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July 1980

JULY

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Johnny Howard v. Martin Marietta Corporation, SE 80-24-DM (Judge Broderick, June 19, 1980)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 1, 1980

PEABODY COAL COMPANY	:	Docket No. BARB 76-117
v.	:	IBMA 77-4
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	

DECISION

This is a penalty proceeding arising under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. §801 et seq. (1976 and Supp. I 1977). An appeal was pending before the Interior Department Board of Mine Operations Appeals on March 8, 1978. Accordingly, it is before the Commission for decision. 30 U.S.C. §961 (1978). Peabody is appealing a decision of an administrative law judge that found the company in violation of 30 CFR §77.404(a) and assessed a penalty of $3,500 for that violation.

The case arose out of a fatality that occurred at Peabody Coal Company's Ken Strip Mine in Kentucky on May 8, 1974. Ellis O. Crick, a welder in the truck repair shop at the mine, was killed when an overhead chain hoist fell and struck him in the head.

An examination of the hoist after the accident showed that a flange on the hoist's assembly had been bent outward. This bend caused the rollers to lose contact with the overhead beam and fall. No one at the Ken Mine was aware of the damage to the flange prior to the accident.

The judge held that the evidence established that Peabody failed to maintain equipment in safe operating condition as required by 30 CFR §77.404(a). That regulation 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". He pointed out that the Board of Mine Operation Appeals, in a case involving a similiarly worded regulation, 1/ held that proof of an unsafe condition in equipment establishes a prima facie case of failure to properly maintain that equipment. He held that an operator must conduct sufficient inspections of potentially dangerous types of equipment such as the hoist in order to satisfy the maintenance requirement in the regulation and that Peabody had failed to fulfill that requirement because no particular inspections of the hoist were being conducted.

1/ Eastern Associated Coal Corporation, 5 IBMA 185, 200(1975).

On appeal, Peabody admits that the evidence established that an unsafe condition existed at its mine at the time of the accident. Peabody argues, however, that the judge erred in concluding that the evidence established a violation of the regulation. Peabody contends that there are two permissible interpretations of the regulation: (1) that the regulation is violated only if the operator knows that equipment is unsafe and fails to remove it from service once the unsafe condition is known, or (2) that the regulation is violated if an operator does not know of the unsafe condition and fails to exercise reasonable care to discover the existence of the unsafe condition.

We reject these arguments. In Peabody Coal Company, 1 FMSHRC 1494 (1979), the Commission held that 30 CFR §77.404(a) imposes two duties on an operator -- a duty to maintain machinery and equipment in safe operating condition, and a duty to remove unsafe equipment from service. The Commission said that an operator violates the portion of the regulation requiring operators to maintain equipment in "safe operating condition" whenever the existence of an unsafe condition is proved. We rejected the argument that a violation of the requirement to maintain equipment in safe operating condition is not established unless the evidence shows that an operator knew or should have known of the existence of the unsafe condition. We said:

> The regulation requires that operators maintain machinery and equipment in safe operating condition and imposes liability on an operator regardless of its knowledge of unsafe conditions. What the operator knew or should have known is relevant, if at all, in determining the appropriate penalty, not in determining whether a violation of the regulation occurred. [1 FMSHRC at 1495.]

Accordingly, because it is undisputed that the hoist was in an unsafe condition, a violation of the regulation has been established.

We turn now to the issue of the appropriateness of the penalty assessed by the judge. In arguing for a reduction of the penalty, Peabody does not dispute the findings of the judge relating to the penalty criteria set forth in section 109 of the 1969 Act. Peabody maintains, however, that those findings do not support the assessment of a $3,500 penalty.

The Commission has declined to disturb penalty amounts assessed by a judge where the record reflects his full consideration of the six statutory criteria. See, e.g. Peabody Coal Co., 1 FMSHRC 1494(1979); Pittsburgh Coal Co., 1 FMSHRC 1468(1979); U.S. Steel Corp., 1 FMSHRC 1306(1979); Kaiser Steel Corp., 1 FMSHRC 984(1979); Shamrock Coal Co., 1 FMSHRC 799(1979); Ruston Mining Co., 1 FMSHRC 794(1979). Peabody does not object to the judge's failure to fully consider the six statutory factors. It argues only that the findings of the judge on those factors warrant a lower penalty. Our independent review convinces us that the judge did not err in assessing the penalty.

The judge's decision is affirmed.

Richard V. Backley, Commissioner

Marian Pearlman Nease, Commissioner

A. E. Lawson, Commissioner

Frank J. Jestrab, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 2, 1980

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
v.	:	Docket No. YORK 79-94-M
NEW JERSEY PULVERIZING COMPANY	:	

DECISION

On May 16, 1980, the administrative law judge issued a "Decision and Order" requiring the operator to pay penalties "in settlement of" six alleged violations. In a footnote to his decision, the judge declared that his disposition was merely "proposed" and stated that he would reconsider and afford both parties an opportunity to be heard if they so requested. The Secretary filed a petition for discretionary review, claiming that the judge had assessed penalties without giving the Secretary the opportunity to be heard because, under Commission precedent, the judge could not reconsider his decision. The Secretary in effect argues that the penalties assessed by the judge are too low. We granted the Secretary's petition. We now reverse.

On the same day that the judge's decision was issued, we issued a decision in another case disapproving the judge's method of disposition. Peabody Coal Co., 2 FMSHRC 1035, 1 BNA MSHC 2369, 1980 CCH OSHD ¶24,468 (1980). That decision is controlling here. 1/ In view of our decision

1/ In Peabody, the judge's decision did not contain a footnote characterizing the disposition as merely proposed. We have therefore considered whether Peabody is distinguishable. We can find no principled distinction. It is quite evident that the judge intended his decision here to serve as his final disposition of the proceedings and yet to permit him to reconsider. This is precisely what our Peabody decision held was inconsistent with the Commission's rules and precedents.

in Peabody, and particularly in view of our decision here, we expect that it will not be necessary to continue to remind the judge that he is to decide cases in accordance with the Commission's rules and precedents. We also observe that the judge did not give the parties a reasonable opportunity to propose a settlement of the case. 2/ Finally, in view of New Jersey Pulverizing's letter of June 27, 1980, which asks that this case be disposed of "without the expense to us or the Government of a hearing", we order the judge to afford the parties an opportunity to propose a settlement before any hearing is scheduled or pre-hearing order is issued.

Accordingly, the judge's decision is vacated. The case is remanded to him for further proceedings consistent with this decision.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

2/ The Secretary's proposal for a penalty was received on October 29, 1979. When the operator initially failed to file a timely answer, an order to show cause was issued to the operator on April 22, 1980. New Jersey Pulverizing's response to the order was received on May 6, 1980. Ten days later, without further proceedings by the judge or the parties, the judge issued his decision.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 9, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. BARB 76-297-P
ISLAND CREEK COAL COMPANY	:	IBMA No. 77-27

DECISION

This is a civil penalty proceeding arising under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976 & Supp. I 1977). The administrative law judge held that regulations adopted by the Department of Interior to implement the civil penalty program did not bind the government to an assessment settlement agreement where such agreement was entered into because of a mistaken assumption of fact on the part of the department's assessment personnel. The judge noted that the mistake and the repudiation of the agreement were called to the mine operator's attention before payment of the penalty. He concluded that the operator was not prejudiced and ordered the case to proceed to a full evidentiary hearing. The judge made de novo findings and assessed Island Creek $5,000. Appeal was timely filed. 1/ We affirm the judge's decision.

This case was initiated as the result of a fatal accident that occurred on January 10, 1975, at an underground coal mine operated by Island Creek in Hopkins County, Kentucky. A mechanic employed at the mine was fatally injured when the boom of a loading machine fell on him. Following an accident investigation, a notice of violation was issued by an inspector of the Mining Enforcement and Safety Administration (MESA) as authorized by §104(b) of the 1969 Coal Act, which charged Island Creek with a violation of 30 C.F.R. §75.1726(b) (1974). That subsection provides:

> No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position.

1/ On March 8, 1978, this case was pending on appeal before the Secretary of Interior's Board of Mine Operations Appeals (Board) under the Coal Act. This appeal is before the Commission for disposition under section 301 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. §801 et seq.

The notice cited the following practice:

> Work was being performed under the conveyor boom in a raised position, on the loading machine in the four south panel entries No. 1 unit and was not blocked into position.

The inspector failed to indicate on the face of the notice that it was being issued as the result of a fatality investigation. The regulations 2/ adopted by the Secretary to implement the civil penalty program required MESA's Office of Assessments to prepare and serve on the mine operator an initial order of assessment. Due to the omission on the face of the notice referred to above, the subject violation was assessed as a non-fatal infraction. By applying the point system provided in 30 C.F.R. §100.3(b) (1975), a penalty of $102 was assessed. The penalty was further reduced to $78 as the result of a settlement conference between a MESA assessment official and Island Creek. During the conference a formal assessment agreement was executed, in compliance with §100.6, by the representatives of the parties.

Two weeks later, the Office of Assessments discovered that the instant notice of violation involved a fatality and determined that the assessment agreement was based on a mistaken assumption of fact on its part. On August 14, 1975, before Island Creek had tendered payment, MESA wrote Island Creek a letter indicating the mistake and repudiated the agreement. Island Creek replied to MESA's letter stating that MESA was bound by the assessment agreement and could not unilaterally void the agreed penalty of $78. Island Creek then tendered payment of the $78, which amount was returned by MESA. MESA reassessed the violation on the theory that it contributed to the fatality and assessed a new penalty of $5,000. Island Creek refused to pay the second assessment and requested a hearing.

Before the judge, Island Creek moved that the proceeding be dismissed with prejudice on the basis that it had previously made payment of an amount agreed upon by MESA in full satisfaction of civil penalty liability for the subject notice of violation. The judge denied the motion and the case proceeded to hearing.

In a written decision issued on March 24, 1977, the judge held that a violation as charged occurred, but found that there was no negligence on the part of the mine operator. After a lengthy discussion of the criteria provided in §109(a)(1) for the assessment of a penalty, the judge determined that a penalty of $5,000 was appropriate.

Island Creek appealed to the Board contending that the judge erred in denying its motion to dismiss the proceeding. It further argued that imposition by the judge of a penalty of $5,000 was excessive and an abuse of discretion in light of the judge's finding that the mine operator was not in any way negligent or at fault with regard to the fatal accident.

2/ 30 C.F.R. Part 100 (1975).

With regard to the first issue, Island Creek argues that the record is devoid of any evidence which would support a finding that MESA entered into the agreement because of a good faith mistake. It further urges that MESA did not have a right to unilaterally void the assessment agreement and that the judge's decision nullifies the purpose of a key provision of the assessment regulations in §100.6(d). Under that provision, failure of the mine operator to tender payment of the agreed amount within 10 days resulted in the agreed amount being entered as the final order of the Secretary. It is Island Creek's position that once the assessment agreement for $78 was signed, MESA was precluded from further administrative action. We reject these arguments.

The record does not include testimony from the assessment official who signed the agreement regarding his state of mind during the negotiations. It does, however, provide substantial evidence that during the conference this official was operating under a mistake of fact. Documents of record indicate that, in agreeing to a reduced assessment of $78, he was unaware that the violation was considered by MESA to be the cause of the accident, in this case a fatality. The judge found, and we agree, that the regulations under Part 100 were designed to provide a mechanism by which an operator could settle penalties for alleged violations without the need for a hearing or a decision on the merits, but that these regulations were not intended to bind MESA to an assessment agreement which was entered into on the basis of a good faith mistake that became known to all parties prior to payment.

One of the six statutory criteria to be considered in assessing a civil penalty is "... the gravity of the violation ..." (Section 109(a)(1)). In this case that criterion was obviously not considered by the MESA assessment official in the context of the actual facts of this case. Nor was the inspector who issued the citation present at this meeting. If Island Creek was also unaware of all facts material is assessing the civil penalty, the agreement of the parties was predicated upon a mutual mistake of fact, a firmly established basis for relief and avoidance of an agreement. 3/ Further, if the operator's representative was aware of all such material facts underlying this citation, and also aware of MESA's lack of such knowledge, he had an equitable obligation to so inform the MESA assessment official, or take the risk that the agreement herein could be timely avoided. In either case, the resulting document could be and under these facts was properly repudiated.

3/ See 54 Am. Jur. 2d Mistake, Accident, or Surprise, §4 et seq. (1971). See also Peabody Coal Company, 7 IBMA 318, 325 (1977).

Finally, we turn to the contention that the $5,000 penalty assessed by the judge was excessive and an abuse of discretion. In his decision, the judge fully considered all six statutory criteria, including the lack of negligence on the part of the mine operator, in making the assessment. Our independent review convinces us that the judge did not err in assessing the penalty. 4/

Accordingly, the judge's decision is affirmed.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

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4/ See Co-op Mining Co., 2 FMSHRC 784 (1980).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 21, 1980

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. LAKE 79-118 LAKE 79-214 LAKE 79-263 LAKE 80-64
v.	:	
THE NORTH AMERICAN COAL CORPORATION	:	Docket Nos. LAKE 79-262 LAKE 80-61
	:	Docket Nos. LAKE 79-266 LAKE 80-65
QUARTO MINING COMPANY,	:	Docket Nos. VINC 79-124-P LAKE 79-228 LAKE 79-265 LAKE 80-31 LAKE 80-32
	:	Docket Nos. LAKE 79-229 LAKE 80-95 LAKE 80-96
THE NACCO MINING COMPANY	:	Docket No. LAKE 79-230

ORDER

The Secretary seeks discretionary review of a February 12, 1980 decision of the administrative law judge. In that decision, the judge dismissed 17 civil penalty cases. The petitions in these cases alleged 26 violations of the respirable dust standard, 30 CFR §70.100(b), and 9 violations of various other standards. Each of the cases contained at least one alleged violation of 30 CFR §70.100(b). In his February 12, 1980 decision, the judge dismissed the 17 cases on the grounds 30 CFR §70.100(b) was invalid and unenforceable. 1/

On February22, 1980, the Secretary filed a motion requesting that the judge reconsider his order vacating the 9 citations that did not allege violations of 30 CFR §70.100(b). On March 7, 1980, the judge corrected the decision. He withdrew the 9 citations and ordered that they be incorporated in new cases. The judge cited Commission Rule 65(c), 29 CFR §2700.65(c)(1979), which provides that the jurisdiction of the judge terminates when his decision is issued, but permits a judge to correct inadvertent and clerical mistakes in a decision after it is issued.

1/ On the same day, the judge also issued a decision in MSHA v. Alabama By-Products, SE 79-110 in which he found that 30 CFR §100(b) was invalid and unenforceable. The Secretary petitioned for review of that decision. The Commission granted the petition on March 6, 1980.

The Secretary's petition for discretionary review seeks review of a single issue: Whether the judge erred in ruling that there is no presently enforceable respirable dust standard. The petition was filed on April 3, 1980, 51 days after the issuance of the judge's decision. The respondents oppose the petition on the grounds it is untimely.

The Act requires that a petition for discretionary review be filed within 30 days after the issuance of the judge's decision. 2/ Commission Rule 5(d), 29 CFR §2700.5(d)(1979), states that "filing of a petition for discretionary review is effective only upon receipt." The Secretary urges us however, to regard his petition, filed 51 days after the judge's February 12 decision, as timely. He argues that his motion to correct the decision tolled the running of the 30 day period until such time as the judge acted upon the motion. Citing Commission Rule 1(b), 29 CFR §2700.1(b)(1979), which provides that we be guided "so far as practicable by any pertinent provision of the Federal Rules of Civil Procedure", he states that his motion to correct the decision is equivalent to a motion to alter or amend a judgment filed under Fed.R.Civ.P 59(e). He states that the courts have held that a Rule 59(e) motion tolls the appeal period until such time as the judge rules on the motion. Since the judge granted his motion to correct the decision on March 7, 1980, he argues that his petition for discretionary review was timely.

We disagree. Commission Rule 65(c) explicitly provides that the jurisdiction of the judge terminates when his decision has been issued by the Commission's Executive Director. Section 113 of the Act requires that petitions for discretionary review be filed within 30 days after the issuance of the judge's decision. Read together, these provisions indicate that the 30 day period for filing a petition for review runs from the date that a judge's decision is issued by the Executive Director. Because a judge has no jurisdiction to alter a decision that has been issued except to correct inadvertent and clerical errors, we hold that the correction of such errors does not toll the period for filing a petition for review. 3/ Cf. Capitol Aggregates, Inc., 2 FMSHRC 1040(1980).

We note in addition that allowing the filing of motions to correct to toll the period for filing a petition could threaten the smooth functioning of the Commission's review process. The statutory scheme contemplates that the period for filing petitions and directing review will run from the date of the issuance of a decision of a judge

2/ Section 113(d)(2)(A)(i), 30 U.S.C. §823(d)(2)(i)(Supp. II 1978).

3/ Commission Rule 1(b) permits resort to the provisions of the Federal Rules of Civil Procedure "on any procedural question not regulated by the Act, these Procedural Rules or the Administrative Procedure Act". 29 CFR §2700.1(b)(1979). Because Commission Rule 65(c) and the Act addresses the issue in this case, we do not believe that resort to Fed.R.Civ. p. 59(e) on this issue is appropriate.

which constitutes his final disposition of the proceedings. 4/ Altering those periods when a motion to correct is filed could create confusion about the deadlines for filing and granting petitions and the exercise by the Commission of its power to direct review on its own motion.

Moreover, our holding should not hamper the parties in preparing petitions for discretionary review. Motions to correct errors due to inadvertent mistakes do not affect the substance of the judgment nor the standing of a party and thus have no bearing upon the merits of an appeal. The principle is aptly demonstrated by this case. The removal of the 9 citations from the decision and the order to reinstate them in other cases left the substance of the judge's decision -- as to which the Secretary was aggrieved -- undisturbed, did not affect the Secretary's standing, and had no bearing upon the arguments set forth in the petition for review.

Accordingly, the petition is dismissed as untimely filed.

Richard V. Backley, Commissioner

Frank J. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

4/ Section 113(d)(1) provides:

> An administrative law judge appointed by the Commission to hear matters under this Act shall hear, and make a determination upon, any proceeding instituted before the Commission . . . assigned to such administrative law judge . . ., and shall make a decision which constitutes his final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission . . . [Emphasis added.]

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 25, 1980

SECRETARY OF LABOR on behalf of LARRY D. LONG	:	
v.	:	Docket No. VA 79-81-D
ISLAND CREEK COAL COMPANY	:	
and	:	
LANGLEY & MORGAN CORPORATION	:	

ORDER

Island Creek Coal Company and Langley & Morgan Corporation have filed petitions for discretionary review of what they believe may be the decision of the administrative law judge. We find that the judge's final disposition of the proceedings has not yet been issued and that the petitions were therefore prematurely filed.

This is a discrimination case brought by the Secretary of Labor on behalf of Larry D. Long against Island Creek and Langley & Morgan Corporation ("the operators"). The Secretary alleged that the operators violated section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. II 1978)["the Act"], and in his complaint requested the following relief: a finding that Mr. Long was "unlawfully discriminated against ... for engaging in actions protected under section 105(c)(1)"; an order that the employment record of Mr. Long be completely expunged of all references to an unlawfully issued discharge; an order directing the operators to "cease and desist in ... discriminatory harassment" of Mr. Long; an order directing the payment of Mr. Long's costs and expenses reasonably incurred for and in connection with the institution and prosecution of these proceedings; and the assessment of civil penalties against each operator.

On June 19, 1980, the Executive Director of the Commission issued a document entitled "Decision" that had been transmitted to him from the administrative law judge. The decision was lengthy, and contained findings of facts and conclusions of law generally unfavorable to the operators. The judge's last conclusion of law declared that the operators had violated section 105(c) of the Act by certain reassignments. Immediately after this conclusion of law, appeared the following:

ORDER

PENDING FINAL ORDER, Applicant shall have 7 days to submit a proposed order for relief, with service on Respondents. Respondents shall have 7 days from such service to file any response to the proposed order.

On July 14, 1980, Island Creek filed a petition for discretionary review. Island Creek believes, based on the wording of the judge's order and discussions with the judge's office, that the document entitled "Decision" was not intended to constitute the judge's final disposition of the proceeding. It therefore argues the issuance of the decision should not be viewed as having begun the running of the time period for filing a petition for discretionary review. Island Creek notes, however, that this document was transmitted to and issued by the Executive Director, and states that "[s]uch action would thereby terminate the jurisdiction of the Judge under the provisions of [Commission Rule 65(c), 29 CFR] §2700.65(c)." Because Island Creek is uncertain of the consequences of these events, it filed this petition to protect its right to seek discretionary review by the Commission. The issue raised by Island Creek is therefore whether the document issued on June 19, 1980, constituted the judge's final disposition of the proceedings. Langley & Morgan's petition for discretionary review, which was filed on July 18, alleges that the judge's decision is erroneous.

Commission Rule 65 states in part as follows:

§2700.65 Decision of the Judge.

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

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

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

Once a judge's decision that constitutes his final disposition of the proceedings is issued by the Executive Director, the periods for drafting and filing a petition for discretionary review, for the Commission to

consider and order review of the judge's decision on its own motion, and for the Commission to consider and grant a petition for discretionary review begin to run. Section 113(d)(1) and (2). In view of these consequences, the careful following of our rules, which were designed to ensure the smooth functioning the Commission's review process, is essential.

Commission Rule 65(a), when read as a whole, requires that the decision of the judge contain an order that finally disposes of the proceedings. Inasmuch as the order that appears at the end of the judge's purported decision does not dispose of the proceeding to any extent, the issuance of this decision did not start the running of the review periods in section 113 of the Act. The petitions for discretionary review are therefore premature.

Accordingly, the petitions for discretionary review are, in these circumstances, dismissed as premature. The Executive Director shall return the record to the judge.

Richard V. Backley, Commissioner

Frank F. Destrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 29, 1980

JOHNNY HOWARD	:	
	:	
v.	:	DOCKET NO. SE 80-24-DM
	:	
MARTIN MARIETTA CORPORATION	:	

DIRECTION FOR REVIEW AND ORDER

The petition for discretionary review filed by Martin Marietta Corporation is granted. The case is remanded to the administrative law judge to determine whether Martin Marietta Corporation was in fact properly served a copy of the complaint of discrimination prior to issuance of the order of default. Should he determine that service was not properly made, the administrative law judge is directed to conduct further proceedings as necessary.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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Administrative Law Judge Decisions

July 1 - 31

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

19 JUN 1980

JOHNNY HOWARD, Applicant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	
	:	Docket No. SE 80-24-DM
MARTIN-MARIETTA CORPORATION, Respondent	:	MD 79-93

ORDER OF DEFAULT

On November 7, 1979 the Applicant filed a complaint alleging discriminatory acts based on § 105(c) of the Federal Mine Safety and Health Act of 1977. According to § 2700.43 of the procedural rules of the Commission, Respondent is required to answer within 30 days after receipt of the complaint. No such answer was received. On March 26, 1980, an order was issued to Respondent to show cause why the relief requested in the complaint should not be granted. No response has been received.

Therefore, it is ORDERED that Respondent is deemed to have admitted the alleged acts of discrimination. It is further ORDERED that the Applicant be restored to his former position with backpay and interest, and that Respondent compensate the Applicant for all costs and expenses (including attorney's fees) reasonably incurred by the Applicant.

James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail

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Martin-Marietta Corporation, P.O. Box 1160, Columbus, OH 43216

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 27, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 80-223-M A. C. No. 20-741-5005
v.	:	
J. P. BURROUGHS & SON, INC., Respondent	:	Holly Sand and Gravel Plant

ORDER OF DISMISSAL

Four section 104(a) citations were issued to Respondent on September 13, 1979. On January 10, 1980, Respondent received a proposed assessment. In the meantime, a conference was held on January 7, 1980, in which penalty reductions were negotiated. Respondent states that it was told by MSHA personnel to ignore the January 10 assessment notice and await a second proposed assessment based on the reductions negotiated at the conference. On January 14, 1980, the second proposed assessment was received by Respondent. Respondent checked the notice of contest form (the "blue card") and mailed it back to MSHA on February 13, 1980. It was received by MSHA on February 15, 1980.

By corrected order issued April 30, 1980, I granted Petitioner's motion to dismiss Respondent's notice of contest. 1/ Respondent sought Commission review, and the Commission remanded the case to consider Respondent's opposition to the motion. I have now considered the affidavit and brief filed by Respondent and the documents previously filed by Petitioner and I conclude that the notice of contest must be dismissed as untimely.

For the purpose of ruling on the motion, I assume that the 30-day period began to run when Respondent received the second proposed assessment, that is, on January 14, 1980. Section 105(a) of the Act requires the operator to "notify" the Secretary that he wishes to contest the proposed assessment within 30 days from the receipt of the Secretary's proposal. I construe this to mean that the Secretary must receive the notice of contest within the 30-day period.

The meaning of "notify" is not specified in the text of the Act, nor in the regulations dealing with notice of contest, 30 CFR § 100.6(b). Section 10(a) of the Occupational Safety and Health Act, 29 U.S.C. §659(a), is parallel to section 105(a). The word "notify" in that section has been construed by the Secretary of Labor to mean that the date

1/ The motion was framed as a motion to dismiss Petitioner's own petition for assessment of civil penalty, but I treated it as a motion to dismiss the notice of contest.

notice of contest is mailed controls. 29 CFR § 1903.17; Secretary of Labor v. J.D. Blum Construction Co., 4 OSHC (BNA) 1255 (1976). It is significant that the Secretary did not place the same interpretation on "notify" in regulations promulgated under the 1977 Act. The difference may be attributed to the fact that an employer has 15 working days to give notice of contest under OSHA instead of 30 calendar days. Departure from the ordinary meaning of the word "notify" was thought justified by the rigors of complying with such a short notice of contest period.

It is the ordinary meaning of the word "notify" which convinces me that notice of contest was untimely in this case. To notify one of a fact is to make it known to him. Black's Law Dictionary, (5th ed. 1979): 66 C.J.S. Notify § 23. And when a statute requires notice to be given, it is the general rule of law that actual personal notice is required. 58 Am. Jur. 2d Notice § 22.

The time for filing charges under Title VII of the Civil Rights Act of 1964 begins to run when the affected employee is notified of EEOC's dismissal. In construing this language, a District Court said:

> While legally Congress might have made the mailing, for example, of the notice of EEOC's dismissal the time of initiation of the 90-day period during which the employee could sue and cut off such opportunity at the end thereof, it did not do so. The employee must be notified; the notice must be given to him or her. There is nothing in the legislative history of the statute which points to any contrary construction or meaning. There must be a receiving of the intelligence that the charge was dismissed by EEOC. To notify is to make known and usually in law connotes a notice given by some person, whose duty it was to give it, to some person who was entitled to receive it or be notified. Notice is given when it is communicated to another.
>
> Reeves v. American Optical Co., 408 F. Supp. 297, 301 (W.D.N.Y. 1976).

Although the notice of contest involved herein was mailed on the 30th day after receiving the second proposed assessment, it was not received by MSHA until more than 30 days had elapsed. I conclude that MSHA was not timely notified of Respondent's intention to contest.

Therefore, the notice of contest is hereby DISMISSED and the proposed assessment of $440 is deemed the final order of the Commission.

James A. Broderick
Chief Administrative Law Judge

Distribution:

Robert J. Krupka, Esq., Counsel for J. P. Burroughs & Son, Inc., Cook, Nash & Deibel, 1201 Second National Bank Building, Saginaw, MI 48607 (Certified mail)

Dkt 4

Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (By personal service)

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

1 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ex rel. Alfred A. Santistevan, Applicant,	Application for Review of Discrimination
v.	DOCKET NO. WEST 80-85-D
C.F.& I. STEEL CORPORATION, Respondent.	Mine: Maxwell

DECISION AND ORDER

APPEARANCES:

Thomas E. Korson, Esq., Office of the Regional Solicitor, United States Department of Labor, for the Applicant,

Richard L. Fanyo, Esq., Welborn, Dufford, Cook, and Brown, for the Respondent.

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

This action was brought by Applicant, the Secretary of Labor, Mine Safety and Health Administration (MSHA) [hereinafter "the Secretary"], on behalf of Alfred A. Santistevan [hereinafter "Santistevan"] pursuant to the provisions of section 105(c)(2)[1] of the Federal Mine Safety and Health Act

1/Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2), reads in pertinent part:

> "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of the subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . . . If upon .

of 1977, 30 U.S.C. §801 et seq. (1978) [hereinafter cited as "the 1977 Act" or "the Act"]. The Secretary alleges that Santistevan received two suspensions, one for 3 days and one for 30 days, because he made complaints to his foreman of unsafe conditions in the coal mine in which he worked. The two unsafe conditions alleged in the Complaint of Discrimination filed by Applicant were that: (1) "on March 29, 1979, the tram motor of the No. 3 Lee Norse Hardhead Miner in Unit 3 was pulling and popping and was unsafe," and (2) "Romero [Jose M. Romero, Assistant Mine Foreman, hereinafter "Romero"] ordered Santistevan to put up an I-beam weighing approximately 600 pounds by himself."

The Respondent denies that it discriminated against Santistevan, and alleges that he was issued the 3 day suspension on June 26, 1979, because of insubordination and the 30 days suspension on June 27, 1979, because he instigated an unauthorized work stoppage.

Pursuant to notice, a hearing was held on the merits in Pueblo, Colorado, on March 4, 5, and 6, 1980. The completion of the filing of post hearing briefs took place on June 23, 1980.

GOVERNING PRINCIPLES

Burden of Proof.

The Applicant as the proponent of the order has the burden of proof, to a preponderance of the evidence, that the Respondent discriminated against

fn 1 cont'd

> . . investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or, vacating the Secretary's proposed order, or directing other appropriate relief. * * * "

Santistevan in violation of section 105(c)(1)[2] of the Act. 30 U.S.C. § 815(c)(2), 5 U.S.C. § 556(d). The preponderance of the evidence is defined as the greater weight of evidence or evidence which is more credible and convincing to the mind. Button v. Metcalf, 80 Wis. 193, 49 N.W. 809 (1891). It is also defined as that evidence which best accords with reason and probibility. U.S. v. McCaskill, 200 F. 332 (1912).

Elements of Proof.

The Applicant must establish that he was engaged in "protected activity," that is, that he made complaints relating to mine safety, and that Respondent took discriminatory action against him because of this protected activity in which he engaged. Munsey v. Morton, 507 F.2d 1202, 1209 (D.C. Cir. 1974). The safety complaints made must be shown to be ". . . the moving force but for which the discriminatory action would not have occured." Shapiro v. Bishop Coal Company, 6 IMBA 28, 59 (1976).

FINDINGS OF FACT

1. Within approximately two weeks prior to March 29, 1979, Applicant Santistevan, a continuous miner machine operator for the Respondent,

2/Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1), reads in pertinent part:

> "No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the statutory rights of any miner . . . in any coal or other mine subject to this Act because such miner . . . has filed or made a complaint notifying the operator or the operator's agent . . . of any alleged danger or safety or health violation in a coal or other mine, . . . or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act."

complained on several occasions to his section foreman, Jose Romero, that the track of a certain continuous miner machine was pulling to the left and that there was something wrong with it. (Tr. I-116,117)[3].

2. As a result of the complaints of Santistevan prior to March 29, 1979, in regard to the continuous miner, "take up jacks" were replaced by Respondent, two times before March 29, 1979, and once on the graveyard shift on March 29-March 30, 1979. (Tr. II-84).

3. A safety inspection of the mine was made by MSHA inspectors on March 29, 1979. (Tr. I-19,20).

4. During the inspection on March 29, 1979, after discovering that the continuous miner had not been operating properly, an MSHA inspector requested that the machine be operated for demonstration. (Tr. I-22,23).

5. An MSHA inspector issued a citation to the Respondent for the following alleged safety violation on March 29, 1979:

> "The Lee Norse . . . was not maintained in a safe operating condition in that the motor for the cutting head was loose and the left track was sticking. . . ." (Tr. I-27).

6. A hazard posed by the use of the continuous miner at the time of the inspection was the possibility of pinning someone against the rib. (Tr. I-25).

3/The transcripts of the hearing are contained in three volumes, with each volume renumbered from the first page. Therefore, references to the transcript will show in roman numeral the volume referred to, followed by the page number of that volume.

