JULY 1979

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

Secretary of Labor, MSHA v. Halquist Stone Company, Inc., VINC 79-118-PM.

Secretary of Labor, MSHA v. Waukesha Lime and Stone Co., Inc., VINC 79-66-PM.

Hilo Coast Processing Company v. Secretary of Labor, MSHA, DENV 79-50-M, etc.

Secretary of Labor, MSHA v. Coaltrain Corporation, MORG 79-26-P.

Eastern Associated Coal Corporation v. Secretary of Labor, MSHA, WEVA 79-117-R.

Review was Denied in the following case during the month of July:

Secretary of Labor, MSHA v. Massey Sand & Rock Company, DENV 78-575-PM.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 2, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
	:	Docket Nos. PITT 78-156-P
	:	PITT 78-157-P
v.	:	PITT 78-396-P
	:	PITT 78-397-P
REPUBLIC STEEL CORPORATION	:	PITT 78-406-P
	:	PITT 78-407-P
	:	PITT 78-408-P
	:	PITT 78-409-P
	:	PITT 78-410-P
	:	
	:	Banning Mine
	:	Russelton Mine
	:	Clyde Mine
	:	Newfield Mine

DECISION

On November 27, 1978, the Commission directed review of a decision approving a settlement in this penalty proceeding. The case was remanded to the administrative law judge so that he could supplement the record with a statement of his reasons for approving the settlement and the facts supporting his approval. Based upon our review of the record as supplemented, we have determined that the judge did not err in approving the settlement. Accordingly, the decision of the judge is affirmed.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

79-7-1

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 9, 1979

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. MORG 78-46-P
v.	:	
VALLEY CAMP COAL COMPANY	:	

DECISION

This is a review of a decision holding the operator, Valley Camp Coal Company, in default in a penalty proceeding.

On January 30, 1978, the Mining Enforcement and Safety Administration (MESA) filed a petition for assessment of civil penalty seeking a penalty of $10,000 for an alleged violation of 30 CFR 75.400. The Company's answer was due on or before March 2, 1978. No answer was timely filed. The Company discovered its omission and on April 6, 1978, filed an answer with a cover letter explaining the delay. On April 13, 1978, the administrative law judge defaulted the Company. The order of default stated in pertinent part that:

> Counsel for respondent "mistakenly took this docket number for MORG 78-26-P, which was another matter that had been previously settled and a dismissal order entered."
>
> Respondent having failed to show cause why it should not be deemed to have waived its right to a hearing and contest of the penalty proposed, ... respondent ... is held in default ...

The Company filed a motion for reconsideration on May 3, 1978, and again described the circumstances surrounding its failure to file a timely answer. Counsel for the Company characterized its omission as "mistake, inadvertence and excusable neglect." In denying the motion for reconsideration, the judge stated:

> The reasons for late filing set forth in Respondent's affidavit filed May 10, 1978 do not add materially to the excuse set forth in the letter of April 6, 1978 accompanying its Answer, and do not establish good cause for setting aside the Order of Default.

The Company timely filed a petition for discretionary review which the Commission granted on October 11, 1978.

The Company argues that the judge erred in failing to issue a show cause order in accordance with 43 CFR 4.544(a) and 29 CFR 2700.26 1/ prior to summarily imposing a penalty. The Company asserts that its failure to file a timely answer is excusable and that, therefore, it should be relieved of the consequences of a penalty based upon a procedural irregularity rather than on the merits of the case.

We find that the operator has shown adequate cause to excuse the late filing of its answer. 2/ Courts do vacate final orders for mistake, inadvertence, or excusable neglect. 3/ In its submissions to the judge, the Company explains that due to a change in personnel, the petition for assessment of civil penalty was forwarded to the Company's counsel without being marked as needing action. Since counsel had just settled a case with a very similar docket number, he erroneously assumed the document related to the settled case. When he discovered his error, counsel promptly filed an answer. We deem the mistake or neglect shown in this case to constitute cause justifying the failure to timely file an answer, particularly where, as here, no prejudice has been shown.

1/ The Board of Mine Operations Appeals' rules were in effect until March 8, 1978. The Company's answer was due on March 2, 1978. The judge's default order was entered after the interim rules (29 CFR 2700.01 et seq.) became effective, and accordingly his actions are governed by those rules.

29 CFR 2700.26 of the Commission's interim rules provide:

> (a) Where the respondent fails to file a timely answer to a petition for assessment of civil penalty, or fails to timely comply with any prehearing order of a Judge, the Judge may issue an order to show cause why (1) the respondent should not be deemed to have waived his right to a hearing and contest of the proposed penalty and (2) the proposed order of assessment should not be summarily entered as the final order of the Commission and not subject to further review by the Commission or a court.
>
> (b) If the order to show cause is not satisfied as provided therein, the Judge may order that the respondent be held in default and issue a summary order imposing the proposed penalties as final and directing that such penalties be paid.

2/ Because we find on the facts of this case that justifiable cause exists to excuse the late filing, and because, in denying the motion for reconsideration, the judge determined whether, in his opinion, such cause existed here, we do not reach the issue of whether 29 CFR 2700.26 required an order to show cause prior to the entry of a default decision. We note, however, that §2700.63 of the Commission's permanent Rules of Procedure (published in the Federal Register on June 29, 1979, at page 38232 do require a show cause order prior to entry of a default.

3/ See Rule 60(b), F.R. Civ. P.

The decision holding the operator in default is reversed and the case is remanded for a hearing on the merits.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 9, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. PITT 75-399-P
	:	IBMA No. 76-37
v.	:	
RUSHTON MINING COMPANY	:	

DECISION

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

Administrative Law Judge Sweeney assessed penalties against Rushton Mining Company for five violations of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. §901 et seq. (1976) (amended 1977) ("the 1969 Act"). Rushton appealed the judge's decision regarding three of the violations.

The judge found violations of 30 CFR §75.1107-1(b) and 30 CFR §75.1725(a), and assessed penalties of $200 and $300, respectively. Rushton does not deny the violations. Rushton asserts, however, that the gravity of the violations does not warrant the penalties assessed. Rushton's arguments do not demonstrate that the judge erred in his conclusions regarding the gravity of the violations. We conclude that the penalties assessed are supported by the evidence and reflect proper consideration of the statutory criteria set forth in section 109(a)(1) of the 1969 Act. The penalties are appropriate and will not be disturbed.

Rushton further argues that the judge's finding of a violation of 30 CFR §75.1105 1/ is not supported by the evidence and must be reversed. Specifically, Rushton argues that the evidence does not support the judge's conclusion that the pump at issue was a "permanent pump" within the meaning of the cited standard. Neither the 1969 Act nor the standards define the term "permanent pump." In resolving this question in the present case, the judge looked to the purposes of the cited standard

1/ 30 CFR §75.1105 provides:

Underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fireproof construction.

and the characteristics of the pump involved. The judge's conclusion that the pump is "permanent" within the meaning of the standard is well-reasoned and supported by the evidence.

Accordingly, the judge's decision is affirmed.

Jerome R. Waldie, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 25, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
v.	:	Docket No. WILK 79-13-P
CUT SLATE, INCORPORATED	:	

DECISION

On November 21, 1978, the Secretary of Labor filed a petition for assessment of civil penalty against Cut Slate, Inc., seeking penalties totaling $170 for three alleged violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. §801 et seq. (1978). 1/ On December 20, 1978, Cut Slate answered pro se. On May 16, 1979, the administrative law judge issued a notice of a prehearing conference to be held in Arlington, Virginia on June 5, 1979, to "expedite settlement, hearing or other disposition of the ... matter ... unless prior thereto the parties confer and file a joint motion to approve settlement." On May 25, an officer of Cut Slate responded by requesting that Cut Slate be excused from "attendance at a hearing and/or conferences at a point this great distance from my home and place of business." Cut Slate described itself as the operator of a very small slate quarry, and stated that its office in Fair Haven, Vermont is approximately 900 miles round-trip from Arlington. The matter was not settled, and Cut Slate did not appear at the June 5 prehearing conference. On June 5, 1979, the judge issued a decision pursuant to Rule 26(c) of the Commission's interim Rules of Procedure, 30 CFR §2700.26(c), holding Cut Slate in default and entered an order assessing the proposed penalty of $170. We reverse.

Rule 7 of the Commission's interim Rules of Procedure, 30 CFR §2700.7, provides:

> All cases will be assigned a hearing site by order of the presiding Judge, who shall give due regard to the convenience and necessity of the parties or their representatives and witnesses, the availability of suitable hearing facilities, and other relevant factors. 2/

1/ The petition alleged violations of 30 CFR 56.15-4 (employee not wearing safety glasses), 30 CFR 56.4-4 (storage of flammable liquids), and 30 CFR 56.4-1 (posting of no smoking signs).

2/ This rule will become Rule 51 of the Commission's permanent Rules of Procedure, effective July 30, 1979 (see Federal Register, June 29, 1979, page 38231).

In order to effectuate the intent of Rule 7 to insure that all parties have reasonable access to the adjudicative process under the Act, we interpret the rule to apply to all instances where the parties are required to personally convene, including prehearing conferences as well as evidentiary hearings. 3/

Rule 7 was derived from section 5(a) of the Administrative Procedure Act, 5 U.S.C. §554(b), which states: "In fixing the times and places for hearings due regard shall be had for the convenience and necessity of the parties or their representatives." The report of the Senate Judiciary Committee considering the APA clarified how the interests of the parties and the agency are to be balanced:

> The last sentence, requiring the convenience and necessity of the parties to be consulted in fixing the time and places for hearings, includes an agency party as well as a private party; but the agency's convenience is not to outweigh that of the private parties and, while the due and required execution of agency functions may be said to be paramount, that consideration would be controlling only where a lack of time has been unavoidable or a particular place of hearing is indispensable and does not deprive the private parties of their full opportunity for a hearing.

Sen. Doc. No. 248, 79th Cong., 2d Sess., 203 (1946).

In NLRB v. Prettyman, 117 F.2d 786, 790 (6th Cir. 1941), the employer claimed that the agency action of designating Washington, D.C. as the hearing site resulted in great inconvenience and a heavy financial burden. The respondent's place of business was 700 miles from Washington. The court held that fair play required the Board to hold the hearing at a place convenient to each of the parties and stated:

> The power conferred on the Board by the Act to hold hearings anywhere within the territorial limits of the United States, was not conferred for its sole benefit, but for the benefit also of those subject to the provisions of the Act. It was not intended that those affected by the Act should be penalized by being required to travel and transport witnesses unreasonable distances to attend hearings pursuant to complaint, nor was it intended that the Act should be used as an instrument of intimidation or oppression on those affected by it. One of the purposes to be accomplished in the administration of every law is the maintenance of public confidence in the value of the measure.

3/ The Secretary of Labor also advocated this interpretation of Rule 7 in his brief on review in this case. We note, in reaching our decision, that interim Rule 1(b), 30 CFR §2700.1(b), provides that "[t]hese rules shall be liberally construed to secure the just, prompt and inexpensive determination of all proceedings consistent with adequate consideration of the issues involved."

There is nothing in the record in this case to indicate that Arlington was selected as the prehearing site because either party requested that location. In fact, Cut Slate strenuously opposed the selection of Arlington as the prehearing site. In its letter to the judge of May 25, 1979, Cut Slate protested the designation of the site:

> ... [I]t does not appear reasonable ... that we should be required to travel 900 miles to attend a prehearing conference in Arlington, Virginia, which constitutes not only expense for travel and lodging, but loss of time from our business during our busiest season. It appears that we are being unfairly penalized for standing up for our convictions in declining to pay a penalty assessed by the Department of Labor which we feel was not warranted.... [I] respectfully request that this matter be disposed of without requiring my attendance at a hearing and/or conferences at a point this great distance from my home or place of business.

In the circumstances of this case, Cut Slate demonstrated sufficiently compelling reasons to excuse its attendance at a prehearing conference in Arlington, Virginia. 4/ Accordingly, we hold that the judge abused his discretion in holding a prehearing conference in Arlington and in defaulting the operator for failing to attend the conference. The case is reversed and remanded for further proceedings consistent with this decision.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

4/ Cut Slate expressed concern not only at the financial burden and loss of time away from its business that a hearing in Arlington would require, but also at whether it was being unduly penalized for having exercised its right under the Act to contest the violations alleged and penalties sought by the Secretary of Labor. We are mindful that providing due process often entails additional cost to the government. However, we believe the remedial purposes of the Act are best served by providing for fair and accessible hearings, and by avoiding even the appearance of the use of inconvenient sites or other procedural obstacles to force settlements or defaults.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 25, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket Nos. BARB 76X656-P BARB 76X661-P BARB 76X662-P BARB 76X663-P
v.	:	
SHAMROCK COAL COMPANY	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. BARB 76X552-P
v.	:	
GREENWOOD LAND AND MINING COMPANY	:	

DECISION

This is a penalty proceeding under section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976) (amended 1977) ("the 1969 Act"). On October 11, 1978, the Commission granted the petition for discretionary review filed by Shamrock Coal Company and Greenwood Land and Mining Company.

In a summary fashion, petitioners raised arguments regarding the administrative law judge's disposition of 32 notices of violation. Petitioners' arguments generally concern whether the judge erred in finding that the violations occurred and whether the penalties assessed for the violations are excessive. Having reviewed the record and considered the arguments of the parties on review, we conclude that the judge's findings of violations of the cited standards are supported by the record and must be affirmed. We note, however, that our affirmance of the judge's finding of a violation of 30 CFR §77.410 1/ in Docket No. BARB 76X552-P is based only on the lack of an operable backup alarm on petitioners' front-end loader. On the record before us, we do not reach the question of petitioners' responsibility for the lack of a backup alarm on the tandem truck hauling soil for the U.S. Forest Service.

1/ 30 CFR §77.410 provides:

Mobile equipment; automatic warning devices.

Mobile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse.

We further find that, with the exception of the $150 penalty assessed for the violation of 30 CFR §77.410 noted above, the penalties assessed by the judge are reasonable and reflect correct consideration of the statutory criteria set forth in section 109(a)(1) of the 1969 Act. Regarding the violation of 30 CFR §77.410, we find that a penalty of $75 is appropriate. Accordingly, the judge's decision is affirmed to the extent that it is consistent with this decision.

Jerome R. Waldie, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS

JULY 1, 1979 - JULY 31, 1979

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 2, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. BARB 79-264-P
	:	A.O. No. 40-01612-03008
v.	:	
	:	Fire Creek No. 1 Mine
FIRE CREEK COAL COMPANY OF TENNESSEE, Respondent	:	

DECISION

Appearances: Darryl A. Stewart, Attorney, U.S. Department of Labor, Nashville, Tennessee, for the petitioner.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a petition for assessment of civil penalty filed by the petitioner against the respondent on January 31, 1979, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, charging the respondent with one alleged violation of the provisions of 30 CFR 70.212, as set forth in Citation No. 140948 issued pursuant to section 104(a) of the Act by MSHA inspector Arthur A. Grant on June 9, 1978.

Respondent filed an answer to the petition and a hearing was convened at Knoxville, Tennessee on May 24, 1979. Petitioner appeared by and through counsel, but respondent did not. Respondent's intention not to appear personally at the hearing was communicated to me shortly before the hearing convened by petitioner's counsel who indicated that respondent wished to incorporate by reference the previous documentary evidence submitted in a prior proceedings involving the same parties. Under the circumstances, respondent's failure to appear was treated as a waiver of its right to a hearing as provided for by Commission rule 29 CFR 2700.49 and petitioner presented evidence in support of its petition. At the conclusion of the hearing, I rendered a bench decision in the matter and my findings and conclusions are incorporated herein and served on the parties as required by 29 CFR 2700.54.

Issues

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

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

Applicable Statutory and Regulatory Provisions

1. The Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) et seq.

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

3. 29 CFR 2700, the applicable rules and procedures concerning mine health and safety hearings.

Findings and Conclusions

Fact of Violation

Citation 140948, June 9, 1978, charges a violation of 30 CFR 70.212, and reads as follows: "The concentration of the intake air samples submitted by the operator for 001 section was 06.3 milligrams per cubic meter of air. Management shall submit additional intake air samples to determine if the working section is in compliance with the applicable respirable dust limit."

Respondent did not contest the citation as issued and MSHA Inspector Arthur C. Grant testified that during his inspection of the mine on June 9, 1978, he issued the citation in question and served it on the mine superintendent. The citation concerned a violation of the respirable dust standards in that the intake air sample submitted by the respondent indicated a heavy concentration of dust on the section cited. He fixed three weeks for abatement and the condition was abated timely. He identified his "inspector's statement" which he

filled out at the time of the citation and stated that the respondent was not negligent because he had no way of weighing the dust samples submitted and did not know what the dust concentration was on the section. He also indicated that the mine in question is a small operation, and that five or six men were exposed to the high dust concentration (Tr. 6-13, Exhs. P-1 through P-4).

In view of the foregoing, I find that petitioner has established a violation of 30 CFR 70.212, as stated in the citation in question.

Negligence

On the basis of the inspector's testimony, I find that the rspondent was not negligent.

Size of Business and Effect of Penalties assessed on Respondent's Ability to Continue in Business

On April 5, 1979, I issued a decision in MSHA v. Fire Creek Coal Company, Docket Nos. BARB 79-3-P, BARB 79-4-P, BARB 79-57-P, BARB 79-58-P, and BARB 79-59-P, in which I found that the imposition of the initial civil penalty assessments recommended by the petitioner would in the aggregate effectively put respondent out of business. I also concluded that the documentary evidence adduced by the respondent in those proceedings supported its assertion that the imposition of the recommended penalties would adversely affect respondent's ability to remain in business.

In the instant proceeding, respondent requested that I consider the prior documentary evidence introduced in the prior proceedings with respect to the adverse financial and economic condition of the respondent as set forth in its answer of March 22, 1979. Since the citation in this case was issued on June 9, 1978, some 2 or 3 months from the issuance of the citations in the prior proceedings, respondent requested that I adopt my previous findings on this issue as my finding in the instant proceeding. During the course of the hearing, petitioner interposed no objection to the adoption of my previous findings concerning the adverse effect of substantial civil penalties on the respondent's ability to remain in business as my finding in this proceeding. Accordingly, my previous findings and conclusions are therefore incorporated by reference and adopted as my finding in this case.

My previous finding that respondent is a very small mine operator is herein incorporated by reference and adopted as my finding in this regard in the instant proceeding and that fact is reflected in the civil penalty assessment made by me with respect to the citation.

History of Previous Violations

My previous finding made in the prior proceedings as set forth

in my decision of April 5, 1979, that respondent has a moderate history of prior violations is adopted and incorporated by reference as my finding on this issue in the instant proceeding.

Gravity

The dust concentration for the section cited was in excess of the required limits and four or five men were exposed to said concentrations while working in the section. In the circumstances, I find that the condition cited was serious.

Good faith compliance

I find that the evidence adduced by the petitioner supports a finding that the condition cited was abated within the time fixed by the inspector and this constitutes normal good faith compliance.

Conclusion and Order

In view of the foregoing findings and conclusions, I believe that a $25 civil penalty is appropriate for the citation in question and respondent is ordered to pay that amount within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge

Distribution:

Darryl A. Stewart, Attorney, U.S. Department of Labor, Office of the Solicitor, Room 280, U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Michael R. Kizerian, Vice President, Fire Creek Coal Company, P.O. Box 329, Oliver Springs, TN 37840 (Certified Mail)

Standard Distribution

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

July 2, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. WILK 79-35-PM
	:	A.O. No. 36-03429-05002
v.	:	
	:	Spring House Quarry & Plant
GILL QUARRIES, INC., Respondent	:	

DECISION

Appearances: David Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Richard F. Brown, Sales Manager, Gill Quarries, Inc., for Respondent.

Before: Chief Administrative Law Judge Broderick

Statement of the Case

This case was commenced by a petition for the assessement of a civil penalty alleging a single violation on April 18, 1978, of the mandatory standard contained in 30 CFR 56.5-50(b). The parties stipulated that Respondent's operations were covered by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., and that on April 18, 1978, the noise level in the hearing zone of the sampled employee was higher than the noise level permitted by 30 CFR 56.5-50. They further stipulated that the employee was wearing ear muffs.

The case was called for hearing on the merits on May 23, 1979, in Philadelphia, Pennsylvania.

Stephen Moyer, a federal mine inspector, testified for petitioner. Richard F. Brown, Sales Manager of Gill Quarries, Inc., testified for Respondent.

Regulation

30 CFR 56.5-50 provides in part:

> Mandatory. (a) No employee shall be permitted an exposure to noise in excess of that specified in the

table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971, "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mining Enforcement and Safety Administration.

PERMISSIBLE NOISE EXPOSURES

Duration per day, hours of exposure	Sound level dBA, slow response
8	90
6	92
4	95
3	97
2	100
1-1/2	102
1	105
1/2	110
1/4 or less	115

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

Note: When the daily noise exposure is composed of two or more periods of noise exposure at different levels, their combined effect shall be considered rather than the individual effect of each.

* * * * * * *

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

Findings and Conclusions

At the close of the hearing, the parties were given the opportunity to orally state their positions on the issues, and I issued a decision from the bench as follows:

JUDGE BRODERICK: All right. In the case of Secretary of Labor, Mine Safety and Health Administration versus Gill Quarries, Incorporated, Docket No. WILK 79-35-PM, based upon the evidence presented this morning, I make the following findings of fact:

Number One, on April 18, 1978, Respondent, Gill Quarries, Incorporated, was the operator of a crush-stone quarry in Montgomery County, Pennsylvania, known as the Spring House Quarry and Plant.

Number Two, on April 18, 1978, Respondent's operation affected interstate commerce. The operation was of moderate size.

Number Three, on April 18, 1978, the noise level survey was made at Respondent's operation by Federal Mine Inspector Stephen Moyer. A noise level reading was made of the primary crusher operator on that date showing exposure to noise of 156-percent of the allowable limit. this translates to be between 93.0 and 93.5 decibels for an eight-hour period.

Number Four, at the time of the survey, the employee affected, the primary crusher operator, was wearing earmuffs which, while worn, reduced the noise level to which he was exposed to permissible limits.

Number Five, there are feasible engineering controls which could be utilized in Respondent's operation to reduce the noise level exposure from the primary crusher operator to within permissible limits. Respondent has not utilized these feasible engineering controls.

Therefore, I find that the Respondent on April 18, 1978, was in violation of the mandatory standard contained in 30 CFR 56.5-50.

Number Six, the violation was moderately serious because of the possibility of permanent hearing loss to the exposed employee. The seriousness was diminished because the exposed employee was wearing ear protection at the time of the inspection.

Number Seven, Respondent was aware of the excessive noise exposure to which this employee was subjected and had not utilized the feasible engineering controls to reduce them. Therefore, I find that Respondent was negligent and the negligence contributed to this violation.

Number Eight, Respondent did not show good faith in promptly abating the citation after it was issued. This is based upon his failure to utilize the feasible engineering controls to reduce exposure.

Based on the foregoing findings of fact and conclusions, and considering the criteria set out in Section 110 I of the Act, I assess a penalty of $100 for the violation which I have found. A written decision confirming this order, this decision, will be issued, and the Respondent will be directed in the written decision to pay within 30-days of the date of the issuance of the decision. That will complete the record in this case.

ORDER

The bench decision is confirmed. Respondent is ordered to pay the sum of $100 for the violation found therein within 30 days from the date of the issuance of this written decision.

James A. Broderick

James A. Broderick
Chief Administrative Law Judge

Distribution:

David Street, Office of the Regional Solicitor, U.S. Department of Labor, Room 14480, Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Richard F. Brown, Sales Manager, Gill Quarries, Inc., 1505 Sandy Hill Road, Norristown, PA 19401 (Certified Mail)

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

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

July 3, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. VINC 79-21-PM A.O. No. 12-00064-05001
v.	:	
LONE STAR INDUSTRIES, INC., Respondent	:	Greencastle Quarry & Mill

DECISION

Appearances: Ann Rosenthal, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the petitioner;
Michael T. Heenan, Esquire, Washington, D.C., for the respondent.

Before: Judge Koutras

Statement of the Proceeding

This is a civil penalty proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, initiated by the petitioner against the respondent on October 18, 1978, through the filing of a petition for assessment of civil penalty, seeking a civil penalty assessment for eight alleged violations of the provisions of mandatory safety standard 30 CFR 56.14-1, set forth in citations issued by Federal coal mine inspectors on March 29, 30, and April 6, 1978. Respondent filed an answer and notice of contest on November 17, 1978, denying the allegations and requesting a hearing. A hearing was held in Indianapolis, Indiana, on March 29, 1979, and the parties submitted posthearing proposed findings, conclusions, and briefs, and the arguments set forth therein have been considered by me in the course of this decision.

Issues

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

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

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

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 29 CFR 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 4-5):

1. Respondent owns the mine in question and is subject to the jurisdiction of the Commission.

2. Respondent has no prior history of violations, and each of the violations at issue in this proceeding was abated by the respondent with a "maximum amount of good faith."

3. Respondent employs 150 individuals, working three shifts, 7 days a week. Its annual production is 1 million tons of raw material and 700,000 pounds of finished material.

Discussion

The petition for assessment of civil penalty filed in this proceeding charges the respondent with eight alleged violations of mandatory safety standard 30 CFR 56.14-1, and the violations were noted in the following citations issued by MSHA inspectors Thurman Worth and Stanford Smith during the course of inspections they conducted at the facility in question on March 29, 30, and April 6, 1978:

Citation No. 365010

The guard was not adequate on the No. 306 V belt conveyor on the top floor of the raw bin silos (Exh. G-2).

Citation No. 367201

The large return idler pulley on stacker belt conveyor No. 214 in the quarry was not provided with a guard (Exh. G-3).

Citation No. 367203

The first (from the head pulley) large return idler pulley on stacker belt conveyor No. 214 was not provided with a guard (Exh. G-4).

Citation No. 367204

The head pulley on the No. 214 stacker belt conveyor was not provided with a guard (Exh. G-5).

Citation No. 367205

The first large return idler pulley for the takeup on five crude material belt conveyor No. 21 to the screen house was not provided with a guard (Exh. G-6).

Citation No. 367206

The first large return idler pulley for the takeup on crude material belt conveyor No. 305 to the main plant was not provided with a guard (Exh. G-7).

Citation No. 367207

The first large return idler pulley for the takeup on belt conveyor No. 215 from the surge pile to the impact crusher was not provided with a guard (Exh. G-8).

Citation No. 367208

The first large idler pulley on the takeup of the belt conveyor feeding the raw mill was not provided with a guard (Exh. G-9).

Testimony and Evidence Adduced by the Petitioner

MSHA mine inspector Thurman Worth testified that the facility in question is an open pit stone quarry operation which produces cement. He confirmed that he inspected the site on March 29, 1978, and that he issued Citation No. 365010 citing a violation of section 56.14-1

on the track-mounted raw bin conveyor belt because he believed the head pulley guard was not extended far enough to protect a person from getting into the pinch point. The criteria he used to determine whether the guarding was adequate was 30 inches, or an arm's length, and "if a person could get their arm into the pinch point, the guard would not be adequate." The 30-inch criteria is MSHA policy which has been in effect since he has been an inspector and at least since July 1976 (Tr. 8-11).

Inspector Worth stated that employees would have occasion to be near the pulley in question, possibly once a day or once a shift while performing maintenance on the belt, checking the motor, or greasing the bearings, and the belt would probably be turned on. If the belt were not running, there would be no danger, and it is possible to grease and service the pulley with the belt turned off. The checking of the bearings, which requires listening, could not be done with the belt turned off, and a person would be standing near the belt when this was done. If someone were to catch his hand in the pinch point, serious injuries or a fatality could occur. Also, someone could catch his clothing or a shovel or grease gun in the pinch point (Tr. 11-14).

On cross-examination, Inspector Worth testified that he was accompanied on his inspection by Mr. Jim Bennett, respondent's maintenance coordinator, and Mrs. Viola Cox, the union safety committeeperson. His inspection followed the material through the processing cycle, and he indicated that the raw material is mined at the quarry, travels through a primary crusher, then along some belts to a stockpile and a secondary crusher, and eventually ends up at the raw mill which is the building where the citation in question was issued. The inspection in question was his first enforcement inspection, but he had visited the site earlier in order to acquaint himself with the operation and that was a casual visit. However, he would have taken action at that time had he observed any safety hazards. The plant had been previously inspected by the Bureau of Mines (Tr. 15-21).

The belt conveyor in question is not stationary and is designed to be moved from place to place over a track, and to discharge the materials into various silos. A guard was installed on the conveyor belt in question at the time he observed it. Mr. Worth identified Exhibit R-1 as a photograph of the belt tail pulley, and Exhibit R-2 as the head pulley. He could not recall whether there was a guardrail at the location in question on the day of the citation shown in Exhibit R-2, and as to the half-round cover guard depicted in Exhibit R-1, he indicated that it was installed after the citation issued in order to abate the violation, and he considers it to be fully adequate. He did not believe that there was any way a person could reach in and under that guard to get to the pinch point unless he did it deliberately. He could not state with any certainty whether another inspector would at some future time again cite the

respondent for a guarding violation. However, he would not cite another violation as long as the guard is in place (Tr. 22-31).

With regard to the "30-inch" criteria, Inspector Worth stated that he followed MSHA policy which is in the form of "memos sent from Washington" which are sent to the MSHA offices, but not published in the Federal Register, and he did not have a copy with him. He cited the violation because he believed the pinch point was not adequately guarded. He believed the respondent should have been aware of the fact that the guard which was provided at the pulley location was not adequate and that a better one should have been provided. The location was partially guarded, but a person could still get into the pinch point accidentally by slipping on loose material on the floor, or while shoveling spillage onto the belt the shovel could get caught in the belt and could pull a person into the pinch point while the belt was running. The previous guard was a box-type guard which extended over the belt, but not far out along the belt so as to prevent a person from reaching back into the pulley (Tr. 31-35).

Inspector Worth identified Exhibit R-3 as copies of citations issued on January 25, 1973, citing the same belt in question for not having a guard. At the time of his inspection, he did not inquire as to the circumstances under which guards were provided for the belt in question (Tr. 41-43).

On redirect examination, Inspector Worth stated that the handrail depicted in the photograph, Exhibit R-2, does not replace the guard, and someone could accidentally slip on a rainy day and get caught in the belt pulleys, but that is less likely since the belt in question is indoors. However, persons could slip on the walkway. The inadequate belt guard should have been obvious to anyone with experience working around belts (Tr. 47-49).

On recross-examination, Inspector Worth stated that in order to perform work on the head or tail roller, the guard would have to be taken off, but when adjustments are made for proper belt tension, the belt is running. Company policy dictates that the belt be locked out or turned off when maintenance is performed, and the only time the belt would be running is when it is being adjusted. He did not observe anyone working on the moving belt, but in his experience, workers do not always follow company policy (Tr. 51-53).

In response to questions from the bench, Inspector Worth stated that the square, box-type guards shown on Exhibits R-1 and R-2 were the guards which were in place at the time of the inspection and that the "half-moon" guards were the ones installed to abate the citation. Those guards are 36 inches long and are bolted to the side of the belt. The area back under the guards seldom requires cleaning because the material on the belt dumps directly into a silo or bin, but certain types of maintenance requires that the guard be taken off.

He defined a "pinch point" as the place where the belt and either the head or tail pulley meet. The idler rollers could be considered pinch points, and the ones depicted in Exhibits R-1 and R-2 would be pinch points and accidents do occur there, but it is less likely that anyone could be mutilated or killed by those rollers because they do not have the tension that the head or tail pulleys have. He conceded that someone could slip on the walkway along an idler pulley and get hurt, but did not know why the belt at those locations is not required to be guarded (Tr. 54-57). Section 57.14-3 is an advisory standard and would have been a more appropriate standard in this case if it were mandatory (Tr. 60).

MSHA inspector Stanford Smith confirmed that he issued Citation Nos. 367201, 367203, and 367204 (Exhs. G-3, G-4, and G-5) during his inspection of the facility in question and he cited section 56.14-1 because of the lack of pulley guards on the No. 214 stacker belt conveyor belt. He described the piece of equipment in question and indicated that it had a head and tail pulley and idler pulleys where the belt angle changed. There was a walkway along the belt in question at the locations where he cited the violations and these locations were not guarded at all with physical guards. The large return idler pulley citation location had a handrail away from the head pulley, but someone could slip or reach into the pinch point. He identified Exhibit R-4 as a diagram of the belt in question and the specific location is where he issued the citations (Tr. 64-73).

With regard to the large return idler pulley citation (No. 367201), Inspector Smith indicated that someone could reach into the pinch point from the walkway in order to reach an adjustable scraper located on the bottom of the belt and that they would do so when attempting to adjust the belt. The purpose of requiring a guard is to remind people to shut the belt down before attempting any adjustments, and by having a guard there, the belt would be shut down before the guard is removed to make adjustments to the scraper. In addition, the pinch point was close enough to someone's foot or leg and could possibly injure them if they slipped. Although persons generally use walkways to travel around the plant, he observed no one using the walkways in question on the day the citation issued. The operator should have known that someone walking along the walkway could slip on grease, rock, or a wet walkway and should have known that the pulley was unguarded as it was readily apparent (Tr. 74-80).

Regarding the first large return idler pulley citation (No. 367203), Inspector Smith indicated that it has greater tension than the other idler pulleys because it is at a point where the belt changes direction. He recalled a scraper at that location and the purpose of the guard requirement would be the same as the other scraper at the second large return idler pulley. The gravity of any injury would be the same and the operator should have known of the requirements for guarding (Tr. 81).

With regard to the head pulley citation (No. 367204), Inspector Smith stated that persons would basically be performing the same type of work around that location as that described by Inspector Worth with respect to the earlier head pulley belt citation, but he could not recall whether the pulley in this case had any grease fittings. He indicated that MSHA is very strict about guarding head pulleys unless they are "guarded by position," that is, no one could contact a pinch point even by leaning over. Head pulleys involve large areas in contact with a pulley which has tension applied, and they constitute dangerous pinch points, and there are greater chances for fatalities at those locations. The operator should have been aware of the guarding requirement and the hazard involved (Tr. 81-84).

Inspector Smith testified that Citation Nos. 367205, 367206, 367207, and 367208 (Exhs. G-6 through G-9) deal with four different belts, but that the situation at each of the locations cited was essentially the same and involved the use of adjustable scrapers. The belts were of the general configuration of that which involved Citation No. 367201 (Exh. R-4), and the danger presented in not guarding those belts was the fact that someone could slip while making adjustments or attempting to knock material off the scraper on the bottom part of the belt and could get caught in the pinch point. Although in this case he observed no one attempting to make adjustments while the belt was running, in his experience, people have attempted adjustments without turning off the belt and that is why guards are required. The four citations were similar, and Citation No. 367208, being issued a week later, should have alerted the operator that a guard was required (Tr. 84-88).

On cross-examination, Inspector Smith identified Exhibit R-5 as a flow chart which reasonably represents the transportation of materials at the plant in question, and the chart depicts the location of the belts which he cited. Generally, during an inspection, an inspector begins his inspection at the quarry and follows the flow of materials along the belts as depicted in the exhibit. He also identified Exhibit G-6 as a magazine picture of the quarry and the No. 214 belt conveyor and primary crusher which appear to be similar to what he observed the day of his inspection. The No. 214 belt rises some 70 feet into the air, at a 30-degree angle, and the belt has a covered walkway alongside of it. The purpose of the walkway is to provide access to the belt, rather than a means of travel around the plant. He indicated that the crusher is a funnel-like affair, installed underground for a distance of some 60 feet, and trucks back up to discharge the material into it. There is a tailpiece at the bottom of the underground crusher, and the belt comes up an incline to the surface. He believed those belts were guarded as required (Tr. 89-102).

With regard to Citation No. 367201, Inspector Smith testified that the second large return idler pulley was located at a point where

a short stairway was installed to reach it, and it was above the walkway and one would have to climb stairs or a ladder to reach it. The primary purpose for this access stairway is to perform maintenance, and he identified a photograph of the stairway and location in question (Exhibit R-7), and the screen depicted in the photograph was installed to abate the citation. He identified the pinch point as being in the upper righthand corner of the photograph, partially behind the girder, and the angle iron shown was there before the guard was installed. He could not recall seeing anyone on the stairway, and he was aware of the fact that 90 percent of the companies have a policy requiring that the belts be locked out before any work is performed on them, and he recalled seeing some safety signs posted in this regard (Tr. 102-107).

Inspector Smith identified a photograph, Exhibit R-8, as the location where he cited Citation Nos. 367203 and 367204, and the screens shown were installed to abate the citations. The screen at the bottom covers the first large return idler pulley, and the one on the bottom covers the head pulley. The stop cord is shown in the picture and is used in an emergency to stop the belt. If the cord were adjusted properly, the belt would stop if someone fell on the cord. He indicated that MSHA guarding policy has been generally upgraded since 1971 in terms of acceptance of acceptable guards in an effort to cut down on injuries and fatalities (Tr. 108-112). In explaining why on previous inspections at the plant citations were not issued for the guarding situations, Inspector Smith explained that inspectors were accepting barriers around walkways that provided access strictly for the belt, but this practice stopped because the barriers would be down and people stopped using them. Although there is a standard covering belt lock-outs, there have been too many cases where they have not been utilized (Tr. 129-130). Inspector Smith identified Exhibit Nos. R-9, R-10, R-11, and R-12, as photographs of the locations where he issued Citation Nos. 367205 through 367208 (Tr. 135-139).

In response to questions from the bench, Inspector Smith testified that anyone walking along the walkway in the areas shown in Exhibit Nos. R-9 through R-12 could possibly come into contact with the pulley devices, if he slipped, intentionally attempted to knock material off the belt bottom, or tried to perform maintenance, and in each case, the belt would have to be running before an injury would be incurred. This is true even in those instances where handrails are installed because if someone slipped, they could miss the handrail. This would be true for Citation No. 367205 (Exh. R-9), but in Citation Nos. 367203 and 367204, a person would almost have to lean in while performing maintenance before he would slip in, and his purpose in issuing these citations was to prevent these events from happening. He was not concerned with pulleys which have only a minimum contact with the belt, and for idler rollers which have only minimal belt contacts, handrails and stop cords are acceptable as fulfilling the guarding requirements (Tr. 139-144).

Testimony and Evidence Adduced by the Respondent

Charles D. Coppinger, respondent's regional operations manager, testified that he was plant manager at the Greencastle Plant at the time the inspection in question was conducted (Tr. 148). The plant was built sometime between 1966 and 1968, and operations began there in 1969 (Tr. 151). The plant is a cement operation located at the primary raw material site. Approximately 16 people work in the quarry, and this represents 10 percent of the total plant workforce (Tr. 152). He indicated that the last lost time accident at the plant was in 1975, and he identified Exhibit R-14 as the Model 22 Safe Working Practices followed by cement plants, including the Greencastle Plant, and included therein is a requirement for locking out the equipment when maintenance is performed, and these practices are posted throughout the mine. The plant is totally automated and operated by one individual in a central control room by a computer. The plant has union and nonunion safety programs, employees have safety representatives, and unsafe conditions can be brought up at any time. The United Cement, Lime and Gypsum Workers International represents the wage-roll employees and has always made it a practice to bring safety problems to management's attention, and the conditions are always corrected. OSHA also inspects the plant, and every piece of equipment where persons might contact it have been guarded, even before the present MSHA requirements. Every belt conveyor in the plant has a pull cord, and some have walkways on both sides which the company installed at great expense because the union believed the belts could be maintained better. He conceded that the plant was cited for guarding violations after 1971, and that they were installed as required by MESA, and rarely did the abatement go for more than 1 day. The guards which were installed to abate the citations at issue in this proceeding were fabricated in the plant shop (Tr. 155-165).

Mr. Coppinger stated that it has always been the intent of the respondent to comply fully with section 56.14-1, and it is company policy to install a guard anywhere that it is needed, but this would not include areas where a person could come into contact with a belt by some extraordinary or deliberate effort, but would include areas where somebody could get hurt. Prior to the inspection in question, he did not believe that anyone was in danger along the belts in question, because no one is on the walkway except for maintenance purposes. The belts are out of the way and an elevator is used to get to the top of the raw mix silos, and he believed they were in compliance, and the union never brought the matter to his attention. The belts and guards which existed on the equipment have been that way for the life of the plant, and a few additional guards were installed where it was deemed necessary by management or if requested by the union (Tr. 165-169).

On cross-examination, Mr. Coppinger testified that he was aware of the fact that the areas cited were not guarded and he still does

not believe that guards are needed. As a practical matter, the only way a person could be injured is to deliberately stick his hand into the pulleys. The only time anyone would go along the walkways would be while greasing the idler rollers and not the head or tail pulleys, and the belts are greased about three times a year. Although maintenance is performed on the belts, it is always performed while the belt is shut down. Belts are changed, but they are not running when this is done. Scrapers are adjusted with the belt off, and no areas of the belt require grease or oil on a daily basis. Belts which are out of alignment are adjusted by tapping idler rollers with a hammer while the belt is running, but the employee stands away from the belt while doing this, but he does walk along the walkway and this chore is accomplished once in a year or two. He conceded that employees do not always follow directions (Tr. 170-178).

