposed under section 110(i) of the Act. Moreover, this conclusion should not be construed as condoning the ill-advised practices followed by MSHA in this case.

II. The Appropriate Penalty

In determining the amount of a civil penalty to be assessed, section 110(i) of the Act requires that six factors be considered: (1) whether the operator was negligent; (2) the gravity of the violation; (3) the history of previous violations; (4) the appropriateness of the penalty to the size of the operator's business; (5) the operator's good faith in attempting rapid abatement of the violation; and (6) the effect of the penalty on the operator's ability to continue in business:

Negligence: As previously discussed, MSHA in fact had an enforcement policy (and had informed King Knob of that policy before the violation in this case had occurred) that pickup trucks need not comply with the cited standard so long as the operator's view directly behind the vehicle is not obstructed. Under MSHA's regulations, "no negligence" means that the operator could not reasonably have known of the violation. 30 C.F.R. § 100.3(d)(1). Under the circumstances if King Knob believed that it was in compliance with the MSHA policy directive and that belief was reasonable then I would be inclined to find an absence of negligence.

The essential facts are not in dispute. The subject pickup truck was equipped with dual outside rearview mirrors and one inside rearview mirror and had a rear window 16 inches high by 60 inches wide. The lower 6 inches of the window was covered, however, by a tool box mounted directly behind it. The truck operator, pit foreman Richard Ford, testified however that the tool box did not obstruct his view of the critical area behind the truck but only the truckbed itself. MSHA produced no probative evidence as to the degree of obstruction and therefore Ford's testimony is uncontradicted. The inspector who testified on behalf of MSHA had no firsthand knowledge of the degree of obstruction, if any, and only surmised that the view to the rear was obstructed based on what he heard from others. The inspector who actually did look through the rear window did not testify. His observations were deficient in any event since when he looked through the window there was an additional 6 to 7 inches of snow piled on top of the tool box leaving only 3 or 4 inches of window exposed. 3/ No one apparently bothered to remove the snow to make a determination of the obstructive effect, if any, of the tool box itself.

3/ Even though MSHA made its estimates of restricted vision while snow was covering part of the rear window, it conceded at hearing that such a temporary obstruction in itself would not warrant the use of a backup alarm under its policy. What MSHA policy would have been if the tool box in this case had not been bolted down but rather was a permanently placed portable toolbox is anybody's guess.

I find that based on this evidence King Knob could have reasonably believed it was in compliance with MSHA's policy excepting pickup trucks from the backup alarm standard where the operator's view to the rear is not obstructed. I therefore find King Knob not to have been negligent in failing to have a backup alarm on the cited truck. I of course make no conclusion as to whether negligence may otherwise have been involved in the fatality in this case. That is not an issue before me.

Gravity: The violation here was serious (though due in large part to MSHA's confusing enforcement policy) and was no doubt a factor resulting in the tragic death of a miner employed by King Knob, when the subject truck backed into him.

History: King Knob has no history of violations at the Robinson Run Mine.

Size of Business: Annual production for the mine was 172,464 tons and for the operator was 1,299,949 tons, thereby placing it in a medium size category.

Good Faith Abatement: A backup alarm was installed on the truck within the time allotted.

Ability to Stay in Business: There is no evidence that any penalty would affect the operator's ability to stay in business.

Considering all of these factors, I conclude that a nominal penalty of $10 is appropriate. The operator is therefore ordered to pay a penalty of $10 within 30 days of this decision.

Gary Melick
Administrative Law Judge

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