7. After the citation was issued on March 29, 1979, Romero asked his crew, including Santistevan, to come to him first with complaints before talking to the (MSHA) inspectors. (Tr. III-40).

8. Between March 29, 1979, and April 25, 1979, Romero told Santistevan to put up a beam 16 feet long by 6 inches thick, weighing approximately 600 pounds, as a roof support, which Santistevan assumed was to be accomplished with the help of the continuous miner machine and the work crew. (Tr. I-125,126).

9. The beam was not installed as requested by Romero and the incident resulted in an agrument between Santistevan and Romero, Santistevan concluding that Romero wanted Santistevan to put the beam up by himself. (Tr. I-126).

10. On June 25, 1979, Santistevan was operating the continuous miner in an area where, because of the condition of the roof, the use of 6 foot roof bolts and straps were required for roof support. (Tr. I-133,134; Tr. III-122).

11. After Santistevan had made a cut with the continuous miner and because it was determined that more height was needed in order to install the 6 foot roof bolts, Romero told Santistevan to cut down more of the top. (Tr. II-214).

12. Santistevan took down a small additional amount of top from the roof. Romero told him it was still not enough, and that he should take down 4, 5, or 6 inches more. (Tr. II-217).

13. Santistevan again cut down more top, but as he was backing out of the area the cutting heads of the miner continued to operate and cut a strap which had been put in place as roof support. (Tr. II-218).

14. After cutting the strap, Santistevan brought the cutting heads of the continuous miner down, apologized to Romero, and stated that it was an accident. (Tr. I-134).

15. Romero had stopped the continuous miner by means of pushing the emergency stop switch on the left side of the machine and accused Santistevan of intentionally cutting the strap. (Tr. II-225, 226).

16. The continuous miner machine is equipped with a "panic bar" which, when activated by the operator, stops all movement of the machine, including the cutting heads. (Tr. II-223).

17. As a result of the incident involving the roof strap, Romero left a note for the general mine foreman stating that Santistevan "had cut down a strap while he was backing the miner out of the face, that it was uncalled for, [that there] was no need for it, and that he did it in anger." (Tr. II-116).

18. On June 26, 1979, Santistevan was given a 3 day suspension by the Respondent for alleged insubordination. (Tr. I-138).

19. On June 27, 1979, a strike occured at Respondent's mine where Santistevan worked. Respondent issued a 30 day suspension to Santistevan for allegedly instigating this strike. (Tr. III-146-148,162,163).

20. In addition to the 30 day suspension given to Santistevan, Respondent issued a 30 day suspension to another miner who had also

allegedly instigated the strike, issued 10 day suspensions to union representatives who participated in the strike, and issued 5 day suspensions to all others who participated, making a total of 51 suspensions. (Tr. II-149, Exhibit V).

21. At the time the suspensions were recommended, Respondent's manager of labor relations had no prior knowledge of any safety complaints having been made by Santistevan. (Tr. II-150).

DISCUSSION AND ADDITIONAL FINDINGS OF FACT

The Respondent admits in its post hearing brief that Santistevan was engaging in protected activity when he made complaints about the continuous miner machine, and that the two suspensions would constitute discriminatory action if they had been imposed because of protected activity. The Respondent argues that the "I-beam incident" did not constitute protected activity.

Assuming that complaints made involving the continuous miner and the I-beam incident both constitute protected activity, I find that the evidence is not convincing that the protected activity was the moving force but for which the suspensions or discriminatory action would not have occured. The evidence is convincing that the 3 day suspension was issued because of the alleged insubordination of Santistevan, and that the 30 day suspension was issued because he allegedly helped to instigate a strike.

After the citation was issued by MSHA in regard to the continuous miner, it was perfectly reasonable for Romero to tell his crew to come to him first with safety complaints. He would then be able to take care of the

problem and, as he testified, keep from receiving citations. The evidence is undisputed that he did not know about the loose motor used for the cutting head of the miner. However, he did know about the problem with the track of the miner, and general unsuccessful attempts were made to remedy the problem before the inspection which resulted in the issuance of the citation.

The evidence shows that the I-beam incident was of no particular significance with regard to the question of discrimination. Both Romero and Santistevan agreed that no one could possibly put the 600 pound beam in place by himself. Thus, no one could seriously conclude that Romero ordered Santistevan to accomplish the job by himself, but that he intended for Santistevan to use the men and machine available to do the job. When this was not done, an argument ensued between Santistevan and Romero.

Moreover, the safety complaints involving the continuous miner and the I-beam incident were too remote to be considered to be the moving force but for which the suspensions would not have occured. The incident involving the continuous miner took place approximately 3 months before the 3 day suspension. The I-beam incident took place at least 2 months before the 3 day suspension. There is no causal connection between those incidents and either of the suspensions. There is evidence that Santistevan and Romero argued about the problem involving the I-beam, but at the end of the argument both expressed apologies to each other. (Tr. II-200).

The 3 day suspension is conclusively shown to have been issued because of the alleged insubordination. Romero testified that Santistevan became angry when he was told to cut down additional top after two attempts. The only reasonable interpretation of Santistevan's conduct involving the strap cutting incident was that he got angry at Romero for ordering him to make a third try with the continuous miner, backed out of the cut too far, and accidently cut the strap. The continuous miner machine could have been stopped immediately by use of the panic bar. In fact, Romero had to activate the emergency stop button to turn off the miner. I conclude that the motive of the Respondent in issuing the 3 day suspension was not for accidently cutting the strap or for protected activity, but for alleged insubordination. As to whether or not Santistevan was in fact insubordinate, that issue is not relevant for me to decide.

As to the 30 day suspension, there is no evidence that it was prompted in retaliation against Santistevan as a result of his engaging in protected activity. The manager of labor relations for the Respondent did not know of any safety complaints by Santistevan when he recommended the suspension. Moreover, other than the length of the suspension, Santistevan was not singled out, but was included in a group of 51 employees suspended by the Respondent for participating in the allegedly unauthorized strike. The evidence does not show that the moving force was the safety complaints, but for which Santistevan would not have received a 30 day suspension. I am not making any finding as to whether Santistevan did, in fact, instigate an unauthorized strike. Rather, I conclude that Santistevan received the 30 day suspension because the Respondent concluded, rightly or wrongly, that he did do so. Thus Respondent did not issue the 30 day suspension as retaliation against Santistevan for engaging in protected activity.

CONCLUSIONS OF LAW

1. At all times relevant to these proceedings, the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter pursuant to the Federal Mine Safety and Health Act of 1977.

2. The Applicant has failed to sustain the burden of proof to a preponderence of the evidence that Respondent discriminated against him in violation of Section 105(c)(1) of the Act.

ORDER

The proposed order of the Secretary is vacated and the complaint of discrimination is dismissed.

Jon D. Boltz
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
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2 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	:	Civil Penalty Proceedings Docket No. DENV 79-424-PM A.C. No. 05-00604-05001
v.		:	
DAY MINES, INC.,	Respondent	:	Docket No. DENV 79-425-PM A.C. No. 05-00604-05002 Sherman Tunnel Mine

DECISION

Appearances: James Abrams, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Piatt Hull, Esq., Wallace, Idaho, for Respondent.

Before: Judge Charles C. Moore, Jr.

The above cases were heard before me in Leadville, Colorado, on Tuesday, March 11, 1980. They involve five citations issued to Respondent during two inspections, one conducted October 3, 1978, and another conducted October 11 and 12, 1978. Two citations were settled at the hearing. Citation No. 331792 from Docket No. DENV 79-424-PM was settled for $84. It alleged a violation of 30 C.F.R. § 57.6-177 concerning proper procedures for the disposal of misfires and carried an assessed penalty of $12. Citation No. 331462 from Docket No. DENV 79-425-PM was settled for the assessed amount of $60. That citation was for loose ground (roof) observed by the inspector in violation of 30 C.F.R. § 57.3-22. The settlements were approved.

The parties submitted several stipulations at the hearing addressing the six criteria of section 110(i) for assessing penalties under the Act. I find that the operator's history of past violations is moderate, that any penalties assessed would not affect Respondent's ability to continue in business, and that Respondent abated the citations in good faith. The issues of negligence and gravity will be considered separately for each citation. Respondent employs 89 employees at its Sherman Tunnel operation out of which 80 are miners. It operates two mines and produces approximately 133,136 production tons per year at the Sherman Tunnel Mine making Respondent a medium-sized operator.

The first citation, No. 331787, alleged that a violation of section 57.3-22 was found in the Hilltop Lateral. Section 57.3-22 requires all working places, haulageways and travelways to be periodically inspected for loose roof and scaled as necessary. The Hilltop Lateral is a dead-end entry off the main tunnel extending about 300 feet. A sump pump is located approximately 30 feet in from the intersection with the main tunnel.

The inspector observed loose ground starting "about the area of the pump" and continuing 300 feet into the lateral (Tr. 43-44). The operator's witness saw no loose ground in the Hilltop Lateral even though it was his habit to look for it when inspecting the sump pump (Tr. 262). He never went past the sump pump, however, as he had been instructed to "stay out of there" (id.). This same area was later barred down and barricades were erected to abate the citation (Tr. 265-266).

The evidence shows there was loose roof in the Hilltop Lateral at least in the area between the sump pump and a point 300 feet into the tunnel. The inspector could not clearly remember seeing loose ground in the area between the pump and the lateral's intersection with the main tunnel (Tr. 43-44). This area between the sump pump and the entrance to the lateral was clearly a work area, as miners regularly inspected the pump (Tr. 261). But the Secretary failed to sustain its burden of proof regarding the presence of loose ground in this area. Therefore, unless the area between the sump pump and the dead end of the lateral is either a work area, haulageway or travelway there was no violation of section 57.3-22.

The area past the sump pump contained tracks and was regularly used for storing cars (Tr. 19-A, 34). The inspector testified that an operator's witness told him during the inspection that the area was not barricaded because it was needed for switching cars and storing equipment, which necessitated frequent trips into the area by miners (Tr. 20). The operator did not rebut these allegations. Based on this evidence, I find that the area beyond the sump pump was a work area and that loose roof was present. It was testified that this condition develops over a period of 6 months to 2 years, which shows negligence on the part of the operator (Tr. 23). This condition was grave as serious injury often results from roof falls. A penalty of $80 is assessed.

Citation No. 331791 is an alleged violation of 30 C.F.R. § 57.6-177 pertaining to misfire disposal procedures. It is alleged that a misfire occurred at the P25-410 stope and that the operator failed to danger off the area and dispose of the misfire by either washing out the borehole, attempting to refire the hole or by inserting new primers.

The inspector testified that he saw the blasting agent ANFO */ and blasting wires in the fired hole. The presence of both indicates that all of the explosive did not detonate and this constitutes a misfire

*/ Ammonium nitrate and fuel oil.

(Tr. 48). He testified in addition that the ANFO was white and the rock face was gray so that the ANFO was visible (Tr. 74). The operator's witness testified on several occasions that he did not see any blasting agent (Tr. 198, 199, 200). This witness washed out the hole with water after the citation was issued and again testified that he saw no ANFO or prell (Tr. 202). This witness, who had also drilled and blasted this hole, testified that due to the vuggy nature of the ground, it was possible that rock could have caved into the drilled hole after it had been loaded, separating the prell so that the portion in front of the fallen rock detonated while the prell behind the rock fall did not. But he concluded that, in his opinion, any remaining ANFO would have detonated a short time thereafter as a result of the surrounding holes detonating (Tr. 197).

Since the inspector testified in detail about the hole, i.e., that the leg wires had been shunted or twisted together and stuffed back into the hole, which was covered with a rock (Tr. 48), and painted with a red circle (Tr. 52), I am inclined to believe that he also saw ANFO in the blasting hole. A misfire is a dangerous condition and can cause fatal injuries. I find that the operator should have followed the procedures in the standard and that in failing to do so its negligence was high and I assess the proposed penalty of $50.

Docket No. DENV 79-425-PM

Citation No. 333814 alleged a violation of section 57.6-1 which requires detonators to be stored in magazines. The essence of this violation is that two miners who were blasting the face erred when they left a box of detonators in the roadway leading to the face until preparation of the blasting holes had been completed.

Two contract blasters were preparing the face for blasting when the citation was issued. Preparation for blasting consists of drilling a certain number of holes in a designated pattern and loading those holes with detonators and explosives. In this case, the miner who had finished drilling went to get the detonators while the other miner, who testified at the hearing completed drilling his part of the face, which he estimated took 15 minutes (Tr. 130). The inspector testified on cross-examination that the detonators were in the roadway for a period of 25 minutes (Tr. 272).

There is a factual dispute about the location of the box of detonators. Three operator's witnesses testified that the box was next to the rib and not in the roadway. The inspector testified that the box of detonators was in the track in the roadway where it could be run over. The inspector was not asked when he was called back to the stand to rebut the testimony of the operator's witnesses. I find that the box of detonators was next to the rib and not in the roadway.

There was also some dispute about whether the container for the detonators was a magazine. "Magazine" is not defined in the regulations so both parties referred to other explosives standards in an attempt to define the

word "magazine." The inspector stated that while he was not sure the detonator container conformed to the standard, he did not remember seeing any exposed metal, which means that the box was properly constructed of nonconductive materials (Tr. 104).

The overall procedure described by the blasters was a reasonable one. I find that the length of time the box of detonators was lying next to the rib, whether it was 15 minutes or 25 minutes, did not constitute storage of the detonators in violation of the standard. The Government has not met its burden of proving a violation in this case and Citation No. 333814 is accordingly vacated.

ORDER

It is hereby ORDERED that the operator pay to MSHA within 30 days of the date of this decision the sum of $274.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

2 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING
v.	DOCKET NO. CENT 79-174-M, A/O No. 41-01505-05005
	DOCKET NO. CENT 79-210-M A/O No. 41-01505-05006
BORSBERRY CONSTRUCTION COMPANY, INC., Respondent.	DOCKET NO. CENT 79-356-M A/O No. 41-01505-05008H Mine: El Paso Quarry and Plant

DECISION AND ORDER

APPEARANCES: Fred J. Haas, Esq., Office of the Solicitor, United States Department of Labor, Dallas, Texas, for the Petitioner,

James H. Luckett, Esq., El Paso, Texas, for the Respondent.

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

These proceedings are brought pursuant to section 110, 30 U.S.C. § 820, of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978). The Petitioner seeks an order assessing proposed civil monetary penalties against the Respondent for violations alleged in five citations. By way of answer the Respondent did not deny the violations alleged, but challenged the amount of penalties proposed by the Petitioner.

The cases were consolidated and a hearing was held in El Paso, Texas on April 15, 1980. The opportunity to file post hearing briefs within 30 days after the transcript was completed was allowed, but neither party elected to do so.

The citations will be discussed in the same order as presented at the hearing.

FINDINGS OF FACT

1. At all times relevant to this proceeding, Respondent operated a rock crushing facility in El Paso, Texas.

2. A duly authorized representative of the Petitioner, an MSHA inspector, issued citations and a withdrawal order based upon five alleged violations observed during the course of inspections of the facility on March 2, 1979, March 7, 1979, and April 26, 1979; all of which are the subject of these proceedings.

3. The imposition of civil monetary penalties in these proceedings will not effect Respondent's ability to continue its business.

4. Production at Respondent's facility consisted of approximately 33,800 production tons or manhours per year (Tr. 8).

5. Respondent has not had a significant history of previous violations. (Tr. 77).

DOCKET NUMBER CENT 79-174-M
CITATION NUMBER 161218

This citation alleges a violation of 30 CFR § 56.6-44[1], on March 2, 1979.

1/Mandatory. When vehicles containing explosives or detonators are parked, the brakes shall be set, the motive power shut off, and the vehicle shall be blocked securely against rolling.

6. A pickup truck containing explosives was parked on an incline of 20 degrees on Respondent's property and the wheels of the vehicle were not blocked. (Tr. 18, 19, 156).

Blasting activities were taking place on Respondent's property and the evidence was that the blasting was under the supervision of someone other than an employee of the Respondent. Although the Respondent attempted to show that ammonium nitrate is not an explosive, the MSHA inspector on rebuttal testified that it was not the ammonium nitrate that he was referring to in the citation as being the explosive, but the four boxes of dynamite which were also located in the truck bed. The inspector further testified that the truck could have slipped out of gear, allowing the truck to roll down the hill, possibly striking other objects or crossing a public highway located approximately 300 yards away. The situation could have resulted in a fatal explosion.

The citation should be affirmed.

CITATIONS NUMBER 160293 and 160294

Both of these citations allege a violation of 30 CFR § 56.9-2[2].

7. On March 7, 1979, two front end loaders, in actual operation at the time they were observed by the MSHA inspector, had no audible backup signal alarms working. (Tr. 48).

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

8. The front end loaders were loading trucks from stock piles of rock material located at Respondent's crusher. (Tr. 48).

Respondent's safety director, who accompanied the MSHA inspector on the inspection, also testified that the backup signal alarms were not working. (Tr. 113). He further testified that there was difficulty in keeping the backup alarms in operation because they were frequently disabled by employees who became annoyed at their sound. The Respondent was very prompt in abating the two citations issued, completing repairs within one-half hour. (Tr. 113).

The safety hazard involved was the inability of the loader operator to observe persons behind him while he backed up the machine. The only worker that normally would have been exposed to the danger was the plant clean-up man. (Tr. 55).

These two citations should be affirmed.

DOCKET NUMBER 79-210-M
CITATION NUMBER 160295

This citation alleges a violation of 30 CFR § 56.9-11[3].

9. On March 7, 1979, an MSHA inspector observed a front end loader in operation at the stock pile area on Repondent's property, and its windshield was cracked. (Tr. 59).

3/Mandatory. Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean.

10. The windshield was approximately 3 feet by 4 feet. The crack, which had a spider web effect, was in the center and extended out 24 to 36 inches. (Tr. 59, 60).

The MSHA inspector testified that there were haul trucks in the area in which the front end loader was working, and that the operator's vision was impaired due to the condition of the windshield. There was a danger of the operator running the loader into an unseen vehicle. The Respondent abated the citation by replacing the window the same morning that the ciation was issued.

The citation should be affirmed.

DOCKET NUMBER CENT 79-356-M
CITATION NUMBER 160306

This citation alleges a violation of 30 CFR § 56.15-5[4]. In connection with the citation the MSHA inspector issued a withdrawal order.

11. On April 26, 1979, an MSHA inspector, while accompanied by Respondent's safety diretor, observed three employees of the Respondent inside the feeder bin of the primary crusher throwing rocks down toward the jaws of the crusher. (Tr. 64).

12. The jaws of the crusher were in operation at the time of the incident, and the employees were not wearing any safety belts or lines. (Tr. 68).

4/Mandatory. Safety belts and lines shall be worn when men work where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

The jaws of the crusher were about 4 feet wide and about 6 feet in length. The jaws open at the top to about 3 feet in width and a feeder belt carries rock material to this opening. The employees were standing on the rocks located above the feeder belt, but the feeder belt was not operating. The three employees were approximately 6 or 7 feet from the mouth of the operating jaw crusher. (Tr. 70).

The inpector issued the withdrawal order, and the three employees left the bin within about 30 seconds. The inspector concluded, and I agree, that the condition was one which could have reasonably been expected to cause death or serious physical harm before such condition could have been abated. The employees had placed themselves in that dangerous location before, even though it was not permitted by Respondent's safety regulations unless the entire crusher was "locked out." It would have taken several minutes to lock out the equipment, more than enough time for the three employees to have received fatal injuries.

The citation and withdrawal order should be affirmed.

I find the facts to be as stated in paragraphs number 1 though 12, and in addition find the following:

13. Respondent's business is a small operation.

14. The Respondent demonstrated good faith in achieving rapid compliance after notification of the violations.

15. The Respondent was negligent in that the violations resulted from the failure of the Respondent to exercise reasonable care to prevent the conditions or practices which caused the violations, and which Respondent knew or should have known existed.

16. The gravity of the violation involving Citation Number 160306 was serious, and the gravity of the other violations was not serious.

CONCLUSIONS OF LAW

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

2. The Respondent violated the regulations cited in Citations Number 161218, 160293, 160294, 160295, and 160306.

ORDER

The withdrawal order issued on April 26, 1979, and all of the above citations are AFFIRMED, and based upon the criteria set forth in section 110(i) of the Act the penalties are as follows:

CITATION NUMBER	AMOUNT
161218	$150
160293	25
160294	25
160295	30
160306	500

It is further ordered that the Respondent pay the total penalties in the above amount of $730 within 30 days from the date of this decision.

Jon D. Boltz
Administrative Law Judge

Distrubition:

Office of the Solicitor, United States Department of Labor, 555 Griffin Square Building, Suite 501, Dallas, Texas 75202, Attention: Fred J. Haas, Esq.

James Luckett, Esq., 2226 Myrtle, El Paso, Texas 79901

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

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3 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceeding Docket No. PENN 79-142 A.C. No. 36-06100-03004
v.		
		Solar No. 9 Mine
SOLAR FUEL COMPANY,	Respondent	

SUMMARY DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; James L. Custer, Manager, Safety and Health, Solar Fuel Company, Somerset, Pennsylvania, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereinafter the Act), to assess a civil penalty against Solar Fuel Company (hereinafter Solar) for a violation of a mandatory safety standard. The case is presently at issue upon the filing of cross motions for summary decision by the parties.

This matter involves the alleged violation of 30 C.F.R. § 75.503, failure to maintain in permissible condition all electric face equipment required to

be permissible "which is taken into or used inby the last open crosscut." Two citations were issued in May 1979, for the alleged violation of the above regulation. Solar contends that the citations are invalid and should be vacated. MSHA contends that the citations are valid and a civil penalty should be assessed.

ISSUE

Whether a citation under 30 C.F.R. § 75.503 may be issued for electric face equipment which is intended for use in or inby the last open crosscut when such equipment is not in permissible condition when cited outby the last open crosscut.

APPLICABLE LAW

30 C.F.R. § 75.503 provides as follows: "The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine."

STIPULATIONS

The parties stipulated the following:

1. On May 3, 1979, and May 4, 1979, duly authorized representative of the Secretary of Labor, coal mine inspector Earl Miller, performed a regular quarterly inspection at the Solar Fuel Company's Solar No. 9 Mine.

2. During the course of his inspection on May 3, 1979, Inspector Miller observed that a Jeffrey mining machine located in an intake air course outby the last open crosscut, was not in permissible condition. (See Citation No. 0617857,

attached hereto as Exhibit No. G-1). He also observed a roof bolting machine, in non-permissible condition in an intake air course outby the last open crosscut, on May 4, 1979, at the same mine in the same working section. (See Citation No. 0617859, attached hereto as Exhibit No. G-2).

3. The section of the mine in question was being prepared for mining operations which were scheduled to begin shortly after the issuance of the subject citations. The operator intended to use both pieces of equipment inby the last open crosscut while performing these mining operations.

4. On May 3, 1979, mining activities at this section of the mine, during the shift in which Citation No. 0617857 was issued, produced 105 tons of coal after the citation was issued.

5. On May 4, 1979, mining activities at this section of the mine, during the shift in which Citation No. 0617859 was issued, produced 285 tons of coal after the citation was issued.

DISCUSSION

Solar contends that a citation issued under 30 C.F.R. § 75.503 may be issued only if the nonpermissible equipment is seen inby the last open crosscut. MSHA contends that nonpermissible equipment intended for use inby the last open crosscut may be cited even if found outby the last open crosscut. Both parties cite authorities in suppport of their positions.

Solar relies primarily upon two decisions issued by administrative law judges and MSHA's Draft Electrical Manual. In Kaiser Steel Corporation, Docket No. DENV 73-131-P (April 9, 1974), an administrative law judge vacated a notice of violation because the equipment was not actually inby the last open crosscut, stating: "I do not construe the regulation as requiring that all electric face equipment, irrespective of where it is located, must at all times be maintained in permissible condition simply because it is intended to

be taken into or used inby the last open crosscut." In Mineral Developing Company, Inc., Docket No. MORG 74-739-P (February 25, 1975), an administrative law judge vacated a notice of violation because MESA (MSHA's predecessor) provided no information to indicate where a nonpermissible scoop was operating and the judge was therefore "unable to determine that the scoop was located inby the last open crosscut."

The MSHA Draft Electrical Manual relied upon by Solar in reference to 30 C.F.R. § 75.503 states, "[e]nergized electric face equipment must be observed in or inby the last open crosscut or in a return entry before a permissibility violation exists." Solar concedes that the Draft Manual has never been in effect and is not a regulation or official policy of MSHA.

MSHA relies upon Peabody Coal Company, Docket No. VINC 77-88 (October 10, 1978). In Peabody Coal Company, the judge rejected the reasoning of Kaiser Steel Corporation. The judge in Peabody Coal Company held:

> This language clearly supports the proposition that all electric face equipment falls under the protection of 30 CFR 75.503 regardless of its location in the mine. Thus, the said shuttle car, which was intended to be used inby the last open crosscut (see Applicant's brief, p. 2), was in violation of 30 CFR 75.503.

The holdings of the cases cited by Solar and MSHA are in direct conflict. In the instant case, MSHA has not shown and does not contend that the equipment in question had been taken into or used inby the last open crosscut at the time the citation was issued. MSHA asserts that the fact that the operator intended to take the machines inby the last open crosscut was sufficient to prove a violation. That reasoning, however, ignores the plain language of

the regulation which requires that the equipment be electric face equipment "which is taken into or used inby the last open crosscut." To prove a violation of 30 C.F.R. § 75.503, MSHA must show that Solar did not maintain in permissible condition, equipment which was "taken into or used inby the last open crosscut."

While I am mindful of the remedial nature of the Act and the fact that the Act is to be construed broadly to accomplish congressional policy, I find nothing in the legislative history which would support the position of MSHA and the holding in Peabody Coal Company, supra. On the contrary, section 318(i) of the Act provides in pertinent part: "'Permissible' as applied to electric face equipment means all electrically operated equipment taken into or used inby the last open crosscut of an entry * * *." In order to support MSHA's position I would have to find that the language "taken into or used inby the last open crosscut" as used in this regulation is redundant. Nowhere in the Act or regulations is there a requirement that a mine operator maintain electrical face equipment in permissible condition if it is "intended" to be taken into or used inby the last open crosscut. The authority cited for the contrary holding in Peabody Coal Company, supra, was 30 C.F.R. § 18.90 titled "Field Approval of Electrically Operated Mining Equipment" which provides in pertinent part as follows:

> The regulation of this subpart (e) set forth the procedures and requirements for permissibility which must be met to obtain MESA full approval of electrically operated machinery used or intended for use inby the last open crosscut of a coal mine which has not been otherwise approved, certified or accepted * * *. (Emphasis supplied.)

I find that 30 C.F.R. § 18.90 concerning "Field Approval of Electrically Operated Mining Equipment" is irrelevant to a determination of whether Solar violated 30 C.F.R. § 75.503. The former section does not purport to be a definitional section for the regulation in controversy. Moreover, it would be unreasonable to expect a mine operator to conclude that the language "intended for use" contained in 30 C.F.R. § 18.90 would apply to 30 C.F.R. § 75.503 when the opposite conclusion is manifest from the language employed.

MSHA does not allege that the electric face equipment involved in the instant citations was taken into or used inby the last open crosscut. Therefore, MSHA has not alleged facts which, as a matter of law, constitute a violation of 30 C.F.R. § 75.503.

Under 29 C.F.R. § 2700.64(b):

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.

Here, the record shows that there is no issue as to any material fact and, based upon the foregoing, Solar is entitled to summary decision as a matter of law.

ORDER

WHEREFORE IT IS ORDERED that Citation Nos. 0617857 and 0617859 are VACATED, Solar's motion for summary decision is GRANTED, and the petition is

DISMISSED. IT IS FURTHER ORDERED that MSHA's motion for partial summary decision is DENIED.

James A. Laurenson

James A. Laurenson, Judge

Distribution by Certified Mail:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

3 JUL 1980

WINDSOR POWER HOUSE COAL COMPANY, Contestant	:	Contest of Orders
v.	:	Docket No. WEVA 79-199-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 79-200-R
	:	Beech Bottom Mine
UNITED MINE WORKERS OF AMERICA (UMWA), Respondent	:	

DECISION

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

Before: Administrative Law Judge Melick

These consolidated cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 801 et seq., upon the applications of the Windsor Power House Coal Company (Windsor) to contest two orders of withdrawal issued by the Mine Safety and Health Administration (MSHA) under section 104(d)(1) of the Act. In challenging these orders, Windsor takes issue not only with the validity of the orders per se but also with the precedential underlying section 104(d)(1) citation which was the basis of the orders. An evidentiary hearing was held on December 12 and 13, 1979, and on January 23, 1980, in Wheeling, West Virginia.

I. The Underlying Section 104(d)(1) Citation

The section 104(d)(1) citation underlying both orders at bar was issued by MSHA inspector Charles Coffield, and received by Windsor, on May 3, 1979. 1/ Windsor did not file notice of its intent to contest that citation

1/ Section 104(d)(1) provides as follows:
"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any

until December 12, 1979, more than 7 months later. Under section 105(d) of the Act the mine operator is afforded an opportunity to challenge such a citation if he notifies the Secretary within 30 days of its receipt of his intent to contest the issuance of the citation. Energy Fuels Corp. v. MSHA 1 FMSHRC 299 (May 1, 1979).

While the former Interior Board of Mine Operations Appeals had permitted notices issued under section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969 (comparable to citations issued under section 104(d)(1) of the 1977 Act) to be contested at the hearing challenging a section 104(c)(1) withdrawal order (comparable to a section 104(d)(1) withdrawal order under the 1977 Act) based on that notice, Ziegler Coal Company 4 IBMA 139 (1975), Eastern Associated Coal Co., 4 IBMA 184 (1975), and Kentland Eklhorn Coal Corp., 4 IBMA 166 (1975), the justification for such a procedure does not exist under the 1977 Act. Under the 1969 Act, as interpreted by the former Interior Board, an abated notice could not otherwise be immediately challenged except as an incident to review of the related withdrawal order. Under the 1977 Act, however, immediate review of the section 104(d)(1) citation is permitted. Energy Fuels, supra. Moreover, there is no specific authority in the 1977 Act to allow hearings on a citation at the hearing contesting a subsequent withdrawal order where the notice to contest that citation has not been timely filed independent of the withdrawal order. I conclude therefore that under the 1977 Act, the underlying section 104(d)(1) citation cannot be reviewed solely as an incident to review of the related 104(d)(1) order but must be independently and timely challenged under the provisions of section 105(d) of the 1977 Act. I find the decisions of the Interior Board, cited above, to be inapposite. Of course, once the right to review the underlying citation has been preserved by filing in accordance with section 105(d), then the hearing on that issue could be consolidated with any hearing requested on any subsequent order of withdrawal based on that citation.

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fn. 1 (continued)
mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of the operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to such comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

Since Windsor did not file its notice of contest to the citation at bar until more than 30 days after its receipt it appears that in accordance with section 105(d) of the Act, I am without jurisdiction to consider that citation.

The Secretary suggested at hearing that since the citation could in any event be contested at subsequent penalty proceedings under section 105 of the Act, I was not without authority to grant immediate review of the citation. Moreover the parties waived the procedural formalities to the bringing of a civil penalty proceeding. I thereupon agreed to conduct a hearing on the underlying citation and issued a bench decision in which I found that the violation was proven as charged and in which I made special "significant and substantial" and "unwarrantable failure" findings. Upon closer examination of the statutory language and decisions of the Commission, I now conclude that I had no jurisdiction to make those special "significant and substantial" and "unwarrantable failure" findings. Since the provisions of the Act do allow the operator to challenge at civil penalty proceedings, the existence of the violation charged in a citation and since the parties in this case waived the procedural prerequisites to such a proceeding, it is apparent that I did have jurisdiction to review that limited issue at hearing. However, since there is no authority under the Act to consider the special findings of "significant and substantial" and "unwarrantable failure" in civil penalty proceedings, it is apparent that upon its failure to timely file a notice of contest to the citation herein Windsor was foreclosed from challenging those special findings. This conclusion is consistent with the Commission decisions in Pontiki Coal Corporation v. MSHA 1 FMSHRC 1476 (October 1979), and Wolf Creek Collieries Company 1 FMSHRC ____ (March 1979), that the validity of a withdrawal order is not an issue in a penalty proceeding. 2/

Under the circumstances, the Bench decision rendered at the hearing on December 12, 1979, and set forth below is applicable only to the issue of the violation itself and any special findings made therein are therefore surplusage. Windsor has waived its right to challenge these special findings by its failure to timely contest the citation under section 105(d) of the Act.