Don Foxx, quarry foreman, testified that he has worked for the respondent for 33 years and is familiar with the plant belt system and the guarding requirements. He accompanied the inspectors during the inspections in question, and indicated that at several locations along the inspection route, idler rollers were not guarded except for a pull cord, and the inspectors raised no questions about those locations. Regarding Citation No. 367201, he indicated that it concerned a return roller located up a stairway some 15 feet off the ground, with handrails on it. The crusher operator would have occasion to go up that stairway to make sure the belt was running properly, and if he were to work on the belt, he would not leave the crusher operating. He identified the crusher (Exhibit R-7), and prior to the installation of the screen guard, he had no reason to know that it was required and no inspector has ever told him that it was (Tr. 188-195). Someone would have to reach up under the truss to get at the pinch point, and he did not believe that someone could slip and fall into it, but someone could intentionally stick a hand in if they were silly enough to do it. Regarding Exhibit R-8, Citation Nos. 367203 and 367204, someone would have to reach in to get at the pinch point and would almost have to stand on his toes to do it. The belt is about a foot inside of the guards which are installed at the belt frame. All of the screens were installed by the morning or evening of the day the citations were issued (Tr. 195-200).

On cross-examination, Mr. Foxx reiterated that with respect to the No. 214 belt citations (Exhs. R-7 and R-8), a person would have to go out of his way to accidentally get caught in the rollers and that one would have to deliberately stick his hand into the roller. The belt would be down if it were being worked on. A person would be pinched more on a bend pulley than on an idler pulley. He is responsible for the No. 214 belt, and he shuts it down when cleaning of the walls is required during the rainy season, and this has occurred about three times a year. Maintenance men would have no occasion to be on the walkways, and no more than one man, a greaser, would be on the walkway (Tr. 200-206).

James M. Bennett, plant maintenance coordinator, maintains the history of all maintenance performed on the equipment and he schedules the maintenance work. He accompanied the inspectors during their inspections and indicated that the screens depicted in Exhibits R-9 through R-12 were added subsequent to the inspection, and he did not object to their installation. However, prior to the inspection, he did not know that guards were required at those locations. The structural steel bracing and handrailing depicted in the photographs were present prior to the citations and he believed they would protect a person from contacting the pinch points which were later guarded by screening. Regarding the idler pulleys on the Nos. 215 and 305 belts, he indicated they were located below a "knee-high"level in relation to the catwalks (Exhs. R-10 and R-11); the handrails were in place and he believed they would prevent someone from coming in contact with the pulleys and indicated that it would be almost impossible for anyone to get into the pulleys unless he did it deliberately (Tr. 208-214).

With regard to Citation No. 365010 concerning the No. 306 belt conveyor (Exhs. R-1 and R-2), Mr. Bennett indicated that the conveyor is movable and that the handrail which is depicted in photograph Exhibit R-1 is stationary. At the time of the inspection, there was an expanded metal guard which extended some 18 to 20 inches out and over the pulley from the belt housing, and that was essentially a manufacturer's guard. There was an additional guard bolted to the belt frame, but it did not cover the top of the belt. He believed these guards were adequate and did not know that the additional guarding which the inspector required to be installed was needed, and he indicated that someone could still reach around the guard that was installed if they wanted to (Tr. 217-220).

On cross-examination, Mr. Bennett stated that when the first citations were issued, it did not occur to him to check other plant areas for guarding problems, and he believed that plant employees always follow the 22 safety guidelines, and he is not aware of any MSHA publications which may be sent to the plant (Tr. 216).

Mrs. Viola Lady is presently employed at the plant as a janitor, but previously worked as a laborer and truck driver, and her duties entailed work around the quarry and belt areas. She is a member of the union and served as safety committeeperson during 1977 and 1978. Safety meetings are held monthly and the employees have no hesitancy in bringing safety matters to her attention or to the attention of management, and management has never been reluctant to correct any safety concerns once it is brought to its attention, and serious safety matters are taken care of immediately. She accompanied the inspectors during their inspections, viewed each of the areas depicted in the photographic exhibits, and is familiar with the MSHA safety standard in issue. Prior to the inspection, she did not feel that there were places in the plant operation that were not guarded

and she was surprised by the issuance of the citations. She believed the locations cited were adequately guarded; no union people ever suggested that they were not, and she could not readily tell the difference between the places that were required to be guarded from other places. The company has a very good safety attitude and everyone is safety conscious, and she did not believe the company failed in its responsibility to the employees or should have known about the guarding requirements in question (Tr. 225-232).

On cross-examination, Mrs. Lady stated that prior to the inspection, she had never been on the walkways. New employees are instructed in equipment lock-out procedures and there are times when employees do not follow all company rules. Information concerning accidents are posted on bulletin boards and employees are instructed on safe working practices at the monthly safety meetings (Tr. 233-235).

Inspector Worth was called in rebuttal and testified that prior to his inspection, the No. 214 belt had been newly installed and problems were encountered in keeping it in line. Two repairmen were at the belt location working on the carrier idlers while the belt was running and they were attempting to align the belt. The walkway adjacent to the No. 214 belt goes to the top of the belt and there is a stairway for a person to walk back down, and this is true of all the belts in question. In his view, although there is a structural steel framework next to all the walkways in front of most of the roller pulleys, it would not prevent someone from getting his arm or leg through the framework (Tr. 240-243).

In response to questions from the bench, Inspector Worth stated maintenance may be performed on the carrier idlers on a running belt and no guards are required. However, handrails and stop cords are required in that situation. Performing such maintenance does present a hazard, but it is less than the hazard presented at the tail pulley location because the carrier idlers have no weight on them, whereas the tail and head pulleys have tension at those points. He conceded that a loaded belt which is running presents a hazard to someone performing maintenance around it, but indicated that the handrail would afford protection and prevent a man from falling over onto the belt. In that situation, the only requirement for guarding is a handrail or stop cord (Tr. 244-246).

On cross-examination, Inspector Worth stated that the respondent has a very good attitude regarding safety and that the violations were not intentional (Tr. 247).

Inspector Smith testified that there was an MSHA policy change in 1975 concerning barriers along the entire length of a belt walkway and that the change was internal and was not disseminated or published in the Federal Register. The intent was to alert the industry

to keep their barriers up because accidents were continuing to occur. He concurred with Mr. Worth's testimony concerning the structural framework and the severity of the injuries which would occur if someone fell through the framework (Tr. 249-252).

Findings and Conclusions

Fact of Violations

Respondent is charged with eight alleged violations of the provisions of 30 CFR 56.14-1, which reads as follows: "Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

Citation No. 365010

The inspector issued this citation because he believed the guard which had been installed did not extend far enough forward to protect a person from reaching around to the pinch point. The existing guard had previously been installed in 1973 after a citation was issued by another inspector during the course of a previous inspection under the Metal and Nonmetal Act, and that guard was installed to abate the citation (Exh. R-3). No one raised any question concerning the sufficiency of the guard until the inspection conducted by Inspector Worth on March 29, 1978. He believed the guard was inadequate and issued Citation No. 365010, and, in so doing, he relied on the "30-inch or arm's length" MSHA policy which apparently required inspectors to cite section 56.14-1 if the pinch point at a belt location was within 30 inches or an arm's length away from where a person reaching or falling on or near the belt could somehow become entangled in that pinch point. Although the existing guard which had been installed apparently satisfied the prior inspector, it obviously did not satisfy Inspector Worth since he believed it was inadequate.

Petitioner argues that the existing guards on the 360 V conveyor feeder belt were inadequate, both at the head and tail pulley locations, and that the existing guards did not extend far enough from the pinch points to keep a person from getting caught. However, the citation simply describes an inadequate guard on the belt conveyor and does not specify any tail or head pulley as such. Respondent's Exhibit Nos. R-1 and R-2 are pictures of the two pulleys, and the inspector confirmed that one is the head pulley and the other the tail pulley. However, his testimony is limited to the head pulley and while one can speculate that he intended to cite both pulleys, that fact is not clear from the record presented. In any event, I find that the petitioner is bound by the citation as issued, and while it is arguable that the citation may be subject to dismissal on the ground of lack of specificity, the parties have not raised that issue. Consequently, I will limit my findings to the head pulley.

Petitioner argues that the 30-inch "arm's length" standard applied by the inspector as the basis for the citation is an "interpretation" that has been in effect at least since 1976, although counsel has been unable to find such interpretation reduced to writing. If petitioner's counsel cannot find it, I fail to understand how respondent is expected to comply with it when the evidence establishes that such "interpretation" was never communicated to the respondent. I find that respondent cannot be held accountable for any nebulous MSHA interpretative memo which is uncommunicated, and that respondent compliance responsibility is limited to section 56.14-1. Thus, the question presented is whether petitioner has established a violation of that standard by a preponderance of the evidence.

Respondent's defense to the citation is that the head pulley was guarded by a box-type guard installed by the manufacturer, as well as an additional guard extending 18 to 20 inches further out which had been installed to abate a previous citation issued by MESA under the Metal and Nonmetal Act for a violation of the very same standard in issue in this proceeding. In addition, respondent maintains that the pulley was further guarded by a handrail and pull cord. Petitioner's response to this defense is the assertion that the fact that a prior inspector "erroneously" determined that the prior guard was adequate does not relieve the respondent of its responsibility to comply with the standard as "properly" interpreted. Petitioner's theory in this regard is rejected. I fail to understand how one can conclude that the prior inspector's judgment as to the adequacy of the existing guard was erroneous since he abated the citation and the respondent relied on that judgment. In my view, such indiscriminate and arbitrary enforcement practices do little to enhance safety and do much to enhance and encourage endless litigation and possible harrassment of mine operators who, in good faith, are attempting to comply with the law.

After full consideration of the evidence presented, I find that the existing guard was adequate and was in full compliance with the cited standard. I find further that petitioner has failed to establish that a person working near or at the head pulley would likely come into contact with a pinch point which is protected by a guarding device of the type installed at the belt location in question. I further find that the inspector's interpretation and application of the standard in this instance was an arbitrary application and it is rejected. The citation is VACATED.

Citation Nos. 367201, 367203, 367204

These citations involve two idler pulleys and a head pulley on the No. 214 VM stacker belt conveyor which were not guarded. Exhibit R-4 is a diagram of the conveyor device in question; Exhibit R-5 is a schematic "flow chart" indicating the role played by that belt conveyor in the plant manufacturing process; and Exhibit R-6 is a

picture of a similar such conveyor belt. Exhibits R-7 and R-8 are photographs of the three locations where the violations were cited.

The conveyor belt in question rises some 70 to 100 feet into the air, at an approximate angle of 30 degrees, and it is a covered belt with an adjacent walkway. The purpose of the walkway is to provide access to the belt, rather than a means of normal and routine travel around the plant, and if one were to walk to the top of the belt, there would be no place to go but back down the walkway or down a stairway.

The unguarded second large return idler pulley at the location of Citation No. 367201 was at a point where access could only be made by means of a short stairway installed for that purpose above the walkway in order to perform maintenance as required. Inspector Smith was concerned that someone could reach into the pinch point from the walkway while attempting to adjust a scraper on the belt bottom or one could get their leg or foot caught in the pinch point if they slipped while on the walkway. He stated that the purpose of the guarding requirement at that location served as a reminder for persons to shut the belt down before attempting any belt or scraper adjustments. With a guard installed, the belt would have to be shut down before it was removed and the adjustments made.

The unguarded idler pulleys at the location of Citation Nos. 367203 and 367204 concerned Inspector Smith because he believed someone would be exposed to the pinch points while adjusting the scaper on the first large return idler pulley (No. 367203) or greasing the head pulley (No. 367204). However, he could not recall whether the head pulley had any grease fittings. He conceded that a person would have to lean into the areas while performing such chores before he could slip in, and his purpose in issuing the citations was to prevent that from happening. An emergency stop cord was installed alongside the belt at the points in question, and assuming it was properly adjusted, it would stop the belt if one fell against it.

Respondent's evidence establishes that the walkways along the belts in question are not regularly used by the workforce as a regular means of travel around the plant. The walkways are there to facilitate ready access to the conveyor belt system for maintenance purposes. Scraper adjustments and belt maintenance are always performed while the belts are shut down. The person responsible for the belt in question indicated that the crusher operator would have occasion to climb the stairway by the idler pulley (No. 367201) to check the belt operation or to perform maintenance, but before doing so would shut the crusher down. As for the idler pulleys (Nos. 367203 and 367204), he indicated that the belt is located approximately a foot inside the belt frame and that someone would have to stand on their toes and deliberately reach in to get at the pinch points.

At page 6 of its brief, petitioner asserts that all of the pinch points cited in this case were in places where they could have been contacted by workers during the ordinary course of their duties. I find that conclusion as to all of the locations cited by the inspectors in this case to be unsupported by the evidence adduced by the petitioner in support of each citation. Citing pages 78 and 241 of the transcript, petitioner, at page 3 of its brief, asserts that the inspectors saw people on the walkways during the inspection. By that statement, petitioner would have me believe that in all eight citations the inspectors observed people on all the walkways at the locations cited and they were all exposed to a hazard. A review of the transcript references relied on by the petitioner indicates to me that the inspector did not know where anyone was walking at any given point in time. For example, at pages 78-79, the inspector testified as follows:

> Q.59. Were there people generally, during your observation in this plant, walking along these walkways?
>
> A. Walkways in general. Not specific.
>
> Q.60. But from your observation, it appeared that people did use these walkways relatively frequently to get around?
>
> A. Yes. Upon it.
>
> JUDGE KOUTRAS: Wait a minute. Let's get clarification now. Generally, people use walkways to get around the plant. Her question is: At this specific location is that true? Did you observe anybody on this walkway?
>
> WITNESS: At the time that -- I can't say that I observed anyone using them. I can't recall.
>
> JUDGE KOUTRAS: Okay.
>
> Q.61. However, people would have to use this walkway just to walk up to the head pulley and the other pulleys.

At pages 241 and 242 of the transcript, the testimony of the inspector reflects the following:

> Q.4. At any point, did you see any people on any of the walkways that are in question here?
>
> A. On 214 belt it was my understanding just prior to our inspection they had installed a new belt.
>
> Q.5. Uh-huh.

A. And they were having problems keeping it in line.

Q.6. This was during your inspection that they were having these problems?

A. Right. And they had two repairmen at this location working on the carrier idlers, trying to keep the belt -- or trying to get it lined up where it would run true.

Q.7. Was the belt running --

A. Right.

Q.8. -- while they were doing this? We've heard testimony that the walkway on the 214 belt didn't go anywhere except to the top of the belt. We haven't heard any testimony on the other walkways next to the other belts. Do any of them go to any destination or do they all go just to the top of the belt also?

A. You could go to the top of the belt on the other ones in question and take stairways down, get on another belt, and keep going on until you get into the mill area.

The only conclusions that I can come to from the testimony cited are the fact that people generally walk around walkways at the plant, the inspector either did not see anyone or could not recall seeing anyone on any of the walkway locations cited on the day the citations issued, and that people have to use the walkway to get to the head pulley locations. As for the No. 214 belt, the inspector clearly stated that it was his understanding that just prior to his inspection, a new belt had been installed. He obviously did not see the installation, nor did he see people on the walkway while the belt was being installed. What he apparently saw were two men adjusting carrier idlers while walking along the belt. As for the use of the belt system walkways and stairways as a normal means of going from one plant location to another, it is clear to me that this simply is not the case. The inspector stated that one could walk up a belt walkway and then down some stairs, up another belt walkway and down more stairs, etc., etc. Petitioner would have me believe that the normal method for an employee to travel from point to point in the plant is to take a "roller coaster" route up and down belts and stairways. This may be true of a maintenance man who may go from belt to belt, but I am not convinced that it is the normal route that non-maintenance personnel would take while traveling by foot around the plant.

With regard to the two men working on the No. 214 belt, petitioner would have me believe that they were exposed to a hazard simply because they were walking along the belt making adjustments

to the carrier idlers. There is absolutely no evidence that these men were attempting any maintenance work on the pulley or that they were required to be at that location. As a matter of fact, the inspector himself conceded that it is permissible to perform maintenance on idler pulleys while the belt is running and that no idler guards are required in such a situation, notwithstanding the fact that a loaded moving belt presents a hazard at that location.

Respondent's testimony is that the belt walkways are not normally used for travel around the plant and that the only reason anyone would use them would be to perform maintenance work. Mr. Coppinger testified that the belts are always shut down when they are changed out or when maintenance is being performed, that there is a plant requirement for locking out the equipment when maintenance is being performed, and that the plant is totally automated and operated by computer. Quarry Foreman Foxx, a man with 33 years' experience at the plant and who is familiar with the belt system, indicated that while the crusher operator would have occasion to use a stairway to check on the No. 214 belt, he would not leave the crusher operating and someone would have to deliberately reach in and over the belt truss to reach the pinch point. As for the large return idler pulley and head pulley on the No. 214 belt, he indicated that someone would have to stand on his toes to reach one pinch point and would have to reach in about a foot from the belt frame to reach another one.

Plant Maintenance Coordinator Benett believed that plant employess always follow the safe work guidelines, and former Plant Union Safety Committee person Lady indicated that employees are instructed on lock-out procedures, and she believed the places cited were adequately guarded.

Turning to the specific citations in question, I find that the testimony adduced by the respondent concerning its lock-out procedures and model safety practices which it has adopted and instituted for its plant operation is uncontraverted by the petitioner. Although these factors may not serve as an absolute defense to the citations, those procedures and practices, when coupled with the fact that the head pulleys on the No. 214 stacker belt (Citation Nos. 367203 and 367204) were located at a place where persons were not likely to come into contact with the pinch points in the normal course of their mine duties, convince me that those locations did not require guarding The first large head return idler pulley pinch point was located in an area which would literally require someone to stand on his toes or to climb up on the belt frame and deliberately reach into the pinch point. The head pulley was located at approximately waist level, some 12 inches inside and behind the belt framework. Both locations were also guarded by a pull cord which would stop the belt if someone slipped and fell against the belt frame. One would have to deliberately reach in for a distance of over 2 feet or crawl into the opening to reach the pinch point. In such a situation, I am not convinced

that the standard requires guards at those locations, nor am I convinced that petitioner has established that in those locations the pinch points were situated in places where persons may come in contact with them in the normal course of their duties. Although not clearly stated, it seems that MSHA's position is that guards are required at every location on a mine site where there is a machine pinch point which conceivably could cause injury to anyone who deliberately and consciously seeks out that pinch point and places his hand in it. If that is the interpretation of section 56.14-1, then MSHA must come forward with some evidence that in their normal course of duties, miners are required to deliberately and consciously expose themselves to danger. With regard to Citation Nos. 367203 and 367204, I find that petitioner has failed to establish by a preponderance of the evidence that the pinch point locations were at a place where miners would likely come in contact with them during the normal course of their duties. Acccordingly, the citations are VACATED.

Part of the inspector's rationale for citing section 56.14-1 and requiring a guard at the No. 214 stacker belt large return idler pulley location was to "remind" one to shut the belt down before attempting any belt or scraper adjustments, the theory being that once a guard is installed, the belt would have to be shut down and the guard removed before any adjustments are made. While this seems to be a reasonable theory, the problem is that the standard cited is not intended to serve as a "reminder." Its purpose is to require guarding of specific and "similar" pieces of exposed moving machine parts. Since there are other mandatory standards which prohibit maintenance or repairs on machinery while it is moving, cleaning of conveyor pulleys while they are in motion, and a requirement that, except for testing, guards be kept in place while machinery is being operated, e.g., 56.14-6, 56.14-29, 56.14-33, I fail to comprehend why an inspector has to rely on section 56.14-1 to serve as a "reminder" when vigorous enforcement of the other standards would seemingly be appropriate. If the problem lies with the language of the standard, then I believe the Secretary should take steps to republish it with clear and understandable langauge which can stand on its own, rather than putting the inspector in the position of trying to find the next best standard to apply in a given situation.

Notwithstanding my comments concerning the inspector's interpretation of section 56.14-1 when he cited the return idler pulley which is the subject of Citation No. 367201, I find that the location of the pulley and the pulley pinch point was such that a guard was required under the cited section. Although the pulley mechanism was located under a structural steel frame, the photograph (Exhibit R-7) clearly shows that it is adjacent to a walkway and stairway, and was exposed on both sides. Absent the screen guard which is depicted in the photograph, and which was installed after the citation, I believe the pulley location is such that someone simply casually walking along the stairway or walkway could easily fall into the pulley if he were

to stumble or trip, and I do not believe that the stop cord or steel framework on the belt would prevent him from becoming entangled in the pulley. In this instance, anyone walking by that location would be exposed to a danger, and since there is a walkway and stairway there, I believe that one may assume that they are there for a purpose and that someone will be walking the area at any given time and would be exposed to a hazard. This is unlike the previous two citations where I found that someone would have to deliberately go out of his way to reach a pinch point by either climbing up and through the belt framework. In the circumstances, I find that petitioner has established a violation as cited in Citation No. 367201 and it is AFFIRMED.

Citation Nos. 367205, 367206, 367207, 367208

The inspector issued these citations because of his concern that someone could slip and fall into the pinch points while attempting to make adjustments to the belt scrapers located at the bottom parts of the belts or while attempting to clean materials off the scrapers at those locations. Although he personally observed no one performing these chores or walking the belts during his inspection, he relied on his prior experience with instances where persons attempted to make belt adjustments without shutting down a belt and this practice impressed him with the fact that section 56.14-1 required guards at the locations cited. The fact that the respondent followed specific safety rules and had a policy of shutting or locking out the belts while those maintenance functions are performed apparently did not impress him. As a matter of fact, based on the evidence and testimony presented in this proceeding, I can venture a guess that the inspector either did not know about the policy, or if he did, he probably would have cited the violations anyway, notwithstanding the fact that he conceded that no hazard existed if the belts were shut down.

Petitioner points to the fact that the four citations involve identical pinch points at four different belt locations containing adjacent walkways which led to other plant areas and which could be used for more than just maintenance work. Petitioner asserts that someone walking on the adjacent walkways or adjusting the scrapers located near each pinch point would be exposed to a hazard if he were to slip and catch his clothing or tools in the belt mechanism.

Respondent takes the position that the cited pinch point locations were protected by the structural steel belt framework, pull cords installed between the walkway and the belt, and guardrails or handrails. Respondent also maintains that the walkways are not used as normal travelways by employees, are used only for purposes of providing access to the equipment by maintenance personnel, and that when maintenance is performed the equipment is locked out.

I find that the idler pulley location cited in Citation No. 367205 was not located at a place where a person casually walking by would likely reach the pinch point if he were to trip and fall on the walkway. Since I cannot conclude that petitioner has established that this walkway was one normally used by miners to get around the plant, the likelihood of anyone being on the walkway regularly and routinely while going about his duties is somewhat remote. Assuming that someone was on the walkway and stumbled or fell, from the photograph (Exhibit R-9), it would appear that the pulley location is some distance from the walkway and one would have to climb over the handrail, step over the opening between the walkway and belt frame, and then reach into the pulley area. A maintenance man would encounter the same difficulties in reaching the equipment. In these circumstances, I find that petitioner has failed to establish a violation and the citation is VACATED.

With respect to the large idler pulley on the Nos. 305, 307, and 215 belts, Citation Nos. 367206, 367207, and 367208, I find that they were located in areas which were required to be guarded. The pulleys were at approximately knee-high level adjacent to a walkway, and from the photographs (Exhibits R-10, R-11, and R-12), it would appear that someone walking along the walkway could get his legs or arms caught in the pulley if he were to fall or slip. Although the belt framework does provide some protection, the openings are large enough to allow someone to become entangled in the pulleys. Although respondent has established that the walkways are not normally used as a regular means of travel about the plant, that fact weighs on the gravity of the situation presented, and I do not accept it as a defense to the citation. This also applies to the lock-out and safety procedures which respondent has established, that is, the fact that the equipment is locked out and the maintenance men follow the company safety rules, may not, in my view, serve as an absolute defense to the guarding requirements of section 56.14-1. Those facts may be considered in mitigation or in connection with the seriousness of the situation presented. The same would apply to the structural steel belt framework which respondent maintains provided sufficient guarding. In my view, the purpose of the framework is to provide structural and stress support for the belt conveyor system and I am not convinced that it was intended to serve as a primary guarding device to protect people on the walkway. The fact that it affords some protection may be considered again as part of the gravity issue, but not as an absolute defense to the citation. Under the circumstances, I find that the petitioner has established the violations as cited in Citations 367206, 367207, and 367208, and the citations are AFFIRMED.

Gravity

I believe that the question of gravity must be determined on the basis of the conditions or practices which existed at the time the citations in question issued. General or speculative conclusions

as to the hazards involved with respect to unguarded belt locations simply is not sufficient to justify a substantial civil penalty assessment, absent a showing of gross negligence or a total disregard for the safety and welfare of the workforce. Respondent asserts that petitioner has failed to establish that the machine parts in question were exposed or moving at the time of the citations and that this is an absolute defense to the alleged violations. Respondent's arguments in this regard are rejected. However, I find that petitioner has not established that men were required to work or were actually working in or near any of the unguarded moving belt locations cited in Citation Nos. 367201, 367206, 367207, 367208, and absent such a showing, I cannot conclude that the violations were serious, and that fact is reflected in the civil penalties assessed by me with regard to those four citations.

Good Faith Compliance

The parties stipulated that respondent exercised maximum good faith in achieving compliance once the conditions were cited (Tr. 238-239). In addition, the testimony adduced reflects that respondent took immediate steps to correct the conditions cited, and that in each instance where the citation has been affirmed (Nos. 367201, 367206, 367207, 367208), respondent exercised rapid compliance and that fact is reflected in the civil penalties assessed by me with regard to those citations.

History of Prior Violations

I find that respondent has no prior history of violations, and this has been considered by me in assessing the penalties which have been levied in this case.

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

The evidence adduced with respect to the size and scope of respondent's quarry and cement operation at the Greencastle Quarry and Mill supports a finding that respondent has a medium-sized operation. Further, respondent has not advanced any argument that reasonable and appropriate civil penalties for the citations which have been affirmed will adversely affect its ability to remain in business. Accordingly, I conclude that the penalties assessed will not adversely affect the respondent in this regard.

Negligence

With regard to Citation No. 367208 issued on April 6, 1978, I find that the respondent failed to exercise reasonable care to prevent the violation since the earlier citations issued on March 30, 1978, should have alerted the respondent as to MSHA's enforcement policy concerning the application of the guarding requirements of

section 56.14-1. Accordingly, as to that citation I find that respondent's failure to comply resulted from ordinary negligence. With respect to the remaining citations which have been affirmed, I find that in view of the somewhat confusing language of the guarding standards previously discussed, including some of the internal MSHA guidelines communicated to the inspectors but not to the operator, that the respondent in this case took reasonable precautions to prevent the violations and that in the circumstances, it could not reasonably have known that physical guards were required by section 56.14-1 at the locations cited. Accordingly, I cannot conclude that the citations which have been affirmed resulted from respondent's negligence.

Additional Issues Raised by the Respondent

Estoppel

Part of the respondent's defense to the citations issued in this case is the assertion that MSHA had not previously cited any guarding violations during previous inspections. Although this may touch on the question of negligence if it established that an inspector specifically advises an operator that a guard is not required at a particular location, I do not believe that the fact that an inspector failed to cite a violation while on the mine property at any given time may serve as a defense to the citation. This defense is one that is often invoked by a mine operator as a defense to a citation and it is a defense that can be invoked for practically every citation. However, as correctly pointed out by the petitioner at page 5 of its brief, such a defense has been consistently rejected. I conclude that petitioner's position on this issue is correct and respondent's assertion to the contrary is rejected.

"Significant and Substantial" Findings

Respondent takes issue with the "significant and substantial" findings made by the inspectors on the face of the citations issued in this case. As far as I am concerned, the fact that an inspector chooses to mark the "significant and substantial" box on the face of a section 104(a) citation does not establish that conclusion as a matter of fact. I can find nothing in section 104(a) that requires an inspector to make such findings when he issues a section 104(a) citation. It seems to me that if an inspector believes that the conditions or practices constitute significant and substantial hazards, he should issue an unwarrantable citation under section 104(d)(1). In any event, I conclude that in the case of a section 104(a) citation, the question of an alleged "significant and substantial" hazard should be treated as part of the gravity issue and that is what I have done in this case.

Clarity of Section 56.14-1

Respondent has advanced the argument that in order to establish a violation of section 56.14-1, petitioner must establish that the unguarded belt pulley parts cited were similar to gears, sprockets, etc., that they were exposed, and that they were moving. As to the similarity of the pulleys in question to the other enumerated parts described in the standard, I find that the petitioner has established that they were similar. Although the standard is not a model of clarity, I conclude that it sufficiently describes the types of parts intended to be covered and respondent has not established anything to the contrary. As for being exposed, I conclude that since the pulleys were not guarded, they were exposed within the meaning of the standard. With respect to the question as to whether they were moving at the time of the citations, I find that this fact need not be established to prove a violation. Since the equipment in question concerns belt lines used to move materials, logic dictates that at some point in time the belts will, in fact, be moving and I conclude that this is all that is required. Under the circumstances, respondent's arguments that these factors may serve as an absolute defense to the citations are REJECTED.

Having disposed of the individual citations which are in issue in this proceeding, I feel compelled to make some comments and observations which cut across all of the citations issued by the inspectors in this case. It has been most difficult for me to comprehend from the record adduced in this proceeding precisely what MSHA's interpretive and enforcement policies are with respect to the application of section 56.14-1. The standard seemingly provides for guards at certain belt locations where exposed machine parts may be contacted by persons. A literal application of that language would require guards at all belt locations containing any of the machine parts listed in the standard or containing any pinch points or exposed parts of any kind. The problem is that other mandatory and advisory standards under the guarding and methods and procedures provisions of the safety standards set forth in Part 56 governing sand, gravel, and crushed stone operations deal with exceptions which allow for contradictory and self-defeating application by industry and Government enforcement personnel in the field. That situation is aggravated by the promulgation of uncommunicated MSHA internal memoranda and policies advising its inspector force as to interpretation, but seemingly leaving those being regulated in the dark. Examples of what I believe are some of the somewhat contradictory application of the machine guarding requirements are the following:

> In citation 365010 the inspector obviously sought to protect a person who would deliberately reach around the installed guard and stick his hand into the pinch point. The guard which had been installed on the belt in 1973 as a result of a prior MESA inspector was apparently deemed

adequate by MSHA until the March 1978 inspection which resulted in the citation. In issuing the citation, the inspector believed the guard should have extended further forward to protect one from reaching around it. In such a situation, advisory standard 56.14-3 would have been more appropriate, and the inspector so stated, but since it is advisory, he did the next best thing and cited 56.14-1, which contains the somewhat loose and ambiguous language "which may be contacted * * *." It seems to me that if the Secretary desires to protect someone who would foolishly and deliberately reach around an existing guard and stick his hand into a belt pinch point, then he should take steps to promulgate the advisory standard as a mandatory standard so that there is consistent and even-handed enforcement.

In issuing citation 365010, the inspector relied on a "30 inch, arm's length" internal MSHA policy directive which apparently had not been communicated to the operator. Further, although the existing guard was installed as a result of a prior 1973 citation under the very same section cited in 1978, the inspector could not state with any degree of certainty whether another inspector would again cite the operator if he believed the guard needed to be further extended. This leaves an operator in a somewhat precarious position of not knowing what is expected of him from inspection to inspection.

In citation 367201, the inspector believed the purpose of section 56.14-1 is to "remind" persons to shut down the equipment before attempting to make belt or scraper adjustments. Since mandatory standards 56.14-29, 56.14-33, and 56.14-35 all seem to require the shut down of equipment before lubrication, cleaning, or maintenance is performed, and 56.14-6 requires that the guards be kept securely in place while the equipment is being operated except for testing, I fail to understand why an inspector has to resort to section 56.14-1 to achieve what seems to be provided for these other mandatory standards. If the answer lies in the fact that the Secretary wishes to guard against foolish and deliberate acts of self-mutilation then he should promulgate a safety standard to cover that situation, or as a minimum insure that the interpretations and applications of pertinent standards are communicated to the industry and consistently enforced.

In citation 367204, the inspector was concerned over the possibility of someone leaning into a belt area while attempting to grease a moving belt, thereby exposing himself to the pinch point. Mandatory standard 56.14-35 prohibits the lubrication of machinery while it is in motion

unless it is equipped with extended grease fittings or cups. Here, the inspector did not know whether such grease fittings were present, but I venture a guess that if they were, he would still have cited section 56.14-1. Thus, in this situation, an operator who greases a moving belt by means of a grease fitting extending into a walkway adjacent to the moving belt, in full compliance with section 56.14-35, would still be subject to a citation under section 56.14-1 on the theory that the person performing the greasing chores might in some way stand on his toes or crawl into the pinch point area of the belt which is located a foot or so from the edge of the belt. I have some difficulty in comprehending such interpretive and enforcement theories, particularly in situations where the belt in this case was "protected" by a stop-cord which MSHA accepts as an adequate "guarding device" for moving belt lines, and which would stop the belt if someone fell against the cord.

In presenting the rebuttal testimony of the inspectors, it seems obvious that petitioner sought to stress the fact that two repairmen were exposed to the hazardous conditions cited by the inspector. The problem with this is that the repairmen were apparently performing these chores in complete compliance with other applicable standards. MSHA's theory simply begs the question and is somewhat confusing and contradictory. For example, MSHA does not require guards along the entire length of a belt line on the theory that belt rollers and idlers do not present the same type of pinch point hazard which is present at the belt or tail or head where there is greater tension on the belt. Thus, in the case of a man walking along a loaded, moving belt, tapping and adjusting roller idlers, MSHA accepts a stop-cord or hand rail as adequate devices to prevent that man from slipping on the walkway and falling through the rail opening against the loaded belt and getting caught between the idler roller and belt. In response to that precise hypothetical setting, Inspector Worth indicated that stop-cords and handrails are acceptable protective devices, notwithstanding the recognized hazard presented. Although he indicated that the handrail would prevent the man from falling against the belt in that situation, he obviously did not consider it to be adequate protection at the belt pulley location in citation 367201. It seems to me that a pinch point present at a belt tail or head where the tension is such as to prevent any belt movement is no different from a hazard point of view than a loaded belt moving at high speed where the load of the moving materials over a belt idler or roller does not allow for belt movement, thereby

creating a pinch point. Yet the two situations seem to be dealt with differently in terms of what is required under section 56.14-1.

During the course of these proceedings, the inspectors alluded to certain MSHA policies concerning applications of the guarding standards. One such policy is the "30 inch, or arm length" rule. Another is the "guarding by location" rule, and yet another is the policy concerning barriers or handrails which was alluded to by Inspector Smith. The problem with these "rules of interpretation" is that no one seems to know about them except the inspector who is issuing citations. It seems to me that there should be some better way to promulgate and enforce guarding standards which are consistent, direct, and understandable, not only to the inspector, but to industry people who are expected, and I might add on the basis of the record here, willing to comply, and who may be subjected to plant closures and civil penalties for failing to do so.

During the course of these as well as other guarding violation proceedings, MSHA's inspectors seem to be relying on generalized and stereotyped conclusions that persons walking or working along a walkway parallel to a moving belt are ipso facto placed in a hazardous position since they may inadvertently slip and fall into a pinch point at the tail or head pulley, thereby incurring serious or fatal injuries. That is a real concern that I share with the inspectors, and from the testimony that I have heard in this case, it is a concern shared by industry people as well. However, problems arise when an inspector attempts to apply these generalized precepts to a specific work-environment situation at any given operation without any real evaluation of all of the prevailing facts and circumstances.

While I accept the fact that a person shoveling around an unguarded belt tail pulley may catch his shovel in the pinch point, I fail to understand how the inspector can conclude that is the case if the evidence shows that no such shoveling ever takes place at that location. While I accept the fact that a person reaching in to grease a tail pulley may become entangled in a pulley pinch point which is unguarded, I fail to understand how an inspector can reach that conclusion in a given case if he does not know whether there is a grease extension present which allows for greasing from a safe distance without the need for a guard. And, while I share an inspector's concern for the protection of a fool who would deliberately place his hand

into a pinch point, I believe that the only rational way to prevent that from happening is to promulgate a "fool safe" safety standard stating that precise proposition, rather than attempting to apply standards which are fraught with nebulous exceptions and language that no reasonable person can understand.

ORDER

On the basis of the foregoing findings and conclusions, the following citations are VACATED and the petition for assessment of civil penalties, insofar as those citations are concerned, is DISMISSED:

Citation No.	Date	30 CFR Section
365010	03/29/78	56.14-1
367203	03/30/78	56.14-1
367204	03/30/78	56.14-1
367205	03/30/78	56.14-1

On the basis of the foregoing findings and conclusions, the following citations are AFFIRMED, and civil penalties are assessed as follows:

Citation No.	Date	30 CFR Section	Assessment
367201	03/30/78	56.14-1	$75
367206	03/30/78	56.14-1	75
367207	03/30/78	56.14-1	75
367208	04/06/78	56.14-1	90

Respondent IS ORDERED to pay the civil penalties assessed in this proceeding, as indicated above, in the total amount of $315 within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge

Distribution:

Ms. Ann Rosenthal, Trial Attorney, Mine Safety and Health Administration, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

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

July 3, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 78-574-PM
Petitioner	:	A.O. No. 02-00151-05001
v.	:	
	:	San Manuel Mine
MAGMA COPPER COMPANY,	:	
Respondent	:	

DECISION

Appearances: Marshall P. Salzman, Trial Attorney, Department of Labor, Office of the Regional Solicitor, San Francisco, California, for the petitioner; N. Douglas Grimwood, Esq., Phoenix, Arizona, for the respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a petition for assessment of civil penalties filed by the petitioner against the respondent on September 25, 1978, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with 14 alleged mine safety violations issued pursuant to the Act and implementing safety standards. Respondent filed a timely answer in the proceeding and requested a hearing regarding the proposed civil penalties initially assessed for the alleged violations. A hearing was held in Phoenix, Arizona, on March 8, 1979. The parties filed posthearing briefs, and the arguments presented therein have been considered by me in the course of this decision.

Issues

The issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalties, and, if so, (2) the appropriate civil penalties that should be assessed for each proven citation, based upon the criteria set forth

in section 110(i) of the Act. Additional issues raised by the parties are discussed in the course of this decision.

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

Applicable Statutory and Regulatory Provisions

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

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

3. The rules and procedures concerning mine health and safety hearings, 29 CFR 2700.1 et seq.

DISCUSSION

Stipulations

The parties stipulated that the respondent is a large mine operator, has no history of previous violations, and that any civil penalties assessed by me in this proceeding will not adversely affect respondent's ability to remain in business. They also stipulated that the inspections referred to in the citations issued in this proceeding did, in fact, occur on the dates indicated and that the respondent received the citations (Tr. 4).

Withdrawal of Citation and Settlement

Petitioner's motion to withdraw Citation No. 371163, April 13, 1978, 30 CFR 57.15-3, was granted from the bench and this alleged violation is dismissed (Tr. 5). With respect to Citation Nos. 376625 through 376628, all issued on May 15, 1978, for violations of 30 CFR 57.4-23, petitioner moved to consolidate these into one violation and indicated that the parties have reached a proposed settlement in the amount of $140 and submitted same for my approval. Arguments were heard on the record, and the motion and proposed settlement were approved (Tr. 192-196).

With respect to the remaining citations which are the subject of this proceeding, testimony and evidence was adduced by the parties

in support of their respective positions and a discussion of the citations and the evidence adduced follows below.

Citation No. 371113, April 18, 1978, 30 CFR 57.12-32, states as follows:

> Cover plates were not installed on electrical junction boxes on 2075 level in panel 27A Rse. Station (pony set) #13 and panel 27B, Rse. Station (pony set) #4. The boxes were located adjacent the pony set ladderways where they could be easily contacted and contained energized circuits (wiring). The pony sets were used frequently during shifts.

Section 57.12-32, provides: "Mandatory. Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

Petitioner's Testimony

MSHA Inspector Warren C. Traweek testified that he inspected the mine in question during various stages in April and May of 1978. He described the mine as a multilevel underground operation primarily producing cooper, and the minerals are extracted by means of the "block caving" mining method. He confirmed that he issued the junction box citation (No. 371113) during the course of his inspection and after discovering the cover plates missing. The junction boxes are used to control a system of block or light signals for controlling the haulage train (Tr. 5-9).

Inspector Traweek indicated that the failure to install the cover plates can result in serious injury or even death to an employee if he should happen to come in contact with the energized circuits inside the junction boxes. Although the boxes were immediately adjacent to the ladderway or passageway, and the area is frequently used during the shift that the block is in operation, he believed that the chances of an accident causing an electrical shock to occur was unlikely since the wiring inside of the junction boxes was well-insulated and welltaped. He believed the operator should have known about the condition because any time that a block is in operation, the area is traveled frequently by a supervisor who is assigned to there and his duties would include visits into the pony sets on a regular basis. When he pointed out the infraction, the operator immediately called an electrician or possibly two electricians. When the electrician arrived, he did not have the particular size of junction box cover; however, the plates were installed when he returned to the mine a week later, but the inspector did not know when they were actually installed (Tr. 9-12).

On cross-examination, Inspector Traweek stated that he did not notice whether the junction boxes were grounded, and therefore did

not know whether that fact would have an effect on whether or not electricity could be conducted. Had the circuits been energized on April 18, 1978, which he believed they were, and had an employee touched such wiring, he could have been injured or killed. Had there not been any exposed wiring, it is unlikely or improbable that an employee would come into contact with an energized circuit; however, it would not be impossible. The junction box was open, and the wires appeared to be well-insulated and well-taped, but he would not stick his finger in there to see if they were or not. The employee who was working in the area was standing on a wooden platform which was wet and the wetness of the area would possibly cancel out the insulating effects of the wood (Tr. 12-17).