The citation at bar charges a violation of 30 C.F.R. § 75.302-1(a). In relevant part, the citation reads as follows:

> [The] inby end of the line brattice that was being used to ventilate the working face of No. 1 entry of 2 right 6 east (029) section was approximately 44 feet 2 inches plus the cutter bar sumped in and coal was being cut with a 15 RU Joy cutting machine SN 18046 operated by John V. Mann * * *.

2/ Although the Commission was concerned in these cases with penalty proceedings under section 109(a)(3) of the 1969 Act, there is no reason to believe that the same construction would not apply as well to the generally similar provisions of section 110 of the 1977 Act.

The cited standard provides, in relevant part, as follows:

> Line brattice or any other approved device used to provide ventilation to the working face from which coal is being cut, mined or loaded and other working faces so designated by the coal mine safety manager, in the approved ventilation plan, shall be installed at a distance no greater than 10 feet from the area of deepest penetration to which any portion of the face has been advanced * * *.

At the conclusion of the evidentiary hearing as to the citation and upon request of counsel, I rendered a bench decision providing, in essence, as follows:

There is no doubt that when Inspector Coffield came upon the working face of the No. 1 entry, the end of the line brattice was at least 44 feet, plus 8 feet (for a total distance of at least 52 feet) from the point of the cutter bar's deepest penetration. The inspector's testimony is undisputed in this connection. Indeed, it is corroborated to a great extent by the operator's own witness, safety inspector Mike Roxby, who testified that in order to abate the violation he needed more than two 20-foot sections of brattice to abate the violation.

I also observe that in the order itself, Inspector Coffield noted that the violation was terminated by extending the brattice to within 8 feet of the working face. Considering the testimony of Roxby that in order to abate the violation it required more than two additional 20-foot sections of brattice, it is apparent that there was in fact an extensive distance between the end of the line brattice to the deepest point of penetration of the working face.

Now, it is also essentially undisputed that some nails for hanging the brattice were in the roof when Coffield came upon the scene at the No. 1 entry. The testimony is also undisputed that these nails did not extend to more than 20 or 22 feet from the existing brattice before abatement. There was some suggestion, I think by Mr. Roxby, that the nails could have pulled out, but there is no affirmative evidence of that, and Roxby himself testified that he did not see any nails lying about. There is no contradictory evidence therefore to indicate that any hangers or hanging devices, nails or whatever, did extend beyond 20 or 22 feet. This becomes significant because the operator has suggested that its employees, without knowledge of supervisory personnel, had taken the line brattice down. But the evidence indicates that the nails extended only 20 to 22 feet beyond the line brattice as found by Coffield thereby indicating that at best the brattice was only hung an additional 20 or 22 feet from the line found by Coffield, thus leaving an additional distance without brattice of 20 or 22 feet, or even more than that depending on how you look at it, but a minimum of 20 or 22 feet from the end of the line brattice to the working face.

There is also testimony from Roxby that in order for work to advance a distance of 30 feet in an entry such as the No. 1 entry would require 5-1/2 hours of actual operating time and could actually involve or be spread over three working shifts. He or one of the other witnesses testified that the work cycle is to cut, drill, shoot, remove the loose coal and roof bolt. When Inspector Coffield arrived at 9:35 at the No. 1 entry, the cutting cycle was underway. According to the most conservative calculation, that would place Foreman Wheeler at that particular location (Wheeler thought he was last there at 8:45) when he was in a position to have seen the brattice (again, even assuming the employees had the brattice hung on the nails observed by Coffield) some 20 or 22 feet from the existing working face. Therefore Foreman Wheeler should have seen that it was in violation of the regulations. Wheeler testified that he thought the line brattice was then actually 10 to 12 feet from the working face when he saw it. However, based on the evidence previously noted, it is apparent that Wheeler's approximation was totally erroneous.

I also consider in this case the fact that the company mine safety inspector, Roxby, testified that he knew of no enforcement policy for correcting employee violations of the brattice regulation and that there had been a history, according to Coffield, of a rather cavalier disregard on the part of other foremen in this particular mine for the maintenance of the brattice regulation.

So all these factors combined lead me to the conclusion that certainly the operator should have known of the violation in this particular case and that it was caused by unwarrantable failure, as defined in Zeigler Coal Company, 7 IBMA 280 (1977). The citation herein was therefore valid.

II. Order of Withdrawal--Docket No. WEVA 79-199-R

Order of Withdrawal No. 811582 alleged violations of 30 C.F.R. § 75.400, charging that there were accumulations of loose dry coal in five different locations in the north main section of the mine and oil, grease and coal on various mining equipment including a shuttle car, a cutting machine, the coal feeder and the loading machine. The cited regulation provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, should be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

The cited regulation had been interpreted by the Interior Department's Board of Mine Operations Appeals in Secretary v. Old Ben Coal Company, 8 IBMA 98 (August 17, 1977), as requiring proof of: (1) An accumulation of combustible materials, (2) the operator's knowledge, actual or constructive, that such accumulations existed, and (3) the failure of the operator to clean up or undertake to clean up such accumulations "within a reasonable time after discovery, or, within a reasonable time after discovery should have been made." On December 12, 1979, the date on which the hearing in this case commenced, the Federal Mine Safety and Health Review Commission reversed the

Board's decision and held that a violation of 30 C.F.R. § 75.400 exists upon a finding alone that an accumulation of combustible materials exists. Secretary v. Old Ben Coal Company, 1 FMSHRC 1954 (1979).

While as a matter of fundamental fairness to operators who have been permitted to rely upon the Interior Board's Old Ben decision and consistent with the criteria set forth by the Supreme Court of the United States in its holdings regarding retroactive application of judicial and agency decisions, 3/ I believe the Commission's Old Ben decision should not be applied retroactively to orders and citations issued after the Board's decision and

3/ As pointed out by the United States Supreme Court in Linkletter v. Walker, 381 U.S. 618, 14 L.Ed.2 601, 85 S. Ct. 1731 (1965), retroactive operation of an overruling decision is neither required nor prohibited by the Constitution and the determination of whether and to what extent a new rule adopted and an overruling decision will be given retroactive effect is not a matter of constitutional compulsion but a matter of judicial policy, to be determined by the court after weighing the merits and demerits of the particular case, by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive application will further or retard its operation. Retroactive effect to an overruling decision will be denied where there has been justifiable reliance on decisions which are subsequently overruled and where those who have so relied may be substantially harmed if retroactive effect is given to the overruling decision. Safarik v. Udall, 113 App. D.C. 303, 304 F.2d 944 (1962), cert. denied, 371 U.S. 901, 9 L.Ed.2d 164, 83 S.Ct. 206; Lyons v. Westinghouse Electric Corp., 235 F. Supp. 526 (1964 D.C. N.Y). The Supreme Court in NLRB v. Bell Aerospace Company, Division of Textron, Inc., 416 U.S. 267, 40 L.Ed.2 134, 94 S. Ct. 1757 (1974), again suggested that retroactivity will be denied when a party has relied upon prior administrative agency holdings and such reliance would result in adverse consequences. If new liabilities are being imposed, fines levied, or damages awarded, reliance on past agency practices and rules will not be penalized. Mezines, Stein and Gruff, Administrative Law, § 14.01; and Annotations at 14 L.Ed.2 992; 10 ALR.3d 1371 and 22 L.Ed.2 821.

Within this framework, it appears that the Commission's decision in Old Ben should not be applied retroactively to the order in this case nor to any order or citation issued after the date of the Board's Old Ben decision and before the date of the Commission's Old Ben decision. Windsor in this case and other operators similarly situated clearly had a right to rely upon the Board's Old Ben decision until modified by the Commission. They should not therefore now be penalized for such reliance.

As also pointed out in Linkletter, another factor to be considered in determining whether to give general retroactive effect to a new judicial rule adopted in overruling earlier precedents is the purpose of the rule. If the purpose of the new rule can be adequately effectuated without applying it retroactively, retroactive operation may properly be denied. Lyons v. Westinghouse, supra; U.S. ex. rel. Angelet v. Fay, 333 F.2d 12 (1964 CA 2 N.Y.), aff'd., 381 U.S. 654, 14 L.Ed.2d 623, 85 S.Ct. 1750; Sisk v. Lane, 331 F.2d 235 (1964 CA Ind.), cert. denied, 380 U.S. 959, 13 L.Ed.2d 977,

before the Commission decision, the Commission has in fact given it retroactive effect. Secretary v. C.C.C.-Pompey Coal Company, Inc., 2 FMSHRC ____ (June 12, 1980). Accordingly, I apply in this case the law set forth in Old Ben Coal Co., 1 FMSHRC 1954 (1979). Thus, in proving the violations of 30 C.F.R. § 75.400 now before me, MSHA need only establish the existence of an accumulation of combustible materials. The term "accumulation," has been simply defined as "a mass of something heaped up or collected." The American Heritage Dictionary of the English Language, Houghton, Mifflen Co. (1976); 1A Words and Phrases, "Accumulate, Accumulation." 4/ I find that this definition appropriately reflects the meaning of the term as used in the cited regulation. Applying this standard to the facts, I find that MSHA has proven violations in five of the nine factual circumstances cited.

Inspector Coffield testified that the first three accumulations were located outby the survey station marked 120 + 59 in the No. 5 entry of the north main section and ranged in size from 2-1/2 to 3 feet high, 3 feet to 8 feet wide and 2 feet to 5 feet long. Another pile of loose dry coal was located inby the 7 West tailpiece and was 10 to 20 inches deep, 8-1/2 feet wide and 8 to 14 feet long. The fifth pile of loose dry coal, located at the No. 5 entry of the 7 West North main section, was 2 to 8 inches deep 14 feet wide and 40 feet long. The piles were measured by Coffield in the presence of Windsor's safety inspector, Michael Roxby.

Coffield opined that the first three piles had been created as a result of dumping because of the way they were formed. He thought they had been there from 1 day to as long as 3 weeks because the coal was excessively dry and there was evidence that a scoop tractor or similar equipment had pushed it to the side and run over it. He dug into the piles with a stick, examined them and concluded that they consisted entirely of coal. He took no samples and performed no tests on the coal.

Coffield also concluded that all five piles of coal were located in areas traveled in preshift examinations. He observed that the shift then in operation had begun about 8:00 or 8:30 that morning. He discovered the first of the subject piles around 9:05 a.m. and found the rest before 9:50 a.m. Coffield concluded that since coal had not yet been mined during that shift

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fn. 3 (continued)
85 S.Ct. 1100. Since the primary purpose of the standard cited in this case is to prevent future dangerous accumulations of coal dust, loose coal and other combustible materials, the purpose of the Commission's interpretation of the rule can be properly effectuated without applying it retroactively.
4/ Although the term may also connote a buildup over a period of time, 1A, Words and Phrases, supra, the Commission has in its Old Ben decision implicitly rejected any such time concept. The Commission rejected the use of the time concept adopted by the former Interior Board in its Old Ben decision and found that the "vast spillage" found in Old Ben was, in itself and without consideration of time for buildup, sufficient evidence of a violation of 30 C.F.R. 75.400.

and because coal had not been mined during the midnight shift, the coal must have been spilled on the previous day's 4 to 12 shift. He also concluded that the accumulations of loose coal were combustible and presented a hazard of fire or possible explosion because of energized equipment located in the area.

I find Coffield's testimony to be credible and his visual observations sufficient to support the violations regarding the five accumulations of loose coal. Coal Processing Corporation, 2 IBMA 336 at pp. 345-346. I find from the large size of these piles that each constituted an accumulation under the cited standard. I further find that the operator had at least constructive knowledge of the accumulations and should have known of their existence from a properly conducted preshift examination. It is undisputed that coal had not been mined after the 4 to 12 shift on the previous day and that the piles remained as late as 9:50 on the morning of the inspection. Moreover company safety man Michael Roxby conceded that the scoop tractor had placed the first pile there earlier in the shift so that the tractor could be used to load posts to correct a roof condition.

In reaching my conclusions herein, I have given full consideration to the testimony of Roxby, mine superintendent John Skeens, and mine safety supervisor David Maulkey. However, for the following reasons I can give but little weight to that testimony. While Roxby testified that the cited piles of coal were either too wet to be combustible or so intermixed with incombustibles so as to be virtually incombustible itself, he conceded that he was not present during the entire inspection, that he took no samples from any of the cited piles and performed no test of combustibility or wetness. Roxby's silence and lack of protest when Inspector Coffield measured the cited coal piles may also be construed as an admission. If Roxby indeed believed that the piles were too wet or that they were intermixed with noncombustibles, it is reasonable to expect that he would have protested in the face of what must have been obvious preparation for a citation or order.

Similarly, I can give but little weight to the testimony of Skeens and Maulkey because they did not accompany Coffield on his inspection and their observations were made sometime later. It is apparent moreover, that since Skeens' testimony differed from both Coffield's and Roxby's regarding the nature of some the coal piles it is quite likely that the witness was not even referring to the same piles that were cited.

Since I have already found that the operator should have known of the five loose coal accumulations cited and failed to exercise reasonable care in cleaning up those accumulations, I find that the violations were caused by the unwarrantable failure of the operator to comply with the cited standard. Ziegler Coal Company, 7 IBMA 280 (1977). 5/

5/ "Unwarrantable failure" is defined therein as the failure by an operator to abate a condition that it knew or should have known existed, or the failure to abate because of indifference or lack of due diligence or reasonable care. Under this sweeping definition, it is apparent that practically any violation would be the result of such "unwarrantable failure."

I do not find on the other hand that any violation existed with respect to the alleged oil, grease and coal found on a shuttle car, the cutting machine, the coal feeder and the loading machine. The Government failed to satisfactorily establish that these substances existed in sufficient quantity to constitute an "accumulation." Indeed, Inspector Coffield admitted on cross-examination that he could not recall the amount of "accumulations" on this equipment. Moreover, as a finder of fact I need more than the inspector's bare conclusions in this regard.

III. Order of Withdrawal--Docket No. WEVA 79-200-R

Inspector Coffield issued Order of Withdrawal No. 811583 on May 16, 1979, for a violation of 30 C.F.R. § 75.202 alleging that "there were overhanging ribs up to 58 inches wide in Nos. 1 through 9 entries and the last open crosscut previous to No. 1 entry of North Mains of 7 West North Mains, 027 Section, for a total of approximately 900 feet and approximately one-half of the ribs were loose" (Tr. 30). The cited regulation provides as relevant herein that "[l]oose roof and overhanging or loose faces and ribs shall be taken down or supported."

Windsor concedes in its pleadings that it was in violation of the cited standard in the No. 1 entry and does not deny that it was the result of "unwarrantable failure." It contends only that the violations and "unwarrantable failure" findings in entries Nos. 2-9 were erroneous.

Inspector Coffield entered the subject mine on May 16 around 8:30 a.m. and observed upon his arrival at the No. 1 entry, loose ribs and top along the left rib of the entry. Proceeding to the Nos. 2 and 3 entries, he observed more loose ribs on the roof on both sides with up to 4 feet of overhang. In the No. 4 entry, he observed loose ribs on both sides and in the No. 5 entry observed loose ribs behind the curtain on the right side. In the No. 6 entry, he observed loose ribs on the right side overhanging 3 to 3-1/2 feet. In the No. 7 entry, he observed loose ribs and overhanging on the right side. In the No. 8 entry, the right rib was loose and overhanging up to 58 inches and in the No. 9 entry, loose ribs were overhanging on the right side. Coffield determined that the overhangs were loose by observing cracks and breaks in the strata between the roof and rib. In some places, Coffield tested the roof with a pick-like instrument and discovered that it fell "real easily, just a touch." There were no supports for any of the overhanging ribs. In his opinion, the condition was obvious and had existed in nine entries for about a week and in the last open crosscut for more than a week. Coffield thought the condition was serious because of the possibility of fatal injury from a rib or roof fall.

I find the inspector's testimony to be credible and his expert opinions to be based on sufficient evidence to support the withdrawal order. His testimony in significant respects is indeed corroborated by Windsor's own safety inspector Roxby and mine superintendent Skeens. Both of these men observed numerous cracks in the ribs. Roxby conceded that some of the ribs were not perpendicular and that some contained loose material. Neither

specifically denied that the ribs were, as a factual matter, "overhanging" but claimed only that in their opinion the ribs posed no danger. Since the essence of the violation charged is the mere existence of unsupported "loose roof and overhanging or loose faces and ribs," their opinion that such ribs posed no danger is immaterial.

Under the circumstances, I find that the violations existed as charged and that Windsor should have known of their existence. They were therefore the result of "unwarrantable failure." Zeigler Coal Company, 7 IBMA 280 (1977). The order of withdrawal was therefore valid in its entirety and no modification is warranted.

ORDER

I. Docket No. WEVA 79-199-R

Order of Withdrawal No. 811582 is affirmed as to the first five accumulations described therein but modified and found invalid as to the last four alleged accumulations described therein.

II. Docket No. WEVA 79-200-R

Order of Withdrawal No. 811583 is affirmed and the contest of Docket No. WEVA 79-200-R is therefore dismissed.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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3 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
Petitioner	:	Docket No. YORK 79-21-M
	:	A.C. No. 30-02135-05002
v.	:	
	:	Docket No. WILK 79-102-PM
NEW YORK STATE DEPARTMENT OF TRANSPORTATION,	:	A.C. No. 30-02135-05001
Respondent	:	Docket No. YORK 80-2-M
	:	A.C. No. 30-02358-05001
	:	
	:	Underwood Pit
	:	Botsford Pit

DECISION

Appearances: Deborah B. Fogarty, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner; William S. MacTiernan, Associate Attorney, Legal Services Bureau, New York State Department of Transportation, Albany, New York, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

These proceedings arise out of the consolidation of three civil penalty proceedings brought by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) against the New York State Department of Transportation (hereinafter New York), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), (hereinafter the Act).

Prior to hearing, New York moved to dismiss all three cases for the following reasons:

1. The pits in question are not subject to MSHA jurisdiction;

2. Enforcement of the Act against New York violates the tenth amendment of the Constitution;

3. New York's activities in connection with these proceedings are not within the ambit of the Act "because the products thereof did not enter commerce nor did the operation or products thereof affect commerce."

I denied New York's motions in an order denying motions to dismiss (attached hereto and incorporated herein as an Appendix) for the reasons stated therein. In that order I found that a hearing was required to determine whether the pits in question were "borrow pits" within the definition of that term in the Interagency Agreement between MSHA and OSHA.

MSHA has authority to administer the Act which applies to all "mines." A mine is defined in the Act, 30 U.S.C. § 802(h), as "an area of land from which minerals are extracted in nonliquid form." The Underwood Pit and the Botsford Pit meet that definition. They are, therefore, mines within the reach of the Act. Consequently, MSHA would have jurisdiction over them. However, MSHA has issued a formal interagency agreement to define its jurisdiction vis-a-vis the Occupational Safety and Health Administration (hereinafter OSHA) in which it has limited its jurisdiction. Interagency Agreement between MSHA and OSHA, U.S. Department of Labor, dated March 29, 1979. 44 Fed. Reg. 22827 (April 17, 1979). That agreement states that "borrow pits" are subject to OSHA jurisdiction. A borrow pit is defined as:

> [A]n area of land where the overburden, consisting of unconsolidated rock, glacial debris, or other earth material overlying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting

party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove larger rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit. MSHA-OSHA Interagency Agreement, par. B(7), 44 Fed. Reg. 22827 (1979).

"Milling" is defined in the agreement to include "sizing." "Sizing" is defined as "the process of separating particles of mixed sizes into groups of particles of all the same size or into groups in which particles range between maximum and minimum size."

A hearing was held in Albany, New York, on June 10, 1980. Randall L. Gadway and Ronald Mesa, testified on behalf of MSHA. Gordon Reimels testified on behalf of New York. Upon completion of the taking of testimony, the parties submitted oral arguments.

ISSUES

1. Whether the pits in question are under the jurisdiction of MSHA.

2. Whether the Commission can decide that the Act may be constitutionally enforced against a state.

3. Whether enforcing the Act against the State violates the tenth amendment.

4. Whether the State's activities are within the coverage of the Act.

5. If the pits in question are determined to be under MSHA jurisdiction, whether New York violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

Section 110(i) of the Act, 30 U.S.C. § 820(i), provides in pertinent part as follows:

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

30 C.F.R. § 56.18-10 provides as follows: "Mandatory. Selected supervisors shall be trained in first aid. First aid training shall be made available to all interested employees."

30 C.F.R. § 56.9-87 provides as follows:

> Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

30 C.F.R § 56.14-1 provides as follows: "Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machinery parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

30 C.F.R. § 56.9-22 provides as follows: "Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways."

STIPULATIONS

The stipulations in these cases are as follows:

1. The New York State Department of Transportation's sand extraction operation at the Underwood Pit is a yearly operation for the purpose of stockpiling sand for winter snow and ice control for certain highways within Essex County.

2. The Underwood Pit is located at the intersection of Route 9 and Route 87 on the Northway extension of the New York State Thurway which road continues north to Montreal, Canada.

3. The New York State Department of Transportation's sand extraction and stock pile operation at the Underwood Pit in 1978 took place on July 5, 6, 7, 10, 12, 13 and 14.

4. The employees present at the Underwood Pit during the sand removal consisted usually of three employees. On July 6, 1978, four employees were present at the site.

5. The equipment used in the extraction of sand operation at the Underwood Pit in 1978 consisted of a Telesmith screening plant, a Northwest crane and a Case front-end loader.

6. Except when extracting sand, this equipment is not generally at the Underwood Pit. A front-end loader is kept on site in the winter for the purpose of loading the stockpiled sand into trucks.

7. Randall Gadway is presently employed by the Mine Safety and Health Administration, hereinafter MSHA, as a metal, non-metal mine inspector.

8. Randall Gadway has been employed in the capacity of the safety and health mine inspector by the Mining Enforcement and Safety Administration, hereinafter MESA, predecessor of MSHA and by MSHA since 1975.

9. Prior to his employment with MESA/MSHA, Mr. Gadway was employed in the mining industry since 1966.

10. On July 5, 1978, as a part of his responsibilities, Mr. Gadway inspected Respondent's Underwood Pit.

11. At the time of the inspection, Mr. Gadway observed the screening plant in operation.

12. At the time of the inspection, bulk material was being removed from the bank of the Underwood Pit and was being dumped into a hopper.

13. From the hopper, the extracted material was transported by conveyor belts to the screen.

14. Sand similar in size and quality to beach sand was dropping through the moving screen.

15. The sand dropping through the moving screen was being removed and stockpiled.

16. At the time of the inspection, the reverse signal alarm of the Case front-end loader was not working.

17. Respondent will not raise the defense that the proposed assessments will affect the operator's ability to continue in business.

18. Prior to July 5, 1978, Respondent had no previous history of paid violations at its Underwood Pit facility.

19. Respondent's Underwood Pit is in Region I by designation of the New York State Department of Transportation. Region I includes all of Essex County, New York.

20. The parties stipulate that the four conditions involved in all four citations--that is Citations 220483, and 220484 at the Underwood Pit and 219993 and 219994 at the Botsford Pit, that these conditions were abated within the time specified by the inspector for abatement and that compliance was normal for all four situations.

21. The parties agree that there were no berms in the upper roadway on the north side of the Botsford Pit.

SUMMARY OF THE EVIDENCE

Operations at the Underwood Pit and the Botsford Pit

While the parties arrive at conflicting conclusions from the evidence presented, there is no essential dispute of fact in this case. The Underwood Pit is described as follows: 300 to 400 feet in diameter,

30 to 40 feet high, and a 70-degree angle of repose of the material being extracted. The equipment employed at this site consists of the following: shed, crane, screening plant, and front-end loader. On the day of the inspection, July 5, 1978, a foreman and three employees were present at the site. A front-end loader was used to extract loose, unconsolidated material from the face and to dump this material on a hopper. A conveyor belt then transported the material to a shaker screen. No screen of any kind was placed over the hopper so that all material dumped arrived at the shaker screen by the conveyor belt. The raw material dumped at the hopper ranged in size from sand-size particles to fist-size rocks. There was no wood or trash in this material. The shaker screen permitted material approximately one-quarter inch or less to pass through. Larger material was discarded. The material passing through the screen was picked up by a crane and stockpiled approximately 30 to 40 feet from the plant. Salt was added to the sand which had passed through the screen and the mixture was stockpiled for winter use by New York for ice control on the State highways.

The Botsford Pit consists of five levels which were being mined by various entities. New York was mining only on level 2. In that area, the Botsford Pit is described as being 150 feet in diameter with an 11-foot high face. The material being extracted from the face ranged in size from fine sand to cantaloupe size particles. There were no trees, trash, or large stones in the area being mined. There was an access road to level 2 which was on a grade. The equipment at the Botsford Pit on the day of inspection, June 27, 1979, was as follows: a Barber-Greene screen, a front-end loader, a truck mounted shovel, and two dump trucks. Four employees were present

on the date of inspection. The procedure followed in extracting the minerals and dumping them into the hopper was the same as at the Underwood Pit. However, at the end of the conveyor belt, the Barber-Greene screen permitted particles of up to 1-1/2 inches to pass. All larger size particles were discarded. Gordon Reimels, New York's resident engineer in charge of highway maintenance for the area in question, testified that New York had specifications that 1-1/2 inches was the maximum size to be used as shoulder fill for rebuilding roads. Some of the material passing through the screen was hauled away in dump trucks for reconstructing shoulders along state highways and the remainder was stockpiled for future use. The material which passed through the screen was used by New York for shoulder grade, drainage backfill, and permanent repair of the State roads.

Citation No. 220483

Inspector Randall L. Gadway conducted an MSHA inspection of the Underwood Pit on July 5, 1978. At that time, he asked the foreman and three employees for proof of their current first aid training. None of those present had any such proof. The foreman was unable to locate a first aid training certificate and was not sure if his training certificate had been issued within the last 3 years. There was no first aid material at the plant and no ambulance was on the site. Inspector Gadway testified that an employee at the site could sustain a severe injury and would require first aid to keep him alive until he got to a hospital. He testified that New York should have known about this violation since the pit had been previously inspected by MESA, the predecessor to MSHA. He believed that an injury was probable because an injured worker would go into shock if no first aid was adminstered.

Citation No. 220484

On the same day, at the Underwood Pit, Inspector Gadway observed that the backup alarm was not working while the front-end loader was moving in reverse. The operator of the loader had an obstructed view because he could not see a person standing 3 feet behind the loader. No other employee served as an observer for the loader operator. The operator of the loader stated that the backup alarm was malfunctioning and that had been reported. He did not indicate when that report had been made. Although there was no one on foot in the immediate area, there was one worker in the vicinity of the hopper approximately 20 to 30 feet from the loader. In this case, Inspector Gadway did not believe that the violation would have been apparent to New York since his experience indicated that backup alarms easily malfunction. The violation in this case could result in the loader running over a person or vehicle. One person would be affected. The gravity of the violation would range between a miner being brushed to a fatality. Inspector Gadway believed that an accident was probable.

Citation No. 219993

On June 27, 1979, MSHA Inspector Ronald Mesa conducted an inspection of the Botsford Pit. He found that there were 13 exposed idler rollers on the conveyor belt which were not guarded. The pinch points were exposed. The foreman was present and the condition was obvious. One person was exposed to injury. New York should have known of this condition. The violation was abated by welding iron guards against the idler arms.

On the same day, Inspector Mesa found that there was no berm on the elevated access road. This road was elevated 11 feet above the surface below. The condition was obvious. It should have been known to New York. He observed four loads being hauled on the road on that day. One person would be affected by the possibility of a truck overturning. An accident could result in lost work days and permanently disabling injuries. Inspector Mesa was unaware of any history of accidents at this pit.

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of the parties have been considered. As noted, supra, New York's arguments based upon a lack of jurisdiction due to the tenth amendment to the Constitution and the fact that the products of its operations at the pits in question did not enter commerce or affect commerce have been rejected for the reasons set forth in the Appendix herein. However, there remains the question of whether MSHA has jurisdiction over the pits in question in light of the MSHA-OSHA Interagency Agreement. A resolution of that question depends upon whether either or both of these pits qualify as a "borrow pit" under that Agreement. With regard to the Underwood Pit, the evidence establishes that raw material ranging in size from fine sand to fist-size rocks is screened so that only sand sized particles (one-quarter inch or less) are used in combination with salt by New York to control ice on highways during the winter. As pertinent here, the MSHA-OSHA Interagency Agreement provides, "extraction occurs * * * for use as fill materials by the extracting party in the form in which it is

extracted. * * * The material is used by the extracting party more for its bulk than its intrinsic qualities * * *." While the term "fill" is not defined in the agreement, that term means, "material used to fill a cavity or passage." Dictionary of Mining, Mineral and Related Terms, Bureau of Mines, Department of Interior, 1968. Thus, it is obvious that the material extracted by New York from the Underwood Pit for the purpose of controlling ice on highways during the winter is not "for use as fill materials." It is used for its intrinsic abrasive qualities. Since New York does not use the sand for fill materials, but rather for its intrinsic qualities, the Underwood Pit is not a "borrow pit" within the meaning of the MSHA-OSHA Interagency Agreement.

With regard to the Botsford Pit, the evidence establishes that some of the material processed by New York through the Barber-Greene screen is used as fill materials. However, New York specifies that only materials up to 1-1/2 inches in diameter can be used as fill material. Since the Barber-Greene screen separates the raw materials into groups which the particles range between maximum and minimum size, i.e., particles ranging from fine sand up to 1-1/2 inches in diameter pass through the screen and particles in excess of 1-1/2 inches in diameter do not pass through the screen, this constitutes "sizing" as defined in the MSHA-OSHA agreement, not as a scalping screen as asserted by New York. Likewise, since "sizing" is included within the term "milling" and "milling" is prohibited in a "borrow pit," the Botsford Pit is not a "borrow pit" within the above agreement. For the above reasons, I find that neither the Underwood Pit nor the Botsford Pit is a "borrow pit" as that term is defined in the MSHA-OSHA Interagency Agreement. Therefore, both pits are subject to MSHA jurisdiction.

Citation No. 220483

This citation alleges the following: "Current first aid training was not provided to selected supervisors and interested employees at the pit." It is required by 30 C.F.R. § 56.18-10 that selected supervisors should be trained in first aid and such training shall be made available to all interested employees. The evidence in this case does not support a finding of a violation of this standard. The evidence establishes only that none of New York's employees at the Underwood Pit on the date of this inspection had a current first aid card. The regulation does not require that the supervisor present at the mine shall have evidence of current first aid training. There is no evidence of record concerning the availability of first aid training to other interested employees. The citation is vacated.

Citation No. 220484

The evidence establishes that the backup alarm on the front-end loader of the Underwood Pit was inoperable at the time of inspection. The operator had an obstructed view to the rear and no observer was present to signal him. I find that MSHA has established a violation of 30 C.F.R. § 56.9-87. The inspector's testimony that the operator could not have been expected to know of this condition prior to the issuance of the citation is rejected for the reason that the loader operator reported the malfunctioning alarm but New York failed to provide an observer for the vehicle as required by the regulation.

Citation No. 219993

The evidence establishes that there were 13 exposed idler rollers on the conveyor belt at the Botsford Pit on the date of the inspection. Pinch

points were exposed which could be expected to result in physical injury. New York is chargeable with ordinary negligence since the condition was obvious and it should have known of the violation. I find that MSHA has established a violation of 30 C.F.R. § 56.14-1.

Citation No. 219994

The evidence establishes that there was no berm on the outer bank of the access road at the Botsford Pit. This was an elevated roadway with an 11-foot drop. This condition was obvious and New York should have known of the existence of the violation. I find that MSHA has established a violation of 30 C.F.R. § 56.9-22.

FINDINGS OF FACT

1. The materials extracted from the Underwood Pit were used on the highways to control ice in winter and not as "fill" and, therefore, the Underwood Pit was not "borrow pit" as that term is defined in the MSHA-OSHA Interagency Agreement.

2. New York's operation of the Botsford Pit involved "sizing" of the raw material and, therefore, the operation of the Botsford Pit was not a "borrow pit" as that term is defined in the MSHA-OSHA Interagency Agreement.

3. There is no evidence of record which establishes that, at the Underwood Pit, New York failed to train selected supervisors in first aid or failed to make first aid training available to all interested employees as alleged in Citation No. 220483.

4. The backup alarm of the front-end loader operated by New York at the Underwood Pit was inoperable at the time the operator of the loader had an obstructed view to the rear and no observer was present to signal the operator as alleged in Citation No. 220484.

5. Exposed moving idler rollers on the conveyor belt at the Botsford Pit could be contacted by persons and cause injury and were not guarded as alleged in Citation No. 219993.

6. No berm or guard was provided on the outer bank of the elevated access road at the Botsford Pit as alleged in Citation No. 219994.

CONCLUSIONS OF LAW

1. An administrative law judge has jurisdiction to determine whether the Act may be constitutionally applied to the facts.

2. Mining sand and gravel is not an integral or essential part of New York's traditional function of road maintenance; therefore, the regulation of such mining by MSHA does not violate the tenth amendment.

3. The mining of sand and gravel by New York affects commerce and is subject to MSHA regulation.

4. New York's operation of the Underwood Pit did not constitute a "borrow pit" and, hence, is subject to MSHA jurisdiction.

5. New York's operation of the Botsford Pit did not constitute a "borrow pit" and, hence, is subject to MSHA jurisdiction.

6. The undersigned judge has jurisdiction over the parties and subject matter of the above proceedings.

7. New York did not violate 30 C.F.R. § 56.14-1 and Citation No. 220483 is vacated and the proposal for a civil penalty thereon is dismissed.

8. New York violated 30 C.F.R. § 56.9-87 by failing to provide a front-end loader with an audible backup alarm as alleged in Citation No. 220484. Based upon the statutory criteria for assessing a civil penalty for a violation of a safety standard, New York is assessed a penalty of $50 for this violation.

9. New York violated 30 C.F.R. § 56.14-1 by failing to guard exposed moving machinery as alleged in Citation No. 219993. Based upon the statutory criteria for assessing a civil penalty for a violation of a safety standard, New York is assessed a penalty of $52 for this violation.

10. New York violated 30 C.F.R. § 56.9-22 by failing to provide a berm or guard on the outer bank of an elevated road as alleged in Citation No. 219994. Based upon the statutory criteria for assessing a civil penalty for a violation of a safety standard, New York is assessed a penalty of $52 for this violation.

ORDER

WHEREFORE IT IS ORDERED that Citation No. 220483 is VACATED and the proposal for a civil penalty thereon is DISMISSED.

It is further ORDERED that New York shall pay the Secretary of Labor the above assessed civil penalties in the total amount of $154 within 30 days from the date of this decision.

James A. Laurenson

James A. Laurenson, Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

3 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
Petitioner	:	Docket Nos. YORK 79-21-M
v.	:	WILK 79-102-PM
	:	YORK 80-2-M
NEW YORK DEPARTMENT OF TRANSPORTATION,	:	Underwood Pit
	:	Botsford Pit
Respondent	:	

ORDER DENYING MOTIONS TO DISMISS

Appearances: Jonathan Kay, Esq., Anthony C. Ginetto, Esq., and Deborah B. Fogarty, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner;
William S. MacTiernan, Esq., Legal Services Bureau, New York State Department of Transportation, Albany, New York, for Respondent.

Before: Judge James A. Laurenson

Procedural History

The above three cases are civil penalty proceedings arising out of citations issued by inspectors employed by the Mine Safety and Health Administration (hereinafter MSHA). MSHA charged the New York Department of Transportation (hereinafter State) with violations of regulations promulgated under the Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter the Act), in the operation of sand and gravel pits. The State moved to dismiss these actions because it claimed that MSHA and the Federal Mine Safety and Health Review Commission (hereinafter Commission) lacked jurisdiction over the State and the pits.

Issues

1. Whether the pits in question are under the jurisdiction of MSHA.

2. Whether the Commission can decide that the Act may be constitutionally enforced against a state.

3. Whether enforcing the Act against the State violates the tenth amendment.

4. Whether the State's activities are within the coverage of the Act.

Facts

The State contends that the Underwood Pit is an area of land from which the State extracts and stores sand for highway maintenance. The usual procedure is for several men to spend about 8 days a year at the site. The men extract material from the bank of the pit and dump it into a hopper. The material is then transported by a conveyor belt to a Telesmith screening plant where it is separated by size. The sand that is separated is stored in piles until winter when it is used on the highways for snow and ice control. The Botsford Pit involves a similar operation. Gravel is removed from the pit and a Barber-Green screening plant is used to separate larger from smaller size stones. The material is used as fill, shoulder fill, or drainage backfill.

MSHA Jurisdiction over Pits

Based upon these facts the State has moved to dismiss these actions on the grounds that MSHA does not have jurisdiction over the Underwood Pit or

the Botsford Pit. The motion to dismiss will be considered to be a motion for summary decision under our rules. Summary decision shall be granted "only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no issue as to any material fact and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.64(b).

MSHA has authority to administer the Act which applies to all "mines." A mine is defined in the Act, 30 U.S.C. § 802(h), as "an area of land from which minerals are extracted in non liquid form." The Underwood Pit and the Botsford Pit meet that definition. They are, therefore, mines and within the reach of the Act. Consequently, MSHA would have jurisdiction over them. However, MSHA has issued a formal interagency agreement to define its jurisdiction vis-a-vis the Occupational Safety and Health Administration (hereinafter OSHA) in which it has limited its jurisdiction. Interagency Agreement between MSHA and OSHA, U.S. Department of Labor, dated March 29, 1979. 44 Fed. Reg. 22827 (April 17, 1979). That agreement states that "borrow pits" are subject to OSHA jurisdiction. A borrow pit is defined as:

> [A]n area of land where the overburden, consisting of unconsolidated rock, glacial debris, or other earth material overlying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove larger rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit. MSHA-OSHA Interagency Agreement, para. B(7), 44 Fed. Reg. 22827 (1979).

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The State contends that the Underwood Pit and the Botsford Pit come within the definition of a borrow pit and therefore are not under the jurisdiction of MSHA. MSHA argues that the pits do not meet the criteria for a borrow pit for several reasons and are, therefore, under MSHA jurisdiction. Each side has submitted affidavits describing the facts concerning the operation of the pits.

MSHA contends that the use of a screening plant at the pits constitutes milling. The agreement defines a borrow pit as not involving milling. The State argues that the screens are scalping screens used to remove large rocks, wood and trash. Use of a scalping screen to remove debris at a borrow pit is permitted under the agreement. Thus, the question is whether the use of the screen at the pits is milling or scalping. Milling is defined in the agreement as "the act of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." Milling is also defined in the agreement as including sizing. Sizing is defined as "the process of separating particles of mixed sizes into groups of particles of all the same size or into groups in which particles range between maximum and minimum size." The distinction between sizing and the use of a scalping screen to remove large rocks is not great and requires a close examination of all relevant facts.

MSHA next contends, with regard to the Underwood Pit, that the pit does not meet the definition of a borrow pit because the material extracted is not used as fill, but rather that it is used more for its intrinsic abrasive

qualities than for its bulk. "Fill" in this sense is defined as "material used to fill a cavity or passage." Dictionary of Mining, Mineral, & Related Terms, Bureau of Mines, Department of Interior, 1968. It seems that the sand was not used for fill in this usual sense. The State argues that the fact that the material was not used as fill in the "conventional meaning of the word" is not crucial because MSHA "has dismissed numerous other citations with respect to sand extracting operations where sand was to be used for highway sanding in the winter season on the basis that such operations were reviewed and found to be borrow pits." The State's argument is not relevant.

MSHA also argues that the pits should be subject to MSHA jurisdiction because OSHA would have no jurisdiction over the pits. Paragraph B(5) of the interagency agreement lists factors in determining whether a particular facility is subject to MSHA or OSHA regulation. One factor is the enforcement capability of the agency. States are excluded from the jurisdiction of OSHA. MSHA argues that it should therefore be deemed to have jurisdiction over the pits. This argument is not relevant.

The affidavits of the parties establish that there is an issue as to whether the State's operation of the pits includes milling which would subject the pits to MSHA jurisdiction or a scalping screen which would preclude MSHA jurisdiction. Whether the screening done at the Underwood Pit and the Botsford Pit is for sizing or as a scalping screen is a material fact which is at issue. Thus, the State has not met its burden of showing that there is no issue as to any material fact and that it is entitled to summary decision as a matter of law. The facts, as presented thus far, require a hearing to make that determination.

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Authority to Determine Constitutional Issue

The State contends that the Act cannot constitutionally be applied to a state. MSHA argues that the Commission cannot reach that issue because neither the Commission nor its administrative law judges has the power or competence to pass on the constitutionality of the statutes under which they operate.

In several cases, the Supreme Court has impliedly or without detailed analysis stated that an administrative agency cannot entertain constitutional issues. The question generally arises when the Court is deciding whether to hear an appeal or to remand a case because a party has not exhausted its administrative remedies. Public Utilities Commission v. United States, 355 U.S. 534 (1955), dealt with a state statute which expressly gave a state commission the right to set rates between private common carriers and the United States. The United States contended that the statute was unconstitutional and brought suit in federal court. The Supreme Court held that the United States did not first have to raise the issue with the state commission because "[t]he issue is a constitutional one that the Commission can hardly be expected to entertain." Id. at 539. Justice Harlan concurring in Oestereich v. Selective Service Board No. 11, 393 U.S. 233 (1968), relied on Public Utilities Commission v. United States, supra, for the proposition that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." Oestereich v. Selective Service Board No. 11, supra at 212. In Oestereich v. Selective Service Board No. 11, supra, the majority struck down a section of the Selective Service Act which prevented judicial intervention into the

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decisions of draft boards. The Court did not directly confront the exhaustion of administrative remedies issue. In Johnson v. Robison, 415 U.S. 361 (1974), the Court was confronted with a similar issue and grounded part of its decision on the fact that the Board of Veterans' Appeal followed the principle stated by Justice Harlan in Oestereich v. Selective Service Board No. 11, supra. Finally, in Weinberger v. Salfi, 422 U.S. 749 at 765 (1975), the Court stated that "the constitutionality of a statutory requirement [is] a matter which is beyond [the Secretary's] jurisdiction to determine." That case involved a suit brought by an individual in federal court challenging sections of the Social Security Act. The Court held that the exhaustion requirements had been met even though there was no final decision by the Secretary in the usual sense. The final decision requirement was met by the Secretary's finding that the only issue was the constitutionality of a statutory requirement. The issue being beyond his competence, he had decided all that he had jurisdiction to decide.

These cases provide language which supports MSHA's contention that the Commission does not have power to decide constitutional issues. However, these cases are clearly distinguishable from the present case by the type of administrative agencies involved and the context in which they arose. The most important distinction is that in all four cases, the Court was interpreting the constitutionality of the express wording of the statute: i.e., whether it was constitutional on its face. In the present case, no one is contending that the statute is unconstitutional on its face, rather, the State contends that it is unconstitutional as applied.

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Several recent federal court cases have more closely scrutinized the power of an administrative agency to decide constitutional questions. In these cases, the difference between whether the court was deciding the facial validity of a statute or the statute's application to facts has been determinative. In Marshall v. Babcock & Wilcox Company, 1979 OSHD 29,013 (3d Cir., Nov. 16, 1979), an employee moved in district court to quash warrants for OSHA inspections. The employer argued that it did not have to exhaust its administrative remedies because it was raising constitutional challenges to the inspections. The district court held that the administrative route must be taken first and that decision was affirmed by the circuit court. The court stated that Occupational Safety and Health the Review Commission (hereinafter OSHRC) could consider fourth amendment motions to suppress evidence "consonant with its limited role under the Constitution, not by reviewing the constitutionality of its statute but by interpreting the statute and by applying constitutional principles to specific facts." Id. The court here approved the distinction first set out by Davis in his Treatise on Administrative Law. Davis articulated the distinction by stating:

> A fundamental distinction must be recognized between constitutional applicability of legislation to particular facts and constitutionality of legislation. When a tribunal passes upon constitutional applicability it is carrying out the legislative intent, either express or implied or presumed. When a tribunal passes upon constitutionality of the legislation the question is whether it shall take action which runs counter to the legislative intent. We commit to administrative agencies the power to determine constitutional applicability, but we do not commit the administrative agencies the power to determine constitutionality of legislation. 3 K. Davis Administrative Law Treatise, § 20.04 at 74 (1958).

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The court considered and rejected the reasoning of Weyerhauser Company v. Marshall, 592 F.2d 373 (7th Cir. 1979), a case which had held that exhaustion was not required when the party was raising a fourth amendment claim concerning a warrant. The decision in Weyerhauser Company v. Marshall, supra, was based on the conclusion that the OSHRC would not rule on the issue of a warrant's validity and that no factual basis need be developed in determining the warrant's validity. The court in Marshall v. Babcock & Wilcox Company, supra, disagreed and held that OSHRC should first apply the facts to constitutional principles.

The same distinction made by the Marshall v. Babcock Wilcox Company, supra, court and Davis in his Administrative Law Treatise was approved by the Fifth Circuit in McGowan v. Marshall, 1979 OSHD 29,044 (5th Cir., Oct. 23, 1979). That case also involved the issue of exhaustion of administrative remedies. The appellant had raised several issues in district court. The court of appeals held that the factual issues and a fourth amendment claim which required a factual finding must first be submitted to the OSHRC, whereas a frontal attack on the facial constitutionality of a section of the statute need not be submitted to the administrative agency because "the Commission has no power to declare unconstitutional the Act that it is authorized to administer." Citing Oestereich v. Selective Service Board No. 11, supra.

In two cases decided by judges of this Commission, a similar distinction has been made. In Secretary v. Waukesha Lime and Stone Company, Inc., Docket No. VINC 79-66-PM, June 5, 1979, the respondent contended that a nonconsensual inspection of its premises without a valid search warrant violated its fourth

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amendment rights. Therefore, Chief Judge James A. Broderick had to decide whether section 103(a) of the Act, 30 U.S.C. § 813(a), which permits nonconsensual warrantless inspections of mines, was constitutional. He stated that as a general rule, "an administrative agency does not have power to rule on constitutional challenges to the organic statute of the agency," but that "it is the responsibility of an administrative agency to determine whether a provision of the statute it administers may constitutionally be applied to facts found by the agency." He also stated that construction of the statute is the duty of the agency and that the statute should be "construed to avoid conflict with the Constitution." Judge Charles C. Moore, Jr. in Secretary v. Probst and Stample, Docket No. MORG 76-28-P, August 31, 1978, was confronted with the same kind of issue. In that case, the respondents contended that section 109(c) of the Federal Coal Mine Health and Safety Act of 1969 on its face discriminated against employees of corporations in violation of their constitutional rights. Judge Moore held that an administrative agency has no power to "declare a portion of its own organic act unconstitutional." Judge Moore also stated, however, that the principle that "agencies and their judges cannot deal with constitutional issues" is "a vast overstatement" because judges constantly must deal with constitutional issues in conducting hearings and applying the law. The Commission heard oral argument in this case on March 12, 1980, to decide whether the Commission has the authority to decide whether a provision of the Act is unconstitutional.

I agree with the principle expressed by Davis in his Administrative Law Treatise and the courts in Marshall v. Babcock Wilcox Company, supra, and McGowan v. Marshall, supra, that even if the Commission does not have the

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jurisdiction to declare a section of the Act facially invalid, it does have jurisdiction to determine whether the Act may be constitutionally applied to the facts. Because that is the issue present here, I find that I have jurisdiction to make the determination.

Tenth Amendment Issue

The State contends that the tenth amendment as interpreted in National League of Cities v. Usery, 426 U.S. 833 (1976) prevents MSHA from enforcing the Act against the State operations involved here. In National League of Cities v. Usery, supra., the Supreme Court held that Congress could not extend the Fair Labor Standards Act to employees of state governments. The Court did not say that such an application of law was beyond the reach of the commerce clause standing alone, but that under some circumstances, Congress' exercise of its powers within the scope of the commerce clause may transgress limitations created by the tenth amendment. There are "attributes of sovereignity attaching to every state government which may not be impaired by Congress." Id. at 845. The Court decided that "[one] undoubted attribute of state sovereignity is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions." Ibid. The Court posed the issue "whether these determinations are * * * functions essential to separate and independent existence * * *." Ibid. The court determined that enforcing the Fair Labor Standards Act against the State would "significantly alter or displace the States' abilities to structure employer-employee relationships in * * * activities * * * typical of those performed by state or local governments" and would therefore

leave little left of the States' * * * separate and independent existence." Id. at 851. The Court held that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress" by the commerce clause. Id. at 852. Later in its opinion, the Court formulated its ruling to be that "Congress may not exercise * * * [the power to regulate commerce] * * * so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." Id. at 855.

The test then is whether enforcing the Federal Mine Safety and Health Act against the State operation involved here would directly displace the State's freedom to structure integral operations or essential decisions in areas of traditional governmental functions. The State argues that road maintenance is an area of traditional governmental function and, therefore, Congress cannot regulate it. MSHA argues that mining sand or gravel is not a traditional governmental function and, therefore, Congress can regulate it. The issue is not as simple as either contends; the issue is whether mining sand or gravel for use in maintaining roads is an integral operation in an area of traditional governmental function.

In National League of Cities v. Usery, supra, the Court upheld the holding of two earlier cases, United States v. California, 279 U.S. 182 (1936), and Parden v. Terminal Railroad Company, 377 U.S. 184 (1964), even though it overruled the reasoning in those cases. Those two cases involved state railroads that were operated in conjunction with state-owned and operated docks. In its opinion, the court did not discuss the fact that the railroads were

operated in conjunction with state docks (arguably a state function) but just viewed them as "engaged in 'common carriage by rail in interstate commerce * * *,'" and held that they could be regulated. National League of Cities v. Usery, supra at 854.

A number of federal district and circuit courts cases have addressed this issue with disparate results: In Jordan v. Mills, 473 F. Supp. 13 (E.D. La. 1979) the court held that a state-run prison store was not subject to the federal antitrust statutes because of the tenth amendment. The court found that running a prison was a fundamental State function and that a store was an integral part of running a prison. The court reasoned that one had to determine if the activity itself was a traditional governmental function or if it was "integrally operative to such a function." In Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir. 1977), cert. denied, 434 U.S. 902 (1977), the court held that an EPA order that the city comply with an anti-pollution plan with regard to traffic control was not violative of the tenth amendment. The court reasoned that the program was not a substantial interference with an integral governmental program or service. The court also stated that traffic plans, at least near New York City, were not areas of exclusive State control but cooperative ventures between local, state, and federal governments. The court in California v. Blumenthal, 457 F. Supp. 1309 (E.D. Cal. 1978), held that a statute which required states to file forms concerning employees for ERISA did not violate the tenth amendment. The court stated that "[t]he instant case is a far cry from one involving 'fundamental employment decisions upon which [the States'] systems for performance of [their governmental] functions must rest'." The court in

Amersback v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979), held that employees of the municipal airport came under the ruling in National League of Cities v. Usery, supra, because the operation of a municipal airport is an integral government function. The court noted certain elements that define which government functions are protected:

> (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a communitywide need for the service or activity. Id. at 1037.

In Public Service Company v. Federal Energy Regulatory Board, 587 F.2d 716 (5th Cir. 1979), cert. denied, 100 S. Ct. 166 (1979), the court had to decide whether federal regulation of state-owned gas which was used to support the public schools violated the tenth amendment under National League of Cities v. Usery, supra. The court held that the federal regulations would not directly displace a traditional state governmental function because the indirect effect on education "comes nowhere near constituting a Federal usurpation of state control over public education in Texas." Finally, in State Department of Transportation v. United States, 430 F. Supp. 823 (N.D. Ga. 1976), the court held that a federal tax on a state airplane used for state business violated the tenth amendment under National League of Cities v. Usery, supra.

To decide whether a state activity is protected from federal regulation by the tenth amendment, it is necessary to determine whether the activity to

be regulated is itself a traditional governmental function (using the criteria expressed in Amersback v. City of Cleveland, supra), or, if is not a traditional governmental function, whether it is an integral or essential part of a traditional governmental function.

I find that mining sand and gravel is not a traditional governmental function; maintaining roads is such a function. (But cf., Friends of the Earth v. Carey, supra). Comparing the facts in this case with the federal decisions, mining is not an integral or essential part of the State function. MSHA regulation of the State's mining is "nowhere near usurpation of state control" over road maintenance. See Public Service Company v. Federal Energy Regulatory Board, supra. The instant case is a "far cry from one involving 'fundamental employment decisions upon which [the States'] systems for performance of [their governmental] functions must rest.'" California v. Blumenthal, supra. The facts of the instant cases are most analagous to United States v. California, supra, and Parden v. Terminal Railroad Company, supra. Like the operation of docks, maintaining roads is a traditional state function; like operating a railroad, operating sand and gravel pits is not a traditional state function. The Court in National League of Cities v. Usery, supra, held that the railroads in United States v. California, supra and Parden v. Terminal Railroad Company, supra could be regulated, even though they were operated to facilitate an arguably traditional state function. Similarly, sand and gravel pits may be regulated even if operated to facilitate a traditional state function. Because mining and gravel is not an integral or essential part of the State's traditional function of road maintenance, it is not protected from federal regulation by the tenth amendment.

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Commerce Clause

Lastly, the State contends that MSHA's jurisdiction does not extend to the subject operation "because the products thereof did not enter commerce nor did the operation or products thereof affect commerce." Section 4 of the Act provides: "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." 30 U.S.C. § 803. The State argues that because the sand and gravel was used by the State and not sold, it did not enter commerce and because it did not enter commerce it did not affect commerce. The State relies on Morton v. Bloom, 373 F. Supp. 797 (W.D. Pa. 1973). That case involved a one-man Pennsylvania coal mine, the coal from which was sold only in Pennsylvania. The court held in Morton v. Bloom, supra, that the mine was not subject to the Act. The court reasoned that Congress did not intend to subjugate a one-man owner-operated mine to the requirements of the Act because it was not necessary to do so to insure the purpose of the Act: the safety of the miner. The court further held that the mine did not affect commerce because the operator did not substantially interfere with the regulation of interstate commerce.

However, the meaning of "affect commerce" is broader than the State's contention or the reasoning in Morton v. Bloom, supra. In enacting the mine safety statutes, Congress intended to exercise its authority to regulate interstate commerce to "the maximum extent feasible through legislation." Secretary v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1976), quoting S. Rep.

APPENDIX

No. 1055, 89th Cong., 2d Sess. 1 (1966), U.S. Code Congressional and Administrative News, 89th Cong., 2d Sess. 2072. The Supreme Court stated in Fry v. United States, 421 U.S. 542 at 547 (1974):

> Even activity that is purely intrastate in character may be regulated by Congress, where the activity combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations. See Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 255, 13 L.Ed.2d 258, 85 S. Ct. 348 (1964); Wickard v. Filburn, 317 U.S. 111, 127-128, 87 L.Ed.2d 122, 63 S. Ct. 82 (1942).

In Wickard v. Filburn, supra, the Court held that wheat grown by an individual solely for his own consumption was subject to federal regulation because it supplied the needs of the individual which otherwise would have to be met in the open market. In Marshall v. Kilgore, 478 F. Supp 4 (E.D. Tenn. 1979), the court relied on Wickard v. Filburn, supra, in finding that coal which was sold intrastate still affected commerce. The court therefore held that the mine which produced the coal was under the coverage of the Act. See also Marshall v. Bosack, 463 F. Supp. 800 (E.D. Pa. 1978). Applying the rationale of these cases to the facts presented here, the State's operations affect commerce because if the State did not operate the pits, it would have to obtain its sand and gravel in the open market. In its brief in regard to the Botsford Pit, the state concedes that it seeks the most inexpensive source for its gravel (Brief at 6), implying that if it did not operate the pit, it would acquire the gravel elsewhere. Since the State's operations affect commerce, they are subject to coverage by the Act.

APPENDIX

Findings and Conclusions

1. The State has not established that the Underwood Pit and the Botsford Pit are borrow pits within the definition of that term in the Interagency Agreement between MSHA and OSHA. That issue must be resolved after a hearing.

2. An administrative law judge has jurisdiction to determine whether the Act may be constitutionally applied to the facts.

3. Mining sand and gravel is not an integral or essential part of the State's traditional function of road maintenance; therefore, the regulation of such mining by MSHA does not violate the tenth amendment.

4. The mining of sand and gravel by the State affects commerce and is subject to MSHA regulation.

ORDER

THEREFORE, IT IS ORDERED that respondent's motions to dismiss are DENIED.

Issued: March 21, 1980

James A. Laurenson, Judge

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APPENDIX

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

3 JUL 1980

OLD BEN COAL COMPANY, Applicant	:	Application for Review
	:	Docket No. VINC 75-313
v.	:	
	:	Mine No. 21
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), (formerly mining enforcement and safety administration), Respondent	:	

DECISION

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

This proceeding was one of four similar proceedings in which the parties waived their rights to an evidentiary hearing and submitted the cases for decision on the basis of the pleadings. The Application was limited by applicant's "partial withdrawal of issues" filed May 20, 1976, to its contention that "the underlying notice of violation and order of withdrawal issued pursuant to section 104(c)(1) of the Act were unlawfully issued and thus provide no basis for the issuance of the subject order of withdrawal * * *."

Because the underlying notice and withdrawal orders were challenged in a proceeding then pending before the Board of Mine Operations Appeals (which came before the Commission under section 301 of the Federal Mine Safety and Health Amendments Act), the case was continued by order of July 25, 1977.

COMMISSION DECISION

On June 2, 1980, the Commission issued its decision which upheld my decision of July 16, 1975, and affirmed the challenged withdrawal orders, including Order of Withdrawal No. 1 MK issued October 21, 1974, which is the order "underlying" the withdrawal order under review herein.

Based upon the Commission decision, I conclude that the underlying notice and order were validly issued. Therefore, the order reviewed herein, being Order No. 1 LDC, December 27, 1974, was validly issued, and must be affirmed.

ORDER

It is ordered that Order of Withdrawal No. 1 LDC, December 27, 1974, is AFFIRMED, and the application for review is DISMISSED.

James A. Broderick

James A. Broderick
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

8 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING
v.	DOCKET NO. WEST 79-128-M
THE ANACONDA COMPANY, Respondent.	MSHA Case No. 24-00689-05003
	Mine: Weed Concentrator

ERRATA SHEET

The following error should be corrected in the Decision issued June 13, 1980. On page 3, line 11 the amount of the proposed settlement should be $662 rather than $661.

John J. Morris
Administrative Law Judge

Distribution:

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

Anaconda Copper Company, P.O. Box 689, Butte, Montana 59701, Attention: Edward F. Bartlett, Esq. and Karla M. Gray, Esq.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

8 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING
v.	DOCKET NO. NORT 78-395-P
CLINCHFIELD COAL COMPANY, Respondent.	A/O NO. 44-04251-02011 I
	Mine: McClure No. 1

DECISION

Appearances:

Michael C. Bolden, Esq., Office of the Solicitor, United States Department of Labor,
for the Petitioner,

Gary W. Callahan, Esq., Clinchfield Coal Company, Lebanon, Virginia 24266
for the Respondent.

Before: Judge Virgil E. Vail

Procedural History

On July 27, 1978, the Mine Safety and Health Administration filed a petition for assessment of a civil penalty in the above-captioned proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The petition alleges a violation of provisions of the Code of Federal Regulations as set forth in a notice of violation issued pursuant to section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801.

The above case was originally assigned to Judge William Fauver in conjunction with several other civil penalty proceedings involving the same Respondent. By Notice of Hearing issued October 15, 1979, this case was scheduled to be heard at Abington, Virginia, on November 27, 1979. On October 19, 1979, Respondent moved to change the hearing site from Abington, Virginia to Arlington, Virginia, and because of a conflict in the hearing schedule of Respondent's counsel, to continue the hearing date to either January 15, 1980, or February 5, 1980. Petitioner did not object and on October 31, 1979, Judge Fauver granted the motion and issued an Order setting the hearing for February 5, 1980, at Arlington, Virginia.

On February 1, 1980, Petitioner filed a motion to continue the hearing to April 1, 1980, and to change the hearing site back to Abington, Virginia. As grounds for the motion Petitioner stated that, the issuing inspector and the Secretary's key witness, Mr. James A. Baker, was no longer an employee of the Mine Safety and Health Administration and that after numerous attempts, the Secretary was unable to secure Mr. Baker's presence at the prescribed hearing due to his busy business schedule, the great distance involved, and a lack of subpoena authority beyond 100 miles. Judge Fauver in his Order stated that the Petitioner was in error as to the 100 mile limit on the subpoena power of the Commission and that there was no mileage or geographical limitation thereon. Judge Fauver further stated that the Petitioner had known of the February 5, 1980, hearing date and site for many months and denied the motion. Petitioner was allowed an additional day to subpoena Mr. Baker and the hearing was set for February 6, 1980.

A review of a partial transcript of the hearing on February 6, 1980, reveals that Mr. Baker was unable to attend the hearing due to adverse weather conditions and requested that he be relieved from honoring the subpoena. This request was granted by Judge Fauver. The Respondent's counsel took exception to granting a continuance in this case stating that their witnesses had come to the hearing from New Mexico and Colorado, and the attorney from Abington, Virginia. Further, Respondent requested that if a continuance was granted, that the hearing be held in Denver, Colorado, and that expenses and costs be assessed against the Government for travel and expenses for Respondent's counsel and witnesses.

A review of the record shows a letter was mailed on February 13, 1980, by Respondent's counsel, Gary W. Callahan, to Petitioner's counsel, Mike Bolden, which states as follows:

> "This letter is to confirm our conversation of Monday, February 11, 1980, at which time we tentatively agreed to have the trial in 78-395-P in Denver, Colorado, on May 7, 1980. I am sending a copy of this letter to Judge Fauver and, of course, will wait his approval."

On February 13, 1980, Respondent filed a Motion to Dismiss the above case asserting that the Government had failed to make a reasonable or diligent effort to have their witness at the hearing; that the Respondent had been prepared for the hearing and had brought their two witnesses from New Mexico and Colorado for the hearing and that to continue the case would make the Respondent's decision to continue to resist the assessed penalty a questionable economic decision.

Judge Fauver, having considered Respondent's letter of February 13, 1980, requesting a relocation of the hearing site to Denver, Colorado, and motion to dismiss filed February 19, 1980, issued an Order on February 20, 1980, denying the motion to dismiss and setting the hearing for May 7, 1980, in Denver, Colorado. Subsequently, the case was reassigned to the undersigned for further proceedings.

A Notice of Hearing was issued, by the undersigned, on March 3, 1980, setting the hearing for May 7, 1980, at 9:00 a.m. in Denver, Colorado.

On March 20, 1980, the Respondent filed a motion to assess costs with the undersigned restating the history of the case as outlined herein above. Said motion was opposed by the Petitioner by motion dated April 1, 1980. The undersigned, issued an Order dated April 8, 1980, denying the Respondent's motion to assess costs by reason of Judge Fauver's prior Order dated February 20, 1980, wherein he denied Respondent's previous motion to dismiss and granted the request for a change in the hearing site to Denver, Colorado, and implicit therein, denied Respondent's prior request for assessment of costs and expenses. A subsequent motion to dismiss dated April 7, 1980, was denied by the undersigned in an Order dated April 21, 1980, wherein said motion to dismiss dated April 7, 1980, was considered to be identical to the prior motion considered and denied by Judge Fauver.

On April 29, 1980, Petitioner requested and was sent a subpoena requiring Mr. James A. Baker to appear at the hearing in Denver, Colorado on May 7, 1980 at 9:00 a.m.

The hearing convened on May 7, 1980, at 8:50 a.m. in Denver, Colorado, with Michael C. Bolden appearing as counsel for the Petitioner and Gary W. Callahan appearing as counsel for the Respondent. At the commencement of the hearing, Mr. Bolden explained that Mr. Baker, the Government's witness, refused to come to the hearing and that without his testimony, the Government was unable to establish a prima facie case and Petitioner requested a continuance of the case.