Inspector Traweek indicated that the lack of junction box covers would cause the insulated wires to become worn over a period of time, but he conceded that this would happen anyway in an underground mine environment (Tr. 17-18). Although he terminated and abated the notice when he returned to the mine on April 11, he does not know when the condition itself was abated earlier but believes it was accomplished rather quickly. He also indicated that the two junction boxes were physically located next to a vertical ladder, which would be the access way to the raise station. An individual climbing or stepping off the top of the ladder could contact the boxes with an elbow or an arm. On a given day, there would be at least two employees assigned to the panel and they would go up and down the ladderway numerous times during the day. In addition, their supervisor would probably be in the raise station from time to time (Tr. 18-20).

Respondent's Testimony

Onofre Tafoya, general haulage foreman, described the junction box in question and indicated that it is used as a signaling device for the motorman. The boxes are grounded to a main feeder that runs the length of the whole panel, and they are connected to another metal frame which is also grounded. The wires on the inside of the junction box are taped with rubber tape on the bottom, and with friction tape on the top. In the past, there have been problems with keeping the covers on the junction boxes because some of the men take them off. The condition of the wires inside the junction box was good, and they were tucked back up inside the cavity of the box. The only thing wrong with them was that the covers were not on them. The wooden staging or wooden floor near the junction boxes was damp in order to keep the dust down, and the floor is wet down when men work there (Tr. 20-23).

On cross-examination, Mr. Tafoya indicated that the entire box is frame grounded and that he assumed that if someone touched one of the live wires they would be shocked but not electrocuted, but he is not an electrician and this was his layman's opinion. The voltage on the box is 110, but he did not know the amperage (Tr. 24).

On redirect, he explained that the mine has experienced problems in keeping the cover plates on junction boxes generally and that the company has conducted studies as to how to solve the problem, including locking the covers (Tr. 28). The covers were put back on the junction box by the end of the shift in which the citation was issued (Tr. 29).

Robert L. Zerga, mine superintendent, testified he is an electrical engineer and was employed as superintendent at the time the citations issued. He testified with regard to the difficulties of maintaining covers on the boxes and stated that the mine had experienced serious problems with vandalism and tampering in that people like to remove the screws and take the box covers off. The foremen are instructed to be aware of missing junction box covers and a six-point check system whereby each man is responsible for locating and reporting unsafe conditions is also stressed. In the San Manuel Mine, there are approximately 1,800 draw points, and it is very difficult to catch anyone tampering with a junction box. Junction boxes can be located in various areas and it is extremely easy for a car-loader to tamper with one without anyone seeing him. He indicated that a wire that is fully insulated will not shock any one, even if he were standing on a wet surface (Tr. 30-32).

On cross-examination, Mr. Traweek stated that he did not know why anyone would want to remove covers from junction boxes. Although one may not receive a shock from an insulated wire, if the insulation were worn and defective, a shock is possible and he estimated that 100-300 junction box covers a year are replaced at the mine (Tr. 32-36).

Citation No. 371115, April 27, 1978, 30 CFR 57.3-22, states as follows:

> A slab of loose concrete was observed in the back of panel 7A between #14 and #15 loading stations (pony sets) on the 2375 level. Employees travel through the area frequently. A test using a scaling bar was conducted to make the determination.

Section 57.3-22 provides:

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

Inspector Traweek testified that he observed the slab of concrete described in the citation in the roof between the Nos. 14 and 15 loading stations, and it was 2 feet by 3 feet, but he did not know its thickness. It had moved a few inches from its original position and the danger presented is that if the block was to fall or drop, individuals in the area could be injured or possibly killed. The chances of the slab falling was improbable, but unless the condition was corrected, it could deteriorate due to frequent blasting in the area which, in turn, caused ground vibration.

Mr. Traweek believed the operator should have known of the condition because anytime the level or panel is active, employees and supervisors, would be traveling throughout the drift or tunnel continuously. On a normal shift, two car-loaders and a supervisor would be working in the area. The concrete in and around the area was not in the best of condition, and he pointed out the condition to the operator's representative who was with him on the inspection. Since it was not the type of situation that the operator's representative could immediately correct himself, they left the area, and he did not know when the actual abatement was accomplished, but he believes abatement was achieved 2 or 3 days later by removing the block of concrete (Tr. 38-42).

On cross-examination, Inspector Traweek conceded that at the time he viewed the condition cited, the concrete block was not loose and he could not get it to move. However, sometime in the past when the block had broken and become displaced, it was loose and there had been movement. Had he known that it would take two men an hour to bar the piece of concrete down, he still would have issued the citation. Not all ground that is moved in a haulageway creates a hazard, but it does involve a judgment call (Tr. 42-45).

On redirect, Mr. Traweek stated that the concrete was located in such an area that if it did fall, it could fall on a person. He visually observed that it had moved sometime in the past, but he did not know when. Had he been able to move the concrete with a scaling bar, he may have issued an imminent danger order. He believed the concrete was loose at one time and might move again. The general area up and down the whole dip for quite a few feet was fairly bad (Tr. 45-46).

On recross, Mr. Traweek testified that he is familiar with the phenomenon known as "keying," and stated that it occurs when loose material or concrete is keyed in with other pieces of rock or concrete so that it is not displaced totally and forms like a keystone in an arch held in place by natural forces (Tr. 47-48).

In response to bench questions, Mr. Traweek stated that the entire drift tunnel is supported by concrete. He characterized the slab in question as loose in his notice because he believed that at

some prior time it had shifted, but at the time he tested it with the bar, it was firm, and by deterioration, he meant the concrete had been in one piece but was breaking up (Tr. 49). He observed the condition after it was abated, and the concrete had been removed and was laying up against the lefthand side of the rib. The cavity was then keyed to the other material and was safe (Tr. 51).

Respondent's Testimony

Mr. Tafoya stated the haulageway tunnel is arch shaped and supported by 18-inch thick concrete with steel caps buried in it. Block caving causes ground movement and keying keeps broken ground in place. The areas are cleaned and scaled daily, and when informed of the concrete citation, he immediately phoned his haulage supervisor and told him to get it fixed promptly. Since he was interested in getting the notice abated before Mr. Traweek left the mine, he left for the surface of the mine, and after he arrived, he met the haulage foreman who told him that it was impossible to remove the piece of concrete. In order to remove the concrete, the foreman used a scaling bar as a long 5-foot chiesel and Mr. Tafoya used a doublejack, and while the foreman was holding the scaling bar, he hit it, and together they managed to chip away enough concrete in order to get the piece of concrete to go out one end. Although he and the foreman worked feverishly for an hour to abate the condition before Mr. Traweek left the level, when he tried to locate Mr. Traweek, he had left. However, the condition was abated within an hour and a half after it was observed by the inspector (Tr. 53-58).

Mr. Tafoya stated that the general area in which the piece of concrete was located was deteriorating, and they had to remove quite a few pieces of concrete by scaling and they had shored up with timber in other places, although the area from where the piece of concrete was removed was never shored up and the cavity from where it came from has remained the same and was as safe as it is now (Tr. 58-59).

In response to questions from the bench, Mr. Tafoya stated that although Inspector Traweek gave them a day in which to abate the condition, that is, until 8 a.m. the following day, he was anxious to have the condition abated before Mr. Traweek left the area, and it is normally his practice to have citations abated as rapidly as possible. Although he had to pry down the piece of concrete with a chisel and a doublejack or sledgehammer, he did not feel that the concrete was going to fall out unless the ground movement was going to become severe, which it did not (Tr. 60-61).

Citation No. 371116, May 9, 1978, 30 CFR 57.15-6, states as follows:

> Protective clothing (gloves, etc.) was not provided or used during operations requiring contact with, or hand immersion in, Houghton, Houghto-clean 221 solvent.

Employees frequently contacted or immersed hands in the solvent during regular cleaning operations. Skin contact warning lables were attached to the solvent (manufacturer's) shipping/ storage barrels. 2075 level car ship.

Citation Nos. 371117, 371118, and 371119, May 9, 1978, 30 CFR 57.15-6

The conditions or practices described in these citations are identical to those cited in citation No. 371116, except for the fact that they allegedly occurred at different locations, namely, the 2075 level locomotive shop, the 2375 level car shop, and the 2375 level drill shop.

Section 57.15-6 provides:

> Mandatory. Special protective equipment and special protective clothing shall be provided, maintained in a sanitary and reliable condition and used whenever (1) hazards of process or environment, (2) chemical hazards, (3) radiological hazards, or (4) mechanical irritants are encountered in a manner capable of causing injury or impairment.

Inspector Traweek testified that he is familiar with the solvent known as Houghto-Clean 221, which is a cleaning solvent for machinery and machinery parts, and that he observed the solvent at the 2075 car shop, the 2075 locomotive shop, the 2375 level car shop and the 2375 level drill shop. He also observed employees who were working in the area engaged in activities which required them to immerse their hands in the solvent. These employees were working in maintenance-type shops such as overhaul, cleanup, repair, and underground--type shops and they would eventually have to wash parts in the solvent. None of the employees at the four locations were wearing protective equipment for their hands. According to the manufacturer's label, the danger of immersing one's hands in the solvent without gloves or protective equipment is skin irritation. He identified a label taken from one of the solvent drums (Exh. P-1). In addition to the warning that appears on the label, Inspector Traweek reached the conclusion that the solvent could irritate one's hands from a complaint of skin irritation from an employee who worked in one of the shops and from information supplied to him by the respondent, which was in the form of a description of the solvent containing warnings "avoid skin and eye contact, may cause irritation on prolonged exposure. In the event of skin contact, wash thoroughly with soap and water" (Exh. P-2, Tr. 63-72).

Inspector Traweek testified that in the four rooms which he inspected, three had no gloves or other protective equipment. In the 2075 locomotive shop, the shop foreman or possibly the shop leadman, indicated that he had protective gloves, but when he asked to see the

gloves, he could produce only one glove that was dust-coated and had obviously not been used. He believed the respondent was aware of the conditions because of the manufacturer's label which was attached to each drum, the complaint of which it had knowledge, and because of the literature that the company had supplied him with as far back as 1975 and possibly earlier. He discussed the need for gloves with supervisory personnel, but their response was that the reason they did not have any gloves was because they have no need for any. He estimated that a number of employees are exposed to the solvent danger, but that only one employee at a time uses the solvent, and in different operations it would be necessary to clean the parts every day. He brought the condition to the attention of the safety engineer who was accompanying him on the inspection and when he went back to abate the notice, the gloves had been provided (Tr. 72-74).

On cross-examination, Mr. Traweek indicated that not all individuals are subject to skin irritation if exposed to the solvent. With regard to the person who complained about suffering skin irritation, he stated that the person had previously suffered welding flash burns which were irritated by exposure to the solvent. He asked employees about the use of gloves, and was told that they were difficult to use because the men had to handle small machine parts. He did not talk to the person who complained, nor did he inquire about the availability of barrier creams. In addition to the four shops or areas previously mentioned, he stopped at a fifth place and gloves were provided in that location. In the course of his inspection of the rooms, no one in any of the rooms told him that they were in fact using protective cream nor did any management personnel ever tell him that such cream was being used, and he did not see any protective creams (Tr. 74-83).

In response to questions from the bench, Inspector Traweek testified that although in only one of the four locations did he actually observe an employee with his hands immersed in the solvent, he did observe employees at the other locations engaged in activities that would ultimately require use of the solvent. He did not take a sample of any of the solvent or subject it to any chemical analysis, and the respondent voluntarily produced information for him regarding the danger involved subsequent to the issuance of his citation. He did not know when the conditions were actually abated, but it was possible that they were abated earlier than the time he had fixed for abatement. He believed the old advisory standard, 57.15-6, requiring the use of gloves to be a better standard than the one cited (Tr. 84-90).

Respondent's Testimony

Clifford O. Hamilton, maintenance planning foreman, testified that he is responsible for all plant cleaning solvents, oils, and lubricants, and that Houghto-Clean 221 was first used in 1975. Prior to that time Houghto-Clean 220 had been used with no complaints about

skin irritation. Complaints were received when Hougto-Clean 221 began being used, and after receiving complaints, he took samples from the drum in question and sent them to the chemical lab at the plant and contacted the manufacturer. Magma Copper's lab could find nothing that would cause the degree of burning that was claimed by the complaining employee, and the manufactuer of the solvent stated that he felt that it was safe and that it should not have caused any burning to the degree of removing hair. The manufacturer thought that it had been contaminated with something. Data Sheets received from the manufacturer (Exh. R-1) concerning Houghto-Clean 221 indicate that when it comes in contact with the skin one should "wash with soap and water," and that "local effects upon skin may have a defatting effect on sensitive individuals" (Tr. 92-96).

The results of the Tests conducted on a sample of the solvent for a period of 16 hours showed no signs of skin irritation as a result of exposure. Gloves are stocked in the warehouse, and barrier creams have been available throughout the mine for as long as he has been employed there. Because of the citations, the respondent has made it mandatory that whenever the solvent is used, employees must wear gloves. However, employees complain about wearing gloves (Tr. 96-101).

On cross-examination, Mr. Hamilton stated that barrier creams are a warehouse item used throughout the mine, but he does not know whether any such creams were actually on hand in any of the four locations cited (Tr. 101-102).

Citation No. 371120, May 9, 1978, 30 CFR 57.4-2, states as follows:

> The Houghton-Clean 221 solvent storage and use area in the 2075 level car shop was not provided with a sign warning against smoking or open flame. The solvent (manufacturer's) shipping/ storage barrels had combustible liquid warning labels attached.

Section 57.4-2 provides: "Mandatory. Signs warning against smoking and open flames shall be posted so they can be readily seen in areas or places where fire or explosion hazards exist."

Inspector Traweek testified that Houghto-Clean 221 was used in the 2075 car shop area, and there was no sign in the immediate vicinity of the solvent warning against smoking or open flame in and around where the solvent was being used. In his opinion, the solvent, if ignited, could cause a fire or explosion, and his conclusion is based initially on the manufacturer's warning label attached to each drum, which states "Caution. Combustible liquid." "keep away from light, heat, spark and open flame." In reaching his conclusion that the solvent could cause a fire or explosion if ignited, he also relied on documents provided him by the respondent (Exh. P-2), which state

that the flash point (undiluted) is 190 degrees Fahrenheit. In addition, the research work in the National Fire Protection Code (Exh. P-6), led him to conclude that it is combustible (Tr. 109-113).

Inspector Traweek stated that he did not know the exact number of people exposed to the solvent hazards, but it would most likely be one individual at a time, although it could possibly be two. He believed that the respondent should have been aware of the existence of a hazard due to the manufacturer's label. He further believed that the respondent should have been aware of the lack of a sign since the shop is generally used on a daily basis on a generally busy shift and there are supervisory personnel such as a leadman or a foreman in the shop. When he returned to the mine to abate the citation, approximately 2 or 3 days later, the signs were in place (Tr. 114).

On cross-examination, Inspector Traweek testified that he issued the citation because he thought that the solvent was a combustible liquid under Class 3-a of the National Fire Protection Code. Class 3b combustibles have flash points above 200 degrees, and class 3a are between 140 and 200 degrees. He was accompanied on the inspection by Mr. Joe Questas, a mechanical foreman of some type, and by Mr. Ward Lucas, a safety engineer. He recalls a conversation with a man by the name of Meier, who was the foreman of another locomotive shop and who told him that solvent was used straight from the barrel without dilution. He recalls from his notes a conversation with Mr. Davis about the issue of protective clothing but he does not recall a conversation with Mr. Davis about the fact that the solvent was used in a solution with water in the place cited (Tr. 114-119).

In response to questions from the bench, Inspector Traweek stated that he did not take a sample of the solvent nor did he subject it to testing because he relied on the word of one of the shop supervisory personnel, and the manufacturer's label and letter that the product worked best undiluted. The solvent that he found in the area that he cited was not in a no-smoking posted zone. He did not observe anyone smoking in the area. It is general practice in the mine to transfer this particular solvent from 55-gallon drums into the cleaning bin itself, but he did not know the procedure that is followed in disposing of it (Tr. 121-124).

Respondent's Testimony

William J. Brinkman, chief industrial hygienist, defined the term "flash point" as the temperature at which a given liquid or solvent is warm enough so as to give off a sufficient concentration of vapors above its surface so as to support combustion if the vapors pass over an open flame. The fire hazard that is posed by a liquid is created by the evaporation of the liquid, i.e., by the fumes that are given off by the evaporation. A sample of the solvent was taken

at the mine and he submitted it to Magma Copper's Technical Services Laboratory and they arrived at a flash point of 205 degrees Fahrenheit. The Houghton 221 solvent which is used at the mine is Class 3-b according to the standards of the National Fire Protection Agency (Tr. 125-129).

On cross-examination, Mr. Brinkman testified that he did not know where the sample that was tested came from, but he submitted it on July 6, 1978, the same day it was delivered to him. Any given amount is guaranteed by the manufacturer not to be below 190 degrees, but between 190 and 200 or above (Tr. 129-130).

Citation No. 376608, May 10, 1978, 30 CFR 57.11-12, states as follows: "The chain guard was not secured in place across the 3-D shaft compartment opening on the first deck (work deck) below the main head sheave deck. The hazard observed was over 100 feet above the ground on the 3-D head frame."

Section 57.11-12 provides: "Mandatory. Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed."

MSHA inspector Chester A. Pascoe testified that he issued the citation on the head frame which is used to support the head pulley or head sheaves over which the hoist rope travels down the shaft to be hooked to a hoisting device used for men and materials. He identified Exhibit P-7 as a photograph of such a typical head frame.

He observed an opening into the shaft compartments off the work deck, and it was not protected by a railing, barrier, or cover since the safety chain that had been provided to span the opening to keep people from falling down into it was down and buried in 2 to 3 inches of rope dressing and grease, etc., on the work deck floor. He considered this area to be a travelway because one has to cross the opening to get to the far side of the head frame in order to perform maintenance and inspections, etc. The purpose of the chain is to prevent a person from accidentally walking or falling off into the shaft compartment which is over a 2,000-foot drop and is similar to an elevator shaft. The chain is fixed between the pipe rails around the shaft compartments. The likelihood of someone falling into the opening is very improbable since the area is not frequently traveled and those persons who do frequent the area come there for a specific purpose. Maintenance and supervisory personnel usually travel through the area several times a year, and at any given time not more than one person is exposed to danger. The operator should have been aware of the condition since it is an obligation of a supervisor to inspect the work areas, and if this had been done, he would have discovered

that the chain was down. When the condition was pointed out, a man was brought down immediately and the chain was dragged out of the grease and hung back up on the hook (Tr. 132-139).

On cross-examination, Mr. Pascoe identified a reasonable sketch of the work deck area which he cited (Exh. R-2), and he indicated that people would have reason to be on the walkway of the A-frame to clean up, and on the day he was there, pipe and wood was lying on the walkway, and he observed people there who had come to abate another citation concerning the cleaning of head frames. In addition, a person or supervisor inspecting the head frame would also have reason to be there.

In the normal course of business, mechanics are assigned to the deck, which is approximately 100 feet in height, to work on cages, skips, etc. While he was in the area, there were no employees working around the openings, and he could not state whether anyone was assigned to work there on a regular basis. He did see foot prints on the rope dressing on the platform which indicated to him that people had been in the area. He did not believe that there would be any employees being transported up and down the hoisting compartment on a regular basis, and he did not know how frequently employees come up to the deck. He did not observe anyone performing any work in any place on the deck other than in connection with another citation that he had previously issued. While the hoist compartment is not a walkway, the walkway where people have to travel is. Employees who are there can tie off their safety belts on the handrails. Maintenance people would have occasion to come up to the deck to maintain guides and the majority of the work could be done from the top of the skip (Tr. 139-146).

In response to bench questions, Mr. Pascoe stated that the chain was installed, but one end was uncoupled and dropped down and the chain is a railing barrier or cover since it is permanently connected on one end and hooked on the other, and it was simply uncoupled (Tr. 147-148).

Respondent's Testimony

Mr. Robert L. Zerga testified there are two means of access to the head frames, one up a hoist or elevator and the other up a ladderway. Persons employed as riggers would have occasion to use the deck.

With respect to Exhibit R-2, he knows of no normal maintenance function that is performed at the far end of the grading. This is not the type of place to which an employee would stray, and there is nothing in the area of the platform that is normally inspected. Regarding cleanup of the deck, his basic policy is not to clean up

the area unless it is to be used for some specific purpose, and persons working on the frame decks must be hooked up by tag lines (Tr. 150-154).

On cross-examination, Mr. Zerga stated that the only machinery on the platform in question is the skip compartment and skip guides, and there is nothing there that would normally be inspected. As far as any cleanup is concerned, the only things cleaned would be rope dressing or dust and dirt, and people would not go to the area to clean those materials unless materials were brought to the area on the skip, and that would be cleaned as a basic thing (Tr. 154-155).

Citation No. 377966, May 11, 1978, 30 CFR 57.12-20, states as follows: "The hoist systems office electrical control center was not provided with a 'like potential' (insulating mat). The control center was exposed to the elements (weather conditions)."

Section 57.12-20 provides:

> Mandatory. Dry wooden platforms, insulating mats, or other electrically nonconductive material shall be kept in place at all switchboards and power-control switches where shock hazards exist. However, metal plates on which a person normally would stand and which are kept at the same potential as the grounded, metal, non-current-carrying parts of the power switches to be operated may be used.

MSHA inspector Clarence Ellis, testified he has been so employed for about 3 years and formerly worked for Magma Copper as an underground mine supervisor. He is not an electrician but has taken most of the MSHA electrical courses and is taking correspondence courses from the Beckley Mine Safety Academy. Three years ago he trained for about 3 months with an electrical inspector. He inspected the hoist systems electrical control center on May 1, 1978, and described a typical load center as "a spot at any mining property where you would have a group of switches grouped in one spot." The location cited was basically a group of switches located outside at one spot in the open and the spot where an operator would stand to operate the switches was not provided with a wooden platform or insulating mat and a person would be standing on the earth when he touched the equipment. Such a situation presents an electrical shock hazard because the potential between the person touching the switching gear and the gear itself would be different. Normally, the potential should be the same. He defined the term "different potential" as follows:

> Potential on -- in electrical people -- when electrical people are using the term potential, potential means a difference in voltage between two (2) points. You

might have, say on this desk if it was made of metal and that desk was made of metal, you might have two hundred and twenty (220) volts on this desk and one ten (110) on that desk and you would definitely have a difference in potential between the two. If the two were connected to two (2) separate grounding systems and you contacted both of them at the same time, you would receive a shock at that point if there were unplanned currents on the equipment at that time.

Inspector Ellis indicated that unplanned currents, or a short, would be required to result in the shock condition he described, and the resulting injury from any shock would depend on the voltage and amperage involved. Most people standing on the bare earth and receiving a shock would probably die. However, he had no idea of the amperage involved in the switching gear in question but was told by a Mr. Lucas from the company's safety department that it ranged from a low of 110 volts to a high of 480 volts. The KVA, or kilovolt rating of the transformers supplying the power to the load center would determine the actual amperage, but this can only be determined by a physical test. However, if one light bulb were burning in the building it is likely that at least one amp would be flowing through the switching gear. He doubted whether anyone could survive one amp of current. He believed that an insulating mat placed in front of the load center would insulate one from a shock hazard. However, the hazard would only be presented if the phase went to ground, and an insulating mat would insulate a person from the earth (Tr. 156-165).

Inspector Ellis testified that the chance of a shock hazard was small and that a hazard would only exist if the equipment malfunctioned at the precise time someone was touching it while standing on the earth without an insulation device. One person would be exposed to the hazard. He believed that the respondent should have been aware of the condition cited because it was located near a building where the mine superintendent and supervisors had offices and they would walk by the load center while going in and out of the building. An insulating mat was installed when the condition was pointed out (Tr. 166-167).

On cross-examination, Inspector Ellis testified that he did not determine whether there was in fact a difference in potential present but simply knew that there was such a difference in potential between the earth and the grounding system of the plant. When asked how he knew this he said--"It's just a matter of fact. * * * I know it is." However, he had no knowledge of the plant grounding system, but indicated that the resistance to the ground anywhere on the property was 25 ohms. He did not know the earth resistence and made no test to determine it (Tr. 168-170).

In response to questions from the bench, Inspector Ellis testified that he did not know the specific equipment supplied by the load center in question and did not go inside the office trailer house in question. The load center consisted of 7 or 8 switch boxes which he believed controlled more than the office. The switch boxes were of a square D-type, approximately 12 x 18 x 6 inches, with three fuses to each box. From his experience, someone touches every electrical switch box on mine property at least once a week. He did not recall precisely when the condition was abated (Tr. 172-173).

Respondent's Testimony

Mine superintendent Robert Zerga, an electrical engineer, testified that he is familiar with the electrical system in question and he identified Exhibit R-3 as a schematic of the electrical control center in question. He discussed the different safety features installed on the center and stated there was no electrical energized circuit with which a person could accidentally come in contact. Everything that can be touched is grounded to earth by means of copper grounding going to the central grounding system. He stated that in order for an electrical potential to occur, the ground wire would have to be lost and a current carrying conductor would have to come in contact with a metal enclosure. The system which was installed at the time of the citation is perfectly acceptable by the National Electrical Code, and he believed the citation issued because of a complete misinterpretation of the standard by the inspector. He described the plant grounding system, and he stated that the potential hazard described by Inspector Ellis would not exist provided the grounding system was intact (Tr. 176-181).

On cross-examination, Mr. Zerga testified that as long as the ground wire is intact, even though defective, it will function as a ground. The plant ground wire system is checked annually under Federal law and it was checked and found to be intact after the citation issued. He reiterated that two events would have to occur for a hazard to exist, namely, the loss of the ground and a short circuit, and this was a very small possibility (Tr. 181-182).

In response to bench questions, Mr. Zerga testified that one would approach the power center and simply pull a switch to turn it off and the switch is insulated from the power conductor. The control center provides power for the trailer house for lighting, a heater, and a fan for cooling in the summer (Tr. 183). Inspector Ellis indicated that the power center was waterproofed and well-insulated (Tr. 190).

Findings and Conclusions

Fact of Violation--Citation No. 371113, 30 CFR 57.12-32

I find that the preponderance of the evidence adduced in this case supports a finding of a violation of section 57.12-32 as charged in the citation. Although respondent's evidence indicates that mine employees are apparently tampering with the cover plates, that fact may not, in my view, serve as an absolute defense. The standard requires that cover plates be kept in place at all times except during testing or repairs, and respondent's evidence does not rebut the fact that the cover plates cited were not so maintained. The citation is AFFIRMED.

Gravity

Petitioner conceded that since the wires inside the uncovered junction boxes were insulated and taped, the chances of any electrical shock occurring under the conditions as they existed at the time of the inspection were small. Respondent's evidence establishes that the junction boxes in question were grounded and that the wires were well-insulated and that an electrician was immediately called and the covers were put back on the boxes by the end of the shift. While it is true that deterioration may occur if covers are left off the boxes over an extended period of time, there is no evidence as to how long the covers were off and there is no evidence that any of the wiring inside the boxes was in other than good condition and not well-insulated. In the circumstances, I conclude that the conditions as cited were nonserious.

Negligence

From the evidence and testimony presented by the respondent, it would appear that there is a problem in the mine with employee tampering and vandalism connected with the removal of electrical junction box covers. I fail to understand why an employee would want to jeopardize his safety and the well being of his fellow workers by engaging in such conduct. In any event, under the circumstances here presented, I find that the respondent did everything reasonable, short of stationing a supervisor at each junction box location, and petitioner has not established that the missing box covers should have been discovered earlier by supervisory personnel. Although the inspector testified that supervisors generally are in the area, he did not specifically establish by any credible evidence that the cover plates were missing early in the shift, or that any supervisor passed through the area and should have seen them. In the circumstances, I cannot conclude that the conditions cited resulted from any negligence on the part of the respondent.

Good Faith Compliance

The record supports a finding that respondent exercised rapid abatement in achieving compliance and that fact is reflected in the penalty assessed for this citation.

Fact of Violation--Citation No. 371115, 30 CFR 57.3-22

The citation charges that a slab of loose concrete was observed at one of the loading station areas of the mine and that a scaling bar was used to test and determine that the concrete was loose. Section 57.3-22 requires examinations of the ground conditions to insure that proper testing and ground control practices are followed, that loose ground be taken down or adequately supported, and that ground conditions along haulageways and travelways be periodically examined and scaled or supported as necessarry. In this case, the inspector admitted that the piece of concrete in question was not loose at the time he observed the condition and that he could not get it to move. He indicated the chance of the concrete falling was improbable and respondent's testimony indicates that the concrete slab had keyed in with other materials and was thus stabilized and that it took two men an hour or so of working to punch the slab out. Under the circumstances, I fail to understand how the inspector concluded that the concrete was loose and that he determined this by testing. The evidence adduced establishes exactly the opposite. I find that petitioner has failed to establish a violation as charged on the face of the citation and Citation No. 371115 is VACATED.

Fact of Violations--Citation Nos. 371116 through 371119, 30 CFR 57.15-6

I find that the petitioner has established a violation of section 57.15-6 as charged in the four citations. While the term "chemical hazards" may not be the best way to describe the hazards involved when employees use cleaning solvents without protective gloves, I conclude it is broad enough to cover the conditions cited in this instance. Although Safety Standard 57.15-9, which provides for the wearing of protective gloves by employees handling materials which may cause injury, appears to be a better standard for application on the facts presented here, that standard is not mandatory but simply advisory. This is a reocurring problem that is best left to the scrutiny of the Secretary as part of his enforcement authority. I agree with the petitioner's arguments that substances strong enough to clean tools and machine parts will cause irritation and eventual harm to the naked skin and that the manufacturer's label and respondent's admissions that sensitive individuals would be susceptible to defatting of the skin or irritation, attest to that fact. The extent of such exposure, insofar as the degree of injury incurred, is a matter connected with the gravity of the situation presented and may not serve as an absolute defense to the citations. In addition,

although respondent's evidence and testimony makes reference to the general availability of protective barrier creams and the fact that protective gloves are a normal warehouse stock item, respondent's evidence does not establish that these protective materials were, in fact, available at the locations cited and the inspector testified that he observed none on hand at the locations cited. All four citations are AFFIRMED.

Gravity

I find that the evidence adduced in support of the citations does not establish that the conditions cited posed any grave threat to the safety or health of any miners at the time of the citations. The inspector saw no one immersing his hands in the solvent, and while it would have been desirable to take a sample to determine by chemical analysis the actual chemical content of the solvent and the danger posed by its exposure to the skin, the inspector did not do so. At best, the evidence establishes that exposure to the solvent in question would cause "dishpan hands." Although it may be true that continued contact with the solvent over a period of time may result in greater harm, there is no evidence to establish the length of time the employees were exposed to the solvent, nor has there been any testing by MSHA of the solvent to determine how it may affect someone through continued and sustained exposure. Under the circumstances, I find that the conditions cited in the citations in question were nonserious.

Negligence

The evidence establishes, and I find, that the respondent failed to exercise reasonable care to prevent the practices cited which caused the violations. The testimony and evidence adduced establishes to my satisfaction that the respondent had received some early warning signs from at least one employee that the solvent in question was causing some problems, and notwithstanding the fact that the solvent caused some irritation to a preexisting condition unrelated to the use of the solvent, the respondent should have taken steps to insure that barrier creams or gloves were provided and made available to employees at the particular shop locations in question. Under the circumstances, I conclude that respondent's failure to exercise reasonable care in the circumstances constitutes ordinary negligence.

Good Faith Compliance

The record supports a finding that respondent achieved rapid compliance once the citations issued and this fact is reflected in the civil penalties assessed by me for these citations.

Fact of Violation--Citation No. 371120, 30 CFR 57.4-2

It is clear from the evidence presented that respondent failed to post the required sign warning against smoking or open flame. Section 57.4-2 requries the conspicuous posting of such signs in places or areas where there are fire or explosion hazards. The critical question presented, therefore, is whether the petitioner has established that the Houghto-Clean 221 solvent presented a fire or explosion hazard. In order to answer that question in the affirmative, there must be some evidence that the solvent in question was, in fact, combustible on the day the citation issued. Petitioner relies on several 1975 letters and the 1975 manufacturer's specifications in support of its conclusion that the solvent flashpoint and its use in an undiluted fashion on the day the citation issued renders it combustible. The fact that the solvent is generally used in undiluted form cannot serve as a basis for establishing that it was so used on May 9, 1978, when the citation issued. In addition, the fact that the 1975 specifications refer to the undiluted flashpoint as being 190 degrees Fahrenheit cannot serve as a basis for establishing that this was the case in 1978 at the time the citation issued.

In this case, the inspector relied on the 1975 letters and specifications regarding the solvent flashpoint and a label cautioning that the solvent was combustible and should be kept away from heat, spark, or open flame. However, he failed to take a sample of the solvent to determine its flashpoint or whether it was, in fact, combustible or being used in diluted form. Although the inspector recalled that someone had told him that the solvent was used in undiluted form and that this was the general practice, no credible testimony was produced by the Petitioner to support such a conclusion. I simply fail to understand why no one took any samples of the solvent to determine its physical properties on the day the citation issued. In my view, reliance on speculative information 3 years prior to the event in question, and reliance on self-serving statements by both parties with respect to whether the solvent in question was, in fact, combustible or hazardous, simply is not sufficient to establish that question. Since the petitioner has the burden of proof in this proceeding, it is incumbent on an inspector to at least establish that the solvent in question was combustible. Based on the evidence adduced by the petitioner in support of this citation, I cannot conclude that petitioner has established this fact by a preponderance of any credible evidence. Under the circumstances, I find that the violation has not been established and the citation is VACATED.

Fact of Violation--Citation No. 376608, 30 CFR 57.11-12

The evidence adduced establishes that the chain guard which was installed at the work deck of the head frame in question was not hooked across the opening, and respondent does not dispute this fact.

Petitioner maintains that the "passage" or area cited by the inspector, as depicted in the sketch on Exhibit R-2, was regularly used and designated for persons to go from one place to another, even though travel was admittedly infrequent. Petitioner also maintains that the frequency of travel is relevant only to the penalty and not to the existence of the citation.

Respondent maintains that the petitioner has not established that the area cited, some 100 feet above the ground on a platform, was a travelway within the meaning of the cited standard or the definition of travelway as set forth in section 57.2. Respondent also points to the fact that the inspector observed no one performing maintenance on the platform, did not know whether employees were assigned there on a regular basis, and had no idea how frequently employees came up to the deck. Further, respondent maintains that it has established that: the only maintenance performed at the cited location is the changing of hoist guides and scrolls and that when this occurs employees are required to be hooked up with safety lines, that no normal maintenance is performed at either end of the platform cited, it is not the type of place where an employee would go to take a break, and that employees would not go on that platform any more often that most people would go to the top of the roof of their homes.

The term "travelway" is defined by section 57.2 as "a passage, walk or way regularly used and designated for persons to go from one place to another." Since the cited standard uses the word "travelway," petitioner must establish that the area cited was, in fact, a travelway within the meaning of the definition. After careful consideration of the evidence adduced and the arguments advanced by the parties, I conclude and find that the respondent, on the facts presented here, has the better part of the argument and petitioner has not established that the work platform some 100 feet above the ground and which is used infrequently, is a travelway. Here, Inspector Pascoe admitted that maintenance personnel went to the platform "several times a year" and the likelihood of anyone falling through the opening cited was improbable since the area is not frequently traveled. Further, he saw no one working there, did not know whether employees were assigned there on a regular basis, did not believe that employees were transported up and down the hoisting device on a regular basis, and indicated that the majority of any maintenance work on the platform could be performed from the top of the skip. Under the circumstances, I fail to understand how he could conclude that the work platform was a travelway regularly used and designated for persons to go from one place to another. I believe the intent of the standard is to protect miners, who on a regular and frequent basis, use designated travelways for movement to and from their regular duty stations or who use such travelways on a regular basis while moving in and about the mine. The facts on which this citation was issued suggest the inspector sought to protect someone working on the platform from falling through the unchained opening.

Even so, the standard cited does not lend itself to the factual setting which prevailed on the day the citation issued. The standard required railings, barriers, or covers, and I fail to understand how a hooked chain can be considered as such. In the circumstances, it would appear that the standard is intended to apply to a working place rather than to a travelway, notwithstanding petitioner's assertion at page 6 of its brief that the use of a chain establishes an inference that an opening some 100 feet in the air at the edge of a platform is a travelway.

In view of the foregoing, I find that petitioner has failed to establish a violation of the cited standard. If the Secretary desires to afford protection to persons working on elevated platforms, he should promulgate a safety standard covering such situations rather than attempting to rely on a loosely worded and vague standard. It seems to me that the inclusion of the term "working place" as part of section 57.11-2 would cure the problem that I have with language which I believe simply does not fit the facts presented. The citation is VACATED.

Fact of Violation--Citation No. 377966, 30 CFR 57.12-20

The standard cited requires that dry wooden platforms, insulating mats, or other nonconductive materials be kept in place at power control switches where there is a shock hazard. Based on the preponderance of the evidence adduced, I find that petitioner has established a violation of the cited standard, and I agree with the arguments advanced by counsel on page 6 of his brief in support of the citation. Respondent's testimony and arguments in support of the citation go to the question of gravity rather than to the existence of a violation. Although the inspector who issued the citation failed to make a detailed evaluation of all of the prevailing conditions, i.e., voltage, amperage, grounding system in use, etc., these factors weigh on the seriousness of the violation rather than on the question of whether there was a violation.

The standard cited is intended to guard against shock hazards and while respondent's testimony established the extreme unlikelihood of an accident occurring because of the grounding system and other protective measures taken to prevent such an occurrence, the fact is that respondent concedes that a shock hazard would exist in the event of an unplanned surge of current or in the event of a loss in the grounding system. Further, I am not convinced that respondent has established that the absence of the required insulating material would make no difference if those events were to occur. I find that the petitioner has established through credible evidence and testimony that the use of the required insulating materials placed at the power control center location would, in fact, provided the required protection afforded by section 57.12-20. The citation is AFFIRMED.

Gravity

Although electrical shock hazards are serious as a general rule, on the facts and evidence adduced in this case, I cannot conclude that the conditions cited constituted a serious violation. The gravity of the particular condition cited must, in my view, be weighed on all of the conditions which prevailed at the time of the citation, including a realistic appraisal of the potential for an accident or hazard occurring. Here, petitioner concedes that the respondent has presented convincing evidence that there was little chance of the hazard described by the inspector occurring. The grounding system was intact and operational, and the other safeguards described by respondent's witnesses were in place and in the circumstances, I find that the condition cited was nonserious.

Negligence

I find that on the facts presented, respondent should have known of the potential hazard in the event of a loss of the grounding system and possible change in the current-carrying capacity of the system in question. Failure to provide the proper insulating material for persons who are required to approach and use the power center, particularly at its location outdoors, was a potential hazard of which I believe the respondent should have been aware. In the circumstances, I find that the respondent failed to exercise reasonable care to prevent the violation and that this amounts to ordinary negligence.

Good Faith Compliance

The record reflects that the respondent provided the insulation mat as soon as the infraction was cited and this demonstrates rapid good faith compliance which I have considered in assessing the penalty for this citation.

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

The parties stipulated that respondent is a large mine operator and that any civil penalties assessed by me for the proven citations will not adversely affect its ability to remain in business. This is accepted and incorporated as my findings on these issues and the findings in this regard are reflected in the civil penalties assessed by me in this proceeding.

History of Prior Violations

The parties stipulated that respondent has no prior history of citations and I accept this stipulation as my finding on this issue and this is reflected in the civil penalties assessed by me in this proceeding.

Dismissal of Citation

Petitioner withdrew its petition for assessment of civil penalty with respect to Citation No. 371163, April 13, 1978, 30 CFR 57.15-3, and the citation was dismissed from the bench.

Citation Nos. 376625 through 376628, issued on May 15 and 16, 1978, all cited violations of 30 CFR 57.4-23, for failure to maintain or inspect several fire hoses which were located at four different mine areas. The inspection tags attached to the hoses contained notations that they were last inspected in 1974 and 1975.

Section 57.4-23 provides: "Mandatory. Firefighting equipment which is provided on the mine property shall be strategically located, readily accessible, plainly marked, properly maintained, and inspected periodically. Records shall be kept of such inspections."

Settlement

On motion by the petitioner, Citation Nos. 376625 through 376628, for infractions of 30 CFR 57.4-23 were consolidated into one violation and petitioner's motion for approval of a settlement in the amount of $140 for the violation was approved by me from the bench after arguments in support of the motion were heard on the record. Petitioner pointed out that the citations were issued because the fire extinguishers were not being inspected periodically as required by the standard. The standards for such inspections as set forth by the National Fire Protection Association, as interpreted by MSHA with respect to section 57.4-23 were at odds with the interpretation placed on that standard by the respondent. However, an agreement was reached as to the proper interpretation, and petitioner asserted that what should have been cited was a lack of a "procedure" for inspecting such fire extinguishers, and that theoretically, some 200 fire extinguishers could have been cited but that could prove to be "overkill" (Tr. 191-194). None of the extinguishers were defective, and the thrust of the citations was the fact that the inspection tags failed to reflect the frequency of inspections.

Conclusion

On the basis of the foregoing findings and conclusions, and after full consideration of the criteria stated in section 110(i) of the Act, respondent is assessed the following civil penalties for the citations which have been established:

Citation No.	Date	30 CFR Section	Assessment
371113	04/18/78	57.12-32	$100
371116	05/09/78	57.15-6	75
371117	05/09/78	57.15-6	75

371118	05/09/78	57.15-6	75
371119	05/09/78	57.15-6	75
377966	05/11/78	57.20-20	125

Citation Nos. 371115, 371120, and 376608 are VACATED, and the petition for assessment of civil penalty insofar as those citations are concerned, is DISMISSED. Citation No. 371163 is likewise DISMISSED on motion by the petitioner.