Respondent then moved again that the case be dismissed and said motion was granted in a decision from the bench as follows:

> "JUDGE VAIL: I see no justification for continuing to subject the Respondent in this case to additional expenses, and I am going to grant your motion to dismiss the citation and the assessment of a penalty against the Clinchfield Coal Company. The basis for this is that I feel that the Petitioner should have secured a subpoena earlier and had it served on Mr. Baker, and then of course if he had failed to appear at this hearing, there is a proceeding for enforcing the compliance, but I feel that's the least that the Government should have done in this case; that with the history of Mr. Baker's uncooperativeness in the last instance, we could have foreseen, or the Government could have foreseen, additional problems in having him appear here, and I feel that based on the fact that proper procedures were not followed in either securing his deposition or in serving him with an official subpoena in order to at least have him in violation of that, is failure on the part of the Government to take whatever basic necessary steps would have been necessary to prove their case. I think that there's merit to the argument of the Attorney for the Respondent that they have been prepared both in Virginia at the original hearing and again at the time of the continuation for the subsequent hearing date set, and now here, they are prepared to proceed with their case, and having these expenses, and I feel that my dismissing this penalty is only proper in the sense."

The bench decision is hereby affirmed.

It is hereby Ordered that as set forth herein, the bench decision granting Respondent's motion to dismiss Docket Number NORT 78-395-P is affirmed and Citation Control Number 44-04251-02011 I is vacated.

Virgil E. Vail
Administrative Law Judge

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Gary W. Callahan, Esq., Clinchfield Coal Company, Lebanon, Virginia 24266

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

(703) 756-6210/11/12

8 JUL 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 80-83-M
Petitioner	:	A.O. No. 11-01176-05002
	:	
v.	:	Barry Plant No. 8 Dredge Mill
	:	
MISSOURI GRAVEL COMPANY,	:	
Respondent	:	

DECISION AND ORDER

Respondent having failed to contest my tentative finding that there is no genuine dispute as to any of the facts material to the five failure to guard violations cited, 30 C.F.R. 56.14-1, I conclude an evidentiary hearing is unnecessary to resolve the matters in contest.

As Professor Gellhorn has noted:

> A hearing to take evidence as is done in a trial at law is an obviously silly waste of time if facts are not in dispute . . . The courts . . . enter summary judgments when the factual allegations of a party have not been materially controverted by his opponent. Trial hearings may permissibly be omitted in administrative proceedings at least as readily as in their judicial counterparts, when the only things to be determined are the legal consequences of uncontested facts. See e.g., Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973); Baxter v. Davis, 450 F.2d 459 (1st Cir. 1971), cert. denied 405 U.S. 999 (1972); Citizens for Allegan County, Inc. v. Federal Power Commission, 414 F.2d 1125 (D.C. Cir. 1969); Compare Fuentes v. Shevin, 407 U.S. 67, 87 (1972); Kirby v. Shaw, 358 F.2d 446 (9th Cir. 1966).
>
> In Recommendation No. 20, the Administrative Conference of the United States proposed that "each agency having a substantial caseload of formal adjudications . . . adopt procedures providing for summary judgment or decision" in order to avoid delays in

the administrative process "by eliminating unnecessary evidentiary hearings where no genuine issue of material facts exists." 1 Recommendations and Reports of the Administrative Conference of the United States 36 (1968-1970). For discussion consult E. Gellhorn and W. F. Robinson, Jr., Summary Judgment in Administrative Adjudication, 84 Harv. L. Rev. 612 (1971). The authors state at pages 616-617: 'Just as summary judgment is not in conflict with the right to trial by jury because it is available only when there is nothing for the jury to decide, (No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined. Ex parte Peterson, 253 U.S. 300, 310 (1920) (Brandeis, J)), a rule allowing summary decision in administrative adjudications would not improperly deny the right to a hearing since it would allow the hearing examiner or agency to dispense with an evidentiary hearing only if the absence of hearing could not affect the decision."

Gellhorn and Byse, Cases and Materials on Administrative Law (6th Ed.) at 584.

Apparently accepting this, petitioner claims only that the physical conditions described in its pretrial submissions, including the detailed sketches and photographs of the areas involved, establish "as a matter of law" that the violations charged occurred, even though the exposure to injury was "sporadic and infrequent." It is claimed that any conceivable exposure is per se a violation of the standard. I do not agree. My assessment of the undisputed physical facts is that each of the five conditions cited is by reason of its physical location and/or existing guarding incapable of causing injury to any employee acting in a normally prudent manner. In other words, I conclude the undisputed facts show each of the locations cited is so inaccessible it is highly improbable that in the course of his work duties any normally prudent employee is likely to come into contact with these moving machinery parts. See, Massey Sand and Rock Co., DENV 78-567-PM, 1 FMSHRC 545, 556 (June 18, 1979) petition for discretionary review denied (July 27, 1979); Central Pre-Mix Concrete Co., DENV 79-220-PM, 1 FMSHRC 1424, 1430-1431 (September 26, 1979); FMC Corporation, WEST 79-168-M, 2 FMSHRC ____, (June 3, 1980) (Slip Op. at 6). As my tentative decision indicates, I do not construe the standard to require guarding against all possible contingencies, including acts of thoughtlessness and foolhardiness.

Accordingly, it is ORDERED that the tentative decision of May 21, 1980, as supplemented herein, be, and hereby is, ADOPTED AND CONFIRMED as the final decision in this matter and the captioned proposal for penalty be, and hereby is, DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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11 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 80-77 A.O. No. 11-00598-03036 V
v.	:	Eagle No. 2 Mine
PEABODY COAL COMPANY, Respondent	:	

DECISION AND ORDER

By its decision of May 16, 1980, the Commission vacated the trial judge's interlocutory decision of March 5, 1980, proposing assessment of a penalty of $1000 in settlement of this matter. The ground for the Commission's action was its finding that there was a dispute as to (1) whether the condition cited, namely an accumulation of loose coal and coal dust that ranged in depth from 4 to 20 inches and extended for a distance of 900 feet along the east side of the 3 South conveyor belt, was as a matter of law, an "accumulation" within the meaning of the Commission's decision in Old Ben Coal Co., VINC 74-11, 1 FMSHRC 1954 (December 12, 1979); and (2) the failure of the judge to afford Peabody the opportunity to "admit or deny" that "the depths of the spillage were those alleged in the withdrawal order." Peabody Coal Co., LAKE 80-25 et al., 2 FMSHRC 1035, 1036 (May 16, 1980).

Ignoring the fact that the first ground for its position presented only a question of law disposed of by its holding in Old Ben, namely that a spillage of loose coal and coal dust ranging in depth from 2 to 14 inches for a distance of 925 feet was, as a matter of law, an accumulation prohibited by 30 C.F.R. 75.400, and second that neither in its answer nor in its response to the trial judge's pretrial order had Peabody ever suggested that one of its grounds for contest was the depth of the accumulation charged in the withdrawal order, the Commission remanded the matter for a full scale evidentiary hearing on the issue of the "depth of the spillage." 2 FMSHRC at 1037.

In due course, the matter came on for an evidentiary hearing on June 24 and 25 in the U.S. Courthouse in Washington, D.C. As the record of that hearing shows, there was, in fact, no genuine dispute regarding the depth of the spillage observed and measured by the Inspector who issued the withdrawal order on May 3, 1979. 1/ It was also shown that the operator's claim that the condition was not, as a matter of law, an accumulation within the meaning of the standard had been laid to rest by the Commission's decision of June 12, 1980 in C.C.C. Pompey Coal Co., PIKE 79-125-P, 2 FMSHRC ____, which merely reiterated its interpretation of the standard as set forth in December, 1979, in Old Ben.

Despite this, and over the objection of counsel for the Secretary that a full scale evidentiary hearing on the question of liability would be a "frivolous" waste of time, the trial judge deferred to the Commission's view that "unless a case is settled or the respondent defaults, an administrative law judge must afford the parties an opportunity for a [testamentary] hearing" with respect to any issue of fact material to proof of the violation not expressly "admitted" by the operator. 2 FMSHRC at 1036. While this is obviously an incorrect standard for determining when an evidentiary hearing must be held, the Commission and its staff, abetted by the Department of Labor, has long encouraged the view that regardless of the amount of the penalty, the expense to the parties involved, or the nonexistance of a genuine dispute over material adjudicative facts, the parties, or either of them, are entitled to demand as a matter of right a full blown trial-type hearing. 2/

The view that a general denial like a plea of "Not Guilty" in a criminal case triggers an absolute requirement for a testamentary hearing absent settlement or default ignores the fact that neither the Mine Safety Law, the APA, the Constitution, nor the Commission's own procedural rules

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1/ The record shows that after the Commission's decision, Peabody felt compelled to make a pro forma challenge to the depth of the accumulation alleged but admitted it had no evidence to rebut the Inspector's measurements.

2/ See Appendix.

mandates such a result. 3/ Rule 28 of the Commission's Rules of Practice requires the operator to include in its answer "a short and plain statement of the reasons why each of the violations cited . . . is contested." Because the operator ignored this requirement, the pretrial order required:

3/ The suggestion that a general denial in a civil penalty proceeding, like a plea of not guilty in a criminal case, triggers the protections and restrictions available in criminal prosecutions is wholly inapposite to complaints for enforcement of civil penalties. The Commission's rules of practice clearly provide for pretrial discovery against an operator either at the instance of the solicitor or the trial judge. In addition, section 113(e) of the 1977 Mine Health and Safety Act empowers the law judge to "compel the attendance and testimony of witnesses and the production of books, papers, documents, or objects, and to order testimony to be taken." There is nothing in the Act or its legislative history to support the view that because Congress made the same conduct subject to both criminal and civil sanctions it intended to extend to the assessment of civil penalties the procedural protections and restrictions available in criminal prosecutions under the Fourth, Fifth and Sixth Amendments. United States v. Ward, ____ U.S. ____, No. 74-394, slip op., pp. 5-8, (June 27, 1980). The protection against compulsory self-incrimination, of course, does not extend to corporations and there is, therefore, no reason why such respondents may not be compelled to produce for use in civil penalty cases documentary and/or testamentary evidence as to their compliance or noncompliance with the mandatory health and safety standards. Furthermore, in Ward, supra, the Supreme Court held that even an individual may be compelled to report a water pollution violation to support a civil penalty assessment where the statute grants him use immunity for such report. Finally, in Ward the Court cited with approval its earlier holding that in the absence of a genuine dispute as to the material facts the granting of a directed verdict or summary judgment is wholly proper in a proceeding to enforce a civil penalty. Hepner v. United States, 213 U.S. 103, 112 (1909).

> A plain and concise statement by the operator in accordance with 29 CFR 2700.28 of the reasons it contests each violation and/or the amount of the penalty. This must include a detailed statement of the specific facts, conditions and practices and theories of law upon which the contest of each violation and/or penalty is based.

In response, the operator stated:

> 1. Respondent will present evidence at the hearing that will show that the condition or practice cited in the Order of Withdrawal occurred sometime shortly before the Order of Withdrawal was written. Specifically, the preshift examiner, Mr. Terry Gwaltney, will testify that he preshifted the area in question within a few hours of the issuance of the Order of Withdrawal and that he found no accumulation or spillage at that time. Consequently it is respondent's contention that what was found by the inspector must have been a spill that occurred sometime immediately prior to his issuing the Order of Withdrawal . . . Consequently, it will be Respondent's contention that a spillage, the type of which the Commission alluded to in Secretary of Labor, Old Ben Coal Company, December 1979, Vol. I, No. 9, 1954, as being ". . . inevitable in mining operations", occurred sometime just prior to issuance of the Order of Withdrawal and, therefore, did not constitute an accumulation under the criteria set forth in 30 C.F.R. 75.400. ID at 1958.
>
> 2. The payment of a maximum penalty for this violation will not impair Respondent's ability to continue in business.

The trial judge submits that any fair reading of this response shows the operator was not contesting the extent or depth of the spillage alleged but only whether, as a matter of law, it constituted an accumulation prohibited by 30 C.F.R. 75.400.

In the absence of a showing that a genuine dispute as to a material adjudicative fact exists, neither constitutional nor administrative due process requires a contested enforcement proceeding be resolved only after the parties are afforded a trial-type hearing. It simply is not true that valid adjudicative actions can be taken only after providing an opportunity to cross-examine witnesses. As the Supreme Court has noted: "No one is entitled in a civil case

to trial by jury unless and except so far as there are issues of fact to be determined." Matter Of Walter Peterson, 253 U.S. 300, 310 (1920) (Brandeis, J).

Due process, therefore, never requires a trial on non-factual issues, such as whether a particular spillage, the extent and depth of which is not in dispute, constitutes as a matter of law an accumulation within the meaning of 30 C.F.R. 75.400. What is needed on such issues is argument, written or oral, not evidence, and certainly not a trial-type hearing. Davis, Administrative Law Treatise § 10.9 (2nd Ed. 1979).

The law clearly is, at a most elementary level, that because a trial is a process for taking evidence, subject to cross examination, and because taking evidence in a trial-type hearing is a waste of scarce and expensive resources except where needed to resolve genuine issues of material fact, 4/ it should be used sparingly and solely for the purpose of resolving such disputes, and never as a matter of right for the resolution of issues of law, policy or discretion. 5/

4/ As the record shows, counsel for respondent recently estimated that the cost to Peabody of an evidentiary hearing is $1500. When a like amount is added for the cost to the Department of Labor and the Commission it is apparent that the cost of unnecessary evidentiary hearings can become very large. As Judge Irving R. Kaufman of the U.S. Court of Appeals for the Second Circuit recently stated, "the judicial system is the most expensive machine ever invented for finding out what happened and what to do about it." Time Magazine, May 5, 1980. While financial cost alone is not of controlling weight in determining whether due process requires a particular procedural safeguard prior to an administrative decision, the public interest in conserving scarce fiscal and administrative resources is a factor that must be weighed. Matthews v. Eldridge, 424 U.S. 310, 348 (1976).

5/ In Co-Op Mining Company, DENV 75-207-P, 2 FMSHRC 784, 785 (April 21, 1980), the Commission emphasized the predictive, discretionary nature of a judge's determination of the amount of the penalty warranted. See also, Peabody Coal Company, BARB 76-117, July 1, 1980, 2 FMSHRC ____. This is in accord with the traditional view that the assessment of a penalty is an "exercise of a discretionary grant of power" not a finding of fact. Brennan v. OSHRC, 487 F.2d 438, 442 (8th Cir. 1973); Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79:8 Columbia Law Review 1435, 1487 (December 1979). Thus,

(continued on next page)

Neither constitutional nor administrative due process mandate a confrontational hearing before a penalty may be assessed. Section 7(c) of the APA, 5 U.S.C. § 556(d), requires confrontational hearings only to the extent that "cross-examination may be required for a full and true disclosure of the facts." If there is no dispute of fact or issue of credibility, there is obviously no need for a full scale trial-type hearing. 6/ In addition, section 7(c) further provides that "In . . . determining claims for money . . . an agency may . . . , when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." Frozen Foods Express, Inc. v. United States, 346 F.Supp. 254, 260-261 (W.D. Tex. 1972) (no absolute right to an oral hearing under section 7(c)). Whether cross-examination is required in an administrative hearing depends on the circumstances presented in each individual case and initially rests in the sound discretion of the trial judge. Attorney General's Manual on the Administrative Procedure Act, p. 78 (1947); Loesch v. F.T.C., 257 F.2d 882, 885 (4th Cir.), cert. denied. 358 U.S. 883 (1958); Delaware River Port Authority v. Tiemann, 403 F.Supp. 1117, 1142 (D.N.J. 1975).

As the Second Circuit recently held, a judgment on the merits does not require a determination of the controversy after a full-scale trial-type hearing:

(Footnote 5 cont.)

where there is no dispute about the fact of violation or the six statutory criteria relevant to the determination of a penalty the Commission should not compel a full-blown evidentiary hearing solely on the issue of the amount of the penalty. The amount assessed is, of course, subject to review on appeal on a claim of inadequacy or excessiveness. Compare, Knox County Stone Company, DENV 79-359-PM (July 23, 1979) appeal pending.

6/ In a variety of situations where due process requirements are involved, something less than an evidentiary hearing can satisfy the right to be heard. Matthews v. Eldridge, supra, 424 U.S. at 343.

> The proverbial "right to a day in court" does not mean the actual presentation of the case in the context of a formal, evidentiary hearing, but rather the right to be duly cited to appear and to be afforded the opportunity to be heard.

Mitchell v. National Broadcasting Co., 553 F.2d 265, 271 (2d Cir. 1977).

As Professor Gellhorn has noted:

> A hearing to take evidence as is done in a trial at law is an obviously silly waste of time if facts are not in dispute. The courts, in their own proceedings, rule on motions to dismiss (or whatever may be the local equivalent of a demurrer); when they do so they assume a set of facts, without receiving and passing upon evidence, and then decide whether the assumed facts add up to something or to nothing. The courts also enter summary judgments when the factual allegations of a party have not been materially controverted by his opponent. Trial hearings may permissibly be omitted in administrative proceedings at least as readily as in their judicial counterparts, when the only things to be determined are the legal consequences of uncontested facts. See, e.g., Weinberger v. Hynson, Westcott and Dunning, Inc., 412 U.S. 609 (1973); Baxter v. Davis, 450 F.2d 459 (1st Cir. 1971), cert. denied 405 U.S. 999 (1972); Citizens for Allegan County, Inc. v. Federal Power Commission, 414 F.2d 1125 (D.C. Cir. 1969); Compare, Fuentes v. Shevin, 407 U.S. 67, 87 (1972); Kirby v. Shaw, 358 F.2d 446 (9th Cir. 1966).
>
> In Recommendation No. 20, the Administrative Conference of the United States proposed that "each agency having a substantial caseload of formal adjudications . . . adopt procedures providing for summary judgment or decision" in order to avoid delays in the administrative process "by eliminating unnecessary evidentiary hearings where no genuine issue of material fact exists." 1 Recommendations and Reports of the Administrative Conference of the United States 36 (1968-1970). For discussion, consult E. Gellhorn and W. F. Robinson, Jr., Summary Judgment in Administrative Adjudication, 84 Harv. L. Rev. 612 (1971). The authors state at pages 616-617: "Just as summary judgment is not in conflict with the right to trial by jury because it is available only when there is nothing for the jury to decide, a rule allowing summary decision in administrative

adjudications would not improperly deny the right to a hearing since it would allow the [law judge] or agency to dispense with an evidentiary hearing only if the absence of a hearing could not affect the decision."

Gellhorn and Byse, Administrative Law, Cases and Comments, (6th ed.) at 584 (1974).

As the record shows, the penalty initially proposed for this violation was $2000, reduced after conference, and after consideration of the claim that the accumulation had existed for only 2 to 6 hours, rather than 24 hours, to $1000. After contest and compliance with Part A of the pretrial order, regional counsel for the Secretary proposed a further reduction to $550, again on the ground that the accumulation had existed for only 2 to 6 hours as shown by the operator's preshift and on-shift reports. Noting that this claimed factor in mitigation had already been taken into account by the assessment conference officer, the trial judge denied the proposal to settle the matter for $550 on the ground that the assessment had already been appropriately discounted by the assessment office, and that no new facts were asserted that would warrant a further reduction. For this reason, the trial judge proposed an assessment of $1000 in settlement and thereafter denied the operator's request for reconsideration. 7/

In frustration over its inability to bargain the penalty away, the operator appealed to the Commission demanding acceptance of the $550 settlement. Granting an interlocutory appeal after the trial judge had set the matter for a hearing limited to the amount of the penalty warranted -- the only matter that was ever in genuine dispute -- the Commission, without the benefit of briefs and after the operator had moved to withdraw its appeal, decreed the need for a full

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7/ The power to "assess" penalties (section 110(i)) when coupled with the power to "approve" compromises, mitigations, and settlements (section 110(k)) necessarily includes the power to propose an increase or reduction in the penalties based on an independent evaluation of the circumstances. See, 31 U.S.C. §§ 951-953; Divers, The Assessment and Mitigation of Civil Money Penalties, supra, note 5, at 1444. This is a discretionary function not reviewable as a finding of fact, but only for an abuse of discretion. Co-Op Mining, supra; OSHRC v. Brennan, supra; American Power Company v. S.E.C., 329 U.S. 90, 112 (1946); Butz v. Grover Livestock Company, 411 U.S. 182, 185 (1973).

scale evidentiary hearing to resolve a fact that was never in dispute, namely the depth of the alleged accumulation. 8/

Congress long ago warned against the inefficiency, confusion, and uncertainty that results to the administrative process when the members of an agency rely on faulty staff analysis in an effort to control the day-to-day conduct of adjudicatory proceedings. The use of piecemeal interlocutory appeals to attempt to control the conduct of trial proceedings is, experience has shown, counterproductive to the just, speedy and inexpensive disposition of enforcement proceedings.

This was certainly the case in this instance. For, as the record shows, after a full day spent taking evidence from the Inspector, the preshift examiner, and the operator's safety director, the matter originally offered and accepted in mitigation of the penalty for the purposes of a prehearing settlement of $1000 became largely irrelevant. And it became irrelevant because the testimony of the operator's preshift examiner disclosed and emphasized other violations which existed contemporaneously with the overlooked accumulation and which indicated that the condition was significantly more serious than originally disclosed. These disclosures clearly made a penalty of $1000 inappropriate, whether or not the abatement shown on the preshift and on-shift reports for May 2 were correct. With the matter in this posture, and in the interest of cutting the loss to effective and efficient enforcement already experienced, the trial judge suggested a settlement conference.

8/ The Commission's uncritical acceptance of the general counsel's apocryphal finding of a triable issue of fact to justify a remand for trial or acceptance of the parties' settlement proposal was a questionable usurpation of the trial judge's authority to regulate the course of the proceeding. A trial judge should not on the basis of a premature, sua sponte, prejudgment of the merits by the Commission be faced with the Hobson's choice of approving an improvident settlement or facing an unnecessary, burdensome or oppressive requirement for an evidentiary hearing. If, on the other hand, the Commission wished to approve the parties' proposed 75% reduction in the penalty it obviously had the authority to do so, without the concurrence of the trial judge. A proper respect for the trial judge's decisonmaking autonomy militates against the adoption of procedural devices designed to undermine or intrude on that autonomy.

At that conference the trial judge expressed the view that the undisputed facts as to the spillage observed on May 3, 1980, warranted a finding that under the attendant circumstances the accumulation violation charged was serious and the result of a high degree of ordinary negligence. He further expressed the view that he could not approve a settlement in an amount less than $2,500. After conferring with their principals, the parties agreed to a settlement at the figure proposed. The subsequent motion to approve settlement made on the record in open court on June 25, 1980, was approved from the bench.

Accordingly, it is ORDERED that the bench decision and order approving settlement in this matter be, and hereby is, ADOPTED and CONFIRMED. It is FURTHER ORDERED that the operator pay the penalty agreed upon, $2,500, on or before Tuesday, July 15, 1980, and that subject to payment the captioned matter be, and hereby is, DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

Thomas R. Gallagher, Esq., Peabody Coal Co., 301 N. Memorial Drive, P.O. Box 235, St. Louis, MO 63166 (Certified Mail)

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Attachment: Appendix

APPENDIX

At the behest of the solicitor's appellate staff, the Commission has recently granted an ex parte review of a clearly provisional decision where the trial judge proposed a penalty reduction of $24.00 or 20% in a total penalty of $144.00 for each of three failure to provide safe access violations initially assessed at $48.00 each. The claim is that even where the record shows the operator admits liability and there is no dispute about the gravity, negligence or any other criteria, the trial judge is without power and authority to reduce a proposed penalty absent a full scale "on the record" trial-type hearing. And this despite the fact that the operator said he did not want a hearing, the solicitor never asked the trial judge for a hearing, and the operator because of the de minimis amounts involved cannot afford to attend a testamentary hearing. Interestingly enough, it is also claimed that because the decision was, despite its obviously provisional nature, "final" the judge "lacked jurisdiction to accord the parties" the opportunity for a settlement conference or evidentiary hearing if the proposed reduction was not acceptable. New Jersey Pulverizing Co., YORK 79-94-M, Direction for Review, dated June 25, 1980.

The Commission did not afford the trial judge an opportunity to pass on these claims as required by section 113(d)(2)(a)(iii) of the Act, nor did the Commission state in its Direction for Review the question of law, policy or discretion involved in its review as required by section 113(d)(2)(B) of the Act.

Had the trial judge been afforded the opportunity to be heard as contemplated by the Act he would have asserted the following. It is well settled that section 7(c) of the APA, 5 U.S.C. § 556(d) incorporated by reference in section 105(d) of the 1977 Mine Health and Safety Act, 30 U.S.C. § 815(d) permits "on the record" hearings where the parties involved file only written submissions, particularly where the trial judge's decision is provisional and affords the parties an opportunity to show the need for a testamentary hearing. Thus, wherever it appears that cross examination is not necessary to a "full and true disclosure of the facts" a case may properly be adjudicated without the waste of time and expense involved in setting, traveling and holding a hearing to take testimony that will add nothing to the record. Davis, Administrative Law Treatise, §§ 10:7, 12:1, 12:2 (2d ed 1980). In fact, the last sentence of section 7(c),

5 U.S.C. § 556(d), specifically provides that claims for money, which civil penalty cases clearly are, may be decided entirely on the basis of written submissions, unless a need is shown for a confrontational type hearing. See, FPC v. Texaco, 377 U.S. 33, 39 (1964); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972); United States v. Florida E.C. Ry. 410 U.S. 224 (1973); Matthews v. Eldridge, 424 U.S. 319 (1976); Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Dixon v. Love, 431 U.S. 105 (1977).

Thus, where the amount in controversy is small, there are no issues of credibility or veracity critical to the decisionmaking process, and there is a strong public interest in conserving fiscal and administrative resources, neither constitutional nor administrative due process requires an evidentiary hearing on small claims for money. Gray Panthers v. Califano, 466 F.Supp. 1317 (D.D.C. 1971) (no due process right to evidentiary hearing on claims of less than $100).

In New Jersey Pulverizing, the provisional decision was predicated on "the information submitted in the official file", i.e., the information presented by the parties. The proper procedure, therefore, was for the solicitor to appeal the correctness of the decision made or to show a need for a trial-type hearing to supplement the record.

A former Assistant Attorney General, in commenting on the "acceptability" of cases decided on the basis of written, on the record, submissions noted that what the trial judge or the litigating public think is proper and acceptable procedure often runs contra to the self-interest of the lawyers:

> There is a tendency on the part of lawyers to think of acceptability in terms of traditional patterns of legal thinking. Since lawyers have valued and enjoy adversary proceedings, it is assumed that members of the public also feel the same way. This assumption, however, is questionable. The issue is one of acceptability of procedures to the persons affected and not to any group of professionals in the community . . . Just as war is too important to be left to the soldiers, justice is so important that it should not be left to the desires (and profits?) of lawyers . . .

Cramton, A Comment on Trial-Type Hearings, 58 Va. L. Rev. 585, 593 (1972) (criteria for evaluating procedures).

As Chief Judge Irving Kaufman remarked, "our current emphasis on early judicial intervention is . . . the culmination of the efforts of many of our greatest legal thinkers to induce the judges to . . . take an active part in the control of litigation . . . Contrary to what most of us have accepted as gospel, a purely adversarial system, uncontrolled by the judiciary, is not an automatic guarantee that justice will be done." The Philosophy of Effective Judicial Supervision over Litigation, 29 F.R.D. 207, 208, 211 (1962).

Finally, the contention that the Commission's procedures are not flexible enough to permit a judge to issue a tentative, provisional or interlocutory decision proposing an increase or decrease in the amount of a penalty proposed by the parties is without merit. The Commission has held that for good cause shown the time for filing a petition for discretionary review may be extended and such an extension would obviously extend the time for finality even assuming finality could ever attach to a tentative, provisional or interlocutory decision. See, Victor McCoy v. Crescent Coal Co., PIKE 77-71, June 23, 1980; Sunbeam Coal Company, 2 FMSHRC 775 (1980).

The above was written before receipt of the Commission's decision of July 2, 1980 in New Jersey Pulverizing. Instead of dismissing the appeal as frivolous, the Commission brushed aside the Department of Labor's fustian demand for a full scale trial-type hearing but vacated the trial judge's decision of May 16, 1980 on the ground that the claimed reservation of a "right to reconsider" rendered the decision ultra vires the decisionmaking powers conferred by the Commission's "rules and precedents." I have no difficulty with this in the context in which the rule speaks, namely, a "final disposition" but I believe its application to a decision proposing a settlement conflicts with the power and authority granted the trial judge under sections 5(b) and 7(b)(6) of the APA, 5 U.S.C. §§ 554(c), 556(c). These provisions when read together clearly confer discretion on the trial judge to afford the parties an opportunity to settle before setting a hearing and to advise the parties of the terms and conditions upon which such a settlement may be approved. This authority is reinforced by the provisions of section 110(i) and (k) of the 1977 Mine Health and Safety Act and its legislative history. The trial judge has repeatedly suggested that under its de novo authority to "assess" penalties and to "approve" proposals to "compromise, mitigate, or settle" penalties, the Commission encourage the use of informal pretrial procedures to effect just, speedy and inexpensive dispositions of cases or violations where the amounts involved do not warrant the convening of a trial-type hearing or there is no genuine dispute of material adjudicative fact.

Ignoring the fact that the trial judge's provisional decision clearly afforded the parties an opportunity to propose a settlement, the Commission noting the operator's plaintive plea to be relieved of this administrative whirlwind adopted that procedure as its own invention and remanded the matter with directions to afford the parties "an opportunity to propose a settlement before any hearing is scheduled or prehearing order issued." So after making itself, the trial judge and the administrative process look ridiculous, the Commission has arrived at the same common sense procedure for the resolution of these de minimis violations as was proposed in the judge's decision and order of May 16, 1980. I think the lesson learned is that whenever the Commission tilts the scales of procedural fairness in favor of a powerful constitutency or political expediency, it risks doing itself and the cause of administrative justice a serious disservice.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

11 JUL 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 79-105
Petitioner	:	A/O No. 36-00807-03023
v.	:	
	:	Renton Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Introduction

The above-captioned proceeding is a petition for the assessment of civil penalties filed by the Mine Safety and Health Administration (MSHA) against Consolidation Coal Company. Pursuant to a prehearing order issued December 27, 1979, the parties discussed the 12 alleged violations contained in the petition and reached a settlement as to 10 of the 12 violations. The terms of this settlement were submitted in a Motion for Decision and Order Approving Settlement filed by the Secretary on February 4, 1980. With respect to the two remaining citations, the parties advised they would submit stipulations for the material facts involved and requested permission to file motions for summary judgment and supporting briefs concerning these two citations. In an order issued March 14, 1980 this request was granted, and the parties subsequently filed the above-mentioned stipulations, motions and briefs.

Citation Nos. 618573, 618578, 618579, 618643, 618645, 618646, 618648, 618649, 618650, 618651.

The Solicitor has filed a motion to approve settlements for these 10 citations.

In her motion, the Solicitor advises the following:

1. The attorney for the Secretary and the respondent's attorney have discussed the alleged violations and the six statutory criteria stated in section 110 of the Federal Mine Safety and Health Act of 1977.

2. Pursuant to those discussions, an agreed settlement has been reached between the parties in the amount of $1,635. The original assessment for the alleged violations was $2,300.

3. A reduction from the original assessment is warranted for the following violations.

Citation No. 618573 was issued for a violation of 30 CFR 75.703. The $195 penalty assessed for this violation should be reduced to $100. The citation states that the energized bonder being used at the bottom landing was not provided with a grounding wire. However, further investigation has disclosed that the bonder was equipped with a grounder which was inadvertently torn off. This could not have been known to the operator. Therefore negligence is less than originally assessed. Also, it must be noted that the track itself gives grounding and that the ground power conductor was proper. Therefore, the probability of occurrence is minimal. It is also relevant that this is direct current and not alternating current. The probability of occurrence with a direct current is far lower than with an alternating current. Therefore, $100 is an appropriate assessment.

Citation No. 618578 was issued for a violation of 30 CFR 75.200. The citation states that the approved roof control plan was not being complied with in the designated and return escapeways for a total distance of 2,000 feet. Further investigation has disclosed that at least half of this area was not required to be center posted as stated in the citation. It was not required to be center posted because it was driven in 1973, well before the roof control plan requiring center posting was instituted. Therefore, the operator's negligence is less than originally stated and a reduction from $295 to $145 is appropriate.

Citation No. 618579 was issued for a violation of 30 CFR 75.200 and appropriately assessed a penalty of $255. The approved roof control plan was not being complied with where partial pillaring was taking place. A cut of coal approximatly 20 feet long and 11 feet wide was exposed and not roof bolted or barricaded as required. As stated in the inspector's statement, the condition should have been detected during a pre-shift examination. However, it is not likely that a person would be harmed by this failure to comply with the roof control plan as there was no means of access to the area which was blocked by the continuous miner. Therefore, the penalty as proposed is appropriate.

Citation No. 618643 was issued for a violation of 30 CFR 75.200 and appropriately assessed a penalty of $305. The approved roof control plan was not being followed as bolts are required to be placed on 4 foot centers. In this case the distance between bolts ranged from 52 inches to 60 inches. Further investigation has disclosed that only three rows of the bolts were out of pattern and that the area has a good solid top. Therefore, the likelihood of an injury occurring is low. However, as the operator is obligated to comply with its roof control plan, a penalty of $305 is appropriate.

Citation No. 618645 was issued for a violation of 30 CFR 75.523-2. The $170 assessment for this violation should be reduced to $120. The deenergizing device on the shuttle car was inoperative.

However, it was not within the operator's control to know of this violation. Someone had tampered with the adjustments on the equipment and the equipment operator did not inform the operator. Also, although more pressure needed to be exerted than allowable, it was possible to deenergize the equipment in its condition at the time this citation was issued. Also, the probability of occurrence is lowered as the shuttle car was protected by a canopy. For these reasons, the penalty reduction is appropriate.

Citation No. 618646 was issued for a violation of 30 CFR 75.400. The $225 assessment for this violation should be reduced to $140. An accumulation of combustible material was found around the bottom landing of the Renton shaft for approximately 700 feet. This operator maintains a weekly clean-up program and a garbage can is provided by the operator. However, this accumulation existed at the lunch place. The operator has instructed the men to use the garbage can and to clean-up after themselves. This violation is not within the operator's exclusive control. It is confirmed that the operator maintains a clean-up plan at this area. For these reasons, the operator's negligence is very low and a $140 assessment is appropriate.

Citation No. 618648 was issued for a violation of 30 CFR 75.200. In the intake escapeway the operator failed to post 100 feet according to the roof control plan. The operator did know of this violation. However, according to the roof control plan posts are supplementary support to be used only after bolts are installed. This area was bolted according to the plan. Also, the roof in this area was strong and there was no indication that there was weight on the cribs. Moreover, the entry was posted. [In a telephone conversation on June 26, 1980 the operator informed my law clerk that the ninth word in the second sentence in this paragraph should be "post" and not "bolt." The operator further agreed to pay the full assessment of $255 for this violation rather than the reduced amount the parties had agreed upon.]

Citation No. 618649 was issued to the operator for a violation of 30 CFR 75.807. The $150 assessment for this violation should be reduced to $100. In this case, a bare energized trolley wire was coming in contact with the high voltage cable on the main track haulage. However, the cable itself was wrapped and insulated. It was not within the operator's control that this condition occurred. One of the brackets holding up the cable broke causing the cable itself to slip and sag near the trolley wire. As the operator was not negligent and as the cable itself was wrapped, this penalty should be reduced to $100. This reflects accurately the lack of operator negligence as well as the low probability of occurrence.

Citation No. 618650 was issued for a violation of 30 CFR 75.200. The approved roof control plan was not being complied with

as the pillar line was not fenced off or posted. The $240 assessment for this violation should be reduced to $160. Further investigation has disclosed that the posts had been set as required by the roof control plan. However, an unintentional roof fall knocked out the breaker posts. As the operator initially did comply with the roof control plan and had not yet reinspected this area, the penalty reduction appropriately reflects the operator's degree of negligence. Also, this occurred in a gob area where it was unlikely that men would be travelling.

Citation No. 618651 was issued for a violation of 30 CFR 75.400. The $210 assessment for this violation should be reduced to $110. An accumulation of fine dry coal, loose coal and float coal dust was present in the pillar section. The operator maintains a continuous clean-up plan. However, this violation occurred in an area where the ribs were frequently sloughing and it was very difficult for the operator to control the violation. Thus, the operator's negligence was very slight. It is documented that the operator cleans this area at approximately dinner time and at the end of the shift. This citation was issued at 11:15, just slightly before the dinner hour. For these reasons, the penalty reduction as proposed is appropriate.

Each of the above penalty proposals takes into account all relevant statutory criteria.

I accept the Solicitor's representations. Accordingly, I conclude the recommended settlements are consistent with and will effectuate the purposes of the Act. The recommended settlements are therefore, approved.

Citation Nos. 618574 and 618644.

In accordance with Commission Rule 64, 29 C.F.R. § 2700.64, each party has moved for summary decision with respect to Citation Nos. 618574 and 618644. 1/

A. Citation 618574

This citation alleges a violation of 30 C.F.R. § 75.1704 for the following condition:

1/ 29 C.F.R. § 2700.64 provides in part:

"(a) Filing of motion for summary decision. At any time after commencement of a proceeding and before the scheduling of a hearing on the merits, a party to the proceeding may move the judge to render smmary decision disposing of all or part of the proceeding.

"(b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law."

The designated return escapeway in the 15 North Section ID #015 had two roof falls which were not maintained to insure passage at all times of any person including disabled persons. Both falls were inby #4617. Both falls did not provide the required width of six feet and both needed posts.

30 C.F.R. 75.1704 provides as follows:

> Except as provided in § § 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

No factual dispute exists. The parties have submitted signed stipulations as to all material facts. These stipulations set forth that:

1. In the designated return escapeway in the 15 Section I.D. No. 015, two roof falls had occurred.

2. Five posts were dislodged.

3. The falls did not allow the required six feet of clearance.

4. The roof in the return escapeway is solid sandrock and generally strong.

5. The return escapeway was examined in compliance with 30 C.F.R. 75.1704-2(c)(1) on April 17, 1979, and the condition described in the subject citation did not exist at that time.

6. On April 20, 1979, an authorized representative observed the two roof falls in the designated escapeway and issued the subject citation.

7. The roof falls occurred between the time of the last regular weekly escapeway inspection, i.e., April 17, 1979, and the date of the issuance of the citation; that is April 20, 1979.

8. The escapeway was not used between April 17, 1979, and April 20, 1979.

9. The negligence of the operator is low, as the operator did comply with the weekly examination requirement of 30 C.F.R. 75.1704-2(c)(1).

10. Were the escapeway to be needed in the event of an emergency, the roof falls could have made passage extremely difficult. Due to the obstruction created by the roof falls, an existing injury could have been aggravated, causing a possible fatality. However, the operator did have its one other designated escapeway maintained in passable and good condition. Also, other entries, though not designated escapeways, were in passable condition. Therefore, it is improbable that such an incident would have occurred.

The issue presented is whether there is a violation of 30 C.F.R. § 75.1704 when the cited condition occurs between the time of the escapeway inspection conducted pursuant to 30 C.F.R. § 75.1704-2(c)(1) and the MSHA inspection.

The mandatory standard is clear in requiring that at least two passageways maintained to insure passage at all times of any person be provided and maintained in a safe condition. "Maintain" is defined, inter alia, as "to keep in a certain condition or position, especially of efficiency, good repair, etc." Webster's New World Dictionary (1972 edition). The regulation does not distinguish between conditions which occur due to unpredictable circumstances and those which are caused by the operator's lack of due diligence. Nor does the standard contain any reference to time. Accordingly, I conclude that the standard imposes an absolute duty upon the operator with respect to the condition of the passageways. Since passage admittedly was extremely difficult, a travelable passageway did not exist and the operator failed to meet the obligation imposed upon it.

I am bound by the clear language of the regulation. The circumstances under which the failure to maintain the requisite passageways occurred, such as the recent roof falls, may be taken into account in determining the degree of negligence. The fact that the operator complied with the weekly examination requirement in 30 C.F.R. § 75.1704-2(c)(1) does not affect the issue of whether there is a violation of 75.1704.

In light of the foregoing, I conclude that a violation of 30 C.F.R. § 75.1704 occurred for which a civil penalty must be assessed. Pursuant to the stipulations set forth herein, I find negligence was low. I also take note of representations that the violation was abated in good faith, the operator is large in size, has a history of previous violations, and that the imposition of a penalty will not affect the operator's ability to continue in business.

A penalty of $180 is assessed.

Citation No. 618644

This citation alleges a violation of 30 C.F.R. § 75.303, for the following condition:

> At three high cavities along the Conveyor Belt in the 16 South Section ID #019 there was no evidence or indication that a pre-shift examination was made prior to men entering the 16 South Section for work. There was no date, time or anybody's initials for the above date. This is a statutory provision that a pre-shift examination and also evidence of said examination shall be made 3 hours preceeding the beginning of the shift. [Modified on May 3, 1979 to read: At three high cavities along the conveyor belt in the 16 South Section ID No. 019 there was no evidence to indicate that an examination was made for 5/1/79 or 5/2/79 after the coal producing shift had begun. The evidence required is the date, time and initials of the person making the examination at all locations he examines. An examination on these cavities was made by the safety director on 5/2/79 after it was pointed out to him by me that no dates were there for 5/1/79. This section produced coal on 5/1/79.]

30 C.F.R. 75.303 provides in relevant part as follows:

> (a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun. Such mine examiner shall place his

initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine.

* * *

The parties have submitted stipulations with respect to the facts involved. These stipulations set forth that:

1. On May 1, 1979, the Renton Mine was idle, therefore, no coal was produced.

2. 30 C.F.R. § 75.303 provides: "belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun. Such mine examiner shall place his initials and the date and time at all places he examines."

3. As the mine was idle on May 1, 1979, it was not necessary for the operator to examine the belt on that day.

4. On May 2, 1979, the operator was engaging in producing coal on the 8:00 a.m. shift and the conveyor belt in the 16 South Section, I.D. No. 019, was energized at the time of the inspection.

5. The authorized representative issued the subject citation at 11:30 a.m.

6. At the time the inspector issued the citation there was no evidence to indicate that an examination was made for May 2, 1979, after the coal-producing shift had begun.

7. The operator did intend to make a belt examination on May 2, 1979, sometime during the shift in which the citation was issued.

8. At the time the citation was issued, the belt was in good condition and no hazards existed.

9. The probability of occurrence is low, as the belt was in good condition.

10. The operator exercised normal good faith in abating this condition within the time set for abatement or a reasonable time thereafter.

The issue presented for resolution in this matter is whether 30 C.F.R. § 75.303 requires an examination of belt conveyors which carry coal to be conducted immediately after each coal-producing shift has begun or at any time during such coal-producing shift.

I conclude that the mandatory standard requires only that belt conveyors on which coal is carried be examined after each coal-producing shift has begun. There is no requirement of immediate examination of belt conveyors after the start of a production shift. Indeed, there is no time requirement at all except that the examination occur during the shift. If the Secretary wished to require an immediate inspection of such conveyors or an inspection within a specified time after the start of the shift, the regulation could have so provided. As I have stated before, I have neither the authority nor the inclination to substitute myself for the formal rulemaking procedures set forth in the Act. See, e.g., Riverside Cement Company, WEST 79-94-M et al, (December 18, 1979).

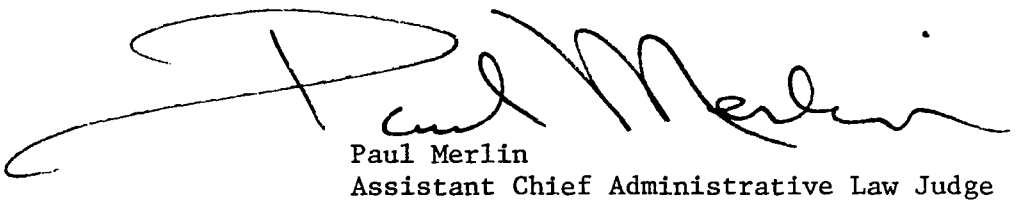
The Solicitor cites the inspector's manual which provides that these examinations shall be started without delay. I do not know what "without delay" means. The operator cites an earlier memorandum issued by a Subdistrict Manager which states that the examination can be done at any time during the shift. I am not bound by either interpretation, which are not official regulations but I do note that the former Board of Mine Operations Appeals held that the operator cannot properly be held to comply with guidelines or amplifications of the Act not properly promulgated as regulations issued pursuant thereto. Kaiser Steel Corporation, 3 IBMA 489 (1974). Here the language of the mandatory standard is clear. If the Secretary wants to require something more or something different, he must amend the regulations in the proper manner.

For these reasons, I find no violation existed and the citation must be vacated.

ORDER

The operator is ORDERED to pay $1,870 within 30 days from the date of this decision.

Citation No. 618644 is hereby VACATED.



Paul Merlin
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

11 JUL 1980

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

DECISION DENYING REQUEST
FOR NEW HEARING

On April 18, 1980, I issued a decision dismissing a Complaint of Discharge and Discrimination filed by Ronald McCracken finding insufficient evidence that his discharge was the result of any discrimination proscribed by the Federal Mine Safety and Health Act of 1977. McCracken subsequently filed a timely petition for discretionary review with the Federal Mine Safety and Health Review Commission claiming, inter alia, that newly discovered evidence warranted reopening of the case and further proceedings. On May 28, 1980, the Commission remanded the case to me for a ruling on that specific claim. No hearing was held inasmuch as there is no genuine issue as to any material fact. U.S. v. Cheramie Bo-Truc No. 5, Inc., 538 F.2d 696 (1976), reh. den., 559 F.2d 1217; Independent Bankers Assoc. of Georgia v. Bd. of Governors or Federal Reserve Systems, 516 F.2d 1206, 170 U.S. App. D.C. 278 (1975). All essential evidence is a matter of record in the form of transcripts and affidavits and the accuracy of those documents is not disputed. The issue here is the interpretation to be given that evidence.

In the absence of specific provisions for consideration of newly discovered evidence in the Commission Rules of Procedure or in the Administrative Procedure Act, my consideration of the question presented will be governed by Rule 60(b)(2) of the Federal Rules of Civil Procedure and as that rule has been judicially construed. Commission Rule 29 C.F.R. § 2700.1(b). In essence, Federal Rule 60(b)(2) provides that a party may be relieved from a final judgment, order or proceeding on the basis of newly discovered evidence. Such relief is considered extraordinary, however, and may be granted only where extraordinary circumstances are present. Posttape Associates v. Eastman Kodak Co., 387 F.Supp. 184, 68 F.R.D. 323 (E.D. Pa. 1975), rev'd. on other grounds, 537 F.2d 751. Thus, a motion under Rule 60(b)(2) asserting newly discovered evidence as a basis for a new trial will not be granted unless (1) the evidence was discovered following the trial; (2) due diligence on the part of the movant to discover the new evidence is shown or may be inferred; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material, and (5) the evidence is such that a new trial would

probably produce a new result. A. G. Pro, Inc. v. Sakraida, 512 F.2d 141 (5th Cir. 1975); Ledet v. United States, 297 F.2d 737 (5th Cir. 1966). These requirements must be strictly met. Strauss v. United States, 337 F.2d 853 (5th Cir. 1964).

McCracken has proffered as "newly discovered evidence" certain testimony from an unrelated proceeding given by Ronald Ernest, a foreman employed by the Valley Camp Coal Company (Valley Camp), which he claims "clearly demonstrates that witnesses of the Respondent testified falsely or incorrectly" at the hearing on the discrimination complaint previously before me. While McCracken does not, in his motion, make reference to the precise testimony of these witnesses that he claims to be false or incorrect, it appears that he is referring to the testimony of James Litman, then vice president for operations at Valley Camp. Although he also names John Gotses, then Valley Camp's industrial relations manager, as the other witness contradicted by Ernest, Gotses in fact did not testify as to the precise subject area now at issue.

James Litman testified, in essence, that in order to enable a person unfamiliar with the hazards unique to underground coal mining to learn to work safely in that environment, it had been the company policy since at least 1974, that underground experience in areas where coal is being extracted was a prerequisite to immediate employment in such areas. He observed that such employees were first required to work with an experienced miner in the underground workings for 6 months as an apprentice or "red hat" to learn of the mine hazards. Litman testified that company requirements in this regard were even more stringent than those of the West Virginia Department of Mines. This testimony was relevant to the case in that it established one basis for showing that McCracken was not qualified, at the time of his layoff, for immediate alternative employment in the underground workings of the mine where coal is extracted.

McCracken contends that the testimony of Ronald Ernest at a deposition on April 24, 1980, establishes, contrary to the testimony of Valley Camp's witnesses, that Valley Camp had in fact adopted the same requirements as the West Virginia Department of Mines in that any coal miner who was qualified and recognized by that department was thereby automatically eligible to work in all underground sections of the mine regardless of his previous experience. Although he submits four pages of transcript from the testimony of Ronald Ernest in support of his claim it is apparent that only the following passage is directly on point:

> Q. Does Valley Camp Coal Company have any requirements in addition to those of the State of West Virginia?
>
> A. We run them through an 80-hour course.
>
> Q. That is done during the--
>
> A. Prior to this employment [as a trainee for the first 90 days and as an apprentice "red hat" for the next 30 days].

Q. Allright, sir. Other than that requirement and the taking of the test, are there any additional requirements for qualification as an underground laborer?

A. Not to my knowledge. 1/

According to the uncontested affidavit submitted by Ernest he construed the last question in the above extract in the context of the requirements of the State of West Virginia and not the requirements of Valley Camp. I find this interpretation of the question to be reasonable and responsive in the context in which it was asked. His testimony is therefore wholly consistent with that of Litman and other witnesses at the hearing. Complainant's allegations are thus without basis in fact. The alleged newly discovered evidence is therefore merely cumulative in nature and as such cannot afford a basis for a new hearing. 2/ The evidence clearly is not of such a nature that would probably produce a new result after a new hearing. Sakraida, supra; Kolstad v. United States, 262 F.2d 839 (9th Cir. 1959); Philippine National Bank v. Kennedy, 295 F.2d 544 (App. D.C. 1961).

In connection with his various pleadings and letters filed in this case McCracken also cites other excerpts from Ernest's testimony as being "noteworthy" or "interesting". Although I do not consider these offhand comments to be a part of the motion filed herein I nevertheless have examined those excerpts in the context of that motion. I do not find that any of these references would afford any basis for relief under Rule 60(b)(2).

Under the circumstances, McCracken does not meet the criteria necessary to succeed on a Rule 60(b)(2) motion asserting newly discovered evidence. I therefore conclude that his claim of "newly discovered evidence" does not warrant reopening of the record or further proceedings. His motion in that regard is therefore denied.

Gary Melick
Administrative Law Judge

1/ Transcript page 16 from the deposition of Ronald Ernest in the case of Cherich v. The Valley Camp Coal Company, in the Circuit Court of Ohio County, West Virginia, Civil Action No. 79-C-730TA.

2/ Since this evidence could hardly be considered as "hidden" at the time of the decision in this case it would, for this additional reason, not afford a basis for relief under Rule 60(b)(2). Ryan v. U.S. Lines Company, 303 F.2d 430 (2nd Cir. 1962).

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14 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		Civil Penalty Proceeding
	Petitioner	Docket No. WEVA 80-41 A.C. No. 46-02380-03008 I
v.		Bishop Preparation Plant
BISHOP COAL COMPANY,	Respondent	

DECISION

Appearances: David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA), under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereinafter the Act), to assess a civil penalty against Bishop Coal Company (hereinafter Bishop) for a violation of mandatory safety standards. The proposal for assessment of a civil penalty alleges a violation of 30 C.F.R. §§ 77.1605(k) and 77.1605(l). A hearing was held in Charleston, West Virginia, on May 21, 1980. Franklin Walls testified on behalf of MSHA. James Lawless and Jack Holt testified on behalf of Bishop. Upon completion of the taking of testimony, the parties submitted oral arguments.

This matter involves the alleged failure of Bishop to provide berms or other guards at a dumping location and on the outer bank of elevated roadways. The order on which the civil penalty is proposed was issued following an investigation of an accident at the Bishop Preparation Plant. The accident occurred when a truck, operated by an employee of an independent contractor, missed the ramp to the dumping area while backing up and went down an embankment.

ISSUES

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

APPLICABLE LAW

Section 110(i) of the Act, 30 U.S.C. § 820(i), provides in pertinent part as follows:

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

30 C.F.R § 77.1605(k) provides as follows: "Berms or guards shall be provided on the outer bank of elevated roadways."

30 C.F.R. § 77.1605(l) provides as follow: "Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations."

STIPULATIONS

The parties stipulated the following:

1. Bishop Preparation Plant is owned and operated by Respondent Bishop Coal Company.

2. Bishop Preparation Plant is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 as amended.

3. The administrative law judge has jurisdiction over this proceeding, pursuant to section 110 of the 1977 Act.

4. The subject order and termination thereof were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the dates, times and places stated therein and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statement asserted therein.

5. The assessment of civil penalties in this proceeding will not affect the Respondent's ability to continue in business.

6. The appropriateness of the penalty, if any, to the size of the coal operator's business should be determined based upon the fact that in 1979 the Bishop Preparation Plant processed an annual tonnage of 751,799 and the controlling company, Bishop Coal Company, had an annual tonnage in excess of approximately 751,799 tons.

7. The alleged violation was abated in a timely fashion and the operator demonstrated good faith in attaining abatement.

8. The gravity of the alleged violation was that an accident occurred. It affected one person and resulted in said person losing a work day.

SUMMARY OF THE EVIDENCE

During darkness on the midnight shift on February 28, 1979, a truck haulage accident occurred at the Bishop Preparation Plant. A coal haulage truck, weighing 40 to 50 tons, operated by an independent contractor was attempting to back onto the dumping ramp at the plant. This was only the truck driver's second trip to the site and he apparently was working his

second consecutive shift at the time of the accident. The driver misjudged the ramp and the right rear wheels missed the ramp by several feet. This caused the haulage truck to go over the embankment which was approximately 11 feet above the surface below. The driver jumped out of the truck prior to its fall and sustained an injury causing him to lose one day of work.

MSHA assigned inspector Franklin Walls to investigate this accident. Upon completion of his investigation, Inspector Walls issued an imminent danger order of withdrawal under section 107(a) of the Act, due to inadequate berms or guards at the dumping site and along portions of the elevated access roadway leading to the dumping site.

The facts concerning the physical condition of the dumping site at the time of the accident are in dispute. Although numerous photographs were received in evidence, they are subject to different interpretations in light of the extensive damage caused to the area by the falling truck. Bishop alleged that prior to the accident, the following berms or guards were provided at the point where the truck went over the edge of the dumping area: a handrail type fence, a small pile of rocks and debris along the edge of the bank, and a metal pipe 8 inches in diameter. MSHA asserts that the 8-inch metal pipe was not present at the time of the accident. Bishop concedes that the handrail was not intended to prevent trucks from going over the edge.

According to the calculation of the parties, if the truck in question were perfectly centered on the ramp, there would be approximately 1-1/2 to 2 feet of clearance on each side of the truck. Based upon the location of

the right rear tire marks at the edge of the bank, the truck missed the ideal backup point by 3 or 4 feet. Both parties agreed that the truck driver was negligent.

Bishop's superintendent, James Lawless, contended that the 8-inch pipe along the ramp and the part of the pipe that went around the corner where the right rear wheels of the truck went over the bank was in place at the time of the accident. He further alleged that the pipe was torn from the concrete and knocked down the bank in the accident. Inspector Walls disagreed and testified that the pipe was found lying at the bottom of the bank covered with float coal dust which indicated that the pipe had not been recently dislodged.

There was some disagreement between Inspector Walls and Superintendent Lawless as to whether even the berm which was installed for abatement would be sufficient to prevent the occurrence of this accident. However, both agreed that under certain circumstances the berm would be sufficient.

Bishop produced further evidence that since 1971 more than 100 trucks use this dumping ramp on each working shift. There had been no accidents or complaints concerning the berm or guard prior to the instant accident. Moreover, the access road and dumping location had been inspected numerous times by MSHA and its predecessor since 1971 with no prior complaints about the inadequacy of berms or guards.

With regard to the access road, Inspector Walls identified four separate locations where berms were either inadequate or nonexistent. The total

length of the cited areas of the access road was several hundred feet. In these locations, the inspector testified that there was an embankment on one side and where berms existed they were very low and would not have been sufficient to prevent overtravel by haulage trucks. Superintendent Lawless testified that he had walked the access road with another MSHA inspector approximately 3 months prior to the date of the instant order and that inspector said nothing about inadequate berms. He contended that the condition of the berms had remained essentially the same from the date of the prior inspection to the time of the accident. However, he conceded that the winter weather conditions and truck usage of the road may have lowered the berms between the date of the prior inspection and the date of this order.

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of the parties have been considered. MSHA contends that Bishop failed to provide adequate berms or guards at the dumping site and along the access road. MSHA further asserts that Bishop is chargeable with a high degree of negligence or gross negligence and that a civil penalty in the amount of $4,000 should be assessed. Bishop asserts that it provided berms at all locations where they were required. Bishop also asserts that it was not negligent in any way and that a $4,000 civil penalty would be "absurd."

Since MSHA's investigation was prompted by the truck accident at the dumping site, the evidence concerning the dumping site will be examined first. The regulation in question, 30 C.F.R. § 77.1605(l), provides as follows: "Berms, bumper blocks, safety hooks, or similar means shall be

provided to prevent overtravel and overturning at dumping locations." I find that the preponderance of the evidence establishes that at the time of the accident in question, the means provided by Bishop to prevent overtravel and overturning were the following: a metal pipe 8 inches in diameter and a small pile of rocks and debris. Although a small metal handrail was also present, this was not intended to prevent overtravel by trucks. I find that the physical evidence, particularly the photographs taken shortly after the accident, supports Bishop's contention that the 8-inch metal pipe was dislodged by the truck's fall. Nevertheless, I find that Bishop violated the regulation in question because the metal pipe and the small pile of rocks and debris were not sufficient "to prevent overtravel and overturning at dumping locations." While the truck driver was admittedly negligent in misjudging the entrance to the dumping ramp by a few feet, this does not exculpate Bishop from liability. Although there is no evidence of any prior accident at this site, Bishop should have known that an 8-inch pipe and a small pile of debris were insufficient to prevent overtravel and overturning of trucks weighing 40 to 50 tons. However, I find no evidence in the record to support MSHA's contention that Bishop is chargeable with a high degree of negligence or gross negligence. For this violation, I find that Bishop is chargeable with ordinary negligence.

The preponderance of the evidence establishes that Bishop failed to provide adequate berms or guards along the outer bank of parts of its access road to the preparation plant. Bishop's contention that the small piles of rocks or debris along the elevated roadway constituted a berm is rejected. The requirement of 30 C.F.R. § 77.1605(k) that berms or guards shall be

provided means that they must be adequate to prevent overtravel of the outer bank. The evidence establishes that Bishop violated this standard. Bishop's reliance upon the failure of MSHA inspectors to cite this condition during earlier inspections is misplaced. Even if the condition of the berms was the same as on the prior inspections, Bishop is on notice by the regulation that adequate berms or guards are required. Since Bishop should have known of this violation, I find it chargeable with ordinary negligence.

In assessing a civil penalty, I have considered Stipulations 5 through 8 and the fact that Bishop is chargeable with ordinary negligence in this case. Based upon the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty of $2,500 should be imposed for the violation found to have occurred.

ORDER

Therefore, it is ORDERED that Respondent pay the sum of $2,500 within 30 days of the date of this decision, as a civil penalty for the violation of 30 C.F.R. §§ 77.1605(k) and 77.1605(l).

James A. Laurenson

James A. Laurenson, Judge

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16 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings Docket No. PITT 79-186-P A.O. No. 36-05018-02012
v.	:	Docket No. PITT 79-185-P A.O. No. 36-05018-03010
U. S. STEEL CORP., Respondent	:	Cumberland Mine

DECISIONS APPROVING SETTLEMENTS

These civil penalty proceedings were initiated by the petitioner against the respondent through the filing of proposals for assessment of civil penalties pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for seven alleged violations of certain mandatory safety standards promulgated pursuant to the Act.

Respondent filed timely answers in the proceedings and the cases were consolidated for hearing in Pittsburgh, Pennsylvania, on March 19, 1980. Subsequently, by motion filed June 17, 1980, petitioner now seeks approval of a proposed settlement negotiated by the parties as follows.

Docket No. PITT 79-186-P

This docket concerns five citations which the parties propose to dispose of by settlement. The citations, initial assessments, and the proposed settlement amounts are as follows:

Citation No.	Date	30 CFR Standard	Assessment	Settlement
235178	11/30/78	77.701	$ 160.00	$ 160.00
235179	11/20/78	77.506	90.00	90.00
235180	11/27/78	77.902	160.00	160.00
235621	11/30/78	77.508	160.00	160.00
235622	11/30/78	77.506	78.00	78.00
			$ 688.00	$ 688.00

Discussion

The proposed settlement is for 100% of the initial proposed assessments made by MSHA for the violations in question. In support of the proposed settlement, petitioner has submitted information pertaining to the six statutory factors set forth in section 110(i) of the Act. In addition, petitioner has submitted a full and complete discussion and analysis of the facts and circumstances surrounding each of the citations, including the factors of gravity, negligence, and good faith compliance. After review and consideration of the arguments presented in support of the proposed settlement, I find that it is reasonable and in the public interest, and that it should be approved.

Order

Pursuant to Commission Rule 30, 20 CFR 2700.30, petitioner's motion is granted, settlement is approved, and respondent is ordered to pay civil penalties in the amount of $688.00 in satisfaction of the aforesaid citations, payment to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter is dismissed.

Docket No. PITT 79-185-P

This docket concerns two citations, 7-0049, 12/13/77, 30 CFR 70.250(a), and 235657, 11/13/78, 30 CFR 77.1713(d), for which civil penalties of $72 and $66 were initially proposed by the petitioner. Petitioner's motion seeks approval of a settlement for citation 7-0049, for the full amount of the $72 assessment, and in support of its proposal petitioner has submitted a full and complete discussion of the facts and circumstances surrounding the citation, including information with respect to the six statutory factors found in section 110(i) of the Act.

With regard to citation 235657, petitioner states that it has been vacated because no violation of the cited standard occurred, and no civil penalty should be assessed.

Order

Pursuant to Commission Rule 30, 29 CFR 2700.30, settlement is approved and respondent is ordered to pay a civil penalty in the amount of $72 in satisfaction of the citation in question, payment to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this matter is dismissed. The vacated citation is dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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16 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceedings
	:	
	:	Docket No. CENT 79-171-M
Petitioner	:	A.O. No. 23-00981-05002
v.	:	
	:	Gooden Quarry and Mill
MARTIN MARIETTA AGGREGATES,	:	
Respondent	:	Docket No. CENT 79-108-M
	:	A.O. No. 13-00120-05002
	:	
	:	Klein Quarry

DECISIONS

Appearances: Rochelle G. Stern, Attorney, Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for the petitioner;
Charles A. Bliss, Cedar Rapids, Iowa, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated civil penalty proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with two alleged violations of certain mandatory safety standards set forth in Part 56, Title 30, Code of Federal Regulations. Respondent filed timely answers contesting the citations and requested hearings. Hearings were held pursuant to notice on May 20, 1980, in Kansas City, Missouri, and the parties appeared and participated therein. The parties waived the filing of posthearing proposed findings, conclusions, and briefs and were given an opportunity to present oral arguments on the record with regard to their respective positions. Further, at the request of the parties, bench decisions were rendered and the decisions are herein reduced to writing as required by Commission Rule 65, 29 C.F.R. § 2700.65(a).