Consolidation of Citation Nos. 376625 through 376628, all charging a violation of 30 CFR 57.4-23, and all issued on May 16, 1978, is APPROVED, and the settlement proposed by the parties in this regard, whereby respondent agrees to pay a civil penalty in the amount of $140, is APPROVED pursuant to 29 CFR 2700.27(d).

ORDER

Respondent IS ORDERED to pay the penalties assessed in this proceeding, including the settlement approved, as indicated above, in the total amount of $665 within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 3, 1979

SECRETARY OF LABOR, on behalf of PERRY R. BISHOP, Applicant	:	Application for Temporary Reinstatement
v.	:	Docket No. KENT 79-161-D
MOUNTAIN TOP FUEL, INC., Respondent	:	No. 4 Surface Mine

DECISION AND ORDER

Appearances: Thomas P. Piliero, Esq., Office of the Solicitor, U.S. Department of Labor for Applicant
Herman W. Lester, Esq., Combs and Lester, P.S.C., Pikeville, Kentucky, for Respondent

Before: James A. Broderick, Chief Administrative Law Judge

On June 18, 1979, the Applicant filed an application for temporary reinstatement of complainant Perry R. Bishop to the position with Respon dent from which he was terminated. The application was supported by a finding of the Secretary that the complaint was not frivolously brought.

On the basis of the Application and the Secretarial finding, I issued an order on June 19, 1979, that Complainant Perry R. Bishop be reinstated to the position from which he was terminated immediately upon receipt of the order by Respondent.

On June 22, 1979, Respondent filed a response to the Secretarial finding and a motion to dismiss the application or to assign the action for immediate hearing. The Response averred that the complaint was frivolously brought.

On June 29, 1979, the case was called for hearing before me in Washington, D. C., pursuant to notice issued on June 25, 1979. The sole issue at the hearing was whether the Secretary's finding that the com- plaint was not frivolously brought was justified.

Respondent renewed its motion to dismiss and after hearing argument, I denied the motion.

David Childers and Larry Adkins testified on behalf of Respondent. Perry R. Bishop testified on behalf of Applicant. Charles O. Webb, a special investigator for the Mine Safety and Health Administration, was called as a rebuttal witness for Respondent.

Much of the testimony on behalf of both Respondent and Applicant was concerned with the merits of the case, i.e., whether complainant's discharge was justified or was the result of activity protected under the Act. The term "frivolous" is defined as: "1. Unworthy of serious attention; insignificant; trivial . . . . 2. Marked by flippancy; silly or gay . . . . " 1/ There is no evidence in the record which would support a finding that the complaint here was frivolous in any of the meanings of that term.

I therefore upheld from the bench the Secretary's finding that the complaint was not frivolously brought, and I hereby confirm that finding.

On the basis of the testimony at the hearing and the contentions of the parties, I issued an order from the bench renewing my order of temporary reinstatement and I confirm that order herein.

Respondent is hereby ORDERED to temporarily reinstate Perry R. Bishop effective June 22, 1979, to the position from which he was terminated or to a comparable position at the same rate of pay and with the same or equivalent work duties as were assigned to him immediately prior to his termination.

This order shall remain in effect pending further order of the Commission or Commission Administrative Law Judge in this case.

James A. Broderick
James A. Broderick
Chief Administrative Law Judge

1/ The American Heritage Dictionary of the English Language (New College ed. 1969), 528.

Distribution: By certified mail.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 6, 1979

SEWELL COAL COMPANY, Applicant	:	Application for Review
v.	:	Docket No. HOPE 79-274
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 0637263 February 21, 1979 Sewell No. 4 Mine

DECISION

Appearances: Gary W. Callaghan, Esq., Lebanon, Virginia, for Applicant;
David L. Baskin, Esq., Trial Attorney, Office of the Solicitor, U.S. Department of Labor, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

Applicant seeks review of an order of withdrawal issued on February 21, 1979, under section 104(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(b), because of the refusal of Applicant to permit Respondent to inspect and copy certain records. Both parties requested an expedited proceeding. Pursuant to notice, a prehearing conference was held in Washington, D.C., on March 29, 1979. At the conference, the parties stipulated to the facts and issues before me, and a briefing schedule was agreed upon. Briefs were filed by both parties on April 16, 1979, and a reply brief was filed by Respondent on April 26, 1979. Applicant did not file a reply brief.

Based on the stipulations of the parties, I adopt the following as my:

FINDINGS OF FACT

1. Applicant, Sewell Coal Company, was, during the month of February 1979, and prior thereto, the operator of a coal mine in Nicholas County, West Virginia, known as the Sewell No. 4 Mine, I.D. No. 46-01477.

2. Sewell Coal Company is subject to the provisions of the Federal Mine Safety and Health Act of 1977 with respect to the operation of the subject mine.

3. I have jurisdiction of the parties and subject matter of this proceeding.

4. The mandatory safety standards involved in this proceeding are contained in Part 50 of 30 CFR, particularly, 30 CFR 50.41.

5. On February 13 and 14, 1979, Federal mine inspector Ronnie Bowman, a duly authorized representative of the Secretary of Labor, began an inspection of foremen's records, accident, injury and illness records, and medical and compensation records at the subject mine. These records were contained in individual personnel files which also contained other data. The inspection was conducted in order to ascertain Applicant's compliance during 1975, 1976, and 1977, with the accident, illness, and injury reporting requirements in effect during those years, and to verify MSHA's existing data base respecting mine accidents, injuries, and illnesses.

6. On February 16, 1979, Inspector Bowman returned to the mine and continued to review the medical and compensation records along with the safety director of the mine. When the inspector discovered what he considered to be two instances of failure to report injuries in 1977, he mentioned this fact to the safety director. The safety director then telephoned a company official, and after a discussion with him, told the inspector that he would not be permitted to continue to inspect the files.

7. On February 21, 1979, the inspector returned to the mine office and was again denied access to the personnel files. The inspector issued a 104(a) citation under 30 CFR 50.41 and when the citation was not abated, issued a 104(b) closure order.

ISSUES

1. Whether MHSA may, under 30 CFR Part 50, without obtaining a valid search warrant, inspect Applicant's personnel files? These files contain medical and other information related to accidents, injuries, and illnesses reportable under Part 50 or to compliance with Part 50. They also contain medical and other information unrelated to accidents, injuries, and illnesses reportable under Part 50, or to compliance with Part 50.

2. Whether MSHA may, under 30 CFR Part 50, copy from these files, information relevant and necessary to the issue of whether Applicant has complied with the injury and illness reporting requirements of Part 50?

3. Whether the inspection of the personnel files described above violates any provision of the Privacy Act?

STATUTORY PROVISIONS

Section 103(a) of the Act provides:

> Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. * * * 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 responsibilites 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.

Section 103(h) provides:

> In addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary or the Secretary of Health, Education, and Welfare may reasonably require from time to time to enable him to perform his functions under this Act. The Secretary or the Secretary of Health, Education, and Welfare is authorized to compile, analyze, and publish, either in summary or detailed form, such reports or information so obtained. Except to the extent otherwise specifically provided by this Act, all records, information, reports, findings, citations, notices, orders, or decisions required or issued pursuant to or under this Act may be published from time to time, may be released to any interested person, and shall be made available for public inspection.

Section 110(d) provides:

> Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 104 and section 107, or any order incorporated in a final decision issued under this title, except an order incorporated in a decision under subsection (a) or section 105(c), shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this Act, punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years, or both.

REGULATION

30 CFR 50.41 provides:

> Upon request by MESA, an operator shall allow MESA to inspect and copy information related to an accident, injury or illnesses which MESA considers relevant and necessary to verify a report of investigation required by §50.11 of this Part or relevant and necessary to a determination of compliance with the reporting requirements of this Part.

DISCUSSION AND CONCLUSIONS OF LAW

NONCONSENSUAL WARRANTLESS INSPECTION

Section 103(a) of the Act directs authorized representatives of the Secretary to "make frequent inspections and investigations in coal or other mines." It further provides:

> For the purpose of making any inspection or investigation under this Act, the Secretary * * * or any authorized representative of the Secretary * * * shall have a right of entry to, upon, or through any coal or other mine.

It is clear from the legislative history that Congress intended this language to give a right of entry without the necessity for obtaining a search warrant:

> Section 104(a) authorizes the Secretary * * * to enter upon or through any mine for the purpose of making any inspection or investigation under this Act. This is intended to be an absolute right of entry without need to obtain a warrant * * *. Safety conditions in the mining

industry have been pervasively regulated by Federal and State law. The Committee intends to grant a broad right-of-entry to the Secretaries * * * to make inspections and investigations of all mines under this Act without first obtaining a warrant * * *. The Committee notes that despite the progress made in improving the working conditions of the nation's miners, * * * mining continues to be one of the nation's most hazardous occupations. Indeed, in view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives. 1/

See also in this connection Marshall v. Donofrio, 465 F. Supp 838 (E.D. Penn. 1978), in which the court held that warrantless inspections of coal mines are not prohibited under the rule of Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

There is little doubt that nonconsensual inspections of mines without search warrants are authorized by the Act, and Respondent concedes as much.

DOES THE RIGHT TO INSPECT WITHOUT WARRANT INCLUDE THE OFFICES OF THE MINE OPERATOR?

The statutory authorization for inspection and investigation refers to "mines." A "coal or other mine" is defined in section 3(h)(1) of the Act as

> (A) an area of land from which minerals are extracted * * *, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property * * *, used in, or to be used in, or resulting from, the work of extracting such minerals * * *.

In a broad sense, mine offices which contain employee health records, would seem to be included in "structures * * *, or other property * * * used in * * * the work of extracting minerals." This construction conforms to that which the Court of Appeals for the Sixth Circuit made concerning similar language in the 1969 Coal Mine Safety Act:

> Even in the absence of warrants, the investigators had a right to enter the six company facilities which were

1/ Senate Committee Report No. 95-181, 95th Cong., 1st Sess., 27 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, p. 615.

> searched. Section 813(b)(1) provides a 'right of entry to, upon, or through any coal mine' for the purpose of making any inspection or investigation mandated by the Act. The term 'coal mine' is broadly defined in Section 802(h) to include 'all structures * * * placed upon * * * or above the surface [of land] used in, or to be used in, or resulting from the work of extracting * * * coal.' All six offices, including the company's general office, were situated in close proximity to working mines and were instrumental in the administration of ongoing mine operations. They were, therefore, part of coal mine premises within the meaning of the Act and subject to entry by representatives of the Secretary at reasonable times.

United States v. Consolidation Coal Co., 560 F.2d 214, 219 (6th Cir. 1977), vacated and remanded, 436 U.S. 942, 98 S. Ct. 2481 (1978), reinstated, 579 F.2d 1011 (1978).

The above-quoted language is dicta, since a warrant was issued in the Consolidation case. However, in this construction, the court relies on the "premise that the nature of the Act entitles it to expansive interpretation." Such an interpretation persuades me that an inspector may, without a warrant, enter mine offices where records are kept.

DOES THE RIGHT TO INSPECT WITHOUT WARRANT INCLUDE THE RIGHT TO SEARCH THE RECORDS KEPT BY THE MINE OPERATOR?

In addition to the authorization for inspections and investigations given by section 103(a) of the Act, section 103(h) requires a mine operator to

> [E]stablish and maintain such records, make such reports, and provide such information as the Secretary * * * may reasonably require * * *. The Secretary * * * is authorized to compile, analyze, and publish * * * such reports or information * * *.

Applicant states that it will produce all records required to be kept by statute upon request of the inspector and admits that production of such records is required without the need for a warrant. The difficult question presented, however, is whether the Secretary may, without a warrant, examine additional records and documents which are not required to be kept by statute and which may contain information other than that related and necessary to comply with Part 50 of the regulations. Two Federal courts in dicta have answered this question in the negative under the 1969 Act. In the case of The Youghiogheny and Ohio Coal Company v. Morton, 364 F. Supp. 45 (S.D. Ohio, 1973), a three-judge court, in upholding the constitutionality of warrantless searches of coal mines, stated:

> The governmental interest in promoting safety, it might be concluded, far outweighs any interest the mine operators may have in privacy.
>
> * * * * * * *
>
> The mine operator, though, does have a general expectation of privacy in his offices on the mining property. There is, however, no expectation of privacy in the maps, books, and records which are maintained for and in compliance with the Mine Safety Act. These must, of course, be produced upon demand to the federal inspector when he makes his unannounced entry. But the Act does not authorize these inspectors to rummage in any wholesale way or to initiate a general search of the mine operator's offices for such records.

Id. at 51 note 5.

In the Consolidation Coal Co. case, supra, the court stated at page 217:

> The Government advances three alternative rationales for reversing the district court's orders: 1) the searches were constitutionally permissible without warrants under Section 813(a)(4) which authorizes frequent inspections and investigations in coal mines * * * for the purpose of * * * determining whether or not there is compliance with the mandatory health or safety standards or with any notice, order, or decision issued under [the Act].
>
> * * * * * * *
>
> We reject out of hand the Government's first contention. The Youghiogheny decision stands for the proposition that only inspections of the underground portions or 'active workings' of coal mines may be performed without search warrants under Section 813(a) and (b). It expressly excludes from the purview of its holding warrantless searches of offices on the mining property * * *. In addition nothing in the Act authorizes the wholesale seizure of records which took place here. Even where a statute requires records to be maintained and authorizes on-premises inspection of them in the normal course, no precedent sanctions direct access to the records without demand in the absence of a search warrant.
>
> 'It is, however, implicit * * * that the right to inspect does not carry with it the right, without warrant in the absence of arrest, to reach that which is to be

inspected by a resort to self-help in the face of the owner's protest.' Hughes v. Johnson, 305 F.2d 67, 69 (9th Cir. 1962).

In In re Surface Mining Regulation Litigation, 456 F. Supp 1301, (D.D.C. 1978), the court examined a regulation promulgated pursuant to the Surface Mining Control and Reclamation Act of 1977, which authorized warrantless searches of surface coal mining operations including the premises in which records required to be maintained were located. The Secretary of the Interior limited the scope of the regulation by a directive to inspectors to obtain warrants before entering any building on the premises. As thus limited, the regulation was upheld because coal mining is a prevasively regulated industry.

In the case of C.A.B. v. United Airlines, 399 F. Supp 1324 (N.D. Ill. 1975), aff'd 524 F.2d 394 (7th Cir. 1976), the courts considered a grant of authority to the Civil Aeronautics Board under the Federal Aviation Act to have access to "all documents, papers and correspondence, now or hereafter existing, and kept or required to be kept." Following the rule of construction that "a court should not construe a statute in such a manner as to raise a serious constitutional issue," the courts interpreted the statute so as to authorize access only to documents required to be kept or documents related to the required records.

These cases show a strong judicial reluctance to read into a statute an authorization for a warrantless search of records not specifically required to be kept by law. A serious constitutional question would be raised by a statute purporting to authorize inspection of all documents in a company's possession without a warrant. See e.g., United States v. Biswell, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972); Colonnade Catering Corp v. United States, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970); Camara v. Municipal, Court 387 U.S. 523, 87 S.Ct. 1727 18 L.Ed.2d 930 (1967); See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18 L.E.2d 943 (1967); see also FTC v. American Tobacco Co., 264 U.S. 298, 44 S.Ct. 336, 68 L.Ed. 696 (1924); U.S v. Morton Salt Co, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950).

Although I am not empowered to pass on the constitutionality of the Act or a provision of the Act which created the Commission, Weinberger v. Salfi, 422 U.S. 749 (1975); Johnson v Robinson, 415 U.S. 361 (1974), I am obliged to construe the Act. A cardinal rule of construction requires me to construe it, if possible, so as to avoid conflict with the Constitution. NLRB v. Mansion Home Center Management Corp., 473 F. 2d 471 (8th Cir. 1973). U.S. v. Biswell, supra., Colonnade Catering Corp. v. U.S., supra. With this rule in mind, I turn again to the language of the statute and to the legislative history.

Inspections and investigations are authorized "for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, * * * diseases and physical impairments originating in the [the] mines, (2) gathering information with respect to mandatory health or safety standards * * *." This language does not specifically authorize searching records in a mine office, but neither does it exclude it. The Senate Committee Report relates the absence of a warrant requirement to "the notorious ease with which many safety or health hazards may be concealed if advance warning of an inspection is obtained." This reasoning obviously applies much more directly to the areas where mining is being performed than to the records in the office.

Mining is a pervasively regulated industry because of health and safety hazards in the work place which distinguish it from most other industries. For these reasons, it is treated differently from most other industries in being subjected to warrantless inspections. But I cannot perceive any substantial differences in the records and files maintained in the mining industry and those maintained in any other industry that would justify treating the former differently under the fourth amendment. Nor does the requirement of a warrant or other legal process before inspecting personnel files maintained by Respondent appear to be so burdensome that it would affect the health and safety of the workers. The relationship of the activity of keeping records to employment safety and health is indirect at most. It is possible, of course, for a mine operator to conceal or destroy or falsify records, if he is aware of an impending inspection. The danger of such an occurrence, however, is not comparable to the danger referred to in the Senate Committee Report that safety or health hazards may be concealed if advance warning of an inspection is obtained. Nor is the danger of tampering with records unique to mining or any other pervasively regulated industry. I conclude that there is not the same urgency for warrantless inspections of mine office records as for other mine work areas. Therefore, following the rule of construction referred to earlier, and guided by the language in the Youghiogheny and Consolidation cases, I conclude that the Mine Safety and Health Act does not authorize wholesale warrantless, nonconsensual searches of files and records in a mine office.

MAY THE SECRETARY BY RULE AUTHORIZE WARRANTLESS, NONCONSENSUAL SEARCHES OF MINE RECORDS?

Section 101 of the Act (in language adapted from section 101 of the Coal Mine Safety Act of 1969) empowers the Secretary to develop and promulgate by rule improved mandatory health or safety standards for the protection of life and prevention of injuries. Pursuant to this authority, Part 50 of Title 30 was published for public comment on October 17, 1977, and became effective January 1, 1978. The question of warrantless inspections of records is not addressed in the preamble to the proposed rules or in the preamble to the final

rules. The latter document discusses objections to Proposed Rule 50.41 on the ground that it invades employees' rights to privacy. It also states that "without inspection of records beyond those required to be kept it is impossible to verify the required records." It is clear, however, that since a statute may not constitutionally authorize warrantless searches of company files and records, a fortiori, a regulation promulgated by the Secretary may not do so.

Part 50 does not explicitly authorize warrantless inspection. To so construe it would raise a serious constitutional question under the fourth amendment. I interpret the regulations so as to avoid this constitutional conflict.

Therefore, I conclude that 30 CFR 50.41 does not authorize the Secretary to inspect without a warrant Applicant's personnel files containing medical and other information, some related and some unrelated to accidents, injuries, and illnesses reportable under Part 50, or to compliance with Part 50. It follows that the regulation does not empower the Secretary to copy from these records without a warrant, information relevant and necessary to the issue of whether Applicant has complied with the injury and illness reporting requirements of Part 50.

PRIVACY ACT

In view of my conclusions stated in the section immediately above, I need not consider the issue raised by Applicant at the prehearing conference that nonconsensual access to its records by the Government would violate the Privacy Act, 5 U.S.C. § 552a. And I note that Applicant did not argue this issue in its brief. Since the Privacy Act refers to maintenance and disclosure of records by Federal Government agencies, it does not appear to be at all relevant to the issues before me.

ORDER

Based on the above findings of fact and conclusions of law, I conclude that Order No. 0637263 and Citation No. 0637262 were invalidly issued and they are hereby VACATED.

James A. Broderick

James A. Broderick
Chief Administrative Law Judge

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

JUL 12 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. BARB 78-600-P
v.	:	Sinclair Mine; Peabody Coal Company
KENNY RICHARDSON, Respondent	:	Drakesboro, Kentucky

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Rees Kinney, Esq., Sam Jarvis, Esq., Jarvis, Payton and Kinney, Greenville, Kentucky, for Respondent.

Before: Administrative Law Judge Michels

This matter is before me for hearing and decision upon the petition for assessment of civil penalty filed against Kenny Richardson, pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c) (the Act), charging Mr. Richardson with acting as an agent for a corporate operator, Peabody Coal Company, and knowingly authorizing, ordering, or carrying out stated corporate violations of mandatory standards. 1/

The standards allegedly violated are 30 CFR 77.404(a), which requires that machinery and equipment be maintained in a safe operating condition or otherwise removed from service immediately and 30 CFR 77.405(a) which prohibits men from working on or from a piece

1/ A hearing was held on this matter on March 21 and 22, 1979, in Evansville, Indiana. Petitioner and Respondent appeared through counsel. The parties have filed posthearing briefs and proposed findings and conclusions and reply briefs. Such proposed findings not adopted or specifically rejected herein are rejected as immaterial or not supported by fact.

The record consists of two volumes of transcript. In referring to the pages in the first volume, the citation will be as follows (Tr.); in referring to the second volume, the reference will be (Tr. II).

of mobile equipment in a raised position until it has been blocked in place securely. The equipment involved was a Model 1260 Bucyrus-Erie dragline which developed a crack in the lower chord or tube of the boom. In the process of repairing the machine, the boom collapsed and a welder fell to his death and others were injured. Following the accident, MSHA conducted an inquiry and thereafter charged the operator with three violations of mandatory standards, the two referred to above and one other not in issue in this proceeding. 2/ Peabody did not contest the charges and the penalties assessed were paid for the two violations which have been alleged herein (Petitioner's Exh. No. 39). Thereafter, this action was brought which alleges in effect that Kenny Richardson is individually liable under the Act for the asserted violations of mandatory standards.

The parties are in agreement that these charges involving conditions which occurred under the Federal Coal Mine Health and Safety Act of 1969 were properly brought under the Federal Mine Safety and Health Act of 1977 (Tr. 17-19).

Findings of Fact

The Peabody Coal Company is a Delaware corporation and the operator of the Sinclair Mine which is located near Drakesboro, Kentucky. This mine is a surface strip coal mine which employs approximately 353 men. The daily production of the mine is about 15,000 tons (Petitioner's Exhibit Nos. 2, 3, 39; Tr. 64-67).

Kenny Richardson, whose full name is James Kenneth Richardson, is 45 years old. He lives at 22 Circle Drive, Greenville, Kentucky, and is presently employed by the Peabody Coal Company's Sinclair Mine at Drakesboro, Kentucky. He has been employed at the Sinclair Mine since January 4, 1964. His present position is day shift master mechanic which he has held since June of 1974. The duty of a master mechanic is to be a supervisor of repair work on the stripping equipment (Tr. II, 26-28). Mr. Richardson was the day shift master mechanic in charge of the 1260 dragline on Tuesday, August 2, 1977, and also on the days immediately preceding that date.

A dragline is a type of excavating equipment which casts a rope-hung bucket a considerable distance, collects the dug material by pulling the bucket towards itself on the ground with a second rope, elevates the bucket, and dumps the material on a spoil bank, in a hopper or on a pile (see Dictionary of Mining, Mineral and Related Terms, Department of the Interior, 1968, p. 346). The Bucyrus-Erie 1260 dragline used at the Sinclair Mine is such a machine. It is

2/ The operator was also charged with violating 30 CFR 77.1713(c) for failing to keep an accurate record of the examination conducted during each shift (Petitioner's Exhibit No. 10; Tr. 77).

pictorially shown in Petitioner's Exhibit Nos. 17-21. The boom or beam of the 1260 dragline is approximately 225 feet long and weighs approximately 200,000 pounds. It is of triangular construction with two 12-inch diameter tubes or "chords" at the top and one single 12-inch diameter chord at the bottom forming a triangle with the V part of the triangle at the bottom. The three chords which form the triangle are each 12 inches in diameter. The walls of the upper chords are 1 inch in thickness, whereas that of the lower chord is one-half inch in thickness. The outside circumference of the lower chord is 38 inches. The three chords are tied together with lacing tubes approximately 6 inches in diameter which form cross-bracing to reinforce the three main chords (Tr. 91-94, 240-241; Tr. II, 112-113, 132).

In its normal working position, the boom is held stationary at a 30-degree angle off the horizontal. The cables of the boom can be dismantled and the boom can be laid on the ground if necessary (Tr. 91-92, 240). The 1260 dragline can be moved by the operator under its own power without assistance from any other machine (Tr. 99).

This machine is equipped with a pressurized system to indicate a crack in the boom. Originally, nitrogen gas was put into the tubes under pressure. Prior to the accident on August 3, 1977, nitrogen was replaced with a compressed air system. There are gauges inside the house of the machine which show the pressure and if a crack develops in a tube the pressure will go down and be visible to the operator of the machine or the oiler (Tr. 233). The pressure in the tube had gone down prior to Monday before the accident, i.e., prior to August 1, 1977, and the pressure system was turned off (Tr. 130-131, 233-234, 264). Edward Yevincy, company-wide master mechanic, had observed that the pressure gauge had gone down indicating a crack in the boom "a week maybe 10 days" before the accident (Tr. II, 187).

In 1968, Bucyrus-Erie recommended that the 1260 dragline be equipped with a "modified intermediate boom suspension system," also called the "change-over kit," a modification designed to support the boom from mast to boom support point. This system was not installed on the Sinclair Mine 1260 dragline and the reason is unknown (Petitioner's Exh. No. 38; Tr. 104). It was installed on the 1260 dragline used at Peabody's River Queen Mine, 6 miles away (Tr. II, 243-244). The 1260 dragline at Peabody's Black Mesa Mine also had the modified system installed (Tr. II, 266).

The modified intermediate boom suspension system would have been acceptable to MSHA in lieu of a block for repairing the boom (Tr. 104, 338). Mr. Richardson denied any knowledge of the suspension system. He testified that in his discussions with Bucyrus-Erie representatives about the cracks on the 1260 dragline he was never advised of the

modified system (Tr. II, 55). However, Wayne Bowling, director of all heavy equipment for Peabody, was aware, prior to the accident, that the 1260 dragline at the Sinclair Mine did not have such system (Tr. II, 247). The modified system was installed on the Sinclair 1260 dragline after the accident (Tr. II, 57-58).

Sometime before August 1, 1977, a crack developed in the lower chord of the boom. The pressure in the tube had dropped a week or 10 days before indicating the crack had developed over a period of time (Tr. II, 187). Mr. Richardson testified he was first advised as to the crack 2 or 3 days before the accident (Tr. II, 231). He was told by Bob Coppage that the crack was getting worse on August 1, 1977, at about 2:30 p.m. (Tr. II, 31, 64). He examined the machine at that time. The crack was visible. He looked at it from the catwalk and could see approximately one-third of the crack or about 10 inches (Tr. II, 65, 66). Mr. Richardson told Bob Coppage that it needed repair (Tr. II, 66).

Mr. Richardson, after completing his inspection, did not consider the machine to be unsafe and he gave instructions that it continue to operate, that is, continue its normal coal digging. The machine continued to operate for about 15 or 20 minutes of Mr. Richardson's shift (Tr. II, 67, 100, 152). The machine was also operated into the second shift for a short period of time (Tr. II, 130). When Mr. Richardson looked at the crack, he could detect "just a little movement" although it was hard to see well (Tr. II, 137). The area of the break was partly obscured by the cross-lacing tubes (Tr. II, 66).

Mr. Yevincy had noticed the crack a week or so prior to the accident and had notified the supervisor, the assistant supervisor, and the master mechanic at the time who was Gail Lee. Mr. Yevincy, on August 2, had also noticed that the crack was "moving a little" (Tr. II, 172).

Cracks had developed at the same point on the chord on the 1260 dragline before. The boom had been repaired a dozen times. On July 19, 1977, there had been a crack repaired by Mr. Yevincy (Tr. II, 124, 172-173; Respondent Exh. No. 1). Mr. Richardson talked with Bucyrus-Erie in July 1977 and was promised instructions for repair. He received certain specifications and instructions on the Saturday prior to the accident. He had also received in June of 1977, information on field repairs (Tr. II, 39-40, 43, 51; Respondent Exh. Nos. 2, 3).

The instructions received by Mr. Richardson from Bucyrus-Erie for field repairs were admitted into the record as Respondent's Exhibit No. 3. The following is the full text of the instructions for effecting repairs on the boom, except for the welding procedures:

FIELD REPAIRS

A. SUPPORTING THE BOOM DURING REPAIRS

In most cases the boom can and should be repaired while it is supported on the machine in its working position. Several methods can be used for access to the area to be repaired.

1. By using an auxiliary crane the welder can be suspended in a basket.

2. Special temporary ladders and platforms can be fabricated. If you require assistance in making these, contact the Service Department at South Milwaukee prior to making the repair.

3. Occasionally the machine to be repaired is in a mine which also has rotary drills. It is possible, depending on the machine location, to position the boom over the mast of the drill so that the repair work can be done from the mast of the drill.

If a section of main chord must be replaced or if numerous cracks are to be repaired, it may be necessary to lower the boom. In this case, the following method of supporting the boom should be followed:

1. As a general rule, use a minimum of four cribs. One under boom point, one under lower apex and one each above and below the chord which is to be removed or repaired. These cribs must be placed at a panel point.

2. When placing cribs, their height should be such that the boom chords are as straight as possible and so that no stress remains in the chord due to its dead weight.

3. Both sides of the boom must be supported even though only one side is to be repaired.

After inspecting the crack on August 2, 1977, Mr. Richardson discussed the method of repair with the second shift master mechanic, Gail Lee, and the day shift machine operator, George Barnett. They considered the possibility of swinging the boom up toward the spoil to make a better work area. There was no discussion of blocking the boom (Tr. II, 68-69, 96-98, 135). Mr. Richardson testified that he did not instruct the second shift mechanics; rather, he stated that he had advised them (Tr. II, 152). He testified further that while

the procedure for repair was discussed, he did not set it up (Tr. II, 99). Mr. Richardson described his participation in the discussion of the repairs as follows:

> A. I told [Gail] that as soon as he got his people over there to shut the machine down, go to work on it, get a good safe working area at the vicinity that he was going to work on the boom, make sure that they had their safety belts and everything in good order, and repair it, put the gussets on, and to talk it over with his crew and see which position that they would rather have the machine in; and I advised him to do that.

(Tr. II, 97).

After observing the crack, Mr. Richardson recognized that immediate repairs were necessary. He told Bob Coppage "that we needed to make some repairs pretty quick" (Tr. II, 66, 201). In response to the question of whether he felt that the machine should be shut down for repairs, Mr. Richardson answered "As soon as I got the available equipment to help over" (Tr. II, 67).

Mr. Richardson was fully familiar with the requirements of the law and the regulations relating to mining and specifically to mandatory standards 30 CFR 77.404(a) and 77.405(a) (Tr. II, 77-80, 162-163).

The repairs, while discussed on the first shift, were actually begun on the third shift which ran from midnight to 8 a.m. Master mechanic Mr. Barber was in charge on this shift (Tr. 150-151). The method used in the past was to take a ladder and secure it to get down to the point of the crack and to use safety belts (Tr. II, 61). The repair on this occasion was approached in the same manner except that a platform for the welder to stand on was attached to the boom (Tr. II, 63). The intended method of repair was to first bevel 6 inches on the side of the lower chord and then to weld the opening solid. After welding the bevel, a gusset plate was to be welded to the chord for reinforcement (Tr. 95-97).

In this instance, the beveling was started approximately 4-1/2 inches above the 9 inches which were still intact of the 38-inch circumference of the chord. Roger Tapp, one of the welders, proceeded to cut the chord and when about 9 inches had been beveled, only 4-1/2 inches of solid wall remained. The lower chord was weakened to the point that it broke. The excess in the load placed on the two upper tubes by the weight of the boom pulling down caused the upper chords to bend upward. As the boom bent upward and back toward the machine, suspension cables running from the mast to the point of the boom went slack allowing the auxiliary support cables to go slack causing the boom to fall to the ground. At the point of

the crack, the boom fell approximately 100 feet to the ground (Tr. 95-97, Petitioner's Exh. Nos. 17-35). The testimony and other evidence indicates that the lower chord, with a circumference of 38 inches, was cracked for approximately all but 9 inches (Tr. 94, 159-161, 217, 250, Petitioner's Exh. Nos. 15-15, 36).

As a result of the accident, the welder, Roger Tapp, fell to the ground and was killed instantly and other miners suffered some injuries (Tr. 85-86; Respondent Exh. No. 6).

During the repair work, the boom of the dragline was not blocked or otherwise secured in place, but was worked on while in its normal raised position for digging operations (Tr. 97, 270, 277). If the machine had been equipped with the modified intermediate boom suspension system, it would not have been necessary to block the boom, according to the testimony of MSHA personnel (Tr. 104, 338). Also, it would not be necessary to block the boom for welding on handrail steps or other work not involving the structure of the boom (Tr. 227-228).

The record fails to reveal the reason why the 1260 dragline at the Sinclair Mine was not equipped with the modified intermediate boom suspension system. The literature which Mr. Richardson received from Bucyrus-Erie does not mention such a system. There is no evidence that the lack of a suspension system on the Sinclair Mine's dragline was a matter of common knowledge at the mine. Only Wayne Bowling testified he was aware that this machine did not have this system (Tr. II, 247). The record does not show that he communicated this information to the Respondent or any other persons at the mine. Mr. Bowling asserts that he did not know whether the boom would have been prevented from falling had it been so equipped (Tr. II, 254).

The 1260 dragline at Sinclair without the modified intermediate boom suspension system was unsafe to operate with a crack in the chord. Inspector James Utley testified that it was unsafe because flexing of the boom through the continued use of the machine would enlarge the crack to the point where the chord would no longer hold. He testified, however, with full knowledge of the ultimate result and also with knowledge that there was no modified suspension system on the machine (Tr. 168). David Whitcomb, a holder of a Bachelor of Science degree in mechanical engineering and an authorized representative of the Secretary, likewise testified that the machine was unsafe with the crack in the chord because the crack would increase and the boom would eventually fall (Tr. 267).

Witnesses for the Respondent and the Respondent himself testified to the effect that the machine in their opinion was safe and that there had been no reason to foresee an accident. This testimony is that of Wayne T. Bowling, director of all heavy equipment (Tr. 235-249, 256-259); Ed Yevincy, company wide master mechanic (Tr.

176-177); George Wallace Barnett, day shift operator for Peabody (Tr. II, 201-202); and Mr. Richardson, the Respondent (Tr. II, 95, 267).

On the question of the safety of the machine, I accept the testimony of the authorized representatives of the Secretary over the Respondent's witnesses because the ultimate breaking of the chord demonstrates that the machine was unsafe. I accordingly find that it was unsafe to continue to operate the machine.

For reasons explained in the discussion, as to the first alleged violation Kenny Richardson knew or should have known that the 1260 dragline was unsafe. As to the second alleged violation, he did not know or have reason to know that the boom of the 1260 dragline should have been blocked while men were working on it with the boom in a raised position.

Discussion

The charge in the petition is that the corporate operator, Peabody Coal Company, violated mandatory safety standards 30 CFR 77.404(a) and 77.405(a) and that Respondent "acting as an agent of the corporate operator within the meaning and scope of section 3(e) of the Act, knowingly authorized, ordered, or carried out each of the aforesaid corporate violations." The petition seeks a penalty of $500 for each of the two alleged violations.

The issues on the merits are (a) whether the corporate operator, Peabody, violated the standards cited, (b) if so, whether Respondent is its agent, and (c) whether Respondent knowingly, authorized, ordered, or carried out these violations. If a violation is found, there is a further issue as to the amount of the penalty to be assessed. 3/

3/ Respondent has also raised a constitutional issue in this proceeding. He contends that section 110(c) of the Act violates certain of his rights guaranteed by the Constitution of the United States. Specifically, he argues that he is subjected to a penalty solely because his employer does business in the corporate form rather than as a partnership or some other business form and that this violates his constitutional right to equal protection of the law. Respondent previously appealed this case on such constitutional issue to the United States Court of Appeals for the Sixth Circuit. This petition was dismissed as premature by the court in an order issued April 25, 1979. The Respondent has preserved this issue. My ruling is the same as that in my prior order of November 28, 1978, in which I rejected this contention as a ground for dismissal.

The initial question is whether Peabody Coal Company violated the standards cited. Peabody was not named as a party-respondent in this proceeding and it made no appearance. Prior to the hearing, Peabody, apparently in settlement of charges relating to the alleged violations of 30 CFR 77.404(a) and 77.405(a), paid penalties of respectively $2,050 and $750 as shown on a computer printout (Petitioner's Exh. No. 39; Tr. 360-362).

Respondent in his brief has not raised, at least directly, any issue as to the liability of Peabody, but MSHA lists this is an issue presented. MSHA contends it has shown in this proceeding that Peabody has violated the cited standards and it relies for its position on the decision of the Board of Mine Operations Appeals in Everett L. Pritt, 8 IBMA 216 (1977). MSHA also is apparently attempting to rely on the payment by Peabody of civil penalties as a basis for its position. In its posthearing brief, MSHA states "The corporate operator disposed of its case at the MSHA Assessment Office level, and the assessment imposed by that office is deemed to be the final order of the Commission pursuant to 30 CFR 100.6(c)." As to this latter argument, it is my view that the mere payment of penalties under assessment procedures set up by the Secretary is not an admission of guilt by the operator. MSHA conceded as much on the record by stating that it did not claim that the payment of the civil penalties by Peabody was an admission of liability on its part (Tr. 23-24).

The issue, therefore, is narrowed to whether there is a showing on this record of violations of the cited standards by Peabody. The corporate operator, as noted, was not present at the hearing and it had no opportunity in this proceeding to be heard on the alleged violations. The Board of Mine Operations Appeals held in Everett L. Pritt, supra, that in spite of an operator's absence, the operator could be found liable for the purposes of section 109(c) of the 1969 Act. This section is comparable to section 110(c) of the 1977 Act. Therein the Board stated, overruling the administrative law judge, that the clause "whenever a corporate operator violates a mandatory health or safety standard * * *" establishes merely a prima facie case under section 109(c) of the 1969 Act. According to the Board, MESA (now MSHA) must establish that the corporate operator violated the standard at issue "but such may be established in a section 109(c) proceeding in the absence of the operator as a party." Board Member Schellenberg dissented, observing that the Board's decision could result in a finding of liability on the part of the agent, though the corporation could be found to be not liable.

The Board cites two other cases decided by administrative law judges in which it asserts that its theory of the law has been followed. However, in those cases the judges made no finding, at least directly, of liability on the part of the corporate operator. In MESA v. Ronald Corl, Docket No. PITT 75-445-P (April 23, 1976), cited by the Board, the judge appears not to have dealt at all with the

issue of corporate operator liability. The second case cited by the Board is MESA v. Daniel Hensler, Docket No. VINC 75-374-P (March 31, 1976). In that case, Judge Luoma found only that "the testimony presented in the instant case within my opinion constitutes a prima facie showing of liability against the operator in a case where the operator is a party." [Emphasis added.]

In my view, the Board was wrong in its decision in the Pritt case. I agree with Board Member Schellenberg in his dissent, not only for the reasons he stated but because there is no way the condition precedent, so clearly set forth in the section, can be met where the corporate operator has not had an opportunity to be heard. 4/ Nevertheless, the precedent of the Board appears to be binding unless and until overruled by the Review Commission. The Board decision requires a prima facie showing of liability of the corporate operator as a condition precedent. I will therefore consider the evidence against the corporate operator in terms of the Board's theory as set out in the Pritt case.

There is another matter of a threshold nature and that is whether Mr. Richardson is an agent of the corporate operator, Peabody Coal Company. I find that he is. "Agent" is defined in Section 3(e) of the Act as "any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine." Mr. Richardson is and was a master mechanic on the day shift for the Peabody Coal Company. He was in charge of the 1260 dragline on the first shift and thus fits the definition of an "agent." He had general supervisory authority over the 1260 dragline involved in the alleged violations even though other master mechanics were in charge on the later shift. Thus, I find that Mr. Richardson was an agent for the corporate operator, Peabody Coal Company. See the Hensler case, supra, decided by the Board of Mine Operations Appeals, in which Daniel Hensler, the Respondent, was a section foreman.

4/ It seems to me that the general solution in light of the language of section 110(c) is to name both the corporate operator and the individual in a joint action. In any such action, the corporate operator should not be permitted to settle the proceeding unless it admits to the alleged violations. Cf. United States v. Consolidation Coal Company and Donald Kidd, 504 F.2d 1303 (6th Cir. 1974). In that case the charge under the criminal subsection of the Act involved both the corporate operator and the individual. Even the Board of Mine Operations Appeals in the Everett L. Pritt case, 8 IBMA 216 (1977), while authorizing a separate trial against the individual, stated that it would be fairer and simpler to join related sections 109(a) and (c) proceedings (now 110(a) and 110(c)).

Alleged Violation of 30 CFR 77.404(a)

The first allegation against Mr. Richardson concerns the standard 30 CFR 77.404(a) which provides: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

The charge as set out in the notice of violation dated August 4, 1977 (Petitioner's Exh. No. 4), is as follows: "Mobile equipment in unsafe condition was not removed from service immediately, in that, a crack in the lower chord of the boom of the Bucyrus-Erie 1260 dragline was known to exist and not removed from service."

The evidence received in this proceeding is sufficient in my view to establish a prima facie case against Peabody Coal Company. The equipment, the 1260 Bucyrus-Erie dragline, had not been fitted with the modified intermediate boom suspension system and therefore was vulnerable to a collapse of the boom such as that which occurred on August 3, 1977. Under the circumstances, cracks in the chords of the boom made it highly unsafe. Two witnesses for the Petitioner, both authorized representatives of the Secretary, testified that the boom was unsafe. Their testimony, it appears, was based on their knowledge that the machine was not equipped with the modified intermediate boom suspension system (Tr. 168, 273). Both witnesses testified to the effect that the boom flexes and that each time a load is picked up and then dropped there would be a flexing which would tend to widen the crack until eventually the chord would be severed. Correspondence from Bucyrus-Erie (a letter to Mr. William Craft, dated September 22, 1977, Petitioner's Exh. No. 38), leaves no doubt that the machine in its condition was unsafe. The letter states: "[t]he crack should have been repaired immediately when it was detected."

Other testimony which will be reviewed in more detail below is to the effect that the equipment was not unsafe at the time on August 2, 1977, that Mr. Richardson was in charge. Mr. Richardson claimed in his testimony that the machine was safe and that it was the cutting into the new metal that made it unsafe. Other witnesses asserted that the machine was safe in their opinion, even though the lower chord had a crack in it of two-thirds its diameter. These witnesses were Wayne T. Bowling, director of all heavy equipment for Peabody, Ed Yevincy, oiler and machine operator for Peabody, and George Wallace Barnett, also an operator of the 1260 dragline for Peabody. Mr. Bowling knew that the 1260 dragline at Sinclair was not equipped with the modified suspension system although he claimed he did not know whether the system would have prevented the boom from falling. As to these latter witnesses, I construe their testimony to mean that, based on the condition as they understood it at the time, they did not believe it to be unsafe. The fact as now known that the broken chord was on a machine not equipped with the modified

intermediate boom suspension system and that it was vulnerable to collapse leaves no basis for their contentions that it was safe. The crack was extending further because of the flexing of the boom and it was only a matter of time until the chord would break and the boom would fall, subjecting miners in the area to the hazard.

Accordingly, I find that the machine was unsafe to operate and pursuant to 30 CFR 77.404(a) should have been removed from service immediately. It was not removed, however, but continued to operate even after personnel had become aware that the crack was enlarging. Therefore, the evidence establishes a prima facie case against the corporate operator, Peabody Coal Company, for a violation of mandatory standard 30 CFR 77.404(a).

The Respondent is an individual and is charged under section 110(c) of the Act as an agent of Peabody Coal Company "who knowingly authorized, ordered, or carried out such violation." Mr. Richardson testified that he had specifically instructed the miners to continue to operate the machine for the remainder of the day shift, a period of 15 to 20 minutes (Tr. II, 152). Thus, he authorized or ordered such violation and the only issue remaining is whether he did so "knowingly." Mr. Richardson admitted during his testimony that he was familiar with the two mandatory standards charged in this proceeding.

The word "knowingly," as used in civil and criminal statutes, is not a term of precise definition. The courts have given various shades of meaning to the word, depending upon the context in which it was considered. See 51 C.J.S. Knowingly (1969), and cases cited thereunder. There is no legislative history under either section 109(c) of the 1969 Act or section 110(c) of the 1977 Act which provides guidance in construing the meaning of this term. Moreover, neither the Board of Mine Operations Appeals nor the Commission has interpreted the meaning of the word "knowingly" in section 109(c) of the 1969 Act. The Commission has not yet construed the meaning of the word in the 1977 Act.

Respondent urges the test applied by Administrative Law Judge Schweitzer in MSHA v. Harvel, Docket No. DENV 77-40-P (November 16, 1978), in which he states as follows:

> "Knowingly," for the purpose of its application to this case regarding section 109(c), means done "intentionally" or "consciously," with knowledge of the facts. It requires more than that the act was done by way of oversight or inadvertence or was an accident, but it does not require that the act was willful, involving reckless disregard of the law.

MSHA argues that the word should have the same meaning as that under contract law, that is, knowing or having reason to know.

The only court case treating the question appears to be United States v. Consolidation Coal Company and Donald Kidd, 504 F.2d 1330, 1335 (6th Cir. 1974). There, the court in construing a criminal provision of the Act stated to the effect that "willfully" means something more than "knowingly" and that even "willfully" need not connote bad purpose, either to disobey or disregard the law or an evil motive.

In support of its position that "knowingly" means knowing or having reason to know, MSHA cites two other cases decided by administrative law judges which bear on this question, namely, Secretary of Labor v. Cowin and Company, Inc., Docket Nos. HOPE 76-210-P through HOPE 76-213-P (Judge Broderick, September 14, 1978), and MSHA v. A. W. Garrett et al., Docket Nos. NORT 76X400-P, etc. (Judge Steffey, June 30, 1977), as well as the United States District Court case, United States v. Sweetbriar, 92 F. Supp. 777, 780 (D.C.W.D.S.C. 1950).

In the Sweetbriar case, the court held:

> [T]he term "knowingly" as used in the Act [the Walsh-Healey Public Contracts Act], does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.

92 F. Supp. 777 at 780.

In my view, the meaning given to the term "knowingly" by the court in Sweetbriar, even though the court was considering a wholly different statute, is one which should be applied to the same term in section 110(c) of the Mine Act. If a showing of actual knowledge that the condition was unsafe was required, it would be applying an extremely strict standard to this civil statute. This does not appear to be the intent of Congress. Accordingly, I will construe the term to mean knowing or having reason to know. Such construction would be in accordance with the Congressional purpose to foster safety in the work place.

Applying such a standard, Mr. Richardson, as to the first alleged violation, i.e., not removing unsafe equipment from service immediately, either knew or had reason to know that the equipment was unsafe under the Sweetbriar reasoning; i.e., he knew or had reason to know when he had such information as would leave a person exercising reasonable care to acquire knowledge of the facts in question or to infer its existence. My reasoning will be developed in the paragraphs which follow.

Preliminarily, it should be considered that the 1260 dragline at the Sinclair Mine was not equipped with the modified intermediate boom suspension system. Had the machine been so equipped, there would not have been violations of either standard as alleged. MSHA officials concede that had the machine been equipped with the modified system, there would have been no need for blocking the boom. Additionally, the manufacturer in its letter of September 29, 1977, observed that such suspension system properly maintained and adjusted would have supported the boom when the lower chord was severed. It follows that had the machine been so equipped, it could have been safely operated for at least the periods at issue in this proceeding.

In Mr. Richardson's favor is the lack of any evidence that either he or any of his peers on the job site had knowledge that the 1260 dragline lacked the modified intermediate boom suspension system. Mr. Richardson testified, and there is no proof to the contrary, that he was without knowledge of the modified suspension system. He denied having any information of this system from the manufacturer, and the literature in evidence sent to him by Bucyrus-Erie does not mention the modification. Other witnesses who worked with him considered the machine to be safe, i.e., Ed Yevincy, oiler and machine operator, and George Wallace Barnett, also a machine operator. This testimony is illogical unless it is considered as their view prior to the accident and without their knowledge of the machine's lack of the supporting modified intermediate boom suspension system which would have prevented collapse. One witness, Wayne T. Bowling, director of all heavy equipment for Peabody, did know that the Sinclair Mine 1260 dragline had not been equipped with the modified system. It is something of a mystery why this information was not communicated to the management of the Sinclair Mine, or to the master mechanics but there is no evidence that it was. Apparently, Mr. Bowling did not know that such equipment was necessary to prevent the boom from falling when a chord is severed, although he should have known this.

Furthermore, Mr. Richardson had seen this boom crack a number of times and either had directed or seen others direct repairs. In none of those instances had the boom been blocked and the repairs had always been conducted safely.

In spite of those factors, Mr. Richardson at least had reason to believe that this 1260 dragline was unsafe. Even though he had no knowledge about the modified intermediate boom suspension system and the safety protection such would have provided, he did have considerable direct knowledge about a potentially dangerous situation. He either knew or had the responsibility for knowing as much as 10 days before the accident that a crack had developed in the boom. Ed Yevincy testified that the pressure gauge had gone down a week or maybe 10 days before. The pressure gauge is an important part of the safety equipment placed on the 1260 dragline. The very purpose of this gauge is to give a warning of a developing hazard. The manufacturer in its letter of September 29, 1977, refers to it as a "crack

detection and warning system." There is no clear evidence that Mr. Richardson personally knew of this lack of pressure until August 2, but he had the responsibility for operating this machine and should have known that the pressure was down.

More than that, Mr. Richardson knew 2 or 3 days before the accident that a crack had developed and he was told by Bob Coppage on Monday, August 1, that the crack had extended. It not until August 2 at 2 p.m. that Mr. Richardson decided to examine the crack. At that time it was described as "getting worse." Mr. Richardson personally examined the crack, although from some distance, and he determined that it needed quick attention. Even though he could not see the entire crack, he was able to observe about a third of it, which indicated or should have indicated to him a very serious condition. Both Mr. Richardson's actions and his testimony suggest that he knew it was serious. Directly after observing the condition, he began discussions with other personnel about the method of repair. He told Bob Coppage that "we needed to make some repairs pretty quick" (Tr. II, 66). While he testified that he did not believe the machine to be unsafe, he did indicate in response to a question that it should be shut down for repairs "[a]s soon as I got the available equipment to help over" (Tr. II, 67).

Considering the evidence described above, there is no doubt that Mr. Richardson knew that he was faced with a very bad crack. It is also clear and his actions show that he knew it had to be repaired without delay. It follows that he must have known that at some point a complete break in the chord was possible as long as the machine continued to operate. Even if it is accepted, as it must be on the basis of this record, that Mr. Richardson was unaware of the lack of the modified intermediate boom suspension system, there is also no evidence that he knew one way or the other what would happen if the chord broke completely through. It was the kind of situation which would raise a person's suspicion, particularly a mechanic with considerable experience, that something bad was happening which could well endanger personnel in the area. Mr. Richardson clearly had "such information as would lead a person exercising reasonable care to acquire knowledge of the facts in question or to infer its existence," that is, the hazardous and unsafe nature of the broken chord. United States v. Sweetbriar, supra. It is not enough, it seems to me, that Mr. Richardson had allowed the machine to operate with a cracked chord in the past. This means only that the miners were lucky it did not break in the past, not that it was safe or that it should have been considered as safe.

Mr. Richardson was faced with a situation which had the obvious manifestations of a hazard, that is, a serious crack and one that was spreading under use. Mr. Richardson recognized the seriousness of it by actions and words and should have known that he was dealing with a hazard to the miners. In spite of this, he specifically directed that the 1260 dragline continue to operate until the end of the shift.

Respondent argues in its brief that "immediate" does not mean the present instant but "a reasonable time in view of the particular facts and circumstances of the case under consideration." I reject this interpretation of the word "immediate." Although only 15 or 20 minutes were involved after Mr. Richardson had made his inspection and directed the continued operation of the machine, that was sufficient time for the chord to sever and the boom to collapse. The exact time in which the chord would have become completely severed under use was unpredictable. Accordingly, when the hazard was discovered the machine should have been taken out of use immediately, that is, at the exact time of the discovery.

Furthermore, the hazard was something that existed not only for the few minutes mentioned, but, in fact, for perhaps a week or more. The pressure in the gauge was lost a week or 10 days prior to the accident. Mr. Richardson knew at least by August 1 that the lower chord was cracked and that the crack was expanding. The machine constituted a hazard even at that earlier time and Mr. Richardson either knew or should have known this.

Accordingly, for the reasons stated above, I find that Mr. Richardson knew or should have known that the 1260 dragline was unsafe and should have removed it from service immediately.

In summary, the evidence establishes a prima facie violation of 30 CFR 77.404(a) by the corporate operator, Peabody Coal Company, and that Respondent, Kenny Richardson, as the agent of such corporation, knowingly authorized, ordered, or carried out such violation.

Alleged Violation of 30 CFR 77.405(a)

The second allegation against Mr. Richardson concerns the standard 30 CFR 77.405(a) which reads in part as follows: "Men shall not work on or from a piece of mobile equipment in a raised position until it has been blocked in place securely."

The charge as stated in the notice of violation dated August 4, 1977 (Petitioner's Exh. No. 7), reads as follows: "Men shall not be required to work on or from a piece of mobile equipment in a raised position until it has been blocked in place securely."

The evidence, I believe, is sufficient to establish against Peabody Coal Company a violation of this standard. 5/

Respondent contended or at least seemed to contend during the course of the hearing, that the standard was not applicable to this

5/ The discussion in the opinion above, with respect to the condition precedent of a violation by a corporate operator, is equally applicable to the alleged violation of this mandatory standard.

particular machine, the 1260 dragline. Respondent appeared to argue that because of the huge nature of the machine the alternatives mentioned by MSHA other than the modified intermediate boom suspension system were not really practical. These alternatives included lowering the boom to the ground or lowering it part way over a spoil pile. Both of these alternatives, as shown on the record, would create some difficulties. Nevertheless, I believe the record is clear that the boom could have been so blocked. The manufacturer in its instructions on field repairs recommends supporting the boom during repairs, in at least some circumstances, that is, where a section of the main chord must be replaced or numerous cracks are to be repaired. This demonstrates quite clearly that the boom can be supported and, of course, there was no other option but to do so in this case where the machine was not equipped with the modified intermediate boom suspension system. The point may be moot for the future, however, since the machine is now equipped with the modified system and in most, if not in all instances of repair, it may no longer be necessary to support the boom.

Respondent also argued that the 1260 dragline was not "mobile" equipment. The machine is large and cumbersome and apparently moves very slowly over the ground. However, it is operated and moved under its own power. In my view, it comes within the definition of the term "mobile" as used in the standard.

Accordingly, I find that the evidence establishes a prima facie case of a violation of the standard 30 CFR 77.405(a) by the corporate operator, Peabody Coal Company.

The remaining question is whether or not Respondent, as agent of the corporate operator, "knowingly authorized, ordered, or carried out such violation."

A principal argument of the Respondent is that he had no duty, authority or responsibility for the implementation of the repairs. He claims that such was the responsibility of other master mechanics, including Gail Lee of the second shift, and M. C. Barber, master mechanic of the third shift when the accident occurred. Also, Respondent denies that he instructed anyone to make the repairs and argues that there is lack of any direct evidence to the effect that he authorized, ordered, or carried out the repair procedures (Respondent's Brief, pp. 22-23). He maintains that he was home in bed when the accident occurred and cannot be held accountable for the repair activity.

The record shows that there are eight master mechanics at the Sinclair Mine working on three shifts. Each is in charge of certain machines during their respective shifts. Kenny Richardson, during the day shift, had the responsibility for three machines including the 1260 dragline. According to some of the testimony, the day shift

master mechanics have no greater authority than the master mechanics on other shifts. However, the evidence shows they do have charge of ordering parts since parts are more readily available during the daytime. Furthermore, the daytime master mechanics, even if they do not specifically direct the repair work to be done on other shifts, wield significant influence over the method of such repairs. Wayne T. Bowling, companywide master mechanic, expressed it as follows:

> Q. What is the--you've made a distinction between the day shift master mechanics. Now what is the basis for that distinction if they have similar powers and authority?
>
> A. What is it? They are out at the times when we have the parts. In the daytime they do most of the setting up when there's a better class of people in the daytime for repairs, welders. We have more-experienced people on days a lot of times and that's the distinction we make.
>
> And they know where the parts are and they do their ordering before they turn in to their supply people what they need and the supply people in the daytime what it would take to keep the night shift--to help them out and to get the material down there.
>
> And then they go discuss it with them in the afternoon and they take over where they left off.

(Tr. II, 241).

Mr. Richardson's testimony on his own authority drew a distinction between instructing other master mechanics, and advising them. He generally testified that while he advised on the repairs, he did not instruct the other master mechanics. At one point, however, he testified that he did instruct them about the repairs to be made, but he did not instruct them as to how to do the repairs (Tr. II, 128).

Other witnesses testified, generally, that the daytime master mechanic made the decision on repairs. George Wallace Barnett, day shift operator, stated that materials and parts are ordered on the day shift and that as far as he knew, the master mechanic on the day shift makes the decision on the repairs to be made (Tr. II, 207). Gene Porter, the third shift oiler, testified that he supposed Mr. Richardson was the lead master mechanic at the mine (Tr. II, 225). John Cooper, day shift welder, testified he was told by the superintendent that Kenny Richardson was the lead master mechanic at the Sinclair Mine (Tr. II, 314). Wayne Bowling testified that Mr. Richardson was the "lead master mechanic" over this particular machine (Tr. II, 250). Kenny Richardson, at the investigational hearing conducted after the accident, according to the testimony of a

witness, admitted that he had set up the work procedures for the repair of the boom (Tr. 305). Also, it was Mr. Richardson who contacted Bucyrus-Erie for instructions and assistance.

The evidence outlined above establishes that, at the very least, Mr. Richardson shared the authority for setting up the procedures to repair the boom. He seems to argue because others shared the responsibility that he cannot be held liable. It seems to me that if Mr. Richardson had some responsibility along with others, the mere fact that the others are not charged in this proceeding would not relieve Mr. Richardson of his responsibility. Furthermore, the evidence is sufficient to show that Mr. Richardson was involved to a greater extent than merely sharing the responsibility with other master mechanics. While he claims that he only instructed the other mechanics in how to go about the repair, it is evident from the record that this instruction, in light of the superior authority held by the daytime mechanics, amounted to a virtual direction. It would be unlikely that other mechanics would countermand his instructions and the facts show that they did not do so in this case.

In the discussions and instructions concerning preparing for the repair work, no serious consideration, if any, was given to the matter of supporting the boom. Mr. Richardson gave instructions or advice on the general manner of preparing for the repair, along with certain safety precautions, but he failed to direct or authorize supporting of the boom.

The final question under this alleged violation is whether Mr. Richardson knowingly authorized, ordered, or carried out the violation. His knowledge or reason to know is much less clear than with the previously considered violation. In the prior violation the physical evidence was there for him to see; however, this situation is considerably different. In the first place, it was not a common practice to support the boom during repair work. Most of the evidence suggests that it was not considered necessary in the trade to support the boom, though this was probably based on the fact that other similar machines are equipped so as not to collapse. Specifically, it had been Mr. Richardson's prior experience that the boom could be repaired while in its raised position.

The manufacturer's instructions which Mr. Richardson had received prior to the accident indicate certain circumstances where the boom should be supported, but it does not state that this is necessary for safety or otherwise. In fact, the instructions state specifically that in most cases the boom can and should be repaired while supported on the machine in its working position. It is only in certain circumstances, such as where a main chord must be replaced or if numerous cracks are to be repaired, that lowering the boom "may be necessary."

The problem, in part, may have been that other 1260 draglines were equipped with the modified intermediate boom suspension system which, with the machine so equipped, would have supported the boom when the lower chord was severed. The issue here, however, is not whether Mr. Richardson had reason to believe the machine or the procedure was unsafe, as with the prior citation. It is solely whether he knew or should have known the boom was required to be blocked and authorized or ordered the repair without such blocking. It seems to me, considering especially that blocking would not have been necessary with the modified suspension system, that the situation was sufficiently confusing and ambiguous as to preclude a finding of knowledge on Mr. Richardson's part.

Accordingly, for the above-stated reasons, I find that Respondent did not know or have reason to know that the boom of the 1260 dragline should have been supported or blocked while men were working on it with the boom in a raised position.

Mr. Richardson's position is distinguishable from that of the operator. The operator is held to a standard of strict liability in a situation of this nature, whereas for the individual to be liable, he must have "knowingly" participated in the violation. Moreover, the operator in fact had knowledge of the lack of the modified suspension system on the machine because its employee, Mr. Wayne Bowling, was aware of this deficiency. Mr. Richardson had no such knowledge.

Assessment of Civil Penalty

Pursuant to section 110(c) of the Act, a person found in violation "shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d)." Subsection (a) is here applicable and it provides that a violation shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each violation. Under subsection (i) of section 110, the Commission in assessing civil penalties shall consider (a) the operator's history of previous violations; (b) the appropriateness of such penalty to the size of the business of the operator charged; (c) whether the operator was negligent; (d) the effect of the operator's ability to continue in business; (e) the gravity of the violation; and (f) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation. The Board of Mine Operations Appeals held in Daniel Hensler, 5 IBMA 115 (1975), that only two of these criteria are inapplicable, namely, (b) and (d). I will hereafter consider the others.

There is no history of previous violations on the part of Mr. Richardson (Tr. 12). Since Respondent did not personally participate in the abatement of the violation, no weight is given one way or the other to good faith abatement (Tr. 14-15). The violation was

grave in that the collapse could have occurred at any time and up to eleven men were exposed to the hazard of the boom falling (Tr. 180). Mr. Richardson was more than ordinarily negligent in that he knew or should have known of the unsafe condition of the machine over which he had responsibility.

The Secretary has recommended a penalty of $500 for each violation. In light of all the circumstances discussed in this decision, I believe that such a penalty is appropriate and so assess that amount for the knowing authorization, ordering, or carrying out a violation of the mandatory standard 30 CFR 77.404(a).

Conclusions

1. The Respondent, Kenny Richardson, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

2. For the reasons stated above, Respondent knew or should have known that the 1260 dragline was unsafe and by failing to remove it from service immediately, knowingly authorized, ordered, or carried out a violation of 30 CFR 77.404(a).

3. For the reasons stated above, Respondent did not know or have reason to know that the boom of the 1260 dragline should have been blocked or supported while men were working on the boom in a raised position, and accordingly did not knowingly authorize, order, or carry out, as charged, a violation of mandatory standard 30 CFR 77.405(a).

ORDER

It is ORDERED that Respondent, Kenny Richardson, pay the penalty assessed herein in the sum of $500 within 30 days of the date of service of this decision upon him.

Franklin P. Michels

Franklin P. Michels
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 13, 1979

HILO COAST PROCESSING COMPANY, Applicant	:	Applications for Review
v.	:	Docket No. DENV 79-50-M
	:	Citation No. 373631; 10/6/78
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. DENV 79-51-M
ADMINISTRATION (MSHA),	:	Citation No. 373632; 10/6/78
Respondent	:	
	:	Docket No. DENV 79-52-M
	:	Citation No. 373633; 10/6/78
	:	
	:	Docket No. DENV 79-213-M
	:	Citation No. 373655; 12/21/78
	:	
	:	Docket No. DENV 79-296-M
	:	Order No. 374481; 1/26/79
	:	
	:	Docket No. DENV 79-297-M
	:	Order No. 374482; 1/26/79
	:	
	:	Docket No. DENV 79-298-M
	:	Order No. 374483; 1/26/79
	:	
	:	Docket No. DENV 79-299-M
	:	Order No. 374460; 1/26/79
	:	
	:	HCPC Quarries & Mill

DECISION

Appearances: Hugh Shearer, Esq., Goodsill, Anderson & Quinn, Honolulu, Hawaii, for Applicant;
Marshall Salzman, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent.

Before: Judge Charles C. Moore, Jr.

While there are eight docket numbers listed above, there are actually only four violations alleged. This is because four citations were issued, three involving noise, one involving dust. Thereafter, because the Applicant had made no attempt to abate the

violations because it was challenging jurisdiction, the orders were issued with respect to each of the citations. It was stipulated at the trial in Honolulu, that there was no attempt on the part of management to abate the violations and accordingly it is obvious that if the citations were valid, the orders were equally valid. It was for this reason that I recently denied a motion by the Applicant for temporary relief with respect to the orders.

I will deal with the dust violation first. In the first place, there is no doubt that this particular company is in dire financial straits. It cannot afford to go to any great expense and still hope to remain in business. The evidence clearly establishes that fact.

The evidence also establishes as a fact that a dust problem exists at the Hilo Mine only 20 percent of the time. The rest of the time, 80 percent of the time, there is too much water and mud. The miners use and are forced to use and are penalized if they do not use, respirators during the dusty season. In my opinion, that is sufficient compliance with the dust standard. I therefore rule invalid and vacate the citation that was issued in this case.

The other three citations involved in these cases concern the noise standard. The noise standard under the metal and nonmetal regulations is entirely different from that involved in coal mine regulations. The coal mine regulations, and this includes surface mines as well as the surface areas of underground coal mines, would allow an operator to provide one engaged in moving gravel from one place to another with a front-end loader, to wear ear protection as a primary method of controlling the noise. The metal and nonmetal standards, however, do not allow ear protection (ear muffs) as a primary protection, but only after a certain amount of money is spent in trying to reduce the noise in general. Under the Occupational Safety and Health Administration, a number of rulings have been made regarding the noise standard, which is identical to the metal and nonmetal standard, and a number of court decisions have been involved, but regardless of decisions, the fact remains that it is a question of judgment as to how much money an operator should be required to spend, in his financial condition, to reduce noise before resorting to either ear plugs or ear muffs.

The noise standard applicable to sand and gravel pits, and that is what was involved in the instant cases, appears in 30 CFR 56.5-50 and consists of slightly more than one-half of a page of the Code of Federal Regulations. A crucial subsection is subsection (b) which states:

> When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection

equipment shall be provided and used to reduce sound levels to within the levels of the table.

The courts have ruled that feasibility includes economic feasibility, as well as technical possibility, but there has been no ruling which has been brought to my attention delineating how these feasibility requirements are to be judged.

The published standards refer to "sound level dBA slow response" followed by various numbers from 90 to 115 with time periods for allowable duration associated with each.

While the noise standard enforced by the Occupational Safety and Health Administration was promulgated by the Department of Labor, the noise standards for coal mines and noncoal mines were originally promulgated by the Department of the Interior. I must assume that when the Department of the Interior used the phrase "dBA" in the noncoal regulations, it meant the same as the same term means under the coal mine regulations. 30 CFR 70.500(a) states: "'dBA' means noise level in decibels, as measured with the A-weighted network of a standard sound level meter using slow response."

The inspector stated that our normal voices at the hearing were producing 60 to 70 decibels. If he yelled, it would be 90 decibels. Inspector High stated that a decibel is 2 times 10 to the minus 5 Newtons per meter (Tr. 157). He changed this to a Newton per meter squared, but did not know what was meant by the term "Newton." He therefore did not know how to describe a decibel since it was in terms of Newtons. It is obviously, however, a pressure produced on the eardrum which could be described in terms of pounds or ounces per square inch.

Rather than being a measure of loudness, the decibel is a measure of the pressure on the eardrum created by a sound. The scale of decibels, however, is not a straight line scale, but is based on the logarithm (to the base 10) of the ratio between two different powers or forces. Normal pressure waves, including sound waves, are subject to the inverse square law of physics so that when the distance between the measuring device and the source is doubled, the pressure at the receiver is halved. When the decibel system of measuring is used, however, doubling the distance to a sound source reduces the sound pressure level by 6 decibels. For example, if a sound level meter 40 feet from a noise source is showing 90 decibels, and the meter is removed another 40 feet from the source, the decibel reading should be 84. A straight line nonlogarithmic measuring system would show a reduction of 50 percent when the distance is doubled. 1/ This lack of a straight line measuring system leads me to suspect

1/ In the decibel system, 0 is barely audible, 10 is 10 times 0, 20 is 100 times 0, 30 is 1,000 times 0, etc.

the validity of the decibel averaging method set out in the regulations. Averaging was not directly involved in any of the instant cases, however.

The three noise violations involved concern the operator of the wagon drill, the operator of the crushing plant, and a bulldozer operator. There was no serious challenge to the allegation that these operators were, if they had not been wearing ear muffs, being exposed to sound levels in excess of that allowed by the health and safety standards. The defense is that the measures suggested by the inspector to reduce the noise levels would cost more than the inspector estimated, that in the company's financial condition it could not afford to make the recommended changes and that the workers were being protected by ear muffs. MSHA's position, on the other hand, is that the company should make feasible changes in the equipment and spend a reasonable amount of money in making those changes to reduce the noise level and then, if the efforts expended did not amount to a sufficient reduction in noise level to comply with the standard, ear muffs could be used for the personnel protection of the operators.

Citation No. 373631 refers to the D8 bulldozer and I do not think it necessary to detail the specific recommendations that the inspector had for reducing the noise level. In general, it involved adding such things as a rubber floorboard under the operator, acoustical rubber tire material over the operator's head, an additional barrier between the operator and the front of the machine, and a muffler. It was his estimate that the changes he recommended would cost about $1,200, but would not bring the sound level reading below 90 decibels. Accordingly, the operator would still have to wear ear muffs for some part of his shift. While it is not altogether clear, and was not stated specifically with respect to each of the three noise violations, the general philosophy that emerges is one of trying to get the operator to reduce the noise level either by muffling or changing machine operators sufficiently often, but if that does not work, then ear muffs will be allowed. That is, they will be allowed in the sense of abating the citation and not issuing a withdrawal order. There was no testimony that if prior to the issuance of a citation, the operator of the mine had attempted to reduce the noise level unsuccessfully that a citation would not have been issued in the first place. If there have been any criteria established for the use of the inspector in determining whether or not to issue a citation when an operator's attempt to reduce the noise level has been unsuccessful, or to determine when to abate the citation and allow the use of personal ear protection, or for his use in deciding when to terminate a withdrawal order, those criteria were not presented during the case and have not been brought to my attention in the briefs. Nor can I find any such criteria in the regulations. It thus appears to be a matter of personal judgment on the part of the inspector.

In cases where it is conceded that the measures taken to muffle the noise of the particular operation involved will not actually

reduce the sound level below 90 decibels, it results in a guessing game on the part of the mine operator if he wishes to avoid a citation. And, it is not even definite that he can avoid a citation if he guesses correctly. First, if there is a machine which is known to be out of compliance and which the operator cannot think of any feasible way to muffle into compliance, he must guess how much money and effort must go into an unsuccessful noise reduction program before an inspector, who will arrive unannounced at some future date, will decide that his efforts were sufficient and that it was reasonable for him to resort to ear muffs. While it is not exactly clear that he would avoid the citation by guessing correctly as to the personal opinion of this yet unknown inspector, it is clear that if he guesses wrong, a citation will be issued and, of course, regardless of whether an order of withdrawal is eventually issued, a penalty assessment will be made.

I am aware of the fact that the Occupational Safety and Health Review Commission has affirmed some citations where the required measures to reduce the noise level would not result in compliance with the standard and that such decisions have been affirmed on review. In RMI Company v. Secretary of Labor Et Al., 594 F.2d 566 (6th Cir. 1979), the court upheld the Review Commission, but stated at page 571 :

> Given the fact that the employees will still be required to wear personal protective equipment for the remaining time they spend in the vicinity of the chipping guns, we probably would not have reached the same result as did the OSHRC were we considering this case as an initial proposition.

The court went on, however, to give the type of deference usually accorded to an administrative agency and affirmed that part of the Commission's decision. I question whether agencies such as the Occupational Review Commission and our own Mine Review Commission should be given the type of deference which courts accord to enforcement agencies, such as the Federal Trade Commission and their enforcement policies. The two review commissions are not enforcement agencies nor are they regulatory agencies. They perform the same function as courts do and their interpretation of regulations should be given no more deference by a reviewing court than that reviewing court would give to a lower court's interpretation of regulations. But since the deference was given in the RMI case, the result is that the court's decision is not a decision interpreting the regulations. It is merely a decision refusing to disturb, because of the deference, the review commission's interpretation of the regulations. Certainly, our Mine Review Commission is not bound to accept the Occupational Review Commission's interpretation even though the rules being interpreted may be similar or identical.

Furthermore, there are fundamental differences in the enforcement provisions between mine health and safety and occupational

health and safety. For one thing, a civil penalty is mandatory if a citation against a mine operator is valid. And I cannot affirm a citation which will result in a civil penalty against a company in dire financial straits because the company failed to guess properly what the inspector would require before agreeing that the use of ear muffs would be appropriate. The citation involved here is VACACTED.

Citation No. 373632 involves the pneumatic wagon drill and it is admitted that there is no feasible way to bring this machine into compliance except by the use of ear muffs. The ruling here is the same as in the previous violation. It might be reasonable to require the company to spend $1,200 or even more to reduce the noise level, but it is completely unreasonable to issue a citation which will result in a civil penalty because the operator was unable to correctly guess the extent of noise reduction efforts that the inspector would require. The citation is VACATED.

Citation No. 373633 involves the operator of the jaw crusher which crushes the basalt into smaller pieces. It was the opinion of the inspector that a booth could be constructed from plywood at a cost of about $1,000 or maybe under that, which would bring the sound level below the 90-decibel limit so that an operator could stay at the controls for 8 hours without being required to wear ear muffs. He later testified (Tr. 53) that even if it cost $2,400 it would nevertheless be feasible to spend that amount of money to bring the crusher into the noise compliance regulation. It was the Applicant's position that an experimental modification would cost $2,000 and that it would not bring the machine into total compliance (see Applicant's Exh. No. 1). When Applicant's witness, Mr. Bryce Robinson, testified, however, he stated that he did believe that a compartment would bring the jaw crusher noise level down below 90 decibels. His estimation, as stated in the transcript at page 82, is $20,000, but he referred to Applicant's Exhibit No. 1 and seemed to be testifying in support thereof. My own handwritten notes, however, do show that he said $20,000, rather than $2,000.

As to the dividing line between economic feasibility and nonfeasibility, the inspector testified at Tr. 55-56 as follows:

> Q. Okay. Is there a point -- same controls, same results, same company -- that it becomes, in your mind, economically infeasible?
>
> A. Yes, it certainly is.
>
> Q. Okay. Can you estimate at what point?
>
> A. I believe that after I'd inspected -- I'd worked there with the people, we'd tried a few things where we were actually trying to accomplish something -- I believe

that as far as reducing noise percentages -- and when it dropped below a certain point, that's all they could have done, that's all that we technologically know about in 1979, then I would abate the citations.

Q. Same controls, same results -- what if these, instead of costing $1,200.00 cost $20,000.00?

A. I would not consider it feasible.

Q. What if they cost $10,000.00?

A. Well, I don't know where the point to stop would be.

Q. Then, is the substance of your testimony -- it would be on a case by case basis, discussing it with the company, where that line of economic feasibility is?

A. Working with the company.

Q. Okay. There is a line of demarcation, but you can't state, at this point, exactly what it is?

A. No, I can't state. After we both tried, then I would say we would abate.

Q. And would that be true -- just as true -- for the drill and the crusher?

A. Either one of the 3 machines.

The entire emphasis is on how to abate a violation, rather than how to avoid one and that is where I think the big problem is with regard to MSHA's enforcement of the noise standard. If a machine is out of compliance with the noise standard and ear muffs are not worn, I think a citation would be justified. Where ear muffs are worn, however, and no harm is coming to a miner's ears, MSHA has to work out some system of advising the mine operator of its desires prior to the issuance of a citation. That is true because even though with respect to the jaw crusher, it may have been possible to reduce the noise below 90 decibels, it was still a guessing game as to what extent and how much money should be spent toward that goal by this particular mine operator. The jaw crusher citation is accordingly, VACATED.

ORDER

It is therefore ORDERED that all four citations involved in these cases be VACATED and that all four withdrawal orders that were based on the vacated citations be likewise VACATED.

It is FURTHER ORDERED that these cases are DISMISSED.

Charles C. Moore, Jr.
Charles C. Moore, Jr.
Administrative Law Judge

Issued: July 13, 1979

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

Standard Distribution

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

July 18, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. BARB 78-453-P Assessment Control No. 15-08799-02021V
v.	:	
LEECO, INC., Respondent	:	Mine No. 18

DECISION

Appearances: Eddie Jenkins, Esq., Office of the Solicitor, Department of Labor, for Petitioner;
A. Douglas Reece, Esq., Manchester, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to written notice dated September 1, 1978, a hearing in the above-entitled proceeding was held on November 14, 1978, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Issues

The Petition for Assessment of Civil Penalty in Docket No. BARB 78-453-P was filed on June 13, 1978, and raises the issues of whether respondent violated 30 CFR 75.200 and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

Occurrence of Violation

The violation of section 75.200 alleged by MSHA's Petition for Assessment of Civil Penalty is based on Order No. 1 HM (7-12) issued June 2, 1977. That order states that respondent was not in compliance with its roof-control plan because the No. 3 supply roadway in the 002 Section was from 17 to 21 feet wide for a distance of 1,000 feet, whereas the roof-control plan provides that the supply roadway may not exceed 16 feet in width. The roof-control plan provides for respondent to support its roof by a combination of roof bolts and timbers (Tr. 84; 87). Page 14 of the roof-control plan requires the installation of two rows of timbers on 4-foot centers down the right side of the entry and one row of timbers on 4-foot centers down the left side of the entry (Exh. M-2). The row of timbers next to the rib on each side of the entry is erected 3 feet from the rib, whereas the second row of timbers on the right side is erected 4 feet from the first row of timbers (Tr. 11). The result of erecting

two rows of timbers 3 feet from each rib and a third row of timbers 4 feet from the first row on the right side is to narrow the entry to 16 feet, that is, the 26-foot entry is narrowed to a 16-foot roadway by timbers which occupy a total width of 10 feet of the entry (Tr. 29). The roof over the roadway is, of course, required to be supported by three rows of roof bolts which are installed on 4-foot centers (Exh. M-2, p. 14; Tr. 21).

The inspector's testimony supports a finding that the roadway was excessively wide because from 250 to 300 timbers had been knocked down along the roadway for a distance of 1,000 feet and had not been reset (Tr. 11; 45). Respondent's witnesses largely corroborated the inspector's testimony with respect to the fact that timbers had been knocked down by the battery-powered tractor when it hauled men and supplies along the haulageway. The operator of the tractor stated that he had knocked down timbers along the roadway because the floor of the mine was uneven and wet. The slippery and uneven floor caused the tractor to fishtail so that the trailer pulled by the tractor would slide from one side of the roadway to the other and would knock down timbers on both sides of the roadway (Tr. 52). Whereas the inspector estimated that the number of timbers which had been knocked down and not reset was between 250 and 300, the operator of the tractor estimated the number of timbers that had been knocked down to be between 100 and 200 (Tr. 11; 34; 41; 53).

Although respondent's witnesses agreed that a considerable number of posts had been knocked down and not reset (Tr. 55; 64), they all disagreed with the inspector's claim that they were following the roof-control plan shown on page 16 of the plan. All three of respondent's witnesses testified that they were following the roof-control plan shown on page 14 of the plan (Tr. 70-71; 79-80). The violation cited in the inspector's order is not affected by a determination of which plan was being followed because regardless of whether respondent was following the plan shown on page 16 or the plan shown on page 14, the roadway was required to be no more than 16 feet wide and the knocked-down timbers rendered the roadway at least as wide as the 17 to 21 feet set forth in the inspector's order (Tr. 30-35).

The basic difference between the plan shown on page 16 and the plan shown on page 14 is that all of the timbers are required to be set on the right side of the entry under the plan on page 16, whereas under the plan on page 14, one row of timbers is required to be installed on the left side and two rows of timbers are required to be set on the right side. Under both plans, the roadway is required to be narrowed down to a width of no more than 16 feet. There are two other primary differences between the two plans. First, the plan on page 16 provides for the entries to be no more than 28 feet wide, whereas the plan on page 14 provides for the entries to be no more than 26 feet wide. Second, the plan on page 16 provides for both timbers and roof bolts to be 4 feet from both ribs and from each other, whereas the plan on page 14 provides for the first row of timbers on each side of the entry to be 3 feet from the ribs (Exh. M-2).

The inspector stated that respondent was prohibited from having an entry wider than 26 feet and he stated that the timbers were required to be within 3 feet of the ribs (Tr. 11; 29). Thus, the inspector was at all times discussing the provisions of the plan on page 14 while claiming that respondent was following the plan on page 16 of the roof-control plan (Tr. 22-24). Therefore, I find that the testimony of respondent's witnesses to the effect that they were following the plan shown on page 14 of the roof-control plan is more credible than that of the inspector.

I find that the testimony of all witnesses indicates that the violation of section 75.200 alleged in the inspector's order occurred.

Gravity. Even though a large number of timbers had been knocked down along the roadway, the roof over the roadway was well supported by bolts. The timbers which had been knocked down and not reset were near the ribs over a portion of the entry which was not traveled by the tractor and trailer hauling men and supplies. The only time that a person could be hit by a rock falling from the area where posts had been knocked down would be at a time when the trailer might slip sideways and be momentarily under an expanse of roof near a rib where a post had been dislodged. Respondent's witnesses stated that the roof in the 1,000-foot area cited in the inspector's order appeared to be in good condition (Tr. 51; 57; 62-63; 83).

Although the inspector stated that about 50 percent of the places he tested sounded loose and drummy, he said that that was not an abnormal condition for a slate roof (Tr. 13). While the inspector estimated that a total of about 250 posts had been knocked down in an area where 750 posts were required to be set, he stated that at none of the 4-foot intervals were there ever more than two posts missing at any one place (Tr. 31). During each shift the tractor passed over the roadway no more than three times, that is, one trip in with the miners at the beginning of a shift, one trip to deliver supplies to the section during a shift, and one trip out of the mine with miners at the end of the shift (Tr. 47; 56). Consequently, the evidence supports a finding that the violation was only moderately serious in the circumstanes described by the inspector and respondent's witnesses.

Negligence. The operator of the tractor which was used to haul supplies and men along the roadway stated that it was his duty as tractor driver to reinstall any timbers which he knocked down along the roadway. He stated, however, that he did not stop and reset timbers when he was in the process of hauling supplies to the face because the supplies were needed to enable the mine to continue to produce coal on an uninterrupted basis. The operator of the tractor stated that he reset timbers only when it happened to be convenient for him to do so (Tr. 55; 57-58).