Issues

The principal issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed,

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

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

Applicable Statutory and Regulatory Provisions

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

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

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

Discussion

Stipulations

The following stipulations were agreed to by the parties in these dockets:

1. Respondent's mining operations are subject to the provisions of the Act.

2. Payment of the assessed civil penalties will not affect respondent's ability to continue in business.

3. Respondent demonstrated good faith by achieving rapid compliance after notification of the cited violations.

4. Respondent's size is 8,368,785 production tons or man-hours per year.

5. Respondent's size with respect to the Klein Quarry is 19,049 production tons or man-hours per year.

6. The gravity factor was properly assessed for the citations in question.

Findings and Conclusions

Independent Contractor Defense

In these dockets, respondent asserted that the violations which prompted the issuance of the citations resulted from actions by certain independent contractors. Further, respondent asserted that it exercised no control over the work or safety of the contractors' employees and that petitioner's attempts to penalize the respondent by imposing civil penalties for violations committed by the contractors is an abuse of discretion.

The parties stipulated that Citation No. 190840 is attributable to the activities by an independent contractor hired by the respondent to perform work at its limestone quarry in Gooden, Missouri. Further, after taking testimony and evidence concerning Citationi No. 178827, petitioner conceded that this citation is also attributable to an independent contractor (Tr. 52).

Respondent's assertion that the Secretary abused his enforcement discretion by proceeding against the respondent mine operator is rejected. It is clear from the present state of the law that an owner-operator of a mine subject to the provisions of the Act can be held responsible for any violations committed by its contractor. MSHA v. Old Ben Coal Company, VINC 79-119 (October 29, 1979); MSHA v. Monterey Coal Company, HOPE 78-469 and 78-476 (November 13,1979).

Docket No. CENT 79-171-M

104(a) Citation No. 190840, issued on February 27, 1979, cites an alleged violation of 30 C.F.R. § 56.4-2, and states as follows: "Signs warning against smoking and open flames were not posted at the contractor (stripping crew) fuel storage area."

30 C.F.R. § 56.4-2 provides as follows: "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."

Fact of Violation

In support of the citation in question, petitioner presented the testimony of MSHA inspector Darrell L. Ragsdale who confirmed that he issued the citation after conducting an inspection of the mine. He also testified as to the facts and circumstances which prompted the issuance of the citation (Tr. 79-85), was cross-examined by respondent's representative, and responded to several questions posed by me (Tr. 85-104, 133-134).

In defense of the citation, respondent presented the testimony of Mr. Dwight Dozier, one of its sales representatives. He testified as to the activities of the independent contractor loader operators who were working around the fuel storage area (Tr. 104-115).

I find that the Secretary has established the fact of violation by a preponderance of the evidence. It is clear from the testimony and evidence presented by the petitioner in support of the citation that the required warning sign was not posted and respondent has not rebutted this fact. Failure to post a sign warning against smoking and open flames on the diesel fuel storage tank constitutes a violation of the cited safety standard (Tr. 203-205). The citation is AFFIRMED.

Gravity

The inspector testified that one of respondent's employees and four contractor employees were in the "area" of the diesel fuel storage tank, and that they were approximately 400 to 500 yards away. He assumed that the dozers and scrapers being used by the contractor employees were using diesel fuel from the storage tank, but he did not ascertain how much fuel was in the tank and upon inspection of the tank, he found it to be in good condition. The tank was a portable 3,000-gallon capacity tank, and the inspector indicated that a rupture and an ignition would have to occur before any hazard was presented. Based on the good condition of the tank, the fact that there is no indication or evidence that anyone was smoking, the fact that the equipment being operated was some great distance away from the fuel tank, and the fact that the inspector observed no fueling taking place, I can only conclude that the failure to post a warning sign was a nonserious violation (Tr. 205-206).

Negligence

Testimony by the inspector reflected that respondent's loader operator obtained his fuel from a source other than the cited fuel tank. Further, it is clear to me that the citation resulted from the acts of the independent contractor and that none of respondent's employees were expoesed to any hazard. I have also considered the fact that respondent's plant is mobile; that is, it is moved from site to site and that respondent often does not have personnel present while work is being performed by the contractor. Considering all of these circumstances, I find no negligence on the part of the respondent with respect to the citation in question. I conclude that the respondent could not have reasonably known of the condition cited (Tr. 206-207).

Docket No. CENT 79-108-M

104(a) Citation No. 178827, issued on February 22, 1979, alleges a violation of 30 C.F.R. § 56.9-11, and states as follows: "The windshield of the JD 644-B front end loader was cracked from top to bottom extending left to right across the entire glass. The vision of the driver was impared [sic]."

30 C.F.R. § 56.9-11 provides as follows: "Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean."

Fact of Violation

MSHA inspector William L. Worsham testified as to the cracked windshield which he observed and respondent does not dispute the fact that the windshield in question was in fact cracked. As a matter of fact, plant manager Dave Short confirmed the fact that the windshield in question was cracked. Section 56.9-11 requires that cab windows be maintained in good condition. Although the evidence establishes that the loader windshield was safety glass, the fact is that it was cracked and the extent of the crack resulted in the impairment of the vision of the loader operator. Under the circumstances, I conclude that the windshield in question was not in good condition and I find that the petitioner has established a violation (Tr. 21-34, 42-50, 52-61, 65-67, 71-79). The citation is AFFIRMED (Tr. 194-195).

Gravity

The extent of the crack in the loader windshield in question, and the inspector's testimony that the vision of the loader operator was impaired, supports a conclusion that the violation was serious. Although the evidence reflects that only one truck was loaded on the day in question and that the truck driver was not directly exposed to any hazard of being struck by the loader, the fact is that the evidence and testimony adduced reflected that as many as 12 to 14 trucks may be loaded on any given day, and the operation of a loader with a cracked windshield which impairs the vision of the operator presents a hazardous condition and situation. I conclude that the condition of the windshield constituted a serious violation (Tr. 196).

Negligence

In this case, the evidence establishes that respondent's Plant Manager Short was also in charge of safety at the Klein Quarry. He candidly admitted that he was aware of the cracked windshield 2 days before the citation was issued. However, he immediately advised the loader operator about the condition, but indicated that he had no authority to remove the equipment from service since it was the property of the contractor (Tr. 52, 56, 57-59). Mr. Short also testified that when the plant is operating at the Klein Quarry he is there on a daily basis, and he indicated that he was there the day before the inspection in question and that the windshield was cracked (Tr. 64).

Notwithstanding the fact that the loader in question was the property of the contractor rather than the respondent, the fact is that the quarry manager who was present and aware of the condition of the windshield was respondent's employee. He was at the mine site when he discovered the defective windshield and was aware of it until the day the citation issued. Under these circumstances, I find that the condition cited resulted from ordinary negligence on the part of the respondent (Tr. 200-201).

History of Prior Violations

The parties stipulated that the respondent's history of prior violations at the Gooden Quarry and Mill, Docket No. CENT 79-171-M, was "average" and petitioner asserted that this prior history consists of two citations for the 2-year period prior to the issuance of the citation on February 22, 1979.

The parties stipulated that respondent's prior history of violations at its Klein Quarry, Docket No. CENT 79-108-M, consist of those listed in Appendix A to the signed stipulation offered and received at the hearing. That document is an MSHA computer printout which reflects that respondent has paid $340 in civil penalties for seven citations issued during the period February 23, 1977, to February 22, 1979.

Based on the size and scope of respondent's mining operations, I cannot conclude that the aforesaid history of prior violations constitutes a poor safety record. To the contrary, I conclude that it indicates a good safety record on the part of the respondent, and this fact is reflected in the civil penalties assessed by me in these proceedings.

Good Faith Compliance

The parties stipulated that the respondent demonstrated good faith by achieving rapid compliance in the abatement of the conditions cited. I accept this as my findings with regard to the citations in issue in these proceedings.

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

The parties presented information concerning the size and scope of respondent's mining operations stated in terms of annual production tonnage and man-hours. Respondent's representative asserted that respondent operates a number of mining sites nationwide, and the parties agreed that respondent is a large operator. I adopt this as my finding in these proceedings.

The parties stipulated that payment of the assessed civil penalties will have no effect on respondent's ability to continue in business, and I adopt this agreement as my conclusion on this question.

Alleged Failure by the Inspectors to Inform Respondent of Their Inspections and to Afford Respondent's Representative of an Opportunity to Accompany the Inspectors During Their Inspections

During the course of the hearing, respondent, for the first time, asserted that the inspector did not follow the proper procedure because he did not give the respondent's representative an opportunity to accompany him during his inspections (Tr. 36). After careful review of the testimony and circumstances surrounding the inspection at the Klein Quarry (Docket No. CENT 79-108-M), respondent's contention is rejected. The inspector believed that

the loader operator was an employee of the respondent, and at the time of the inspection he specifically advised the employee of the purpose of his visit and afforded him an opportunity to accompany him. He also gave him an opportunity to call respondent's representative (Tr. 23-25, 30-32, 38). The loader operator was the only other person at the mine site (Tr. 43), and the inspector testified that he always attempts to contact mine management during his inspections, and that he has in the past contacted plant manager Dave Short in this regard (Tr. 45-46). On the day in question, the quarry in question was not in operation and the only activity going on was a loading operation with a front-end loader, and the inspector testified that the loader operator advised him that after contacting respondent's office, he was advised that no one wanted to come to the mine site (Tr. 47-49).

With respect to Docket No. CENT 79-171-M, and the inspection which took place at the Gooden Quarry and Mill, the inspector testified that he informed Bill Stevenson, the front-end loader operator, of the purpose of his visit, and Mr. Stevenson accompanied him during his inspection (Tr. 81). He also indicated that an employee of respondent's was at the facility (Tr. 93-94), and respondent's sale representative identified Mr. Stevenson as an employee of the respondent (Tr. 105). Under these circumstances, I conclude that respondent was given a full opportunity to accompany the inspector, and its assertion to the contrary is rejected.

Penalty Assessments

On the basis of the foregoing findings and conclusions, civil penalties are assessed as follows in these proceedings (Tr. 198, 211):

Docket No. CENT 79-108-M

Citation No.	Date	30 C.F.R. Section	Assessment
178827	2-22-79	56.9-11	$95

Docket No. CENT 79-171-M

Citation No.	Date	30 C.F.R. Section	Assessment
190840	2-27-79	56.4-2	$20

ORDER

Respondent is ORDERED to pay civil penalties totaling $115 within thirty (30) days of the date of these decisions.

George A. Koutras
Administrative Law Judge

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23 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. CENT 79-354-M A.O. No. 23-00544-05002
v.	:	Pacific Pit & Plant
PENNSYLVANIA GLASS SAND CORPORATION, Respondent	:	

DECISION AND ORDER

Appearances: John O'Donnell, Esq., U.S. Department of Labor, Arlington, Virginia, for the Petitioner; Jeffrey J. Yost, Esq., Berkeley Springs, West Virginia, for the Respondent.

Before: Judge Kennedy

Oral argument in this matter was heard in Courtroom 8 of the United States Courthouse, 3d and Constitution Avenue, Washington, D.C. on Thursday, July 16, 1980. The subject was a motion to recuse the trial judge filed by counsel for Pennsylvania Glass Sand Corporation, a wholly owned subsidiary of the International Telephone and Telegraph Company, a giant multinational corporation. The asserted ground for disqualification was a claimed prejudicial prejudgment of the merits of this proceeding that stemmed from a review by the judge of the facts set forth in the parties' prehearing submissions. The results of this review were stated in the trial judge's order of May 14, 1980 which directed the parties to show cause why in the absence of any dispute of fact or issue of credibility necessitating an evidentiary hearing the violation charged (an alleged inadequacy of the foot brakes on a 20 ton capacity pit truck) should not be settled by the payment of a penalty of $60, instead of the $275 proposed by the government. This in turn was predicated on the judge's finding that while the violation charged was

potentially serious, the brakes were mechanically sound and were rendered inadequate due solely to circumstances beyond the control and without the fault or negligence of the operator.

In a demonstration of professional ineptitude and incompetence previously unsurpassed in the experience of the trial judge, counsel for the operator, Mr. Yost, a member of the bar of the state of West Virginia and a 1972 graduate of the University of West Virginia Law School, admitted on the record in open court he had never read and could not recite either the facts or the holding of the principal precedent relied upon in support of his motion. 1/

As the record shows, the case, Withrow v. Larkin, 421 U.S. 35 (1975), not only does not support the operator's claim, but on the contrary held that pretrial review by an administrative adjudicator of evidence submitted during

1/ This and other professional and ethical lapses committed by Mr. Yost in the course of this proceeding should be of concern not only to the bar of the State of West Virginia but also to the Commission and his supervisor, the General Counsel of Pennsylvania Glass Sand Corporation. The record shows that in his zeal to create the impression the trial judge improperly considered a mine inspector's statement in arriving at the evaluation of May 14, Mr. Yost attempted to conceal the fact that he had been in possession of the statement since December 1979. It may be that Mr. Yost is more to be pitied than censured and should not be singled out for his devotion to the transcendental ethic of the adversary system, namely that winning is not everything, it is the only thing. Certainly the Commission, the bar associations and, if reports are to be believed, the Supreme Court have shown a high tolerance for ethical lapses of equal if not greater magnitude. Schwarzer, Dealing With Incompetent Counsel--The Trial Judge's Role, 93 Harv. L. Rev. 633 (1980); Oakes, Lawyer and Judge: The Ethical Duty of Competency in Final Report, Annual Chief Justice Warren Conference on Advocacy in the United States, 73 (1978). Distinguishing half truths from whole lies is an occupational hazard for the legal profession in general and for most lawyers in particular. Bok, Lying: Moral Choice in Public and Private Life 154-173 (Vantage Books 1978).

the course of a pretrial investigation of the matter is no bar to the adjudicator's participation in a later evidentiary hearing under the fair trial/due process clauses of the constitution. Thus, the Court held:

> * * * The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the [judge] at a later adversary hearing. Without a showing to the contrary, [judges] "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." United States v. Morgan, 313 U.S. 409, 421 (1941). 421 U.S. at 55.

The Court further held that the fact that an adjudicator on the basis of prehearing submissions issues "formal findings of fact and conclusions of law asserting" there is "probable cause to believe" a violation of law has occurred is no bar to the judge's conduct of a subsequent adversary hearing in the absence of clear and convincing evidence that "the risk of unfairness is intolerably high." 421 U.S. at 58. The general rule is that,

> The risk of bias or prejudgment in this sequence of functions has not been considered intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position . . . The initial . . . determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same [judge] makes them in tandem and that they relate to the same issues does not result in a procedural due process violation. 421 U.S. at 57-58.

In conclusion, the Court held, "This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law." 421 U.S. at 56. The Court also cited with approval Professor Davis' statement that the APA "does not and probably should not forbid the combination with judging of . . . [the function of] negotiating settlements . . ." Id. at n. 24. Indeed, as counsel for the Secretary pointed out, the Commission's Rules and the APA specifically recognize the power of the trial judge to propose and hold

settlement conferences. Rule 54(a)(6). The slight "contamination" of the adjudicatory function that results from a trial judge's participation in settlement discussions has never been deemed sufficient to require disqualification. 421 U.S. at 56 n. 24.

This came as somewhat of a shock to Mr. Yost, as I am sure it will to some of his more competent colleagues, many of whom labor under the impression that admissions contained in pleadings and other writings and documents filed in response to a formal pretrial order are not "evidence". As McCormick points out such "judicial admissions" are not hearsay and need not be offered in evidence at an adversary hearing before they may be considered as probative of the facts asserted. McCormick On Evidence, § 265 (1972 ed.). The Act and the Commission's rules of practice clearly provide for pretrial discovery at the instance of the trial judge. Thus, section 113(e) of the Act and Rule 58 empower the trial judge to "compel the attendance and testimony of witnesses and the production of books, papers, documents, or objects and [to] order testimony to be taken by deposition at any stage of the proceedings before [him]." (Emphasis supplied).

There is no merit, therefore, in the claim that a trial judge's pretrial involvement in the development of the facts and formulation of the issues to be tried, or determined without a trial, is an "extrajudicial" activity that creates an appearance of bias or automatically disqualifies him from participation in hearing and deciding the matter. The view that the lawyers are in absolute control of the proceeding, and the trial judge powerless to require the parties to show a need for an evidentiary hearing or to suggest any other procedure for informal adjudication in the interest of a just, speedy and inexpensive disposition of the matter, is a myth that has long since been discredited. Rule 614 of the Federal Rules of Evidence when coupled with the authority conferred by section 113(e) of the Act, is clear legislative recognition of the fact that, unless they choose to be, the law judges are not imprisoned within the case as made by the parties. Evidentiary hearings are for the purpose of resolving genuine issues of credibility, veracity or disputes over material facts, not for discovering whether such issues exist. Nor are they for the purpose of allowing the lawyers to engage in irresponsible and wasteful exercises in amateur or obfuscatory advocacy before a captive audience.

In Mathews v. Eldridge, 424 U.S. 319 (1976), the Supreme Court held that while financial cost alone is not a controlling factor in determining whether due process requires a particular procedural safeguard such as an evidentiary hearing prior to an administrative decision, the government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources, is a factor that must be weighed in determining the necessity for such a hearing. 424 U.S. at 348. The Court noted:

> At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by cost . . The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness . . . The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it." Id.

Here, a conservative estimate of the cost of an evidentiary hearing in St. Louis, Missouri, the point requested by the operator and therefore the situs required under the Commission's rules and decisions, was $2,000 exclusive of the salaries of the participants. Furthermore, a breakdown of this estimate showed the cost allocable to the operator, exclusive of the salaries paid its prospective witnesses, would approximate $700. This cost when weighed against even the proposed penalty of $275 shows how grotesquely disproportionate the cost of evidentiary hearings can be to the deterrent value of the penalty. See also, Cut Slate, Inc., 1 FMSHRC 1039 (1979). Unless penalties are increased to compensate the public for the cost of such unnecessary or improvident hearings, I believe they should be a last, not a first, resort.

Counsel contended, and he said the Commission agrees, that because the 1977 Mine Safety Law says an operator and the Secretary are to be afforded the "opportunity" for an "on the record" hearing as provided under section 5 of the APA, 5 U.S.C. § 554, a confrontational type hearing is a jurisdictional prerequisite to a penalty assessment

unless both counsel agree to settle or that there are no disputed issues of material fact. Peabody Coal Company, 2 FMSHRC 1035 (1980). I believe this is a substantially fair reading of Peabody, but note the Commission beat a hasty retreat from the rigidity of Peabody in New Jersey Pulverizing, 2 FMSHRC ___, July 2, 1980. In the latter case, the Commission denied the Secretary's punitive, unilateral demand for an evidentiary hearing in the face of opposition from both the trial judge and the operator. Although the Commission's decision does not mention it, the judge's reduction in the amount of the penalty in dispute was only $16. I believe the trial judges and the Commission must be alert to prevent use of the evidentiary hearing by either the solicitor or the operator to coerce the trial judge into rubber stamping improvident settlement proposals. Whenever, and for whatever reason, the Commission tilts the scales of procedural fairness, it risks doing itself and the cause of administrative justice a serious disservice.

Furthermore, for the reasons set forth in my decision after remand in Peabody, 2 FMSHRC ___, July 11, 1980, I emphatically do not agree with the operator's claim that "an administrative law judge does not have the authority to require parties to show there is a genuine issue of material fact or question of credibility before he must grant them an evidentiary hearing."

The idea that fundamental due process accords a party the right, if he chooses to exercise it, to have every item of evidence submitted via a witness in open court subject to full cross-examination has never been the rule in administrative proceedings. In Richardson v. Perales, 402 U.S. 389 (1971), the Supreme Court held the APA mandates cross-examination only to the extent that it "may be required for a full and true disclosure of the facts" and does not preclude a requirement for the submission of all or part of the evidence in written form, 402 U.S. at 409. Certainly, if such evidence is admissible as part of the "on the record" hearing, it must be admissible as part of the prehearing record particularly when it is received subject to the parties' right to show a need for cross-examination.

Directly in point on the claim that the APA and the Mine Safety Act mandate an opportunity to cross-examine before any item of information may be treated as "evidence" is United States v. Florida East Coast Railway Co., 410 U.S. 224 (1973). There the Court was confronted with the necessity of defining the meaning of the term "hearing" as used in the ICC Act. The Court found:

> The term "hearing" in its legal context undoubtedly has a host of meanings. Its meaning undoubtedly will vary depending on whether it is used in the context of a rulemaking type proceeding or in the context of a proceeding devoted to the adjudication of particular disputed facts. . . [W]e think that reference to [the Administrative Procedure Act], in which Congress devoted itself exclusively to questions such as the nature and scope of hearings, is a satisfactory basis for determining what is meant by the term "hearing" used in another statute. Turning to [the APA], we are convinced that the term "hearing" as used therein does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker.
>
> * * * * * *
>
> * * * even where the statute requires that [the proceeding] take place "on the record after opportunity for an agency hearing," thus triggering the applicability of § 556, subsection d provides that the agency may proceed by the submission of all or part of the evidence in written form if a party will not be "prejudiced thereby". Again the Act makes it plain that a specific statutory mandate that the proceedings take place on the record after hearing may be satisfied in some circumstances by evidentiary submission in written form only.
>
> * * * * * *
>
> We think this treatment of the term "hearing" in the Administrative Procedure Act affords a sufficient basis for concluding that the requirement for a hearing . . . did not by its own force require the Commission either to hear oral testimony, to permit cross-examination of Commission witnesses, or to hear oral argument. . . 410 U.S. 240-241.

Since Florida East Coast establishes that a statutory requirement for an APA "hearing" may be satisfied without a trial it simply is not true that valid adjudicative actions cannot be taken under the Mine Safety Act in the absence of an oral hearing at which the parties are afforded the opportunity to cross-examine witnesses. For this reason, the trial judge has repeatedly suggested that under its de novo

authority to "assess" penalties (section 110(i)) and to "approve" proposals to "compromise, mitigate, or settle" penalties (section 110(k)), the Commission encourage the use of informal adjudicatory procedures involving written submissions to effect a just, speedy and inexpensive disposition of cases where the amounts involved do not warrant the convening of a trial-type hearing or there is no genuine dispute of material adjudicative fact.

The choice is not between swatting flies with a sledge hammer or rubberstamping improvident settlement proposals, but the use of traditional pretrial techniques to screen out cases that do not merit the time and expense of a trial-type hearing and to dispose of such cases on written submissions or at settlement conferences. See e.g. Republic Steel Corp., 2 FMSHRC 666 (March 7, 1980); Jones & Laughlin Steel, 2 FMSHRC 678 (March 11, 1980); Consolidation Coal Co., 2 FMSHRC 725 (March 19, 1980); Consolidation Coal Co., 2 FMSHRC 1084 (May 9, 1980); U.S. Steel Corporation, 2 FMSHRC 1115 (May 20, 1980); Missouri Gravel Co., 2 FMSHRC 1124 (May 22, 1980); Call & Ramsey Co., 2 FMSHRC 1237 (May 14, 1980); Beckley Coal Co. and Kanawha Coal Co., 2 FMSHRC 1658 (June 27, 1980); Missouri Gravel Co., 2 FMSHRC ____ (July 8, 1980).

Just as war is too important to be left to the generals so also justice is too important to be left to the self-serving interests of the lawyers. Professor Maurice Rosenberg, in his Jackson Lecture before the National College of State Trial Judges, has effectively shown that formal rules, actual practices, and most procedural innovations in recent times have reflected a gain in judges' power and activity "at the expense of the lawyers' role as the mover and director of litigation." Nothing, he believes, will slacken the trend toward judicial activism. M. Rosenberg, The Adversary Process in the Year 2000, 1 Prospectus, 5, 15-18 (1968).

That judicial activism is necessary if we are to have a rule of law rather than a rule of lawyers is underscored by the following comments by Chief Judge Irving Kaufman of the Second Circuit:

> * * * our current emphasis on early judicial intervention is . . . the culmination of the efforts of many of our greatest legal thinkers to induce the judges to . . . take an active part in the control of litigation . . . Contrary to what most of us have accepted as gospel, a purely adversary system, uncontrolled by the judiciary, is not an automatic guarantee that justice will be done.

The Philosophy of Effective Judicial Supervision Over Litigation, 29 F.R.D. 207, 208, 211 (1962).

In 1906, Roscoe Pound shocked the lawyers of that time by speaking derisively of the cherished adversary system as the "sporting theory of justice" and documented its inefficiencies and intricacies. He also advocated the removal of certain matters from the courts to administrative tribunals where they could be subjected to disposition in a more efficient, if less adversary, fashion. Pound's attack on the adversary system was vigorously rejected by the bar and his ideas did not receive the unqualified endorsement of the ABA until 1976 when the Chief Justice adopted them as his own. At that time, in his appearance before The National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, the Chief Justice offered solutions to the stultifying delays and staggering expense of modern litigation that centered around more judicial control of the adversary process. Burger, Agenda for 2000 A.D.--A Need for Systematic Anticipation, 70 F.R.D. 83 (1976).

After this enlightenment, Mr. Yost, persuaded his position was based on an almost total misunderstanding of the relevant facts and applicable law, elected to withdraw his motion to recuse 2/ and to move for approval of a settlement in the amount of $60.00--the amount proposed in the show cause order of May 14, 1980. Mr. O'Donnell, counsel for the Secretary concurred, whereupon the trial judge granted both motions from the bench and ordered the matter dismissed.

The premises considered, it is ORDERED that the bench decision be, and hereby is, ADOPTED and CONFIRMED as the

2/ This made it unnecessary to decide whether the motion was filed in good faith or was frivolous and filed for the purpose of causing vexatious delay and harrassment of the administrative process. I also pass the question whether an adjudicatory agency has the power to tax attorney fees and costs against a party who has litigated in bad faith or may assess those expenses against counsel who willfully abuse the administrative process. See, Roadway Express, Inc. v. Piper, et al., ___ U.S. ___, slip op. 11-14, decided June 23, 1980.

final disposition of this matter and upon payment of the settlement agreed upon, $60.00, on or before July 30, 1980, the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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23 JUL 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceeding	
MINE SAFETY AND HEALTH	:		
ADMINISTRATION (MSHA),	:	Docket Nos.	Assessment Control Nos.
Petitioner	:	VA 79-41	44-04680-03007 V
	:	VA 79-43	44-04680-03009 V
v.	:	NORT 79-58-P	44-04680-03002
	:	NORT 79-87-P	44-04680-03005 V
PEGGY-O COAL COMPANY, INC.,	:		
Respondent	:	No. 4 Mine	

DECISION

Appearances: Sidney Salkin, Esq., and Covette Rooney, Attorney, Office of the Solicitor, U.S. Department of Labor, for Petitioner; James Ball, Vansant, Virginia, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued March 5, 1980, a hearing in the above-entitled proceeding was held on May 8, 1980, in Richlands, Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 103-118):

> This consolidated hearing involves four Petitions for Assessment of Civil Penalty filed by the Secretary of Labor seeking to have civil penalties assessed for a total of 13 alleged violations of the mandatory health and safety standards by Peggy-O Coal Company, Incorporated. The Petition in Docket No. NORT 79-58-P was filed on January 19, 1979, and alleges seven violations. The Petition in Docket No. NORT 79-87-P was filed on April 30, 1979, and alleges one violation. The Petitions in Docket Nos. VA 79-41 and VA 79-43 were both filed on July 10, 1979, and allege one and four violations, respectively. The issues in a civil penalty case are whether violations occurred and, if so, what civil penalties should be assessed based on the six criteria contained in section 110(i) of the Federal Mine Safety and Health Act of 1977. In this case two of those criteria can be considered

on an overall basis and I shall make one set of findings for those first two criteria, which are the size of the respondent's business and whether the payment of penalties would cause respondent to discontinue in business. First, as to the size of respondent's business, the record shows that at the time the citations and orders in this proceeding were written, the operator had two coal mines, the No. 4 and the No. 5. Each of the mines produced about 150 to 200 tons of coal on an average daily basis and employed between eight and nine miners. At the present time, the No. 4 Mine is no longer in operation, but respondent does have in operation the Nos. 8 and 9 Mines. The No. 8 Mine produces about 100 tons of coal per day and the No. 9 produces approximately 150 to 200 tons of coal per day. Respondent sells its coal to Commonwealth Resources under a contract which requires respondent to sell on a fixed amount per ton. Therefore, on the basis of those facts I find that respondent is a small company and that any penalties assessed in this case should be in a low range of magnitude to the extent that the penalties are determined by the criterion of the size of respondent's business.

The operator testified that he is not in as good a financial condition at this time as he'd like to be and he indicated that while he would be able to come up with money assessed in the form of penalties that it would be difficult for him to do so. On the basis of that information I conclude that the payment of penalties would not cause the respondent to discontinue in business so long as penalties are reasonably assessed under the six criteria.

The remaining four criteria, history of previous violations, gravity, negligence, and good faith effort to achieve rapid compliance will each have to be considered separately for each violation.

Contested Proceeding
Docket No. NORT 79-87-P

Only one violation is alleged in Docket No. NORT 79-87-P. That alleged violation is based on Citation No. 322486 dated October 24, 1978, alleging a violation of section 75.200. Section 75.200 requires the operator of each coal mine to file with MSHA a roof-control plan applicable to the situation in each mine. In this proceeding the roof-control plan was introduced as Exhibit 2A. A violation of section 75.200 occurred because in the operator's battery charging station, which was located in the No. 6 entry inby survey station No. 248, the inspector observed 18-inch roof bolts in an area measuring approximately 80 feet by 20 feet. The roof-control

plan requires that bolts no shorter than 30 inches shall be used in the roof-control pattern. On October 24, 1978, when the inspector wrote Citation No. 322486, he found that only 10 of the bolts in the battery charging station were 30 inches in length. The inspector did not make a detailed diagram of the way the bolting pattern appeared on October 24. When the inspector wrote Citation No. 322486, however, he provided that the operator should place 30-inch roof bolts as required by the roof-control plan in the battery charging station by October 27, 1978. When the inspector returned on October 27, 1978, he did not find that an appropriate number of 30-inch roof bolts had been installed. He believed that the operator had made little or no effort to abate the violation of section 75.200 cited in Citation No. 322486. Consequently, he wrote an order of withdrawal requiring the operator to install 30-inch roof bolts in accordance with the roof-control plan.

When the inspector returned on October 30, which was a Monday, following the writing of the order on the preceding Friday, he found that 30-inch roof bolts had been installed on 5-foot centers as required by the roof-control plan and therefore he terminated the order of withdrawal. The roof-control plan does indicate on page two of Exhibit 2A that the roof bolts must anchor in at least 12 inches of firm strata. A roof-control expert has testified in this proceeding that that provision should be interpreted to mean that a 30-inch roof bolt is always required as a minimum length and that 30-inch roof bolts must anchor into at least twelve inches of firm roof support. It was the inspector's belief and also the belief of the roof-control expert that the violation alleged in Citation No. 322486 was serious because of respondent's failure to install a proper number of 30-inch roof bolts.

The inspector stated that when he came back on October 27 to check this area, nine roof bolts had been installed of the required 30-inch length, but they had been installed where nine 18-inch roof bolts had been removed. The inspector's Exhibit 23 shows that there were 31 eighteen-inch roof bolts in existence in the battery charging station area and nine of those indications, namely Nos. 7, 12, 13, 14, 15, 16, 18, 26, and 27 did have 30-inch roof bolts installed beside the holes where the 18-inch roof bolts had been removed. So by October 27, or 3 days after the citation was written, respondent had installed nine bolts in addition to the 10 which the inspector observed on October 24. The inspector estimated that 60 roof bolts would have been required in this area and the roof control expert testified that 64 thirty-inch bolts should have been installed in this area. Consequently, on

October 27, 1978, there were still lacking in this area at least 40, thirty-inch roof bolts. Based on the facts that I have just recited I think that the record justifies a finding that this was a serious violation.

Respondent was represented by the owner in this proceeding and the owner has testified that he did not install any more bolts in the battery charging station between October 24, 1978, when the citation was written, and October 30, 1978, when the order of withdrawal was terminated. The owner states that he did install about eight or 10 roof bolts in a 10- by 15-foot area which had been cited by the inspector in his order as having been completely unsupported (Exh. 3).

I find that the inspector's testimony in this instance must be given more weight than that of the owner because the inspector had detailed notes to document his findings and I do not believe the inspector would have fabricated what he saw and would have put it in documentary form without having a visual basis for it. Moreover, the inspector's findings were supported by the testimony of Inspector Matney, who at that time was a trainee and who is now a full-fledged MSHA inspector. Consequently, I find that I must make my findings on the basis of the inspector's statements in this instance.