Respondent's safety inspector testified that he was in the same 1,000-foot area cited in the inspector's order on May 31, 1977, just 2 days prior to June 2, 1977, when the inspector's order was written. On May 31, 1977, respondent's safety inspector saw about 80 to 100 posts

knocked down. Some of them were within the 1,000-foot area cited in the inspector's order. Respondent's safety inspector said that he instructed the section foreman on May 31, 1977, to take some men to the area where the posts had been knocked down and replace them (Tr. 64; 69). Despite the fact that approximately 100 posts had been reinstalled on May 31, respondent's tractor operator said that he saw from 100 to 200 posts down on June 2 when the order was written (Tr. 53; 55).

I find that respondent was grossly negligent in allowing such a large number of posts to be knocked down and not reset within a period of only 2 days.

Good Faith Effort To Achieve Rapid Compliance. The inspector testified that respondent replaced all of the knocked-down timbers within a period of about 3-1/2 hours (Tr. 16). Therefore, I find that respondent demonstrated a good faith effort to achieve rapid compliance.

Size of Operator's Business. Respondent's No. 18 Mine produces about 350 tons of coal per day from the Hazard No. 4 coal seam which is from 28 to 34 inches thick (Tr. 8). The No. 18 Mine has three coal-producing sections and all of them use Wilcox continuous-mining machines equipped with continuous-belt haulage systems. Respondent operates three underground coal mines in addition to the No. 18 Mine. The production from all four mines amounts to approximately 800 tons of coal per day (Tr. 68). Exhibit M-3 shows that respondent is controlled by "Kaneb Services", but there is nothing in the record to show how large a company "Kaneb Services" may be. The former Board of Mine Operations Appeals held in Old Ben Coal Co., 4 IBMA 198 (1975), that it is error for a judge to go outside the record and consult reference books for the purpose of making findings as to an operator's size. Based on the evidence in this record, I find that respondent operates a medium-sized business.

Effect of Penalties on Operator's Ability To Continue in Business. Counsel for respondent did not present any evidence at the hearing with respect to respondent's financial condition. In Buffalo Mining Co., 2 IBMA 226 (1973), and in Associated Drilling, Inc., 3 IBMA 164 (1975), the former Board of Mine Operations Appeals held that when a respondent fails to present any evidence concerning its financial condition, a judge may presume that payment of penalties would not cause respondent to discontinue in business. In the absence of any specific evidence to the contrary, I find that payment of penalties will not cause respondent to discontinue in business.

History of Previous Violations. Exhibit M-3 shows that 37 previous violations of section 75.200 have occurred at respondent's No. 18 Mine since November 1975. Three of the violations occurred in 1975, 21 violations occurred in 1976, and 13 violations had occurred in 1977 by May 5, 1977. Roof falls still are the primary cause of injury and death in underground coal mines. I consider violations of section 75.200 to be a matter which should receive respondent's utmost attention. The statistics do not indicate that respondent is making progress in being able to reduce

the number of violations of section 75.200 which are occurring at its No. 18 Mine. Therefore, I shall increase by 20 percent any penalty assessed under the other criteria because of respondent's unfavorable history or previous violations of section 75.200.

Assessment of Penalty

The findings hereinbefore made show that respondent is a medium-sized operator. Any penalty assessed for the violation of section 75.200 cited in Order No. 1 HM should, therefore, be in a medium range of magnitude. As previously shown, the violation was only moderately serious because the roof of the supply roadway showed no signs of falling and was considered to be in relatively good condition. Nevertheless, the knocking down of about 250 posts along a 1,000-foot roadway would have a deteriorating effect on the roof, particularly when it is considered that the timbers were being knocked down by the hundreds within a period of only a few days. Consequently, a penalty of $750 should be assessed under the criterion of the gravity of the violation.

The largest portion of the penalty should be attributable to the fact that the violation involved a high degree of negligence. A large number of posts had been knocked down on May 31 and an even larger number had been knocked down and not replaced within a further period of only 2 days. The tractor operator was supposed to reset the timbers, but he was not doing so. In such circumstances, the penalty should be increased by $3,000 under the criterion of negligence to a total of $3,750.

As indicated above, respondent's unfavorable history of previous violations requires that the penalty of $3,750 be increased by 20 percent, or $750, to $4,500. If a large-sized company or operator had been involved, I would have assessed a larger penalty than $4,500. It has been my practice to decrease the penalty assessable under the other criteria when the operator shows an outstanding effort to achieve rapid compliance. The evidence does not show that respondent's abatement of the violation was other than a normal abatement. Therefore, the penalty will not be decreased nor increased under the criterion of good faith effort to achieve rapid compliance.

Conclusions

(1) On the basis of all the evidence of record and the foregoing findings of fact, respondent is assessed a civil penalty of $4,500.00 for the violation of section 75.200 cited in Order No. 1 HM (7-12) dated June 2, 1977.

(2) Respondent was the operator of the No. 18 Mine at all pertinent times and as such is subject to the provisions of the Act and to the health and safety standards promulgated thereunder.

WHEREFORE, it is ordered:

For the violation of section 75.200 described in paragraph (1) above, Leeco, Inc., is assessed a civil penalty of $4,500.00 which it shall pay within 30 days from the date of this decision.

Richard C. Steffey
Administrative Law Judge

Distribution:

Eddie Jenkins, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

A. Douglas Reece, Esq., P.O. Box 432, Manchester, KY 40962 (Certified Mail)

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

July 18, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. BARB 78-401-P
	:	A.C. No. 15-03746-02049V
v.	:	
	:	Upper Taggart Mine
SCOTIA COAL COMPANY, Respondent	:	

DECISION

Appearances: Eddie Jenkins, Esq., Department of Labor, for Petitioner;
Richard C. Ward, Esq., Hazard, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to written notice dated September 1, 1978, a hearing in the above-entitled proceeding was held on November 15, 1978, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

MSHA's Petition for Assessment of Civil Penalty in Docket No. BARB 78-401-P was filed on May 12, 1978, and seeks assessment of a civil penalty for an alleged violation of 30 CFR 75.1725.

Issues

The issues raised by the Petition for Assessment of Civil Penalty are whether a violation of section 75.1725 occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act.

Findings of Fact

1. Ronald E. Suttles, a Federal coal mine inspector, was in the process of making a complete inspection of respondent's Upper Taggart Mine when he received a complaint regarding a shuttle car in the One Right Section of respondent's mine. Inspector Suttles went to the One

Right Section on Monday, April 19, 1976, to determine whether there was any validity to the complaint. The inspector asked Joe Pratt, the operator of the B-29 shuttle car, to maneuver the car so that Inspector Suttles could determine whether it was in safe operating condition. Inspector Suttles concluded that the wheels on one side of the shuttle car would not turn properly. He considered that the shuttle car created a hazard to any miners near the car because the shutttle car had to be backed up several times when the operator of the car needed to receive coal from the continuous mining machine, go around corners, or dump coal at the belt feeder (Tr. 6-12).

2. Despite the fact that the B-29 car was not in safe operating condition on April 19, 1976, Inspector Suttles did not write a notice of violation or order of withdrawal with respect to the unsafe car. Inspector Suttles stated that new management had just taken over the operation of the Upper Taggart Mine. The inspector had been getting good cooperation from the new management and accepted management's assurances that the car would be fixed without the necessity of the inspector's writing an order or notice of violation with respect to the car (Tr. 13).

3. Inspector Suttles stated that when he returned to the mine on April 20, 1976, he saw the B-29 shuttle car being operated. Inspector Suttles was "pretty sure" that the same operator, Joe Pratt, was driving the shuttle car. Mr. Pratt told Inspector Suttles that the car had not been repaired (Tr. 15-16). Inspector Suttles then issued at 9:55 a.m. unwarrantable failure Order No. 2 RDS under section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969. Order No. 2 RDS cited respondent for a violation of section 75.1725 because the B-29 shuttle car (6SC) being used in the One Right Section was not being maintained in a safe operating condition in that the steering was bad and the operator could not safely steer the car through crosscuts (Exh. M-1). Section 75.1725 requires mobile equipment to be maintained in safe operating condition, or requires, in the alternative, that unsafe equipment be removed from service immediately.

4. James Bentley, respondent's safety inspector, testified that when he and Inspector Suttles came to the face area of the One Right Section on April 20, 1976, the miners were in the process of opening a new section of the mine off of the old section in which they had been working. Mr. Bentley said the B-29 car had been repaired on the 11 p.m.-to-7 a.m. shift on April 20 and that the car had not been moved on the day shift of April 20 because there was not sufficient room between the place where the belt feeder was located and the working face for two shuttle cars to be operated. Mr. Bentley said that new parts had been installed on the B-29 shuttle car and that the old parts were still lying beside the car. The old parts had to be picked up so that the car could be moved. Mr. Bentley said that

the operator of the B-29 car got up on it and moved it a few feet but that there was not enough room for it to be operated very much (Tr. 32-40; 42).

5. Timothy Maggard, a repairman who normally works on the 3 p.m.-to-11 p.m. shift, testified that the B-29 car broke down on his shift on April 19, 1976, at about 8:30 p.m. Mr. Maggard made a temporary repair of the B-29 car on April 19 so that the car could be used up to the end of the production shift which ended at 11 p.m. Mr. Maggard said that the steering mechanism on the B-29 car was so bad that he decided that it needed to be completely rebuilt. Although Mr. Maggard had already worked his full 8-hour shift by 11 p.m., he continued to work overtime on the next shift (11 p.m.-to-7 a.m.) so that the B-29 car would be in good operating condition for the beginning of the next production shift which was due to start at 7 a.m. Mr. Maggard had completed the repair of the B-29 car by 5 a.m. on April 20. He was due to report back to the mine to work his regular shift which began at 3 p.m. that same day. Therefore, Mr. Maggard obtained the promise of the other repairmen on the 11 p.m.-to-7 a.m. shift that they would take the old parts to the end of the track for him and he went home to get some sleep before reporting back to the mine at 3 p.m. Before Mr. Maggard left for home, however, he drove the B-29 car around the block in each direction to make sure that all wheels were turning properly when the machine was maneuvered around corners (Tr. 46-49; 53-56; 59).

6. When Mr. Maggard returned to the mine to work his regular shift commencing at 3 p.m. on April 20, 1976, he found that a red tag had been placed on the B-29 car indicating that the car was the subject of a withdrawal order. Mr. Maggard first checked the car's steering by jacking it up. He turned the car's steering wheel in one direction and checked the wheels on both sides of the car to make certain that they turned. He then turned the steering wheel in the opposite direction and found that the wheels all turned properly in that direction also. Mr. Maggard thereafter drove the car around the block and could find nothing wrong with it. Therefore, he parked the car where he found it with the red tag still on it. He then reported to the maintenance foreman that he could find nothing wrong with the B-29 car. When Mr. Maggard reported for work on his regular shift on April 21, 1976, he found that the red tag had been removed from the B-29 car and that it was being used (Tr. 49-50; 56-57).

7. Richard Combs, who was general mine foreman at the Upper Taggart Mine on April 19 and 20, 1976, testified that the time sheets in the company's files show that Mr. Maggard worked a regular 8-hour shift on April 19 and worked 8 hours of overtime on the 11 p.m.-to-7 a.m. shift on April 20 (Tr. 62-66; Exhs. A and B).

8. In his rebuttal testimony, Inspector Suttles first stated that there was more room for use of the B-29 car on April 20, 1976,

than the company's witnesses had described. Inspector Suttles conceded, however, that his memory of the conditions in the One Right Section on April 20 was not distinct and that the continuous-mining machine might have been involved in cleaning up the mine floor for commencement of mining operations in a different direction. If that were true, respondent's claim that there was insufficient room for operation of two shuttle cars was probably correct. Inspector Suttles stated that he was not entirely certain about what the miners were doing on the 20th, but he was certain that there was sufficient space for both shuttle cars to be used on the 21st (Tr. 68-70).

Nonoccurrence of Violation

I find that the preponderance of the evidence supports a conclusion that no violation of section 75.1725 occurred on April 20, 1976. There is no doubt but that the steering on the B-29 shuttle car was defective on April 19, 1976, as both Inspector Suttles and the repairman, Mr. Maggard, agreed that the steering on the B-29 shuttle car was in bad condition on April 19, 1976, when Inspector Suttles asked that it be repaired. If Inspector Suttles had cited the B-29 shuttle car for a violation of section 75.1725 on April 19, 1976, there is no reason to believe that respondent's management would have contested the citation.

If the inspector had been more certain of what he actually saw on April 20 when he came back to check the condition of the B-29 car, it is possible that I could have found in his favor, but his admission that he could not recall for certain what the miners were doing on the 20th, as opposed to the 21st, makes it impossible to find in his favor. Mr. Maggard's demeanor at the hearing was that of a truthful witness and his testimony is consistent throughout. Both his direct testimony and his cross-examination show that he specifically recalled the rebuilding of the steering system on the B-29 shuttle car. The fact that he personally drove the car after it was repaired is a very convincing reason to believe that he had satisfactorily repaired the B-29 shuttle car before Inspector Suttles ever issued Order No. 2 RDS citing the car for a violation of section 75.1725. Additionally, Mr. Maggard jacked up the car to test the steering on the 20th after the order was issued and Mr. Maggard again drove the car after the order was issued without finding anything wrong with it. The fact that nothing was done to the B-29 car between the time the inspector issued his order and the next day when it was found to be in proper operating condtion, is strong and convincing evidence that nothing was wrong with the steering on the B-29 car at the time the inspector's order was written.

At transcript page 41 Mr. Bentley referred to the fact that both the inspector and respondent's management were under a lot of pressure at the time the inspector issued his order on April 20, 1976. As I have indicated in Finding No. 1, supra, Inspector Suttles had received

a complaint to the effect that the B-29 shuttle car was being operated in an unsafe condition. Even though he found that the B-29 shuttle car was unsafe on April 19, the inspector did not write an order or notice citing management for the violation at the time the violation was observed. It appears that the inspector's failure to cite a violation on the 19th may have been the subject of criticism. Therefore, when he returned to the mine on April 20, he was under pressure to cite the company for the violation which did exist the previous day but which did not exist on April 20 when he actually wrote his order of withdrawal.

The inspector's order is dated April 20, 1976, so there is no question before me as to whether the inspector could have backdated his order to cite respondent on the 20th for a violation which he observed on the 19th. The finding of a violation can be sustained only if the testimony shows that the B-29 shuttle car was defective on the 20th. The preponderance of the evidence shows that the car had been repaired between 11 p.m. on the 19th and the time that the inspector saw the car on the 20th. Since the car was not in an unsafe condition on the 20th, no violation of section 75.1725 existed when Order No. 2 RDS was written.

Ultimate Findings and Conclusions

(1) The Petition for Assessment of Civil Penalty filed in Docket No. BARB 78-401-P should be dismissed because of MSHA's failure to prove that a violation of section 75.1725 occurred as alleged in Order No. 2 RDS (6-206) dated April 20, 1976.

(2) Scotia Coal Company was the operator of the Upper Taggart Mine at all pertinent times and as such is subject to the provisions of the Act and to the health and safety standards promulgated thereunder.

WHEREFORE, it is ordered:

The Petition for Assessment of Civil Penalty filed May 12, 1978, in Docket No. BARB 78-401-P is dismissed for the reason stated in paragraph (1) above.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

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

JUL 18 1979

ALABAMA BY-PRODUCTS CORPORATION, Applicant	:	Application for Review
v.	:	Docket No. BARB 78-601
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mary Lee No. 1 Mine
and	:	
UNITED MINE WORKERS OF AMERICA (UMWA), Respondent	:	

DECISION

Appearances: James Birchall, Esq., for Applicant;
Terry Price and George D. Palmer, Esqs., Office of the Solicitor, U.S. Department of Labor, for Respondent.

Before: Judge Lasher

I. Statement of the Case

Applicant seeks review of Order No. 239581, dated July 5, 1978, issued by MSHA inspector William J. Vann and which alleges a violation of 30 CFR 75.200. The order was issued pursuant to section 104(b)(1) of the Federal Mine Safety and Health Act of 1977, 1/ citing Applicant with failure to comply with its roof control plan "in that the controls of the continuous miner had moved 6 feet beyond the last row of permanent roof support in the crosscut between Nos. 1 and 2 right aircourses on the 5075 section." MSHA and UMWA both filed timely answers to the application. UMWA did not appear at the hearing and was dropped as a party. Both Applicant and MSHA were represented by counsel at the hearing which was held in Birmingham, Alabama, on February 1, 1979.

1/ 83 Stat. 742, 30 U.S.C. § 801 et seq.

II. Findings of Fact and Discussion

Applicant admits that the violation charged by Inspector Vann did occur. 2/ By its application, Applicant seeks to have the section 104(b)(1) order reviewed for the sole purpose of challenging the prerequisite finding that the violation was "caused by an unwarrantable failure" of the operator to comply with the mandatory safety standard cited. By express agreement of the parties, the validity of the underlying 104(d)(1) citation is not in issue. Neither party takes the position that MSHA must establish, as part of a prima facie case of violation, that the violation is "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." See UMWA v. Kleppe, 532 F.2d 1403 (1976).

Inspector Vann testified that he arrived at the section at approximately 7:55 a.m. on July 5, 1978, in the company of Steve Freeman, the assistant mine foreman, and that he arrived at the violation site at 8:05 a.m. The continuous miner was not being operated when he arrived at the violation site because it had pulled a cable and pinched a lead which cut off the main breaker deenergizing the continuous miner. He indicated that the head of the cutter was approximately 20 feet beyond the last row of roof supports and that it was approximately 6 feet from the last row of roof supports to the controls of the continuous miner (Tr. 56, 57). The continuous miner was situated between the No. 1A aircourse and the No. 2 aircourse on the left side of the crosscut. When Inspector Vann arrived, the continuous miner operator, Chuck Chism, and his helper, Drew McElrath, were setting timbers in the area. Chism told Inspector Vann that he did not realize he was out from under roof supports until he crawled out from under the canopy of the continuous miner (Tr. 66, 79), presumably after the main breaker had cut off and deenergized the machine. The continuous miner helper, McElrath, told Inspector Vann that he was busy setting timbers and had removed a cable at the time (Tr. 69), presumably in explanation of his failure to signal Chism that he was going under unsupported roof. 3/

2/ The provision of the roof control plan (Exh. M-4) violated (appearing on page 11 thereof), requires that the "operating controls positioned on the * * * continuous mining machines shall not advance inby the last row of permanent roof support."

It is a well established principle of mine safety law that a violation of the provisions of an approved control plan constitutes a violation of 30 CFR 75.200. Affinity Mining Company v. MESA et al., 6 IBMA 100 (1976).

3/ McElrath was not Chism's permanent helper. The helper's job had been filled by Chism himself until approximately 4 weeks prior to July 5, 1978, when Chism was promoted to operator of the continuous

Jimmy Hyche, day shift mine foreman for Applicant, testified that the duties of a continuous miner helper include watching for the operator of the continuous miner, setting timbers, keeping the cable attached to the miner out of the way of the miner, and directing the operator where to proceed in situations when the operator can see for himself. When he arrived at the violation site on July 5, 1978, Mr. Hyche indicated that Chism, Inspector Vann, and Chism's helper, McElrath, were present. According to Hyche, Inspector Vann asked Chism if Leo Blake, the section foreman, had instructed him to cut coal from under the roof beyond the law row of roof supports. Chism's reply was that Blake had not done so. Chism also told Hyche that he "couldn't see." Hyche indicated that the distance from the law row of permanent roof support to the cutter head was approximately 24 feet and that the distance from the last row of roof supports to the controls of the continuous miner was only 3 feet. Hyche said that one reason Chism could not see the last row of roof supports and proceeded beyond it was because the canopy on the continuous miner extends over the operator's head, obstructing his vision.

Clarence Key, who had operated the continuous miner in question prior to the time Chism replaced him on it, testified that Section Foreman Blake was "above average" as a section foreman and that Blake had always instructed him not to go beyond roof supports. Key also testified that Chism had been his helper and was a good one.

Section foreman Leo Blake, testifying on behalf of Applicant, indicated that it would take the continuous miner only 30 seconds to move out from under unsupported roof if the continuous miner was not actually cutting coal. He testified that he had instructed the miners under his supervision "hundreds of times" in connection with not working under unsupported roof. He also indicated that the helper (McElrath) was apparently pulling curtains down instead of doing his job.

Based on the pleadings and stipulations of the parties, I find preliminarily that the violation did occur as alleged in the withdrawal order, that for purposes of this proceeding, the underlying 104(d)(1) citation and order were properly issued, and that the violation cited in the subject order did not constitute an imminent danger but was, at the same time, "of such nature as could significantly and substantially contribute to the cause and effect of a mine hazard."

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fn. 3 (continued)
miner. On July 5, 1978, the helper's job had not been permanently filled. McElrath had been employed as a miner for approximately 3 years and had attended numerous safety meetings and performed many different jobs. His classification on July 5, 1978, was "timber helper," and he was a fulltime employee.

The parties have thus narrowed the issues to one: Whether the violation of the roof control plan resulted from an unwarrantable failure of the Applicant to comply with its provisions.

Following the Kleppe decision, supra, the Interior Board of Mine Operations Appeals, in Zeigler Coal Company, 7 IBMA 280 (1977) at 295-296, determined that an inspector should find a violation of a safety standard was caused by unwarrantable failure to comply with such standard where he finds any of the following circumstances:

> [T]hat the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the oeprator knew or should have known existed or which it had failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

The Board went on to hold that the inspector's judgment in determining "unwarrantable failure" must be based upon a thorough investigation and must be reasonable.

As I divine it, MSHA's theory of unwarrantable failure is that the violation was visible and that it should have been detected in the pre-dayshift examination since the violation allegedly occurred on the prior shift. However, after carefully considering the record, and, in particular, the transcript references pointed to by MSHA (Tr. 13, 21, 22, 26, 27, 51, 52, 56, 100), I am unable to find or infer as MSHA seems to urge, that the continuous miner moved beyond the last row of permanent roof supports during the shift prior to the one on which it was observed by Inspector Vann. Although there were two eyewitnesses, neither of them, the continuous miner operator, Chism, nor his helper, McElrath, were called by MSHA to testify when the violation occurred. Furthermore, based on Inspector Vann's own account of his conversation with Chism and McElrath at the time he issued the order, it appears more likely that the violation occurred shortly before the inspector arrived on the scene (Tr. 51, 52, 65, 67, 69, 70, 77). Also, had the violation occurred on the prior shift, it would have been written up in the fireboss book (Tr. 20, 46).

According to the inspector, Chism told him that he was not aware that he was under unsupported roof until he climbed from underneath the canopy of the machine. There is evidence that the canopy obstructs the vision of the continuous miner operator, and that the helper, McElrath--whose function in part was to tell Chism when he was near unsupported roof (Tr. 101)--was only temporarily assigned to Chism (Tr. 101-104).

The testimony of Applicant's witnesses, Hyche, Key, and Blake, that the violation occurred in only a few minutes (Tr. 42, 106) is far more convincing than the testimony of the inspector which is not based

on direct knowledge, is inferential and in important respects, hypothetical in nature (Tr. 84), 4/ and, which in turn, is the only support for MSHA's somewhat contrived theory that the violation occurred on the prior shift.

The more persuasive evidence in this proceeding leads me to conclude that this was an inadvertent violation which occurred shortly before the inspector arrived on the scene despite genuine efforts on the part of the mine operator to avoid such (Tr. 41, 46, 110-115). I thus find that the violation in question was not caused by the unwarrantable failure of the Applicant to comply with the safety standard in question, and that there is merit in the application for review.

ORDER

All proposed findings of fact and conclusions of law submitted by the parties not expressly incorporated in this decision are rejected.

Order of Withdrawal No. 239581, dated July 5, 1978, is VACATED.

Michael A. Lasher, Jr., Judge

Distribution:

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4/ I am unable to find evidentiary support for the key hypothetical question, i.e., how many carloads of coal would be required to move a block of coal 50 inches high, 4 feet deep, and 10 feet wide (Tr. 21, 22, 84). Thus, the transcript reference given by MSHA for the "10-feet wide" figure appears on page 13:

"Q. What is the approximate width of the front end of the miner?

"A. The cutter head?

"Q. Right.

"A. Approximately ten foot."

I am unable to find from this testimony that a 10-foot wide area of coal was removed.

Although not clearly stated, MSHA's theory apparently is that 10 carloads of coal would have been required to remove such a block of coal (Tr. 22), and that since only two carloads were removed the morning of the violation (Tr. 52), the rest would necessarily have had to have been removed on the prior shift the evening before.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 23, 1979

EASTERN ASSOCIATED COAL COMPANY, Applicant	:	Application for Review
v.	:	Docket No. MORG 77-74
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Federal No. 1 Mine

DECISION

This proceeding was brought by Eastern Associated Coal Corporation under section 105(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., 1/ to vacate an order of withdrawal issued by two Federal mine inspectors pursuant to section 104(a) of the Act.

The parties submitted prehearing statements pursuant to a notice of hearing and a prehearing conference was held on April 11, 1978, in Pittsburgh, Pennsylvania.

The hearing was held on July 11 and 12, 1978, in Pittsburgh, Pennsylvania. Both sides were represented by counsel, who have submitted their proposed findings and conclusions and briefs following receipt of the transcript. The final brief was filed on March 7, 1979.

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

1/ In 1977 Congress passed the Federal Mine Safety and Health Amendments Act of 1977 (P.L. 95-164, 91 Stat. 1290), which supersedes the 1969 Act. The "Act" for the purpose of this decision, refers to the 1969 Act before amendment. Effective March 9, 1978, administration of the Act was transferred from the Department of the Interior to the Department of Labor, and administrative adjudications were transferred from the Interior Department to the newly created Federal Mine Safety and Health Review Commission.

FINDINGS OF FACT

1. At all pertinent times, Applicant, Eastern Associated Coal Corporation, operated an underground coal mine known as the Federal No. 1 Mine, in Marion County, West Virginia, which produced coal for sales in or affecting interstate commerce.

2. Federal mine inspectors David E. Workman and William H. Reid arrived at the surface refuse area of the Federal No. 1 Mine during the afternoon shift on August 29, 1977. The inspectors were accompanied by Foreman Robert Sabo.

3. The inspectors were sent to the mine by their supervisor in response to an anonymous safety complaint about the air brakes on a Euclid dump truck used in the refuse area.

4. When the inspectors and Mr. Sabo arrived at the refuse site, they observed the Euclid truck approaching them. Mr. Mark Merico, the truck operator, stopped the truck and the inspectors asked him if he had any problems with the brakes on the truck. Mr. Merico told them that when the truck was loaded he had difficulty keeping it under control.

5. Mr. Merico told the inspectors that there was air leaking from the right rear wheel brake. He had complained about the condition to a mechanic who inspected the brakes. The mechanic told Mr. Merico that no leak existed, but made some adjustments to the brakes. Mr. Merico had also entered his observation regarding the brakes in a weekly log maintained by the company. He told the inspectors that when the truck was loaded, he could not stop or hold it on some of the grades in the refuse area.

6. The truck is normally driven on designated roads in the refuse area. These roadways vary from flat plateaus to inclines of about 14 percent. There are curves along some of these roads. At various places, if the truck went out of control, it could run off the roadway severely injuring or killing the driver. The truck is driven on all three shifts to transport slate and other mine refuse from the mine to the refuse area.

7. Pressure for the truck's air brakes is maintained by a compressor. An air pressure gauge keeps the operator informed of the pressure in the system. The normal pressure is 120 pounds per square inch (psi), and in normal operation, the pressure drops about 10 to 20 psi when the brakes are applied. The footbrake and the handbrake are part of a single pneumatic system. A rupture at any point in the system would render the entire braking system inoperative. There is an emergency brake on the truck, but it could not independently stop or hold the truck.

8. With the truck parked, Mr. Merico applied the brakes while the inspectors observed. They heard a hiss caused by air escaping from the right rear wheel, and saw the air pressure gauge drop from 120 to 70 psi when the brakes were applied. Mr. Merico told the inspectors that the truck could not be safely controlled if the pressure dropped below 90 psi.

9. Inspector Workman decided to test the brakes to determine whether an imminent danger existed. He had conducted similar tests of braking systems on mobile equipment in underground mines. He had previous experience driving large trucks equipped with air brakes, although he had not operated a Euclid dump truck before. At the inspector's request, Mr. Merico loaded the truck and then instructed Inspector Workman in the operation of the truck.

10. Accompanied by Mr. Merico, Inspector Workman first tested the brakes three times by driving up a slight incline in second gear. He testified that the truck was sliding as if he were driving on a road covered with ice. After these tests, he believed the brakes were inadequate but had not decided whether an imminent danger existed.

11. Inspector Workman then drove the truck to an adjacent area where the grade was 14 percent. He drove up the grade and stopped with the front wheels of the truck over the top of the incline. He determined that it was a safe area to conduct a test because it was straight, the downward incline leveled off after about 25 feet, and below there was a sufficient level area for the truck to stop without adequate brakes.

12. Inspector Workman backed down the hill and felt the truck pulling backwards despite his application of the brakes. The truck was in gear at this time. He asked Mr. Merico if he had any problem holding the truck in this type of terrain and Mr. Merico suggested that if he put the truck in neutral and let the truck drift a little, it would be impossible to stop the truck. Inspector Workman asked Mr. Merico if there would be a hazard in following this testing procedure. He was told that if a problem arose, he could put the truck back in gear and would then be able to better control the truck. Mr. Merico also told the inspector, at this point, that he was required in normal operations to back the truck down an incline.

13. Inspector Workman followed the procedure Mr. Merico suggested. He steadily applied the brakes and then pumped them when the rear wheels reached the bottom of the incline. The truck would not stop until it came to the flat plateau at the bottom of the incline. The air pressure gauge dropped to 70 psi during the test.

14. Inspector Workman repeated this test two times with Inspector Reid, Mr. Sabo, and Mr. Merico in the cab of the truck. The

cab of the Euclid truck was large enough to safely accomodate the four men.

15. Both inspectors were satisfied, after these tests, that the brakes were very dangerous. Mr. Sabo agreed that the brakes were unable to stop the truck and that the truck should be parked until the brakes could be repaired. I find that the brakes on the Euclid truck were unable to safely stop or hold the truck on inclines that were regularly used during normal use of the truck. Although it would have been a better practice for the inspector to have the truck driver operate the truck while he accompanied him, I find that the inspector exercised reasonable care in choosing a test site and test procedures to determine whether an imminent danger existed, in light of the inspector's experience and the fact that the regular driver accompanied the inspector and instructed him in the operation of the truck.

16. Following the tests, the inspectors issued an order of withdrawal pursuant to section 104(a) of the Act. The truck was taken out of service and the brake diaphragm was replaced. The cause of the brake problem was the fact that the diaphragm was cracked around the outer rim.

17. Mr. Daniel Bainbridge, a mining engineer for the Applicant, testified that the leak responsible for the hissing noise heard by the inspectors was caused by a small leak in the diaphragm. This type of leak would cause a loss of air pressure when the brakes were applied.

18. There is, according to Mr. Bainbridge, no test to determine when this kind of a leak will completely rupture, although it is more likely that a diaphragm would rupture if the diaphragm were cracked and leaking. Age, lack of lubrication and an unattended leak could all contribute to a rupture of a diaphragm.

19. I find that the leak in the brake diaphragm of the Euclid truck was an unsafe condition. I further find that there was a substantial risk that the diaphragm on the truck would completely rupture, rendering the braking system inoperative and very dangerous to the operator.

20. There was a serious risk that the driver of the Euclid truck would lose control over the truck because of a rupture in the diaphragm. Considering the terrain of the refuse site, I find that the condition cited constituted an imminent danger to the operators of the Euclid truck.

DISCUSSION

The controlling issue is whether the condition of the brake diaphragm cited by Inspectors Workman and Reid constituted an imminent

danger within the meaning of sections 104(a) and 3(j) of the Act. Section 104(a) provides:

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

Section 3(j) states: "'imminent danger' means the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

In Consolidation Coal Company, v. MSHA, Docket No. MORG 78-335 (decided February 28, 1979), I reviewed the evolving administrative, judicial, and legislative construction of the term "imminent danger" and concluded that an imminent danger order would be valid where a substantial possibility of immediate serious harm existed.

In the Consolidation Coal Company decision, supra, I stated:

> The Interior Board of Mine Operations Appeals, in a decision affirmed by the Seventh Circuit Court of Appeals, construed "imminent danger" as being a situation in which "a reasonable man would estimate that, if normal operations designed to extract coal in the disputed area should proceed, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger." Freeman Coal Mining Company, 2 IBMA 197, 212 (1973), aff'd sub nom Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F.2d 741, 745 (7th Cir. 1974).
>
> The Fourth Circuit Court of Appeals stated in a case involving an imminent danger order: "The Secretary determined and we think correctly, that 'an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.'" Eastern Associated Coal Corporation v. Interior Board of Mine Operations Appeals, 491 F.2d 277, 278 (4th Cir. 1974), aff'g Eastern Associated Coal Corporation,

2 IBMA 128, 136 (1973). See also: Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975).

> Absent legislative history or a decision of the Commission to the contrary, it would appear reasonable to apply the test developed by the Interior Board. The statutory language concerning "imminent danger" in the 1977 Act is the same as the language in the 1969 Act; however, the 1977 legislative history clearly indicates that Congress did not intend that the part of the Board's requirement enunciated in Freeman, supra, that "it is at least as probable as not that the feared accident or disaster would occur before elimination of the danger," be followed by the Commission in interpreting the current Act.

Consolidated Coal Company v. MSHA, supra at p. 6.

This conclusion is based on the legislative history of the 1977 Act. The 1977 Senate Committee Report rejected a construction of "imminent danger" that would require a finding by a Federal mine safety inspector that it would be as likely as not that a serious injury or death would result before a condition might be abated.

The Senate Committee Report states:

> The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time. It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the Commission. * * *

S. Rep. No. 95-181, 95th Cong. 1st. Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 626 (1978).

The Applicant contends that the inspectors failed to make a reasonable determination that the brakes on the Euclid truck could not be reasonably expected to cause death or serious physical harm before the condition could have been abated. It also contends that the inspectors failed to use reasonable testing procedures. However, it is clear from a preponderance of the evidence that the condition of the air brakes on the Euclid truck was unsafe.

The three witnesses present when the inspection was conducted (Inspectors Reid and Workman and Mr. Merico) 2/ all testified that there was air leaking from the right rear wheel and that the brakes were not adequate to stop or hold the truck on a roadway that was regularly used. Mr. Merico, the truck operator, had been concerned about the truck's braking capacity for about 3 weeks prior to the inspection because he had trouble controlling the truck when it was loaded. About 1 week before the inspection, he noticed that the wheel was leaking. The cause of this leak was a cracked diaphragm. According to Applicant's witness, Mr. Bainbridge, it would be impossible to predict when the cracked and leaking diaphragm would rupture completely, although this could happen at any time.

I conclude that it was reasonable for the inspectors to order the truck out of service until the diaphragm could be replaced because there was a substantial possibility of serious injury or death should the truck be continued in use. This condition satisfied the Act's definition of "imminent danger".

Although the Applicant offered evidence that Inspector Workman's "pumping" of the brakes was improper and the brakes should have been applied by steady pressure, this point applies to only part of his tests and does not rebut the other numerous facts that show the brakes were inadequate, including the fact that the psi went down to 70 when the truck driver applied the brakes, that everyone heard the hissing noise, the foreman (who witnessed the tests) agreed that the brakes could not hold properly, the diaphragm was cracked, and the inspector also found the brakes inadequate when he applied steady pressure.

CONCLUSIONS OF LAW

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

2. At all pertinent times, Applicant's Federal No. 1 Mine was subject to the provisions of the Act.

3. The Secretary proved, by a preponderance of the evidence, that the condition of the Euclid Truck's braking system in the mine's refuse area on August 29, 1977, constituted an "imminent danger" within the meaning of the Act.

All proposed findings and conclusions inconsistent with the above are hereby rejected.

2/ The fourth person present, Foreman Sabo, was not called as a witness.

ORDER

WHEREFORE, IT IS ORDERED that the Application for Review is DENIED and the subject withdrawal order is AFFIRMED.

William Fauver

WILLIAM FAUVER, JUDGE

Distribution:

Mr. Robert C. Brady, Eastern Associated Coal Corporation, 1728 Koppers Building, Pittsburgh, PA 15219 (Certified Mail)

Lawrence W. Moon, Jr., Esq., Trial Attorney, Office of the Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Harrison Combs, Esq., United Mine Workers of America, 900 15th St., NW., Washington, DC 20004 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 25, 1979

EASTERN ASSOCIATED COAL COMPANY, Applicant	:	Application for Review
	:	Docket No. MORG 77-74
v.	:	
	:	Federal No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	

AMENDMENT TO DECISION

The Decision entered on July 23, 1979 in the subject proceeding is AMENDED as follows: the docket number in the caption is changed from MORG 77-79 to MORT 77-74.

William Fauver

WILLIAM FAUVER, JUDGE

Distribution:

Mr. Robert C. Brady, Eastern Associated Coal Corporation, 1728 Koppers Building, Pittsburgh, PA 15219 (Certified Mail)

Lawrence W. Moon, Jr., Esq., Trial Attorney, Office of the Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Harrison Combs, Esq., United Mine Workers of America, 900 15th Street, N.W., Washington, D.C. 20004 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 24, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. HOPE 77-238-P
	:	A.O. No. 46-01884-0004
v.	:	
	:	No. 9 Mine
WILLIAMS COAL CO., Respondent	:	

DECISION

Appearances: John H. O'Donnell, Trial Attorney, U.S. Department of Labor, Arlington, Virginia, for the petitioner.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a petition for assessment of civil penalty filed by the petitioner on April 27, 1977, pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, now the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with three violations of certain mandatory health and safety standards. The case was delayed because of certain difficulties encountered by the petitioner in achieving service of the petition on the respondent. On June 20, 1978, service was made by leaving a copy at the residence of the respondent after personal service was refused. Subsequently, on August 8, 1978, Chief Judge Broderick issued a show-cause order requiring the respondent to state why the case should not be summarily disposed of because of the failure by the respondent to file an answer to the petition as required by the appropriate procedural regulations. On August 28, 1978, Mr. Cecil Williams, Point Pleasant, West Virginia, filed a response to Judge Broderick's order on behalf of the respondent wherein he states the following: "The Williams Coal Co. Inc., is no longer in business. The Corporation has been closed out and out of business since 1972. There is no assets and I am not personally going to pay the penaltys [sic]."

By notice issued by me on April 13, 1979, a hearing was scheduled in Charleston, West Virginia, for June 7, 1979. The certified letter mailed to the respondent was returned by the post office as

"unclaimed." Subsequently, by notice dated May 9, 1979, the hearing site was changed to Arlington, Virginia, and the certified notice mailed to the respondent was also returned by the post office with a notation "out of business." A hearing was convened in Arlington on June 7, 1979, and petitioner appeared but respondent did not.

DISCUSSION

It seems obvious to me in this case that the respondent has no interest in pursuing the matter further and he has apparently taken the position that since the company is out of business further efforts on his part would be fruitless. In view of the failure of the respondent to appear at the hearing after several attempts to serve him with notice thereof I will treat this matter as a default proceeding to be disposed of in accordance with the Commission's summary disposition rules, which state in pertinent part as follows at 29 CFR 2700.26(c):

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

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

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

Applicable Statutory and Regulatory Provisions

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

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

3. Commission rules, 29 CFR 2700.1 et seq.

DISCUSSION

The citations issued in this proceeding were all issued by MSHA coal mine inspector George M. Pritt on July 29, 1971, and the conditions cited by the inspector are set forth in the following violations:

No. 1 GMP July 29, 1971, 30 CFR 70.272

This notice states that a required report and a report and certification concerning the conditions relative to dust control which exist in the active workings of the mine had not been received by MSHA's district office for the year 1971. Section 70.272 requires that such reports be initially submitted on or before June 30, 1970, and annually thereafter on the anniversary date of each initial report.

No. 2 GMP July 29, 1971, 30 CFR 75.1702-1

This notice charges that a program to insure that persons do not carry smoking materials, matches, or lighters underground had not been submitted for approval to the Bureau of Mines. However, it also states that "the program was submitted to an office in Pittsburgh by mistake." The section cited requires such programs to be submitted to the coal mine safety district manager on or before May 30, 1970.

No. 3 GMP July 29, 1971, 30 CFR 75.1713(c)

This notice charges that a report showing arrangements made to provide 24-hour emergency transportation and medical assistance for injured miners had not been submitted to the district manager. However, it also states that "due to a misunderstanding this report was sent to an office in Pittsburgh."

Findings and Conclusions

Fact of Violations

In support of its case, petitioner introduced copies of the notices of violations and the abatements served on the respondent during the course of the mine inspection (Tr. 6,7; Exhs. 2-7). I find that the petitioner has established the violations as alleged in the petition for assessment of civil penalties filed in this proceeding.

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

Petitioner's Exhibit G-8 reflects that as of 1971 respondent's daily coal production was 300 tons and that the mine employed 18 non-union miners. I find that this supports a finding that respondent was a small mine operator. As for the penalty assessments made by me in this case, since it appears that respondent is no longer in the coal mining business, the penalties assessed have no effect on respondent's ability to remain in business and that issue is moot. From the information supplied by the petitioner during the course of the hearing, the former mine operator is now in the business of selling automobiles in the State of Ohio (Tr.5).

History of Prior Violations

Petitioner's Exhibit G-1, a computer printout of respondent's history of violations, reflects that for the period January 1, 1970, through July 29, 1971, respondent had a total of 25 paid violations for which it paid a total of $1,275 in assessments. None of the prior violations were for the standards cited in this proceeding. In the circumstances, I conclude that respondent's prior history is insignificant and that fact is reflected in the penalties assessed by me in this matter.

Negligence

With regard to notice 1 GMP, citing a violation of 30 CFR 70.272, I conclude that respondent's failure to submit that report, absent any explanation, constitutes ordinary negligence. As for the remaining two violations concerning programs for smoking materials and emergency transportation arrangements, it would appear from the record that respondent had established such programs but simply filed the required reports with the wrong Government office through a mistake and misunderstanding (Tr. 10-11; Exhs. G-4, G-6). Under the circumstances, as to Notice Nos. 2 GMP and 3 GMP, I cannot conclude that respondent was negligent and find that he was not.

Good Faith Compliance

The record supports a finding that respondent abated the violations in good faith and petitioner agreed that this was the case (Tr. 8). I have taken this into account in assessing the penalties in this case.

Gravity

I cannot conclude that the conditions cited in the three violations constituted any real threat to the safety or health of the

miners. The violations all concern reporting requirements for programs which the operator apparently had established but simply had not reported on.

Penalty Assessments

In view of the foregoing findings and conclusions, I believe that the following civil penalty assessments are appropriate:

Citation No.	Date	30 CFR Section	Assessment
1 GMP	7/29/71	70.272	$ 25
2 GMP	7/29/71	75.1702-1	15
3 GMP	7/29/71	75.1713 (c)	15

ORDER

Respondent is ordered to pay the civil penalties assessed in this matter within thirty (30) days of the date of this decision and order.

George A. Koutras
Administrative Law Judge

Distribution:

John H. O'Donnell, Trial Attorney, U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203

Mr. Cecil Williams, c/o Riverside Volkswagen Company, 195 Upper River Road, Gallipolis, OH 45131 (Certified Mail)

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

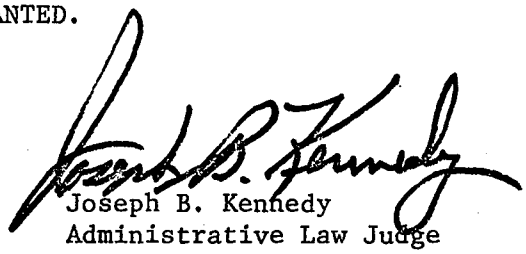
July 25, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. DENV 79-407-PM A.O. No. 24-00165-05001
v.	:	Zonolite Mine
W. R. GRACE AND CO., Respondent	:	

ORDER OF DISMISSAL

The Regional Solicitor, Denver, Colorado moves to withdraw and nol pros the captioned petition for a penalty assessment because of the "uncertainties of litigation." This vague and unparticularized reason would, if accepted, justify the dismissal of almost any case. For this reason, I believe the motion should be denied. Because of the Solicitor's obvious lack of zeal for vigorous enforcement, 1/ however, I find a further waste of the taxpayers' money in pursuing this $30.00 penalty is unwarranted.

Accordingly, it is ORDERED that the motion to dismiss the captioned petition be, and hereby is, GRANTED.



Joseph B. Kennedy
Administrative Law Judge

1/ This violation is just one of 109 violations charged against respondent in this and six other dockets. In the other cases the Solicitor has moved for approval of a reduction in the penalties that amounts to almost two-thirds the amount originally assessed. It is a small wonder that the operators continue to regard civil penalties as a "cheap nuisance". Even more disturbing is the fact that after a year in office the Commission has issued no decision setting guidelines for the assessment of meaningful penalties. In fact, if I read the Commission's new rules correctly, the Commission has effectively repealed section 110(k) of the Act, 30 U.S.C. § 820(k).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 25, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. BARB 79-76-P
	:	Assessment Control No. 15-06809-03001
v.	:	
	:	No. 1 Tipple
BOYLE AIRE COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Eddie Jenkins, Esq., Office of the Solicitor, Department of Labor, for Petitioner;
Elvin Smith, Corbin, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

When the hearing was convened on June 27, 1979, in the above-entitled proceeding, counsel for MSHA and respondent's representative asked that I approve a settlement agreement reached by the parties. Under the settlement agreement, respondent would pay the full amount of the penalties proposed by the Assessment Office.

MSHA's Petition for Assessment of Civil Penalty seeks assessment of civil penalties for alleged violations of 30 CFR 77.1607(cc) and 30 CFR 77.1713(c). The Assessment Office proposed that a penalty of $84 be assessed for the alleged violation of section 77.1607(cc) and that a penalty of $60 be assessed for the alleged violation of section 77.1713(c). The data in the official file show that respondent processes only about 100 tons of coal per day and is, therefore, a small operator. In the absence of any evidence to the contrary, I find that payment of penalties will not cause respondent to discontinue in business. The record contains no evidence to show that respondent has a history of previous violations. Respondent made a good faith effort to achieve rapid compliance.

Section 77.1607(cc) requires that unguarded conveyors with walkways be equipped with stop devices or cords along their full length. Citation No. 126422 alleged that respondent's conveyor was not equipped with the required stop devices. Respondent's answer to the Petition for Assessment of Civil Penalty states that only one person walks along the conveyor and that he does so only to grease the belt rollers and head drive at 10-day intervals of operation. Such greasing can be done only when the belt is motionless and the key to the power center is kept by the tipple operator. Moreover, respondent's answer states that the tipple operator's seat is located in a position which makes it impossible for anyone to walk past him so as to pass along the walkway beside the conveyor belt. If a hearing had been held, it is likely that respondent's evidence would have shown that there was a low degree of gravity and

negligence associated with the alleged violation of section 77.1607(cc). Therefore, respondent's agreement to pay the penalty of $84 proposed by the Assessment Office should be approved.

Section 77.1713(c) requires that an entry be made in an approved book of the results of the daily inspection of surface facilities. Citation No. 126423 alleges that the daily record book was not being kept up to date. Respondent's answer to MSHA's Petition claims that respondent was making the entries in an approved book, but was making the entries at the end of the shift instead of at the beginning of the shift as required by the inspector. If a hearing had been held, it is likely that respondent's evidence would have shown that the violation was nonserious and that it involved a low degree of negligence, if any. Therefore, respondent's agreement to pay the penalty of $60 proposed by the Assessment Office for the alleged violation of section 77.1713(c) should be approved.

WHEREFORE, it is ordered:

(A) The parties' request for approval of the settlement agreement is granted and the settlement is approved.

(B) In accordance with the settlement agreement, respondent is ordered to pay, within 30 days from the date of this decision, a civil penalty of $84 for the violation of section 77.1607(cc) alleged in Citation No. 126422 dated April 7, 1978, and a penalty of $60 for the violation of section 77.1713(c) alleged in Citation No. 126423 dated April 7, 1978. Although it was not stated on the record at the hearing, it appears that respondent may already have submitted a check to the Assessment Office in payment of the penalties which are ordered to be paid in this paragraph. If respondent has already submitted a check for payment of the penalties involved in this proceeding, respondent may, of course, ignore this order to pay.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge

Distribution:

Eddie Jenkins, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Boyle Aire Coal Company, Attention: Elvin Smith, Partner, Route 1, Box 497, Corbin, KY 40701 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 26, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. VINC 78-49-P
	:	A.O. No. 11-00599-2011V
v.	:	
	:	Orient No. 6 Mine
FREEMAN UNITED COAL MINING COMPANY, Respondent	:	

DECISION

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

Before: Judge Cook

I. Procedural Background

On December 29, 1977, a petition was filed for assessment of civil penalty against Freeman United Coal Mining Company pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 819(a) (1970), for an alleged violation of the mandatory safety standard embodied in 30 CFR 75.400. An answer was filed on January 16, 1978.

A notice of hearing was issued on July 14, 1978. The hearing was held on September 26 and September 27, 1978, in Chicago, Illinois. Representatives of both parties were present and participated.

At the hearing on September 26, 1978, the parties submitted proposed settlement agreements as to all or part of the alleged violations in the following companion cases: Docket Nos. VINC 78-394-P, VINC 78-392-P, VINC 78-393-P, VINC 78-396-P, VINC 78-397-P. Settlement proposals were not submitted in either the present case or in Docket No. VINC 78-395-P. It was proposed that the record be consolidated as to all cases, but the Respondent preferred to maintain separate transcripts of the proceedings in both the present case and

Docket Nos. VINC 78-394-P and VINC 78-395-P. The record of the September 26, 1978, settlement negotiations was consolidated with the separate records of the remaining contested cases.

A schedule for the submission of post-hearing briefs was agreed upon at the conclusion of the hearing, but a delay in the receipt of transcripts and other problems experienced by counsel forced a revision of the briefing schedules. Under the revised schedule, briefs were due on or before February 6, 1979, and reply briefs were due on or before February 19, 1979. Respondent filed its post-hearing brief on February 6, 1979. Petitioner filed no post-hearing brief. No reply briefs were filed.

II. Violation Charged

Order No. 6-0179 (1 LDC), November 1, 1976, 30 CFR 75.400

III. Evidence Contained in the Record

(A) Stipulations were entered into by the parties during the course of the hearing, and are set forth in the findings of fact, infra.

(B) Witnesses

MSHA called as its witness Lonnie Connor, an MSHA inspector.

Freeman called as its witness Richard Gale Dawson, the chief belt maintenance foreman at the Orient No. 6 Mine at the time of the hearing, and shift mine manager on November 1, 1976.

(C) Exhibits

(1) MSHA introduced the following exhibits into evidence:

(a) M-1 is a copy of Order No. 6-0179 (1 LDC), November 1, 1976, 30 CFR 75.400.

(b) M-2 is a termination of M-1.

(c) M-3 is a 5 page document containing copies of Inspector Conner's notes.

(2) Freeman introduced the following exhibits into evidence:

(a) Exhibits O-1-A through O-1-F are copies of preshift reports.

(b) O-2 is a map of the Respondent's Orient No. 6 Mine.

(3) Exhibit 3 is a computer printout listing paid assessments for violations cited at the Orient No. 6 Mine.

(4) The exhibits listed below, although not pertaining to the mine which is the subject matter of the above-captioned proceeding, were ordered filed with the exhibits in the above-captioned case during the proceedings on September 26, 1978. These exhibits, pertaining to the companion cases listed in Part I, supra, are set forth as follows:

(a) Exhibit 1 is a computer printout listing paid assessments for violations cited at Respondent's Orient No. 3 Mine

(b) Exhibit 2 is a compter printout listing paid assessments for violations cited at Respondent's Orient No. 4 Mine.

IV. Issues

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

V. Opinion and Findings of Fact

A. Stipulations

1. During the settlement proceedings on September 26, 1978, the parties entered into the following stipulations:

(a) The Orient No. 6 Mine produces approximately 1,159,797 tons of coal per year (Tr. 5, 11-September 26, 1978, Docket Nos. VINC 78-392-P, et al).

(b) The Freeman United Coal Mining Company produces approximately 6,221,752 tons of coal per year (Tr. 5, 11-September 26, 1978, Docket Nos. 78-392-P, et al).

2. During the course of the hearing, the parties entered into the following stipulations:

(a) Two shafts had been drilled (Tr. 95).

(b) As indicated in the core report, the material from those shafts contained a high degree of rock and other materials of that type, such as shale (Tr. 95).

(c) The material from the shafts was stockpiled underground (Tr. 95).

(d) In addition to the coal which the belt hauled from the production areas, some material from the shafts was placed on the belt to be disposed of outside the mine (Tr. 95).

(e) The 18th north belt is a 36 inch wide belt (Tr. 98).

(f) The belt is a rope suspended conveyor using polyvinyl chloride belting material (Tr. 98).

(g) The belting material is a "scandura conveyor belting" with a U.S.B.M. approval No. 28-1, which specifies that this material is fire resistant and will not support combustion (Tr. 98).

(h) Fire protection is provided along the conveyor with a two inch water line provided with fire hose outlets as required, and a "fire sensing direction [sic] system" along the entire belt line (Tr. 98).

(i) At every drive assembly there are provided 300 feet of fire hose, carbon dioxide fire extinguishers, and numerous sacks of rock dust (Tr. 98).

(j) In accordance with the Code of Federal Regulations, this conveyor line is contained and isolated from the intake and return escapeways (Tr. 98-99).

(k) There was not present in this belt entry any high voltage electric wires (Tr. 98-99).

B. Occurrence of Violation

MSHA inspector Lonnie Connor conducted a regular health and safety inspection at Respondent's Orient No. 6 Mine on November 1, 1976 (Tr. 6). He issued the subject order of withdrawal at 6:20 p.m., citing the Respondent for a violation of the mandatory safety standard embodied in 30 CFR 75.400 (Tr. 16, Exh. M-1). The order of withdrawal states:

Coal and coal dust have accumulated alongside and under the 18th north-east conveyor belt from a point 100 feet outby the 1st section tail pulley to the tail pulley of the 3rd section of belt, a distance of 3,700 feet. The accumulations range from 2 to 18 inches in depth, and the bottom of the belt and the return rollers were rubbing the accumulations for 700 feet. The belt was recorded dirty on the preshift examiner's book (Exh. M-1).

The 18th north east conveyor belt is approximately 6,000 feet long (Tr. 49), and consists of three sections (Tr. 11, 49). It is a 36 inch belt (Tr. 30, 98), but had worn down to a 31-32 inch width at points (Tr. 47). The inspector walked the west side of the belt line in its entirety (Tr. 10, 30-31). The only places on the east side of the belt that he specifically checked were the drives and tail pieces (Tr. 31).

There was a 24 inch high accumulation of coal dust around the tailpiece of the first section (Tr. 11). According to the inspector, belt shovelers had shoveled coal dust away from the tail pulley itself and had piled it along side the ribs of the entry (Tr. 11).

The second section of the drive had coal dust accumulations packed both in and under the drive, and around the rollers of the drive (Tr. 11). The inspector testified that the dust was packed around the bottom rollers of the drive for 3 to 4, and possibly 5 inches, although he admitted that he did not measure it (Tr. 12). He did not check the rollers for heat, and did not notice any heat source in the area (Tr. 12, 17). He described the accumulations as "damp and wet" at that location (Tr. 12).

Proceeding in from the second section drive, he found accumulations of various depths all along the second section of belt (Tr. 13, 27). These accumulations extended from the head to the tailpiece (Tr. 32). For a distance of 650 feet, they measured 18 inches deep or more in spots (Tr. 32). The remainder measured 2 to 4 inches in depth (Tr. 32). The bottom rollers of the belt were rubbing the accumulations (Tr. 13). Generally speaking, the accumulations were dry, but there were some wet areas along the beltline (Tr. 35). The second section tailpiece was also packed with accumulated coal dust (Tr. 13). The tailpiece was described as "dirty" (Tr. 27).

The third section of the belt had accumulations of coal and coal dust around it. The third section drive also had some coal dust around it. Coal dust had been shoveled out from around the tailpiece and had been stacked around it (Tr. 28).

The accumulations were located mostly on the west side of the belt (Tr. 13). The measurements were made with a tape measure

(Tr. 13). Although the inspector did not recall how many measurements he had taken, he stated that the measurements were interspersed along the beltline (Tr. 13).

The accumulations consisted of lumps of coal with some rock in it (Tr. 14). The pieces of coal were large (Tr. 43). The rock that was intermixed with the coal along the west side of the belt was large rock that had been cut as part of the mining cycle (Tr. 43). This was described as normal because "[t]here is no pure coal. It all has rock intermixed with it * * *" (Tr. 43-44). The inspector further testified that the amount of rock observed in the accumulation was insufficient to render the accumulation inert "as a whole" (Tr. 45).

The coal dust was not float coal dust, but a fine coal dust that could pass through a 100 mesh screen (Tr. 14).

The inspector testified that coal was being run at the time (Tr. 17), although he did not know how much coal had been mined on that shift (Tr. 46). Although the belt was running, the inspector did not recall whether anything was being carried on the belt (Tr. 47).

The inspector had checked the preshift examiner's books prior to going underground (Tr. 14). He testified that two recordings in the preshift examiners books stated that the belt was dirty (Tr. 16). The preshift examination conducted between 5 and 8 a.m. on November 1, 1977, recorded the belt as dirty from the first section tail to the second section tail (Exh. O-1-C, Tr. 15). According to the inspector, Mr. Tom Gentry, the mine manager, had recorded in the book that he did not have the necessary people to correct the condition (Tr. 16).

The inspector testified that a written cleanup plan was in effect at the mine on November 1, 1977, and that he had seen it on a previous occasion (Tr. 17). He did not recall the Respondent as having any provisions in the cleanup plan for cleaning the conveyor belt system (Tr. 18). However, he was aware that the Respondent had a practice of assigning belt shovelers as needed to the different areas that needed cleaning (Tr. 18). He testified that the practice at the Orient No. 6 Mine was to do very little shoveling (Tr. 48). Although they usually patrol the belt "maybe once a shift," they mostly station themselves at the drive or tailpiece and cleanup spills caused by the failure of the belts to stop in sequence (Tr. 48).

According to the inspector, a great deal of spillage occurs along this belt because it had worn, reducing the width to 31 or 32 inches at points (Tr. 47). Due to this narrowness, the belt should be cleaned by assigning people to continuously work on it (Tr. 47). He stated that one man could handle 6,000 to 7,000 feet of belt in the absence of the spillage problem, but that it would require 2 or 3 men on each shift to keep this particular belt clean (Tr. 49). The inspector saw one man shoveling, and he was located in the middle of the second section of the belt (Tr. 19).

Mr. Richard Gale Dawson, the Respondent's shift mine manager on November 1, 1976 (Tr. 73-74), testified that he walks each belt line weekly, and that he had probably walked the 18th north east belt line more than 50 times as of November 1, 1976 (Tr. 86). His experience, both as a belt foreman and from walking the belt, indicated that it would require 2 men to properly clean it (Tr. 86). Two men would be sufficient, in the absence of a personal communication from the belt examiner that the belt was especially dirty (Tr. 87). According to Mr. Dawson, the examiner makes an entry in the preshift report anytime the belt needs cleaning, but this does not necessarily indicate that a hazard exists (Tr. 87). If it is of such a nature as to present a hazard, the examiner normally informs Mr. Dawson (Tr. 87). He testified that on November 1, 1976, no one told him anything regarding the nature and extent of the accumulation cited by the inspector (Tr. 87).

The preshift mine examiner's report for October 31, 1976, covering the shift examination from 9 p.m. to 12 midnight (Exh. O-1-A) contains a notation covering the second section of belt showing a dirty tail (Tr. 78). According to Mr. Dawson, this notation indicated a spill at the transfer point involving approximately 12 feet (Tr. 78). He stated that a belt cleaner had been assigned to clean this section of belt (Tr. 78).

The preshift mine examiner's report for November 1, 1976, covering the 5 a.m. to 8 a.m. examination (Exh. O-1-C) states: "18 north belt dirty from 3177 to second belt drive west side" (Tr. 81). This covers a distance of 750 feet (Tr. 81-82). No one was assigned to clean the area (Tr. 110).

The northeast section of the mine did not operate between 8 a.m. and 4 p.m. on November 1, 1976, and no coal was produced on this section during that 8 hour time period (Tr. 82-83).

During the preshift examination conducted between 1 p.m. and 4 p.m. on November 1, 1976, the examiner recorded a dirty belt in the first section of tail and the second section of tail (Exh. O-1-D, Tr. 84). According to Mr. Dawson, the entry indicated that approximately 2,200 feet of belt was involved (Tr. 85). However, he was unable to state why the belt was reported dirtier in Exhibit O-1-D than in Exhibit O-1-C because the belt had not been in operation during the intervening shift (Tr. 85). Mr. Dawson testified that the entry in Exhibit O-1-D caused him to assign additional personnel to clean the belt (Tr. 85-86).

In describing the accumulations, Mr. Dawson stated that some of them had been shoveled from the second section drive and thrown along side the rib (Tr. 89). He described the drive area as being extensively wet, as standing in water (Tr. 89). The material between the drives was characterized as damp (Tr. 103).

He characterized the material along the west side of the drive as primarily refuse material from two shafts being drilled approximately 700 feet from the belt tail, (Tr. 89, 90, 99), although he admitted seeing some large chunks of coal and some small particles of coal (Tr. 99). The drilling process had produced refuse consisting primarily of shale, with some limestone and a small amount of lime rock (Tr. 91). He stated that such material would be wet (Tr. 91). The parties stipulated that in addition to the coal which the belt hauled from the production areas, some material from the shafts was placed on the belt to be disposed of outside the mine (Tr. 95).

In Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par. 22,088 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977), the Board of Mine Operations Appeals (Board) held that the presence of a deposit or accumulation of coal dust or other combustible materials in active workings of a mine is not, by itself, a violation.

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

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

8 IBMA at 114-115.

For the reasons set forth below, I find that accumulations of combustible material were present in the mine's active workings, as described in the subject order of withdrawal.

There is a conflict in the testimony as to the composition of the material along the 18th notheast conveyor belt. The testimony of Mr. Dawson characterizes the material as primarily shale, limestone and lime rock, while the testimony of Inspector Conner characterizes it as coal and coal dust. Having had the opportunity to assess the credibility of the witnesses, I conclude that the inspector's testimony correctly identifies the composition of the material. The inspector recalled the sinking of the two shafts, that some of the material had been stockpiled in crosscuts, and he

believed that some of it had been loaded out (Tr. 39-40). He was aware that some of the material from the shafts was included in the areas observed along the belt line, and was able to give a detailed description of its color (Tr. 40). The fact that he was aware of the presence of this material during the course of the inspection, and that he was able to identify it, indicates that he correctly identified the accumulation as principally coal and coal dust.

Although the accumulations were described as damp to wet in certain areas, there is no indication that the accumulations were sufficiently wet in all areas to prevent combustion under any circumstances. In fact, the inspector stated that most of the material was dry (Tr. 35).

Accordingly, it is found that accumulations of combustible materials existed in the mines active workings, as described in the subject order of withdrawal (Exh. M-1).

The preshift examiner's reports contain references to accumulations along the 18th northeast conveyor belt, but they do not contain entries indicating that the accumulations were as extensive as those reported by the inspector. However, the discrepancy between Exhibits O-1-C and O-1-D as to the extent of the accumulations reveals that the reports are a less than accurate indicator of the duration of their existence. Exhibit O-1-C is the entry which preceded Exhibit O-1-D, and the former entry records a less extensive accumulation problem than does the latter. Yet, the belt was neither in operation nor was any coal produced during the intervening time period. In light of this discrepancy, I accept the inspector's estimate that the accumulations existed for a number of shifts (Tr. 22). An individual conducting a proper preshift or onshift examination should have discovered the accumulation's presence. Accordingly, it is found that the Respondent knew or should have known of their existence.

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

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

8 IBMA at 115.

The Board further stated:

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

8 IBMA at 111.

The extent of the accumulation and the opinion of the inspector, coupled with the testimony regarding the usual cleanup procedure for the mine, indicate that the accumulation existed for more than a reasonable time. The fact that some of the accumulations had been piled along the ribs, coupled with the fact that only one belt shoveler was working on the accumulations when the inspector walked the belt, indicate that the Respondent was not securing effective removal of the accumulation at the time the order was issued. Two or three shovelers should have been assigned to continuous cleanup duties along the belt. Although Mr. Dawson's experience indicated the need for 2 shovelers to maintain the area in an acceptable condition, (Tr. 87), he did not always assign 2 shovelers to the subject belt (Tr. 86).

Although the entry in the preshift report for the examination conducted between 5 a.m. and 8 a.m. on November 1, 1976, (Exh. O-1-C) revealed an accumulations problem along the subject belt, no one was assigned to clean the belt on the November 1, 1976, 8 a.m. to 4 p.m. shift (Tr. 110). The mine manager is supposed to abate items reported by the examiners (Tr. 111). The entry in the preshift report for the examination conducted between 1 p.m. and 4 p.m., on November 1, 1976 (Exh. O-1-D) indicated to Mr. Dawson that 2 shovelers were required to alleviate the problem. Even though he may have assigned an additional shoveler to the belt, the fact remains that only one belt shoveler was working in the area at the time the order was issued. In the words of Inspector Connor: "That one man that I saw shoveling on the belt could not have cleaned the accumulations in a week of shoveling" (Tr. 22).

In view of the facts as set forth above, it is found that MSHA has both established a prima facie case for a violation of 30 CFR 75.400 and preponderated over the rebutting evidence adduced by the Respondent. Zeigler Coal Co., 4 IBMA 88, 82 I.D. 111, 1974-1975 OSHD par. 19,478 (1975). Accordingly, it is found that the violation occurred as alleged.

C. Gravity

The violation was observed by the inspector during a production shift (Tr. 114), although no coal had been produced (Tr. 115). The belt was running (Tr. 12), but the inspector could not recall anything being carried on it (Tr. 47).

Some rollers were surrounded completely by accumulations (Tr. 12), but the inspector did not know how many rollers were turning in the accumulation (Tr. 38). He did not recall whether any rollers were broken (Tr. 38). He did not check the rollers for heat, (Tr. 12, 17), and did not notice any heat source in the area (Tr. 12).

According to the inspector, the mine is gassy, liberating in excess of 600,000 cubic feet of methane in 24 hours (Tr. 7). However, there was no methane present in the belt entry (Tr. 37). The explosive range for methane is 5 to 15 percent, with 9 percent as the optimum (Tr. 27). The belt entry was isolated, as far as the inspector could ascertain (Tr. 37). Mr. Dawson described the belt as isolated (Tr. 97).

The inspector classified the violation as a serious one (Tr. 20). In his opinion, serious physical harm could have befallen a miner because if a mine fire were to occur or if an explosion were to occur the accumulations could possibly propagate and extend an explosion (Tr. 20).

The most probable ignition sources were described as friction or electicity (Tr. 37-38). Friction could have been caused by the rollers rubbing rock and coal (Tr. 20, 38-39). The drive was classified as a possible ignition source because the drive bearings could overheat and cause combustion (Tr. 21). However, there was no indication that overheating of the drive bearings was likely to occur. The inspector did not recall seeing any cables or electrical wiring in contact with the coal dust (Tr. 39).

If an ignition had occurred, some smoke would have reached the face area (Tr. 21), but the majority of it would have entered the return air course (Tr. 22).

Most of the accumulations were dry (Tr. 35). There were some wet areas, as set forth in Part V (B), supra.

The inspector observed a small amount of rock dust underneath the accumulations (Tr. 36).

The belting material was a "scandura conveyor belting" with a U.S.B.M. approval No. 28-1, which specifies that this material is fire resistant and will not support combustion (Tr. 98). Fire protection was provided along the conveyor with a two inch water line provided with fire hose outlets as required, and a fire sensing system along the entire belt line (Tr. 98). Three hundred feet of fire hose, carbon dioxide fire extinguishers and numerous sacks of rock dust were provided at every drive assembly (Tr. 98). In accordance with the Code of Federal Regulations, the conveyor line was contained and isolated from the intake and return escapeways Tr. 98-99). No high voltage electric wires were present in the subject belt entry (Tr. 98-99).

Accordingly, on the facts as set forth above, it is found that the violation was serious.

D. Negligence of the Operator

It is found, as set forth in Part V (B), supra, that the Respondent knew or should have known of the violation. Of particular significance are the following findings:

The Respondent did not assign individuals to clean the subject belt during the 8 a.m. to 4 p.m. shift on November 1, 1976, even though the entry in the preshift report (Exh. O-1-C) indicated that the belt was dirty. As mentioned in Part V (B), supra, the entry in Exhibit O-1-D reveals a more extensive accumulation problem than does the entry in Exhibit O-1-C, even though the belt was not in operation and no cleaning occurred during the intervening shift. These facts indicate that either the area was not subjected to a proper preshift examination or that the examiner failed to accurately record his observations in the preshift reports. However, the actual or constructive knowledge of a preshift examiner is imputed to the operator. Pocahontas Fuel Company, 8 IBMA 136, 84 I.D. 488, 1977-1978 OSHD par. 22,218 (1977) aff'd sub nom. Pocahontas Fuel Company v. Andrus, 590 F.2d 95 (4th Cir. 1979).

In view of the foregoing, it is found that the Respondent demonstrated considerably more than ordinary negligence.

E. Good Faith in Securing Rapid Abatement

The order of withdrawal was issued at 6:20 p.m. on November 1, 1976 (Exh. M-1). Mr. Dawson proceeded immediately to the 18th north east conveyor belt area after learning of the closure order (Tr. 87). Mr. Dawson walked the beltline, and thereupon assigned a crew to

remove the accumulations by telling the face foreman that he wanted more individuals to shovel (Tr. 88). The order was terminated at 7:45 p.m. on November 2, 1976.

Accordingly, it is found that the Respondent demonstrated good faith in securing rapid abatement of the violation.

F. History of Previous Violations

The history of previous violations at the Respondent's Orient No. 6 Mine during the 24 months prior to October 28, 1976, is embodied in the following chart:

Violations of 30 CFR	Year 1 10/30/74-10/29/75	Year 2 10/30/75-10/28/76	Totals
All Sections	190	169	359
Section 75.400	32	28	60

(Note: All figures are approximations)

The operator had paid assessments for approximately 359 violations of all regulations falling under 30 CFR within the 24 months preceeding the violation of October 29, 1976. Approximately 190 of those violations occurred between October 30, 1974 and October 29, 1975, while 169 occurred between October 30, 1975 and October 28, 1976.

The operator had paid assessments for approximately 60 violations of 30 CFR 75.400 during the 24 months preceeding October 29, 1976. Approximately 32 of those occurred between October 30, 1974 and October 29, 1975, while approximately 28 occurred between October 30, 1975 and October 28, 1976.

G. Appropriateness of Penalty to Operator's Size

The Freeman United Coal Mining Company produces approximately 6,221,752 tons of coal per year. (Stipulations embodied in transcript of the September 26, 1978 settlement proceedings, pp. 5, 11, Docket Nos. VINC 78-392-P, et al). The Orient No. 6 Mine produces approximately 1,159,797 tons of coal per year. (Stipulation embodied in transcript of the September 26, 1978 settlement proceedings, pp. 5, 11, Docket Nos. VINC 78-392-P, et al).

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

Counsel for the Respondent concedes in his post-hearing brief that assessment of the maximum penalty would have no effect on the Respondent's ability to continue in business (Respondent's Post-Hearing Brief, p. 23). Furthermore, the Interior Board of Mine

Operations Appeals has held that evidence relating to the issue as to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

1. Freeman United Coal Mining Company and its Orient No. 6 Mine have been subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969 and the Federal Mine Safety and Health Act of 1977 during the respective periods involved in these proceedings.

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

3. The violation charged in Order No. 6-0179 (1 LDC), November 1, 1976, 30 CFR 75.400 is found to have occurred.

4. All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorported herein.

VII. Proposed Findings of Fact and Conclusions of Law

Freeman United Coal Mining Company submitted a post-hearing brief. MSHA submitted no post-hearing brief. Such brief, insofar as it can be considered to have contained proposed findings and conclusions, has been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

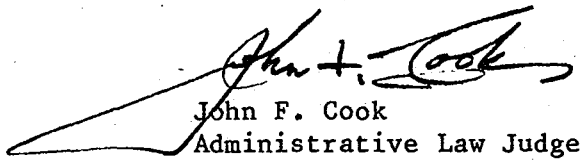
VIII. Penalty Assessed

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

Order No.	Date	30 CFR Standard	Penalty
6-0179 (1 LDC)	11/01/76	75.400	$ 3,000

ORDER

The Respondent is ORDERED to pay civil penalty in the amount of $3,000 as assessed in this proceeding within 30 days of the date of this decision.



John F. Cook
Administrative Law Judge

Issued: July 26, 1979

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 26, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PITT 78-419-P
Petitioner	:	A/O No. 36-00818-02012V
v.	:	
	:	Foster No. 65 Mine
LEECHBURG MINING COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT
AND
ORDERING PAYMENT OF CIVIL PENALTY

Appearances: Michael V. Durkin, Esq., Joseph Walsh, Esq., and Anna Wolgast, Esq, Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Henry McC. Ingram, Esq., and R. Henry Moore, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Cook

On July 31, 1978, the Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalty against Leechburg Mining Company (Leechburg). This petition was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1977). An answer was filed on August 18, 1978. A prehearing order was issued.

Subsequent thereto, various notices of hearing were issued. When the hearing convened on December 5, 1978, in Pittsburgh, Pennsylvania, MSHA proposed the receipt into evidence of certain documents in order to establish its prima facie case in the absence of the issuing MSHA inspector. Leechburg interposed objections, both to the receipt of the documents into evidence and to a continuance, on various grounds. Instead, Leechburg moved for dismissal of the proceeding with prejudice. As grounds therefor, Leechburg cited MSHA's failure to comply with Leechburg's prehearing interrogatories, requests for admissions and requests for production of documents. The motion was denied, upon the premise that MSHA would comply with the requests for admissions and for production of documents within 15 days and on December 6, 1978, the hearing was continued until February 15, 1979.

On February 15, 1979, MSHA filed a motion for approval of settlement. An order was issued on February 16, 1979, cancelling the hearing and continuing the proceeding indefinitely pending consideration of the request for approval of settlement.

An order was issued on March 6, 1979, denying the motion for approval of settlement. Subsequent thereto, MSHA filed a second motion wherein it requested both approval of a settlement and dismissal of the proceeding.

Information as to the six statutory criteria contained in section 110 of the Act has been submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

MSHA's motion sets forth the following justifications for the proposed settlement:

> Comes now the Mine Safety and Health Administration (MSHA), by and through its undersigned attorney, and moves the Administrative Law Judge (Judge) to approve the settlement to which the parties have agreed, as expressed in this second motion, and to dismiss the Petition for Assessment of Civil Penalty.

The alleged violation in this case and the settlement are identified as follows:

Number:	Date:	30 CFR:	Assessment	Settlement
7-0029	9/09/77	75.1403	$1,650	$ 250

> 1. On or about February 15, 1979, the original motion to approve settlement was filed. On March 6, 1979, the Judge issued a decision disapproving the proposed settlement. Since then the parties have reviewed the entire matter in light of the Judge's disapproval. They believe that their proposed settlement is an appropriate disposition of the case. Therefore, this second motion proposes a settlement of the one alleged violation in the case for $250, i.e., the same amount proposed in the original motion.
>
> 2. In the original motion, due to a typographical error, for which MSHA apologizes, the amount of the proposed assessment was stated as $650 instead of the correct $1650. However, during the negotiations which resulted in the proposed settlement, the Office of the Solicitor

was aware of the correct proposed assessment. It was determined that the proposed assessment was much too high and the proper penalty was agreed to be $250.

3. After correcting the proposed assessment, MSHA now adopts the original motion and its attachments in support of this motion to approve settlement. (A copy of that motion is attached). In addition, brief comments on the six criteria will be included here.

4. Gravity was sufficiently covered in the original motion.

5. Negligence was sufficiently covered in the original motion.

6. The Respondent is a small to medium size operator as the tonnage figures in the original motion indicate.

7. The Respondent demonstrated good faith in achieving abatement after notification of the alleged violation.

8. Attached hereto and made a part hereof is a computer printout from MSHA's Office of Assessments. It reflects that in the two years immediately preceding the subject alleged violation, Respondent paid penalties for 107 violations. Two of the penalties were for violations of the mandatory standard here in question - one in 1975 and one in 1976. The penalties paid for these were $58 and $78, respectively.

9. Payment of the agreed penalty will have no effect on Respondent's ability to continue in business. The parties have agreed that the Judge should take official notice of the financial information introduced before him in Leechburg Mining Co., PITT 78-420 (decision pending), for a somewhat detailed view of Respondent's financial condition. In order to facilitate such consideration, attached hereto and made a part hereof are pages 15 through 34 of the transcript of that proceeding and two exhibits from that proceeding, the Respondent's Financial Statement and 1977 Federal tax return.

It is the parties belief and conviction that approval of this settlement is in the public interest and will further the intent and purpose of the Federal Mine Safety and Health Act of 1977.

Those portions of the February 15, 1979, motion, incorporated by reference into the above-quoted passage, state the following:

* * * * * * *

2. In support of said settlement MSHA submits the order of assessment including the narrative findings of the assessment office, the order of withdrawal, the order of termination, and the inspector's statements, and the notice of safeguard.

3. As set forth in the narrative findings of the assessment office, the annual company production is 169,761 tons. The annual production for the Foster #65 Mine is the same.

4. As set forth in the narrative findings of the assessment office, the history of violation includes 111 violations during the 24-months prior to the violation at issue.

5. The order of withdrawal was issued on September 9, 1977. The condition or practice cited in the order reads as follows. "The clearance face along the track haulage road was obstructed with loose rock, mud, steel rails, and cement blocks at various locations beginning at the 4 right section and extending outby to the quarter mains overcast, a distance of approximately 3200 feet. The clearance space measured from one to 16 inches from the furtherest [sic] projection of the normal traffic at these locations. Issued in reference to notice to provide safe guard No. 1 WDW issued 2-18-72.

6. The notice to provide safeguard reads as follows: "The clearance space and shelter holes along all track haulage entry at this mine shall be cleared of loose rock and other loose materials, crosscuts used as shelter holes shall be cleared of loose rock and other loose materials for a depth of at least 15 feet." In its narrative findings the assessment office concluded that the violation resulted from the operator's negligence. The daily examination should have revealed this condition. The testimony of the inspector would support this conclusion. In its narrative findings, the office of assessment did not make an express finding of gravity. In a discussion with the inspector, the inspector stated that the entry was not used regularly. The entry was used only by one supply car each day, and by the examiner who made the daily inspection. The inspector stated that approximately five percent of the 3200 feet contained obstructions. He stated that there were perhaps four or five cement blocks in the entire area. He said that there were three or four rails in this area. He said that most of the obstructions consisted of loose rock fallen from the roof. This rock resulted from sloughing. The sloughing debris measured from eight to ten inches in depth. These obstructions

presented a tripping hazard to anyone walking in the area. He stated that there was no other hazard presented by the violation.

In accordance with the wishes of the parties, official notice is hereby taken of the financial information introduced in Leechburg Mining Company, Docket No. PITT 78-420-P (June 27, 1979). 5 U.S.C. § 556(e) (1976). In that decision, the evidence adduced by Leechburg as to the company's financial condition was analyzed as follows:

> The Respondent is subject to a maximum aggregate penalty assessment of $60,000 for the six subject violations. The Respondent, through the testimony of company president Harold Dunmire, contends that a $60,000 penalty would jeoparize the Respondent's survival, considering the Respondents other financial obligations (Tr. 435-36). The Respondent anticipates difficulty in raising $60,000 within 30 days because the company's current financial posture renders doubtful the provision of the requisite monies by a lending institution (Tr. 445-46).
>
> In addition to the testimony of company president Harold Dunmire, the Respondent offered a copy of the Respondent's tax return for the year ending June 30, 1978, and financial statements for the year ending June 30, 1978, in support of its position. The Respondent did not call an expert witness to assist in interpreting the tax return and the financial statements. Bearing in mind the limitations imposed by the lack of expert testimony, the following picture of the Respondent's financial condition was established by the evidence.
>
> Leechburg Mining Company is owned by a small group of shareholders and is not part of a larger business entity (Tr. 437, 440). Eighty-two percent of the company's stock is held by the Mellon Bank on behalf of the Hick's estate (Tr. 438). The Bank administers the trust for the estate (Tr. 439). The beneficial interest in the trust is held by Lewis and Harry Hicks, the heirs of the Hick's estate (Tr. 438-39).
>
> The company has approximately 80 employees (Tr. 432). It operates only one mine, the Foster No. 65 Mine (Tr. 440). The mine has two sections operating (Tr. 432). The company's coal production was lower during the year ending June 30, 1978 than during the year ending June 30, 1977, because of the United Mine Worker's strike in 1978 (Tr. 432-33). The company produces approximately 900 to 1,000 tons of coal per day (Tr. 441). It is sold to Penelec at a price of $26.60 per ton, F.O.B. (Tr. 433, 441). The

contract with Penelec expires on April 22, 1979. The company anticipates receiving a reduced price per ton after April 22 because the current prevailing market rate for coal is $22 to $25 per ton (Tr. 441).

The company has large obligations based on a settlement agreement with the Pennsylvania Department of Environmental Resources for reclamation of 130 acres of refuse area (Tr. 434). This reclamation is proceeding at the present time (Tr. 434). It costs $20,000 to $25,000 per month, and is projected to cost $1.3 million upon completion in 1981 (Tr. 435, 441-3, Exh. OX-13). According to Mr. Dunmire, the company lacks sufficient assets to fund this liability and must pay for it on a day-to-day, month-to-month basis out of net operating revenues (Tr. 434-35).

At a recent board of directors meeting, one director proposed closing the company, primarily in consideration of the obligations to the Pennsylvania Department of Environmental Resources (Tr. 436). It was decided at that time to continue in business as long as sufficient revenue could be generated (Tr. 436).

Leechburg's U.S. Corporation Income Tax Return for the year ending June 30, 1978, shows a $257,236 loss for tax purposes (Exh. OX-15). The $257,236 loss was computed as follows:

Gross Income	
Gross receipts or Gross Sales	$3,883,699
Less: Cost of Goods Sold	3,534,850
Gross Profit	348,849
Interest	55,735
Gross Rents	5,810
Gross Royalties	5,082
Other Income	4,086
Total Income	419,562
Deductions	
Compensation to Officers	79,605
Salaries & wages (not deducted elsewhere)	9,901
Rents	690
Taxes	157,349
Interest	2,785
Depreciation	241,857
Depletion	662
Pension, Profit Sharing, etc. plans	73,107
Other Deductions	110,842
Total Deductions	676,798
Taxable Income	(257,236)

Tax

Refunded 25,714

The financial statement for the year ending June 30, 1978 (Exh. OX-13), reveals the following information:

Balance Sheet

Assets	June 30, 1978	June 30, 1977
Total current assets	1,760,592	2,002,797
Mortgage Receivable	10,932	12,777
Annuity Contract	72,000	72,000
Fixed Asset-At Cost	1,948,592	1,762,846
	3,792,116	3,850,420
Liabilities		
Total current Liabilities	649,903	446,694
Deferred Compensation	72,000	72,000
Committments and Contingencies (note c)	--	--
Stockholders Equity		
Capital stock par value $5 per share- 20,000 shares authorized & issued	100,000	100,000
Capital contributed in excess of par value	38,675	38,675
Retained Earnings	2,931,538	3,193,051
	3,070,213	3,331,726
	3,792,116	3,850,420

Statement of Earnings and Retained Earnings	1978	1977
Revenues	3,954,413	5,484,939
Costs and Expenses	4,217,634	4,790,494
(Loss) earnings before income taxes	(263,221)	694,445
Income Taxes	(1,708)	88,243
(Loss) Earnings for Year	(261,513)	606,202
Retained earnings-beginning of year	3,193,051	2,686,849
Cash dividends paid	--	(100,000)
Retained earnings-end of year	2,931,538	3,193,051
(Loss) Earnings per share	($13.08)	$30.31

Statement of Changes in Financial Position	1978	1977
Working capital at beginning of year	1,556,103	971,440
Working capital at end of year	1,110,689	1,556,103
(Decrease) Increase in working capital	(445,414)	584,663

Cost of Operations (Years ended June 30)	1978	1977
	3,737,349	4,335,249

Fixed Assets & Accumulated Depletion & Depreciation

	Balance July 1, 1977	Additions	Deductions	Balance June 30, 1978
Fixed Assets	4,659,000	433,546	24,263	5,068,283
Accumulated Depletion & Depreciation	2,896,154	246,365	22,828	3,119,691

The land reclamation expenses are not covered in the financial statements (Tr. 443). Reclamation expenses currently run between $20,000 to $25,000 per month (Tr. 435). This translates into yearly expenses ranging between $240,000 and $300,000.

The financial statement (Exh. OX-13) reveals assets valued at $3,792,116 for the year ending June 30, 1978, a $58,308 decline from the $3,850,420 figure for the year ending June 30, 1977. Total current liabilities increased from $446,694 to $649,903 during the same time period, while retained earnings declined from $3,331,726 to $3,070,213 (Exh. OX-13).

Revenues declined from $5,484,939 in the year ending June 30, 1977 to $3,954,413 in the year ending June 30, 1978 (Exh. OX-13), while costs and expenses failed to decline at the same rate (Exh. OX-13). This resulted in a $261,513 loss for the year ending June 30, 1978, as opposed to the $606,202 profit for the year ending June 30, 1977.

It is impossible to determine, on the basis of the information supplied, whether the loss experienced in the year ending June 30, 1978, is attributable to such

unforeseen and nonrecurring activities as the 1978 United Mine Workers' strike (Tr. 432-3), or whether it indicates long term financial problems. The Respondent offered no evidence, other than the deleterious effects of the strike, which would have explained the decline in revenues reflected in the financial statements, a decline responsible for the loss experienced during the year ending June 30, 1978. It appears, however, that Respondent's financial posture, when viewed in light of total assets and retained earnings, is sufficiently secure to withstand the assessment of moderately appropriate civil penalties.

PITT 78-420-P at pp. 35-39.

In view of the reasons given above by counsel for MSHA for the proposed settlement, and in view of the disclosure as to the elements constituting the foundation for the statutory criteria, it appears that a disposition approving the settlement will adequately protect the public interest.

ORDER

Accordingly, IT IS ORDERED that the proposed settlement, as outlined above, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that Respondent, within 30 days of the date of this decision, pay the agreed-upon penalty of $250 assessed in this proceeding.

John F. Cook
Administrative Law Judge

Issued: July 26, 1979

Distribution:

Michael V. Durkin, Esq., Joseph Walsh, Esq., & Anna Wolgast, Esq., MSHA, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Henry McC. Ingram, Esq., R. Henry Moore, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, 900 Oliver Building, Pittsburgh, PA 15222 (Certified Mail)

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

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 27, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. VINC 79-108-P A.O. No. 33-01172-03010
v.	:	Meigs No. 1 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION

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

Before: Judge Koutras

Statement of the Case

This proceeding is one of twelve docketed cases scheduled for hearings on the merits at Columbus, Ohio, June 19, 1979. A petition for assessment of civil penalty was filed in this case by the petitioner pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) on January 4, 1979, seeking civil penalty assessments for two alleged violations of the Act and implementing mine safety and health standards. Respondent filed timely answers contesting the citations, and pursuant to notice, the parties appeared at the time and place for the hearing. During a prehearing conference on the record, the parties informed me that they had reached a tentative settlement with respect to this docket. They requested an opportunity to be heard with respect to the proposed settlement and that I approve same pursuant to Commission Rule 29 CFR 2700.27(d).

The parties were afforded an opportunity to present arguments in support of the proposed settlement. The citations, initial assessments, and the proposed settlement amounts are as follows:

Citation No.	Date	30 CFR Section	Assessment	Settlement
279508	7/11/78	75.1722(b)	$530	$265
279522	7/18/78	75.200	$445	$325

Discussion

In support of its recommendation concerning the proposed civil penalty of $265 for the guarding citation, petitioner's counsel pointed out that the cited belt pulley area was protected with a guard of sorts, namely chicken wire over most of the exposed area. In addition, the condition was abated rapidly in approximately an hour and twenty-five minutes. The respondent believed the existing guard was adequate but was willing to settle the matter.

With regard to the roof control plan citation, section 75.200, respondent argued that the roof bolter was coming in to bolt the area cited at the time the inspector cited the violation. Petitioner stated that the condition was abated promptly, that the pertinent roof control plan provisions were explained to the working crew by the operator, and that the petitioner was satisfied with the proposed settlement after taking into account the question of negligence and gravity of the situation presented (Tr. 4-13).

ORDER

After due consideration of this matter, I find that the proposed settlement should be approved. Accordingly, pursuant to 29 CFR 2700.27(d), respondent is ordered to pay civil penalties totaling $590.00 in satisfaction of the cited violations within thirty days of the date of this decision. Upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

David M. Cohen, Esq., American Electric Power Service Corporation, P.O. Box 700, Lancaster, OH 43130 (Certified Mail)

Linda Leasure, Esq., U.S. Department of Labor, Office of the Solicitor, 881 Federal Office Building, 1240 E. Ninth Street, Cleveland, OH 44199 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 27, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. VINC 79-113-P
	:	A.O. No. 33-02308-03011
v.	:	Raccoon No. 3 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION

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

Before: Judge Koutras

Statement of the Case

This proceeding is one of twelve docketed cases scheduled for hearings on the merits at Columbus, Ohio, June 19, 1979. A petition for assessment of civil penalty was filed in this case by the petitioner pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) on January 4, 1979, seeking civil penalty assessments for two alleged violations of the Act and implementing mine safety and health standards. Respondent filed timely answers contesting the citations, and pursuant to notice, the parties appeared at the time and place for the hearing. During a prehearing conference on the record, the parties informed me that they had reached a tentative settlement with respect to this docket. They requested an opportunity to be heard with respect to the proposed settlement and that I approve same pursuant to Commission Rule 29 CFR 2700.27(d).

The parties were afforded an opportunity to present arguments in support of the proposed settlement. The citations, initial assessments, and the proposed settlement amounts are as follows:

Citation No.	Date	30 CFR Section	Assessment	Settlement
279979	8/17/78	75.202	$345	$225
277702	8/18/78	75.606	$106	$106

Discussion

With regard to citation no. 277702, respondent agreed to pay the penalty which was initially assessed for the cited violation. With regard to the proposed reduction for citation no. 279979, respondent pointed out that the cited overhanging rib conditions were 52 inches high and because of relatively low coal, the chances of someone being under the rib and being injured was minimal. Further, there is no evidence that the ribs were loose and the inspector did not measure the extent of the overhanging ribs. In addition, since the ribs had to be sheared down to abate the citation, this was indicative of the fact that the ribs were not loose. Petitioner concurred in respondent's assessment of the gravity presented, although recognizing that a crushing hazard to a machine operator was present (Tr. 36-40).

In addition to the evidence and arguments presented as to the specific circumstances surrounding the citations, petitioner presented information concerning the size and scope of respondent's mining operations at the Raccoon No. 3 Mine and evidence concerning the prior history of violations at that mine (Tr. 35, Exhibit P-1).

ORDER

After due consideration of this matter, I find that the proposed settlement should be approved. Accordingly, pursuant to 29 CFR 2700.27(d), respondent is ordered to pay civil penalties totaling $331.00 in satisfaction of the cited violations within thirty days of the date of this decision. Upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

David M. Cohen, Esq., American Electric Power Service Corporation, P.O. Box 700, Lancaster, OH 43130 (Certified Mail)

Linda Leasure, Esq., U.S. Department of Labor, Office of the Solicitor, 881 Federal Office Building, 1240 E. Ninth Street, Cleveland, OH 44199 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 27, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. VINC 79-149-P A.O. No. 33-01173-03012
v.	:	Meigs No. 2 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION

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

Before: Judge Koutras

Statement of the Case

This proceeding is one of twelve docketed cases scheduled for hearings on the merits at Columbus, Ohio, June 19, 1979. A petition for assessment of civil penalty was filed in this case by the petitioner pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) on January 22, 1979, seeking civil penalty assessments for three alleged violations of the Act and implementing mine safety and health standards. Respondent filed timely answers contesting the citations, and pursuant to notice, the parties appeared at the time and place for the hearing. During a prehearing conference on the record, the parties informed me that they had reached a tentative settlement with respect to this docket. They requested an opportunity to be heard with respect to the proposed settlement and that I approve same pursuant to Commission Rule 29 CFR 2700.27(d).

The parties were afforded an opportunity to present arguments in support of the proposed settlement. The citations, initial assessments, and the proposed settlement amounts are as follows:

Citation No.	Date	30 CFR Section	Assessment	Settlement
279170	8/15/78	75.400	$225	$130
279171	8/15/78	75.301-1	$295	$295
279172	8/15/78	75.301-4(b)(1)	$255	$255

Discussion

Regarding citations 279171 and 279172, respondent agreed to pay in full the penalties initially assessed for those citations. With regard to citation 279170, concerning an alleged accumulation of oil and grease on and around a cutting machine motor, petitioner asserted that while the respondent was negligent in allowing the condition to occur and that it could result in a probable mine fire, the condition was promptly abated and the respondent exercised good faith in this regard (Tr. 24-29).

ORDER

After due consideration of this matter, I find that the proposed settlement should be approved. Accordingly, pursuant to 29 CFR 2700.27(d), respondent is ordered to pay civil penalties totaling $680.00 in satisfaction of the cited violations within thirty days of the date of this decision. Upon receipt of payment, the matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

David M. Cohen, Esq., American Electric Power Service Corporation, P.O. Box 700, Lancaster, OH 43130 (Certified Mail)

Linda Leasure, Esq., U.S. Department of Labor, Office of the Solicitor, 881 Federal Office Building, 1240 E. Ninth Street, Cleveland, OH 44199 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 27, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. VINC 79-140-P
	:	A.O. No. 33-02308-03008
v.	:	Raccoon No. 3 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION

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

Before: Judge Koutras

Statement of the Case

This proceeding is one of twelve docketed cases scheduled for hearings on the merits at Columbus, Ohio, June 19, 1979. A petition for assessment of civil penalty was filed in this case by the petitioner pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) on January 18, 1979, seeking civil penalty assessments for two alleged violations of the Act and implementing mine safety and health standards. Respondent filed timely answers contesting the citations, and pursuant to notice, the parties appeared at the time and place for the hearing. During a prehearing conference on the record, the parties informed me that they had reached a tentative settlement with respect to this docket. They requested an opportunity to be heard with respect to the proposed settlement and that I approve same pursuant to Commission Rule 29 CFR 2700.27(d).

The parties were afforded an opportunity to present arguments in support of the proposed settlement. The citations, initial assessments, and the proposed settlement amounts are as follows:

Citation No.	Date	30 CFR Section	Assessment	Settlement
279804	7/11/78	75.301-1	$560	$325
279807	7/12/78	75.301	$530	$305

Discussion

In support of the proposed settlement for these violations, the petitioner pointed out that the conditions cited were similar violations

related to ventilation, and that one deals with a possible explosion or fire hazard, and the other involves possible exposure to respirable dust. The proposed reduction of the initial penalty takes into account the fact that while more than one employee would be exposed to the fire hazard, only one would be exposed to the dust hazard. The emphasis placed on the number of employees exposed to the hazards by the assessment office was exagerated. Further, after consulting with the inspector, who was present in the courtroom, petitioner asserted that he believed the conditions cited resulted from a problem with adjusting and repairing the line curtains and that they were isolated events. Further, the prior history for prior violations of the same standards show very few for the year 1978 (Tr. 45-49).

In addition to the evidence and arguments presented as to the specific circumstances surrounding the citations, petitioner presented information concerning the size and scope of respondent's mining operations at the Raccoon No. 3 Mine and evidence concerning the prior history of violations at that mine (Tr. 35, Exhibit P-1).

ORDER

After due consideration of this matter, I find that the proposed settlement should be approved. Accordingly, pursuant to 29 CFR 2700.27(d), respondent is ordered to pay civil penalties totaling $630.00 in satisfaction of the cited violations within thirty days of the date of this decision. Upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

David M. Cohen, Esq., American Electric Power Service Corporation, P.O. Box 700, Lancaster, OH 43130 (Certified Mail)

Linda Leasure, Trial Attorney, Office of the Regional Solicitor, U.S. Department of Labor, 881 Federal Office Building, 1240 E. Ninth Street, Cleveland, OH 44199 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 27, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. DENV 79-244-PM
	:	A.O. No. 04-04075-05001
v.	:	
KAISER CEMENT AND GYPSUM CORPORATION, Respondent	:	Permanente Cement Plant

DECISION

Appearances: Donald F. Rector, Attorney, Office of the Regional Solicitor, U.S. Department of Labor, San Francisco, California, for the petitioner; Coraltha O. Lewis, Esquire, Oakland, California, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a petition for assessment of civil penalty filed by the petitioner on January 26, 1979, 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 in the amount of $60.00 for an alleged violation of 30 CFR 56.14-6, and $8.00 for an alleged violation of 30 CFR 56.11-1. The violations were cited in Citations 374802 and 374803 issued by an MSHA mine inspector on March 23 and 28, 1978.

Respondent filed an answer to the petition on February 26, 1979, contesting the citations and requesting a hearing. A hearing was scheduled for San Francisco, California, on June 27, 1979, and the parties subsequently filed a joint motion to approve a proposed settlement and disposition of the matter.

Discussion

With regard to Citation No. 374803, petitioner moves to dismiss the citation on the grounds that it cannot establish a violation of the cited standard. The motion is granted and the petition for assessment of civil penalty with respect to that citation was dismissed.

As for Citation No. 374802, the parties stated that respondent wishes to withdraw its contest and to pay the civil penalty initially assessed at $60.00 for a violation of 30 CFR 56.14-6. In support of the joint motion, the parties assert that the proposed settlement is reasonable and that the proposed disposition of the matter is in the public interest and will further the intent and purpose of the Act.

After review of the proposed settlement presented by the parties, I find that the proposed disposition of this case is consistent with the Act and it is approved.

Order

Citation No. 374803 is dismissed. Respondent is ordered to pay a civil penalty in the amount of $60.00 in satisfaction of Citation No. 374802 within thirty (30) days of the date of this decision and order. Upon receipt of payment by the petitioner, the matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Coraltha O. Lewis, Counsel, Kaiser Cement & Gypsum Corporation, Kaiser Building, 300 Lakeside Drive, Oakland, CA 94666 (Certified Mail)

Donald F. Rector and Marshall P. Salzman, Esqs., U.S. Department of Labor, Office of the Solicitor, 450 Golden Gate Avenue, P.O. Box 36017, Room 10404 Federal Building, San Francisco, CA 94102 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 27, 1979

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. DENV 79-128-P
	:	A.O. No. 42-00081-03001
v.	:	Docket No. DENV 79-129-P
	:	A.O. No. 42-0081-03002
CO-OP MINING CO., Respondent	:	Co-Op Mine

ORDER

The enclosed Decision and Order in the captioned dockets is referred to the Commission pursuant to Rule 29 CFR 2700.5.

George A. Koutras
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 27, 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 79-128-P
Petitioner	:	A.O. No. 42-00081-03001
v.	:	
	:	Docket No. DENV 79-129-P
CO-OP MINING CO.,	:	A.O. No. 42-00081-03002
Respondent	:	
	:	Co-Op Mine

DECISION AND ORDER
DISMISSING PROCEEDINGS

Appearances: Carl E. Kingston, Esq., Salt Lake City, Utah, for the respondent.

Before: Judge Koutras

Synopsis of the Cases

The Arlington, Virginia Solicitor's Office, on behalf of MSHA, filed petitions for assessment of civil penalties against the respondent. Respondent filed timely answers and requested a hearing in Salt Lake City. A hearing was scheduled for Salt Lake on Thursday, July 19, 1979, and the parties were so advised more than ninety (90) days in advance.

Approximately 3 weeks in advance of the scheduled hearings, the parties began settlement negotiations which apparently were finalized sometime during the period July 11-13, 1979 (Tr. 15, 26). I was never informed of any such negotiations or possible settlement, nor was I ever informed of the Denver Regional Solicitor's involvement in the cases until 2 days in advance of the hearing.

On Friday July 13, 1979, while I was on travel status in Idaho conducting hearings, the Denver Regional Solicitor's Office telephoned my office and informed my law clerk that the parties had tentatively agreed to a settlement and that the Solicitor required an additional 2 or 3 weeks to submit it to me and that he did not intend to appear at the hearing. On Tuesday, July 17, 1979, my secretary informed me personally for the first time by telephone while I was in Helena, Montana, conducting a hearing, that she was contacted by telephone by

the Denver Regional Solicitor's Office who informed her that the parties had reached a settlement and did not intend to appear at the scheduled hearing.

On Tuesday, July 17, 1979, at my direction, my secretary contacted counsel for the parties and informed them that they were directed by me to appear at the scheduled hearing and would have an opportunity at that time to present arguments concerning the proposed settlements. Counsel for the parties advised her that they had agreed among themselves not to appear at the hearing and to so inform me.

On Wednesday evening July 18, a day before the hearing, and while in Salt Lake City, I telephoned respondent's counsel at his office in Salt Lake from my motel for the purpose of confirming that he had received my previous directive to appear as communicated to him by my Secretary. He confirmed that he had and also confirmed that he and counsel from the Denver Regional Solicitor's Office had agreed not to attend the hearing. I again directed him to enter an appearance and he indicated that he would, notwithstanding his agreement with petitioner's counsel not to appear.

When the hearing was convened on July 19, the Denver Regional Solicitor failed to appear. Respondent's counsel also failed to appear, and when contacted by me by telephone to ascertain why he had not appeared after advising me that he would, he informed me that after conferring with the Denver Regional Solicitor's Office the evening of July 18, he decided not to appear. He was again directed to appear and he did. The cases were subsequently dismissed for lack of prosecution pursuant to Commission Rule 2700.26(d)(3).

BACKGROUND

These proceedings concern petitions for assessment of civil penalties filed by the petitioner against the respondent on December 6, 1978, 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 three alleged violations in Docket No. DENV 79-128-P, and five alleged violations in Docket No. DENV 79-129-P. The petitions were signed by MSHA counsel Edward H. Fitch, of the Arlington, Virginia, Office of the Solicitor. Mr. Fitch has been counsel of record in these proceedings until July 17, 1979, at which time I was notified for the first time that the Denver Regional Solicitor was handling the cases.

Respondent filed timely answers to the petitions, interposed several defenses, and requested that any hearings held in the cases be conducted in Salt Lake City, Utah. By notice issued April 13, 1979, the parties were advised that hearings would be conducted in Salt Lake City commencing at 9:30 a.m., Thursday, July 19, 1979. A second notice issued on June 26, 1979, advised the parties of the precise hearing location in Salt Lake City, Utah.

On Tuesday, July 17, 1979, while in Helena, Montana, to preside at a hearing, I received a telephone call from my secretary who informed me that the Denver Regional Solicitor's Office attorney, James Abrams, had called my office on Friday afternoon, July 13, 1979, and informed my law clerk that he and counsel for the respondent had reached a settlement with respect to the citations in issue. Reportedly, Mr. Abrams informed my office that, in view of a shortage of secretarial help in his office, he required an additional 3 weeks in which to prepare and submit the settlement for my review and approval. He further advised my office that in view of the settlement agreement, he saw no need to personally appear at the hearing scheduled for Salt Lake City, Utah, Thursday July 19, 1979. It should be noted that although the original and amended notices of hearings were issued on April 13 and June 26, 1979, the Denver Regional Solicitor's Office has failed to enter an appearance in the matter, and I first learned that Mr. Abrams was counsel for MSHA on July 17, 1979.

At my direction, my secretary called Mr. Abrams in Denver and counsel for the respondent in Salt Lake City on July 17, 1979, and informed them that they were directed to appear at the hearing pursuant to the aforementioned notices of hearing and that they would have an opportunity at that time to present oral arguments on the record with respect to the settlement. My secretary informed the parties that I had been out of the office during the preceding week in connection with hearings in Spokane, Washington, Wallace, Idaho, and Helena, Montana, and that I planned to travel to Salt Lake City at the conclusion of the Helena hearing, and would not be returning to Arlington until the following week.

Late in the afternoon on Tuesday, July 17, 1979, my secretary telephoned me again and advised me that she had called the parties and advised them that I expected them to appear at the scheduled hearings pursuant to the notices which were issued. She informed me that Mr. Abrams advised her that he did not intend to appear at the hearing and he requested that I call him to discuss the matter. I instructed my secretary to call Mr. Abrams again and to inform him that I again directed him to appear at the scheduled hearing.

Upon my arrival in Salt Lake City on the evening of Wednesday, July 18, I telephoned counsel for the respondent at his office in Salt Lake to confirm that he had received my instruction to appear at the scheduled hearing. He confirmed that he had but indicated that in a conversation with Mr. Abrams, Mr. Abrams informed him that he had no intention of appearing at the hearing. I again directed respondent's counsel to appear, and my attempts to contact Mr. Abrams at his office in Denver by telephone were not successful.

At 7:30 a.m., Thursday morning, July 19, 1979, I received a telephone call from my secretary who informed me that Mr. Abrams had again

informed her that he did not intend to appear at the hearing because the Denver Regional Solicitor would not authorize travel in the case of a proceeding where the parties had agreed to a settlement.

The hearings in these dockets were convened at 9:30 a.m., Thursday, July 19, 1979, at the designated hearing site in Salt Lake City, pursuant to the notices duly issued and served on the parties. The parties failed to appear at the designated hour. I thereupon contacted respondent's counsel at his office and inquired as to why he had not appeared and whether he intended to do so. His initial response was that he did not intend to appear because he and Mr. Abrams had agreed not to. When reminded of his assurance to me the previous evening that he would appear, and after being advised that I considered the agreement by counsel for the parties not to appear as bordering on a flagrant disregard and contempt of the jurisdiction and authority of the Commission and the presiding judge which could lead to a possible disciplinary action or a default, counsel indicated that he would appear and he did.

Issues Presented

1. Whether the intentional and flagrant refusal of the Denver Regional Solicitor's Office to appear at the hearing under the facts presented in these proceedings constitutes a lack of prosecution warranting dismissal of the cases pursuant to Commission Rule 2700.26(d)(3), which states as follows: "If the Secretary fails to appear at a hearing, the Judge may summarily dismiss the case for want of prosecution."

2. Whether the conduct of MSHA Denver Regional Counsel Abrams, and respondent's Counsel Kingston, in mutually agreeing not to appear at the hearing pursuant to the notices, orders, and directives issued to and served upon them, constitutes a flagrant disregard for the authority and jurisdiction of the Commission and one of its judges amounting to unethical or unprofessional conduct warranting disciplinary proceedings pursuant to Commission Rule 2700.5.

3. Whether the Denver Regional Solicitor's Office engaged in unethical or unprofessional conduct by eliciting from a party-respondent, during the course of a proposed settlement, an agreement not to appear before the judge at a scheduled hearing.

4. Whether the agreement by counsel, not to appear at the hearing after being directed and ordered to do so, constitutes contempt for the duly constituted authority and jurisdiction of the judge, and whether such conduct constitutes unethical and unprofessional conduct warranting disciplinary proceedings pursuant to Rule 2700.5.

DISCUSSION
Dismissal for Want of Prosecution

I believe that it is clear from the facts presented in these proceedings that the Denver Regional Solicitor's Office deliberately and flagrantly decided not to appear at the hearing. Further, it is also clear to me that the Solicitor's Office may have exercised the influence of that office in convincing and instructing respondent's counsel that he too should not appear, and elicited an agreement from counsel not to appear. In the circumstances I believe it is clear that Commission rule 2700.26 (d)(3) is controlling and that the cases should be dismissed for lack of prosecution, notwithstanding the settlement agreement entered into by the parties, the particulars of which were uncommunicated to the judge in advance of the scheduled hearings.

On the facts presented here, the parties began settlement negotiations some 3 weeks prior to the scheduled hearings; yet as of 2 days prior to the hearing, the judge was left completely in the dark, both as to the details of the proposed settlement and the fact that the Denver Regional Solicitor was involved in the cases. Surprisingly, respondent's counsel believed that the Regional Solicitor and the judge worked for the same agence (Tr. 17). Further, the Regional Solicitor apparently believes that a telephone call to the judge's clerk or secretary, informing them that the case has been settled and that the parties do not intend to appear before the judge who is on his way to the hearing site is sufficient to constitute proper and timely notice to the judge with respect to a proposed settlement. As far as I am concerned, the Regional Solicitor is free to continue the handling of cases under his jurisdiction in such a haphazard fashion, and I am free to ignore him and continue dismissing cases in similar circumstances.

On the facts presented in these proceedings, the Regional Solicitor apparently believed that upon completion of the hearing in Helena, Montana, on July 17, 1979, that I should have proceeded back to Arlington, waited 2 or 3 weeks for his settlement motion, and then proceed to act on it. Assuming that I disapproved one or all of the citations, the Solicitor would have me docket the case for hearing a second time and travel back to Salt Lake City for the hearings. The Solicitor overlooks the fact that in these dockets the next stop on my hearing schedule was Salt Lake, counsel for the respondent was in Salt Lake, the official court reporter was in Salt Lake, and that the efforts expended in such arrangements were in preparation for the hearing. The Solicitor also overlooks the fact that the parties were given an opportunity to support the proposed settlement on the record at the hearing and that the parties had 90 days' advance notice of the hearing. In my view, 90 days is ample time for the parties to reach a proposed settlement, and I do not believe it is unreasonable for a judge to ask the Solicitor to send an attorney to Salt Lake from

Denver to present his case, when in fact, the judge, opposing counsel, and court reporter are in Salt Lake. As a matter of fact, out of the four cases on my hearing docket for the week of July 16th, three were scheduled for Salt Lake, and one was scheduled for Helena, and the Denver Regional Solicitor assigned three different attorneys to handle those four cases. Further, in one of those cases, MSHA v. Coastal States Energy Company, Docket No. DENV 79-88-P, Denver Regional Attorney James H. Barkley advised my office by telephone call of June 21, 1979, that the parties had reached a settlement in the matter. Mr. Barkley had not previously entered his appearance and he was advised that he should do so and also file a motion and justification for the proposed settlement. He subsequently entered his appearance in writing on July 2, 1979, and on July 6, 1979, the parties filed their proposed settlement for my consideration. Under those circumstances, the hearing scheduled for Salt Lake City on July 20, 1979, was cancelled and the parties were so informed.

Failure of the Denver Solicitor to Enter an Appearance

Commission Rule 2700.11(a) requires that all initial pleadings be filed with the Commission and that once a judge is assigned to the case all further documents shall be filed with the judge. Every person filing such documents is required to state his address and business telephone number and to advise the Commission of any changes therein, 2700.11(b). Further, the successors of such person is required to inform the Commission of their interest in the matter and to state their address and business telephone number.

The petitions for assessment of civil penalties initially filed by Arlington Counsel Fitch on behalf of MSHA complied with Commission Rule 2700.11(b). However, by failing to enter his appearance in this matter, the Denver Regional Solicitor, as Mr. Fitch's successor, failed to comply with this rule.

Possible Disciplinary Action

It is obvious from the course of events which have transpired, and the facts presented in these cases, that the Denver Regional Solicitor's Office is of the view that it can control the judge's hearing docket and decide for itself whether or not to appear at a hearing pursuant to notice based solely on an ex parte settlement entered into and approved by the Regional Solicitor. It is further obvious from the record presented here that the Regional Solicitor believes that he can not only instruct his own attorneys not to appear at a hearing but may also exercise the power and influence of his office to convince a respondent's attorney that he too should ignore a judge's directives and not appear at a hearing. While I recognize the fact that the Denver Regional Solicitor's Office has discretion as to how to run the prosecutorial functions of his office and the attorneys assigned to him, I do not recognize any authority in his

office to dictate the manner in which a Commission judge conducts his official business in connection with hearings over which the judge has authority and jurisdiction, particularly in the circumstances presented in these proceedings where the parties have had more than 3 months notice, and the judge is attempting to conduct his docket in an orderly, judicious, timely, expeditious, and I might add, economical manner, without any undue and unwarranted interference by a prosecutor's office who mistakenly believes that it can control the judge's trial docket.

Although I am not particularly concerned over the fact that the Regional Solicitor, as a matter of policy, has apparently taken the position that his attorneys should not appear at a hearing in a case where the parties agree to settle a case, I am concerned that he can purport to exert his authority over a party respondent during settlement negotiations to convince or persuade that party to disregard a notice, order, or directive issued by a Commission Judge in connection with the conduct of hearings that are properly before the judge. That is precisely what has transpired in these cases. On the one hand, respondent's counsel is placed in the precarious position of going against an agreement entered into with the Solicitor not to appear before the judge, thus leaving himself open to possible retribution in future cases in which he and the Solicitor may be involved in. On the other hand, counsel is placed in the position of finding himself in a contempt posture by a flagrant disregard of a judge's notices, orders, or directives in matters properly and legally within his jurisdiction and authority. Such a situation simply cannot be tolerated or permitted to continue, and I believe that the Commission should carefully consider such a situation.

Findings and Conclusions

The following findings of material and relevant facts are, in my view, supportive of the disposition made by me in this matter.

1. The notices of hearings in these proceedings were issued and served on the parties more than ninety (90) days in advance of the scheduled hearings.

2. Settlement negotiations were begun by the parties approximately 3 weeks in advance of the date of the hearings, and I was never informed of those negotiations or the fact that the cases may be settled until 2 days before the hearings while on travel status in Montana (Tr. 26).

3. The parties agreed among themselves that as a result of a settlement agreement reached by them on Friday, July 13, that they would not appear at the hearings pursuant to the notices issued by me in this regard.

4. I was away from my office in Arlington, Virginia, on official travel status during the period July 8 through July 20, 1979, for the purpose of conducting hearings in Spokane, Washington, Wallace, Idaho, Helena, Montana, and Salt Lake City, Utah.

5. On Tuesday, July 17, 1979, while in Helena, Montana, for the purpose of conducting a hearing, I was personally informed for the first time, by a telephone call from my secretary that (1) the Denver Regional Solicitor's Office, namely, Attorney James Abrams, was handling the cases, and (2) that Mr. Abrams indicated that he would not appear at the scheduled hearings.

6. At my direction, my secretary telephoned counsel for the parties on Tuesday, July 17, 1979, and informed them that they were directed and expected by me to appear at the scheduled hearings pursuant to the previously issued notices of hearings. The parties were also informed that due to the fact that I was in travel status and had not recieved any information concerning the proposed settlement prior to July 17, 1979, that it would be impossible for me to act on any settlement proposals prior to the date of the scheduled hearings. Further, the parties were informed that they would have a full opportunity to present the proposed settlement to me on July 19, 1979.

7. The Denver Regional Solicitor's Office advised and instructed respondent's counsel that the Regional Solicitor had approved the proposed settlement negotiated by counsel, and that in view of this, Mr. Abrams would not appear at the hearing, and that respondent's counsel need not appear (Tr. 30).

8. After being notified by my office on July 17, 1979, that they were expected to appear at the hearing pursuant to the notices, counsel for the parties again agreed among themselves that they would not appear (Tr. 30).

9. On Wednesday, July 18, 1979, respondent's counsel was directed by me personally by telephone to appear at the scheduled hearing and he assured me that he would, notwithstanding his agreement with the Denver Regional Solicitor's Office that counsel would not appear (Tr. 29).

10. On July 19, 1979, counsel for the parties failed to appear at 9:30 a.m. at the designated hearing site.

11. At approximately 9:40 a.m. on July 19, 1979, respondent's counsel was contacted by telephone by me and he informed me that after consulting with the Denver Regional Solicitor's Office the previous evening,and that morning,he would not appear. He also informed me that the Denver Regional Solicitor's Office would not appear pursuant to the agreement made by the parties, and requested him not to appear (Tr. 30).

12. At my direction, and after being informed of the possible consequences for failing to appear pursuant to notice, namely, the default and disciplinary rules of the Commission, respondent's counsel appeared at the hearing under protest and was given an opportunity to make a statement concerning the matter (Tr. 12-36).

13. Denver is approximately an hour's distance by air from Salt Lake City, the requested and designated hearing site, and the official court reporter and respondent's counsel are located in Salt Lake City and were readily available for the hearing.

14. By letter dated July 18, 1979, addressed to me and received by my office on July 19, 1979, the day of the hearing, signed by Mr. Abrams for Associate Regional Solicitor Henry C. Mahlman, he states as follows:

> This will confirm my July 13, 1979 notification to Ms. Mary Linda Ponticelli of a proposed settlement in the above captioned action. This further confirms my July 17, 1979 notice to your secretary of our inablility to participate in a hearing given the pendency of the parties' proposed settlement.
>
> As I understood your secretary, you preferred not to discuss this matter with either me or respondent's counsel. I mentioned to your secretary, given no opportunity to visit with you, that travel to Salt Lake City, Utah by this office and the transporting of a witness could not be rightly authorized in the face of a proposed settlement agreement. The purpose of my contact was to advise you, in a timely fashion, of my intentions prior to your departure for Salt Lake City, Utah from Montana and the retaining of a court reporter. We hope to have such agreement before you in the next few weeks.

15. A copy of a letter dated July 13, 1979, from respondent's counsel Kingston to Mr. Abrams, and received in my office on July 18, 1979, a day before the hearing states as follows:

> This letter will confirm the settlement which we reached regarding the above. My client has agreed to pay the following penalties in the listed amounts, thus avoiding the necessity of formally hearing the matter in Salt Lake City on July 19, 1979.

Citation No.	Amount
00245741	$ 50.00
00245773	100.00
00245776	110.00

00246309	85.00
00246310	75.00
00246311	75.00
00246497	50.00
00246498	95.00

16. By letter dated July 18, 1979, and received by my office on July 24, 1979, respondent's counsel advised, in pertinent part, as follows:

> This will confirm my conversation with your secretary on July 17, 1979, wherein I advised her that I had agreed with the Office of the Solicitor to a settlement of the above captioned case and therefore did not plan to attend the hearing scheduled in Salt Lake City on July 19, 1979. I understand that the Solicitor's Office will not appear either.

17. As of this date, the Denver Regional Solicitor's Office has yet to file any written notices of his appearance in this case as required by Commission Rules 29 CFR 2700.11 (a) and (b).

18. As of this date, there is not presently pending before me any motion with respect to the proposed settlement negotiated as between the parties.

19. At no time have the parties filed any motions or requests with me that the scheduled hearings be continued for any reason.

20. After receiving more than three (3) months' written notice of the scheduled hearings, and after receiving subsequent oral notices, orders, and directives that they were to appear, the parties took it upon themselves by mutual agreement, both during and after their settlement negotiations, not to appear, in flagrant and contemptuous disregard for the authority and jurisdiction of the presiding judge.

21. Contrary to Mr. Mahlman's assertion in his letter (signed by Mr. Abrams) that he considered the July 17, 1979, phone call to my secretary as a timely effort to preclude my traveling to Salt Lake City, I do not consider that to be timely or relevant, nor do I accept his so-called policy determination that precludes travel by his attorneys when the parties, without regard or any consideration for the presiding judge, decide among themselves not to enter an appearance.

22. The Denver Regional Solicitor's Office has arbitrarily and steadfastly refused to enter an appearance at the scheduled hearing on the ground that the Regional Solicitor, as a matter of policy, has refused travel authorization for his attorneys in cases in which he has approved a settlement as between the parties. However, in instucting respondent's counsel that he too should not appear at the

hearing, the Regional Solicitor's Office, as justification for this position, advised respondent's counsel that "in light of the fact that they had not at that late date arranged for someone to appear in Salt Lake City" respondent should not make an appearance (Tr. 30).

Conclusion

The foregoing discussion and findings clearly indicate to me that the Denver Regional Solicitor's Office never intended to enter an appearance in this matter. Accordingly, I conclude that the cases are ripe for dismissal pursuant to Commission Rule 29 CFR 2700.26(d)(3), for want of prosecution. Although I considered the possibility of dismissing the dockets for an additional reason, namely, the failure of the petitioner to comply with my prehearing orders and directives to enter an appearance (29 CFR 2700.26(d)(1) and (2)), which would require an issuance of a show-cause order, I believe that this would be a fruitless gesture on my part, particularly in light of the Regional Solicitor's rigid position as shown by the facts and circumstances presented in these proceedings.

ORDER

IT IS ORDERED THAT:

1. These dockets are DISMISSED for want of prosecution.

2. In view of the circumstances surrounding the petitioner's and respondent's apparent flagrant disregard for the authority and jurisdiction of the Commission and one of its judge's, the matter is referred to the Commission pursuant to Rule 29 CFR 2700.5, Secretary of Labor v. James Oliver and Wayne Seal, Docket No. NORT 78-415, March 27, 1979.

IT IS FURTHER ORDERED THAT:

1. Respondent's motion, made at the hearing, that I disqualify myself from these proceedings for bias and prejudice is DENIED, without prejudice to respondent reasserting such a motion in the event these decisions are appealed and remanded.

2. Respondent's motion, made at the hearing, that I reconsider my dismissal of these dockets and entertain and consider the settlement entered into by the parties is DENIED.

George A. Koutras
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 31 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. NORT 79-26-P
Petitioner	:	A.C. No. 44-02853-03001
v.	:	
	:	No. 39 Mine
LAMBERT COAL COMPANY,	:	
Respondent	:	Docket No. NORT 79-36-P
	:	A.C. No. 44-01656-03002
	:	
	:	Docket No. VA 79-26
	:	A.C. No. 44-01656-03004
	:	
	:	No. 14 Mine

DECISION

Appearances: Leo J. McGinn, Esq., Office of the Solicitor, Department of Labor, for Petitioner; William Rogers McCall, Esq., Bristol, Virginia, for Respondent.

Before: Administrative Law Judge Michels

These are civil penalty proceedings brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Separate petitions for the assessment of civil penalties were filed in each of the above-captioned dockets alleging a total of 17 violations of 30 CFR 75.1710-1. A hearing was held in Abingdon, Virginia, on June 19, 1979, at which both parties were represented by counsel.

At the hearing, pursuant to 29 CFR 2700.15(b), counsel for Petitioner moved to withdraw the petitions for civil penalty assessments. As grounds for this action, counsel stated:

> Each of these docket numbers involved in this proceeding consist solely of allegations, regulations under 75.1710. In each instance they are related to the Number 39 Mine and the Number 14 Mine of the Lambert Coal Company. After investigating the circumstances surrounding the petitions for the assessment of civil penalties,

the Solicitor's Office moved to withdraw the citations involved for this reason; we are unable to sustain a violation in any of these instances of that mandatory standard. The reason for this in each instance--first of all, each violation was terminated by the fact that MSHA recognized that the mining height had gone below the minimum mining height required under the statute at that time. And that there was an undulating bottom in each of the mines. Now, it further discovered that a petition for modification had been filed with respect to the mines in question by Lambert Coal Company on February 20, 1976. And on April 13th and 14th, 1976, MSHA reported and admitted that the subject mines had a minimum mining height of thirty-eight inches, and therefore, the Number 14, 39 and 40 Mines of the Lambert Coal Company were not subject to the requirements of 30 CFR 75.1710. As the result of the large number of petitions for modification and the change in the regulations which had been in the change over from the Department of Interior to the Department of Labor, a decision was not rendered in this case, unfortunately, until the 26th of October, 1978. In the meantime petitions had been filed against the company. After checking with MSHA's District, there was an agreement that the mining heights did not sustain a violation of this regulation. Each was determined in the petition for modification. Based upon this information, with the knowledge and consent of our client, I wish to withdraw the petitions for assessment of civil penalties.

(Tr. 4-6).

Respondent did not object to Petitioner's proposed action. Thereupon, a ruling was issued from the bench granting approval for Petitioner to withdraw its petitions in these cases (Tr. 7). The proceeding were then dismissed. I hereby AFFIRM that ruling.

Franklin P. Michels

Franklin P. Michels
Administrative Law Judge

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