Coming to the criterion of negligence, the operator knew, and is required to know, the provisions of his roof control plan; consequently, he should have installed the necessary 30-inch roof bolts.

It should be noted for the record that the area where the battery-charging station was situated had been increased in height by the removal of some of the roof, so that where the ordinary mining height in this area was 44 inches, the roof of the battery-charging station had been blasted out to make an area approximately 7 feet in height. In doing the blasting work the operator had, of course, destroyed the original roof support pattern and was obligated to install 30-inch roof bolts, on 5-foot centers just as if this were a new area from which coal had been removed.

It has been the operator's defense in this case that the 18-inch roof bolts had been installed for the purpose of holding the wires which carried the electricity needed to operate the battery-charging stations, of which there were three in this area. While that may have been his purpose in putting in the 18-inch roof bolts, the fact remains and the evidence shows that the 30-inch roof bolts had not been installed as they should have been. The inspector has indicated that there would have been no objection to the operator's having installed 18-inch roof bolts to support his

wire provided he had first installed 30-inch roof bolts as required by the roof-control plan. The inspector claims that the reason the operator had not put in 30-inch roof bolts was that he felt that the sandstone in the roof of the battery-charging station was extremely hard and a lot of bits were used up in drilling these holes and that the operator used 18-inch roof bolts, instead of 30-inch roof bolts, as a matter of economics rather than for the purpose of hanging the wires on them.

There is no reason to doubt the operator's statement that he put in 18-inch roof bolts for the purpose of supporting his wire. The fact remains that he had not put in 30-inch roof bolts which were required to make this area safe. Three scoops were used in the mine to load coal and transport it from the face to the conveyor belt; consequently, at various times, three different scoop operators came to the battery-charging station to get new batteries or to obtain recharged batteries. Therefore, the operator's failure to support this area properly was the result of gross negligence.

We come now to the criterion of whether the operator showed good faith effort to achieve rapid compliance. The record shows that he did not demonstrate good faith because he not only didn't make any effort to install the proper number of 30-inch roof bolts between October 24 and October 27, but did not install them at all until his mine was closed with a withdrawal order. Consequently, it's impossible to find that he showed good faith in abating this violation of section 75.200.

Exhibit 5A shows that the No. 4 Mine had two violations of section 75.200 in 1977 and two violations in 1978. Although we have two exhibits in the proceeding which are supposed to cover different portions of the years both of the exhibits show violations for some of the same time period. So it's a little bit confusing to try to determine the number of violations for other than 1977 and 1978. I always look upon violations of section 75.200 as being the worst type of violation that a company can have on a repetitious basis. So I think that even two violations each year is an excessive number of violations of section 75.200 and therefore under the criterion of history of previous violations I shall assess a $50 penalty on that criterion alone. Respondent's failure to show a good faith effort to achieve rapid compliance should be assessed at $150. The gravity of the violation should be assessed $200, and the negligence involved should be assessed at $300, or a total penalty of $700 for this violation of section 75.200 alleged in Citation No. 322486.

After the bench decision set forth above had been rendered, the parties entered into a settlement conference which resulted in the making of motions for approval of settlements as to the alleged violations in the remaining three dockets. The bases for approval of settlements are discussed below.

Settlement Agreements

Docket No. VA 79-41

Order No. 322927 1/23/79 § 75.403

Order No. 322927 alleged a violation of section 75.403 for which the Assessment Office proposed a penalty of $700. Respondent has agreed to pay a reduced amount of $600. The circumstances believed to warrant the reduction of $100 is that, although the violation did exist, the operator had in fact made preparations to clean up and rock dust the affected areas and had assigned a man to do the work prior to the time the inspection occurred. At the time the inspector observed the violation, the work had not been started, but the preparations had been previously made. Counsel for the Secretary believed that the aforesaid circumstances reduced the degree of gravity and negligence sufficiently to justify the reduction (Tr. 112-113).

Docket No. VA 79-43

Order No. 322926 1/23/79 § 75.400

Order No. 322926 alleged a violation of section 75.400 for which the Assessment Office proposed a penalty of $500. Respondent has agreed to pay a reduced amount of $250. The grounds for the reduction are based on the facts that the inspector observed no stuck rollers along the belt line where the accumulations existed and the mine floor was wet. No known ignition sources were present and there were no miners in the area. Additionally, the alleged violation was promptly abated. In such circumstances, the gravity of the violation was diminished. Therefore, a reduction in the penalty is justified (Tr. 113).

Order No. 322515 12/28/78 § 75.316

Order No. 322515 alleged a violation of section 75.316 for which the Assessment Office proposed a penalty of $500. Respondent has agreed to pay a reduced amount of $400. The alleged violation did not expose any miners to respirable dust because no one was working in the area where curtains had not been installed. There was immediate compliance because curtains were installed within 45 minutes (Tr. 113-114).

Order No. 322516 12/28/78 § 75.316

Order No. 322516 alleged a violation of section 75.316 for which the Assessment Office proposed a penalty of $500. Respondent has agreed to pay a reduced amount of $400. The degree of negligence was reduced by the fact

that the operator was prepared to install line brattice in each of the affected work areas at the time of the inspection. Gravity was not great because, although coal had been shot, it had not been loaded. Abatement was immediate; therefore reducing the penalty is justified.

Order No. 322517 12/28/78 § 75.319(1)

Order No. 322517 alleged a violation of section 75.319(1) for which the Assessment Office proposed a penalty of $250. Respondent has agreed to pay a reduced amount of $150. The inspector's order was based on his conclusion that the operator had been working two sections on a single split of air. The inspector, however, did not observe two loading machines and the operator denies that he intended to operate two sections on a single split of air. If a hearing had been held, a credibility issue would have been raised. Therefore, a reduction in the penalty is warranted (Tr. 114).

Docket No. NORT 79-58-P

Citation No. 323809 8/1/78 § 75.1715

Citation No. 323809 alleged a violation of section 75.1715 for which the Assessment Office proposed a penalty of $40. Respondent has agreed to pay a reduced amount of $35. A reduction of $5 is warranted because the operator explained to the Secretary that he did have a check-in and check-out system; that he had records which indicated to him the identity of each miner working underground. The only items he lacked were the tags which the regulations require miners to wear (Tr. 81).

Citation No. 323810 8/1/78 § 75.1702

Citation No. 323810 alleged a violation of section 75.1702 for which the Assessment Office proposed a penalty of $78. The respondent has agreed to pay a reduced amount of $73. As justification for the reduced penalty, the operator claims that he had just purchased a cigar prior to accompanying the inspector inside the mine. The cigar was still wrapped and the operator had no matches. The operator forgot that he was carrying the cigar until it happened to drop out of his pocket (Tr. 82).

Citation No. 323811 8/1/78 § 75.1714

Citation No. 323811 alleged a violation of section 75.1714 for which the Assessment Office proposed a penalty of $84. Respondent has agreed to pay a reduced amount of $78. As justification for the reduction, the operator indicated to the Secretary's counsel that no hazard was involved in the fact that two miners were not wearing their self-rescuers because of the fact that self-rescuers were in the area. The gravity of the violation was low inasmuch as self-rescuers were promptly obtained once their absence was pointed out (Tr. 82).

Citation No. 323812 8/1/78 § 75.400

Citation No. 323812 alleged a violation of section 75.400 for which the Assessment Office proposed a penalty of $114. Respondent has agreed to pay a reduced amount of $94. As grounds for the reduction, the operator has indicated to the Secretary's counsel that the wiring was intact in the area of the coal accumulation and no stuck rollers existed along the conveyor belt. The inspector agreed that there were no ignition sources which would have been likely to cause a fire.

Citation No. 323813 8/1/78 § 75.516-2(a)

Citation No. 323813 alleged a violation of section 75.516-2(a) for which the Assessment Office proposed a penalty of $106. Respondent has agreed to pay a reduced amount of $98. As grounds for a reduction, the operator indicated to the Secretary's counsel that there was insulation on the wires used as hangers and that the wires being suspended were in good condition. The inspector confirmed the operator's claims. Therefore, the Secretary's counsel believed that a reduction in the penalty is justified.

Citation No. 323814 8/1/78 § 75.1713-7(a)(3)

Citation No. 323814 alleged a violation of section 75.1713-7(a)(3) for which the Assessment Office proposed a penalty of $66. Respondent has agreed to pay a reduced amount of $61. A reduction is believed to be appropriate because the operator and the inspector both agree that only one person was in the area where the first-aid kit lacked a full complement of supplies and the operator immediately corrected the deficiencies.

Citation No. 323817 8/2/78 § 75.1704-2(d)

Citation No. 323817 alleged a violation of section 75.1704-2(d) for which the Assessment Office proposed a penalty of $48. Respondent has agreed to pay a reduced amount of $43. The basis for the settlement in this instance is that the operator has indicated to the Secretary's counsel, and the inspector agrees, that the operator did have a map and that he promptly posted the map after the citation was issued, thus reducing the degree of negligence and providing prompt abatement.

I find that respondent and counsel for the Secretary gave satisfactory reasons for approval of the penalties agreed upon in their settlement conference and that the settlement agreements hereinbefore discussed should be accepted.

Summary of Assessments and Conclusions

(1) Based on all the evidence of record and the aforesaid findings of fact, or the parties' settlement agreements, the following civil penalties should be assessed:

Docket No. VA 79-41

Order No. 322927 1/23/79 § 75.403 .....(Settled).....	$	600.00

Docket No. VA 79-43

Order No. 322515 12/28/78 § 75.316 .....(Settled).....		400.00
Order No. 322516 12/28/78 § 75.316 .....(Settled).....		400.00
Order No. 322517 12/28/78 § 75.319(1) ...(Settled).....		150.00
Order No. 322926 1/23/79 § 75.400 .....(Settled).....		250.00
Total Settlement Penalties in Docket No. VA 79-43.....	$1	,200.00

Docket No. NORT 79-58-P

Citation No. 323809 8/1/78 § 75.1715 .....(Settled)...	$	35.00
Citation No. 323810 8/1/78 § 75.1702 .....(Settled)...		73.00
Citation No. 323811 8/1/78 § 75.1714 .....(Settled)...		78.00
Citation No. 323812 8/1/78 § 75.400 .....(Settled)...		94.00
Citation No. 323813 8/1/78 § 75.516-2(a) ....(Settled)...		98.00
Citation No. 323814 8/1/78 § 75.1713-7(a)(3).(Settled)...		61.00
Citation No. 323817 8/2/78 § 75.1704-2(d)....(Settled)...		43.00
Total Settlement Penalties in Docket No. NORT 79-58-P..	$	482.00 1/

Docket No. NORT 79-87-P

Citation No. 322486 10/24/78 § 75.200 .....(Contested)..	$	700.00
Total Settlement and Contested Penalties in This Proceeding...	$2	,982.00

(2) Respondent, as the operator of No. 4 Mine, is subject to the Act and to the mandatory safety and health standards promulgated thereunder.

WHEREFORE, it is ordered:

(A) The parties' requests for approval of settlements are granted and the settlement agreements in Docket Nos. VA 79-41, VA 79-43 and NORT 79-58-P are approved.

1/ On page 84 of the transcript, counsel for the Secretary stated that the total proposed settlement was $470; however, a mathematical error was made at that time, and is corrected in the tabulation above.

(B) Pursuant to the parties' settlement agreements and the bench decision rendered in the proceeding in Docket No. NORT 79-87-P, respondent shall, within 30 days from the date of this decision, pay civil penalties totaling $2,982.00 as set forth in paragraph (1) above.

Richard C. Steffey

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

Distribution:

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Peggy-O Coal Company, Inc., Attention: James Ball, President, P.O. Box 235, Vansant, VA 24656 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

23 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	: Civil Penalty Proceeding	
		: Docket Nos.	Assessment Control Nos.
v.		: WEVA 80-124	46-01407-03042V
		: Olga Mine	
OLGA COAL COMPANY,	Respondent	: WEVA 80-125	46-02437-03007V
		: WEVA 80-126	46-02437-03008
		: WEVA 80-127	46-02437-03009V
		: Olga Preparation Plant	
		: WEVA 80-128	46-05319-03009V
		: Road Fork No. 2 Mine	

DECISION

Appearances: Barbara Krause Kaufmann, Attorney, Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
James R. Haggerty, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued March 21, 1980, a hearing in the above-entitled proceeding was held on May 20, 1980, in Bluefield, West Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

Upon completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 141-154):

> The Petition for Assessment of Civil Penalty in Docket No. WEVA 80-124 was filed on January 25, 1980, and seeks to have a civil penalty assessed for an alleged violation of 30 C.F.R. § 75.200. In any civil penalty proceeding the issues are whether a violation of a mandatory health or safety standard occurred, and, if so, what civil penalty

should be assessed, based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

The first matter to be considered in this proceeding insofar as the contested case is concerned, is whether a violation of section 75.200 occurred.

CONTESTED CASE

DOCKET NO. WEVA 80-124

I shall make some findings of fact based on the evidence which I've heard today. Those findings will be set forth under enumerated paragraphs.

1. On May 16, 1979, two coal mine inspectors went to Respondent's Olga Mine. At that time, those two inspectors, namely, James M. Oliver and Melvin L. Sperry, went to the six north section, and specifically to the No. 2 pillar split.

2. After examining the conditions that they saw in the No. 3 pillar split, they jointly wrote Order No. 655146, dated May 16, 1979, alleging that respondent had violated its roof-control plan, and thereby had violated section 75.200, because the continuous-mining machine had proceeded for a distance of 35 feet so as to bring the controls of the continuous-mining machine beyond roof supports.

3. Exhibit P-2 provides, in Paragraph 6, that "The operator shall not advance the controls of the miner inby the last row of bolts and additional bolting shall be done if necessary to keep the operator in compliance and breaker posts shall be extended to the last row of bolts during mining of wing lifts."

4. The inspectors based the violation on measurements of the intitial cut of coal in the pillar, and of the area off to the right of the bolted portion of the entry, as shown in Exhibits P-3 and P-5. The violation here is not the normal one which is encountered in this kind of situation, because the area of unsupported roof under which the operator of the continuous-mining machine proceeded was up the right rib of the pillar block. The inspectors based their conclusion that the operator of the continuous-mining machine had cut along the right rib in a straight direction, parallel to the right rib, on the fact that they saw ripper cutting marks, or bit marks, which were parallel to the right rib. They additionally made measurements beyond the last row of roof bolts to show that the last row of roof bolts was 17 feet outby the face of the cut of coal which had been mined.

5. Respondent presented as witnesses, the superintendent of the mine and the operator of the continuous-mining machine on the evening shift, which was the one involved in the violation cited in the inspectors' order. The operator of the continuous-mining machine testified that he did not go out from under supported roof in order to cut the coal, as it is depicted on Exhibit A. The operator of the continous-mining machine stated that he had inadvertently started cutting a wing off the initial split in the pillar, and had cut about one and maybe a little more of another shuttle car of coal when he realized that he had made a mistake. At that point, he backed up the continuous-mining machine and moved it inby that portion he had just cut, so as to begin cutting on the wing at a more inby point in this No. 3 pillar split. The operator stated that he had cut the coal out, as shown in the green area on Exhibit A, by the end of his shift, at which time the roof fall occurred. And he backed the continuous-mining machine out of the No. 3 pillar split, and left the section.

I think that those are the primary findings I need to make. A question of whether a violation of section 75.200 occurred must be based on the painful process of determining which of the various witnesses' testimony is the most credible. There are several considerations that must be made for me to find that a violation of section 75.200 occurred; and I shall explain them at this time.

The operator of the continuous-mining machine was unable to explain satisfactorily why an operator with 4 years of experience would have failed to recognize that he had no need to start taking a wing of coal out of a block, midway in that block, when he was aware of the fact that a previous operator had cut through the left side of the pillar at an opening which should have alerted the operator that the first wing of coal to be cut would be in the same area to which he eventually went, and which is shown on Exhibit A in green.

Another reason that I've elected to accept the inspectors' testimony as more credible than the operator's, is that the operator's Exhibit A does not purport to explain why the initial split had excess width, as compared with the red area, where the operator of the continuous-mining machine said he mistakingly made a cut. I cannot believe that the inspectors could have measured the distance from the rib to the last roof bolt on the left, in the four places shown on Exhibits P-3 and P-5, without having established that the right rib ran in a straight direction.

Additionally, the operator of the continuous-mining machine made no statements concerning whether there were bit marks running parallel to the right rib or running diagonally as they should have run, if this red and green area shown on Exhibit A had been mined in a diagonal fashion, as is shown by the location of the continuous-mining machine on Exhibit A.

Also, the inspectors measured the distance from the last roof bolt to the most inby area of the pillar split with their measuring tape and I do not believe they could have done that without having been aware of whether there was a roof fall in the green area or not. As Ms. Kaufmann pointed out in her closing statement, either there was not a roof fall there, or it had been cleaned up before the inspectors arrived on the scene.

There was no testimony by any expert to rebut the inspectors' claim that the cuts of the continuous-mining machine were parallel to the right rib. It is true that one of the inspectors believed that the make of the continuous-mining machine was a Joy machine, when in actuality it was a Lee Norse machine, but I did not hear anyone claim that the Lee Norse machine would fail to make any marks parallel to the rib, if the machine had been trammed while cutting in a straight inby path, from the beginning of the pillar to the last portion that was cut by the continuous-mining machine.

There has been some discussion by respondent's attorney as to the fact that Inspector Oliver seemed to think that this pillar block was only 35 feet long, whereas it appears to have been about 70 feet long. But I think that that is immaterial when it comes to a question of whether the continuous-mining machine was out from under permanent supports.

In any event, Inspector Sperry was very specific in drawing Exhibit P-5, showing that he depicted the posts which were in the crosscut outby the No. 3 pillar; and he said he was positive that the drawing he has on Exhibit P-5 shows the outby area of the pillar. The drawing, which he made very carefully on Exhibit 5, does show all of the pillar which is involved in the citation described in Order No. 655146.

For the reasons given above, I find that a violation of section 75.200 occurred when the controls of the continuous-mining machine were advanced beyond permanent supports. Having found that a violation occurred, it is now necessary to consider the six criteria. At least three of the criteria may be given a general consideration, which will be applicable to the settled cases as well as the contested case.

The parties entered into some stipulations about at least two of the criteria. It was stated that respondent is subject to the jurisdiction of the Act, the Commission, and the judges. It was also stipulated that the violation alleged in Order No. 655146 was abated in a normal good faith effort to achieve compliance.

It was stipulated that as to the size of respondent's business that it produces 530,342 tons of coal per year; and since respondent is an affiliate of Youngstown Sheet & Tube Company, it may be considered to be a large operator. To the extent that the size of the operator is considered in assessing a penalty, I find that the penalty should be in an upper range of magnitude.

The former Board of Mine Operations Appeals has held in several cases that if respondent presents no financial data, it may be concluded that the payment of a penalty would not cause it to discontinue in business. Since no financial data were presented in this case, I find that payment of penalties would not cause respondent to discontinue in business.

As to the criterion of the history of previous violations, counsel for the Secretary of Labor has stated that she will mail to me a computer printout in the near future, and will send a copy of it to counsel for respondent. And if he does not notify me of any errors that he thinks exists in the computer printout, I shall subsequently add to the written decision, which is mailed to the parties, a consideration of the criterion of history of previous violations.

A 21-page computer printout listing alleged violations for which respondent has already paid penalties was sent to me on May 24, 1980. That 21-page document is marked for identification as the Secretary of Labor's Exhibit P-6 in this proceeding and is received in evidence. Counsel for respondent has not notified me that he has found any errors in Exhibit P-6. Therefore, it will be used to evaluate the criterion of history of previous violations.

Exhibit P-6 shows that respondent has previously violated section 75.200 on 52 occasions. Sixteen of the violations occurred in 1977, 28 occurred in 1978, and 8 violations had occurred in 1979 by May 9, 1979. Since roof falls still account for a large percentage of the injuries and deaths which occur each year in underground mines, I consider it to be a serious matter when an operator has a long list of violations of section 75.200, especially if the violations have an upward trend, as they do in this case, because there is an increase from 16 violations in 1977 to 28 in 1978. Therefore,

the penalty otherwise assessable under the other five criteria for this violation of section 75.200 will be increased by $500 under the criterion of history of previous violations.

As to the criterion of gravity, there was considerable testimony by the inspectors to the effect that the roof conditions in the six north section were substandard, in that there was heaving of the bottom, and some cracking in the roof, and that going out from under the roof bolts would be a hazardous act for a person to make. Consequently, I find that the violation was serious.

As to the criterion of negligence, the evidence does not show that the section foreman on the second shift was aware of the fact that the continuous-mining machine had been used in the fashion that it was. There is evidence that this particular split on the No. 3 pillar was something that was written up by the preshift examiner. And there's been some testimony that danger boards had been erected outby the pillar. The inspectors did not see the danger board, but it is alleged that the preshift examiner had put one up. So, at least an effort had been made to alert people to the possibility that this was a dangerous area. Now, for that reason I find that there was not a large degree of negligence.

Considering that respondent is a large operator, that payment of penalties will not cause respondent to discontinue in business, that there was a normal good faith effort to achieve rapid compliance, that the violation was serious, and that there was a low degree of negligence, a penalty of $1,000 would have been assessed, but as indicated above, the penalty of $1,000 will be increased by $500 to $1,500 because of respondent's adverse history of previous violations of section 75.200.

APPROVAL OF SETTLEMENTS

DOCKET NO. WEVA 80-125

The violation here involved was an alleged violation of 30 C.F.R. § 77.202, which prohibits the existence of coal-dust accumulations in dangerous amounts. Order No. 655348, issued May 30, 1979, cited a violation of section 77.202 because float coal dust was present on all four levels of the crusher building, ranging in depths of up to 18 inches. The motion for approval of settlements states that respondent has agreed to pay the full penalty of $800 proposed by the Assessment Office in this instance, because the facts show that possible ignition sources existed in the area of some of the accumulations. Some mitigating factors were that the accumulations existed on surface facilities where there was little danger that dust would

accumulate in a hazardous amount, and that some steps were being taken to clean up the accumulations at the time the order was written. Therefore, the violation was not as serious as it would have been if it had occurred underground, and respondent was not as negligent as it would have been if no steps to clean up the accumulations had been taken.

I find that the Assessment Office determined an appropriate penalty, and that respondent's agreement to pay the full amount proposed by the Assessment Office should be approved.

DOCKET NO. WEVA 80-126

The single violation of section 103(f) of the Act involved in Docket No. WEVA 80-126 was alleged in Citation No. 654849, which stated that respondent failed to pay a miner who walked around with an inspector. The Assessment Office considered the violation to be nonserious, to be associated with ordinary negligence, and proposed a penalty of $114. Respondent has agreed to pay a reduced penalty of $52.

The motion for approval of settlement states that the reduced penalty is justified because respondent acted in good faith under its interpretation of section 103(f), namely that respondent was obligated to pay only one representative under the walkaround provisions of section 103(f) of the Act.

I find that respondent's agreement to pay a reduced penalty of $52 should be approved, because respondent was not as negligent, in the circumstances, as the Assessment Office believed when it proposed a penalty of $114 based primarily on attributing 10 penalty points under the criterion of negligence pursuant to 30 C.F.R. § 100.3.

DOCKET NO. WEVA 80-127

Three violations of section 77.202 are involved in Docket No. WEVA 80-127. The first violation of section 77.202 was alleged in Citation No. 654835, because the inspector asserted that float coal dust had accumulated on all three levels of the crusher building in depths of up to 3 inches. The motion for approval of settlement says that the Assessment Office's proposed penalty of $500 is excessive, and that respondent's agreement to pay $375 is justified, because respondent has a clean-up plan under which the

crusher building is washed down every three shifts, which had the effect of making the crusher building damp, and reducing the likelihood of fire or explosion. Additionally, the accumulations were less than 3 inches in depth, except in a few locations. It is said that these facts reduced the probability of fire, and also the degree of negligence.

The second violation of section 77.202 was cited in Order No. 654837, which alleged existence of float coal dust up to 6 inches in depth in the skip hoist facility. Respondent has agreed to pay a penalty of $450 instead of the penalty of $600 proposed by the Assessment Office. The motion for approval of settlement states that a reduced penalty is justified because the accumulations were less than 1 inch in all but a few locations, that there were no miners in the area described in the order, and that there were no ignition sources in the area.

The third violation of section 77.202 was cited in Order No. 654847 which alleged that float coal dust up to 1 inch in depth had accumulated at several places in the man hoist facility. The motion for approval of settlement states that a reduced penalty of $600 is warranted instead of the penalty of $800 proposed by the Assessment Office, because further investigation has indicated that the accumulations were less than 1 inch in depth in nearly all instances. The motion avers that that fact warrants a conclusion that respondent was not as negligent, and that the violation was not as serious as it had been considered to be by the Assessment Office.

I have found in prior cases that inspectors do not consider accumulations on the surface as serious as underground accumulations. Therefore, I find that satisfactory reasons have been given for accepting respondent's offer to pay reduced penalties for the three violations of section 77.202 involved in Docket No. WEVA 80-127.

DOCKET NO. WEVA 80-128

Two violations are involved in Docket No. WEVA 80-128. The first violation was of section 75.200, alleged in Citation No. 655224, which stated that respondent had failed to follow the provisions of its roof-control plan, because no temporary supports had been installed in the face area of the Nos. 1 and 2 entries after completion of the mining cycle. The motion for approval of settlement states that the No. 1 entry had been driven 19 feet inby permanent supports, and that the No. 2 entry had been driven 21 feet inby permanent supports, and that there were cracks in the roof. Since the

violation was serious and involved a high degree of negligence, the motion states that respondent has appropriately agreed to pay the full penalty of $1,000 proposed by the Assessment Office.

The second violation in this docket was cited in Order No. 655225 which stated that respondent had violated section 75.326 because belt haulage air was being used to ventilate the active working section. The motion for approval of settlement states that respondent's offer to pay a reduced penalty of $500 instead of the $1,000 penalty proposed by the Assessment Office is justified because, although belt haulage air was used to ventilate the working face, the air had reached the working face because respondent had been forced to remove a permanent stopping in order to bring in supplies needed for installing a new conveyor belt. The belt could not have been installed without removing the stopping.

At the time the order was written, the conveyor belt was not being operated. The motion states that the aforementioned facts show that the violation was not as serious and did not involve as much negligence as the Assessment Office believed to exist when it proposed the penalty of $1,000.

I find adequate reasons have been given to approve respondent's agreement to pay $1,000 and $500, respectively, for the violations of sections 75.200 and 75.326 involved in Docket No. WEVA 80-128.

Summary of Assessments

Based on all the evidence of record and the aforesaid findings of fact, or the parties' settlement agreement, the following civil penalties should be assessed:

Docket No. WEVA 80-124

Order No. 655146 5/16/79 § 75.200.....(Contested).....$ 1,500.00

Settlement Agreements

Docket No. WEVA 80-125

Order No. 655348 5/30/79 § 77.202.....$ 800.00

Docket No. WEVA 80-126

Citation No. 654849 4/23/79 § 103(f).....$ 52.00

Docket No. WEVA 80-127

Citation No. 654835 4/3/79 § 77.202.....$ 375.00

Order No. 654837 4/4/79 § 77.202.....$ 450.00
Order No. 654847 4/17/79 § 77.202.....$ 600.00

Total Penalties in Docket No. WEVA 80-127.....$ 1,425.00

Docket No. WEVA 80-128

Citation No. 655224 6/22/79 § 75.200.....$ 1,000.00
Order No. 655225 6/22/79 § 75.326.....$ 500.00

Total Penalties in Docket No. WEVA 80-128.....$ 1,500.00

Total Settlement and Contested Penalties in This Proceeding.....$ 5,277.00

WHEREFORE, it is ordered:

(A) The parties' requests for approval of settlement are granted and the settlement agreements submitted in this proceeding in Docket Nos. WEVA 80-125, WEVA 80-126, WEVA 80-127, and WEVA 80-128 are approved.

(B) Pursuant to the parties' settlement agreements and the bench decision rendered in the proceeding in Docket No. WEVA 80-124, respondent shall, within 30 days from the date of this decision, pay civil penalties totaling $5,277.00 as set forth in the paragraph under Summary of Assessments above.

Richard C. Steffey

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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24 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	:	Civil Penalty Proceedings : Docket No. WEVA 79-222 A/O No. 46-01367-03024 V
v.		:	
AMHERST COAL COMPANY,	Respondent	:	Paragon Mine : Docket No. WEVA 79-223 A/O No. 46-03773-03012 V
		:	MacGregor No. 8 Mine

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, Region III, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Edward I. Eiland, Esq., Logan, West Virginia, for Respondent.

Before: Judge Stewart

The above-captioned cases are civil penalty proceedings brought pursuant to section 110(a) 1/ of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. § 820(a). The hearing in these matters was held in Charleston, West Virginia, on January 16, 1980. At the conclusion of the hearing, the parties waived their right to file posthearing briefs.

1/ Section 110(a) of the Act reads as follows:
"The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense."

On December 7, 1978, inspector Henry J. Keith issued Order No. 23000 pursuant to section 104(d)(1) 2/ of the Act. He cited 30 C.F.R. § 75.1307 3/ and described the relevant condition or practice as follows:

> Explosives were not properly stored in the 10 road 008 section in that about 24 sticks of powder were lying on the floor of the No. 2 entry near a battery charger that was energized. Said explosive was not kept in a container constructed for this purpose. The container the explosives were in also was not closed. This was located in the above area.

The inspector found that the operator demonstrated an unwarrantable failure to comply with the mandatory standard. He noted that the operator had a responsibility to conduct an onshift examination in the section. He based his finding of unwarrantable failure on his belief that the condition was obvious and would have been observed in the course of such inspection.

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

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

"If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

3/ 30 C.F.R. § 75.1307 reads as follows:

"Explosives and detonators stored in the working places shall be kept in separate closed containers which shall be located out of the line of blast and not less than 50 feet from the working face and 15 feet from any pipeline, powerline, rail, or conveyor, except that, if kept in niches in the rib, the distance from any pipeline, powerline, rail, or conveyor shall be at least 5 feet. Such explosives and detonators, when stored, shall be separated by a distance of at least 5 feet."

The operator abated the condition by removing the explosives to the mouth of the section. In the opinion of the inspector, a normal degree of good faith was shown by the operator in abatement.

The parties were in agreement with respect to all statutory criteria to be considered in determining the amount of civil penalty to be assessed except for the issue of negligence. At the conclusion of Petitioner's presentation of evidence, the Administrative Law Judge made a finding from the bench with respect to the negligence of the operator in permitting the existence of the condition. This ruling was as follows:

> Let the record show that there have been discussions between counsel and the Judge and, in response to the question as to whether or not there was negligence, I find that the record at this point, as adduced by evidence of the Government, has failed to show the length of time that the explosives were in the area in which they were sighted by the inspector and it has not been shown that anyone connected with management was either in that area or should have been in that area at the time when the explosives were there. Therefore, it has not been shown that the company knew or should have known of the existence of the explosives where they were found by the inspector. Therefore, I find that there was no negligence by the operator.

As a result of this finding regarding negligence, and additional discussions between counsel, the parties agreed that the penalty in this case should be reduced to $200. A penalty of $1,500 had been proposed by MSHA's Office of Assessments. In support of the settlement agreement, counsel for Petitioner asserted the following:

> The parties have agreed that, although there was no negligence involved, this was a moderately serious situation warranting more than a merely nominal penalty. The parties feel that a penalty of $200 adequately reflects the absence of negligence and the seriousness of the violation. The operator's past history in regard to these types of violations is insubstantial. * * * The parties have reached a stipulation as to the size of the operator and it is agreed that the 1978 production figure of 1,377,448 tons is representative of the operator's average annual tonnage and that places this operator in the size of a medium sized operator. In light of these criteria the parties move that the proposed settlement of $200 for this violation be approved.

The settlement proposed by the parties was approved by the Administrative Law Judge on the record. This approval is hereby AFFIRMED.

On December 14, 1978, MSHA nspector Keith issued Order of Withdrawal No. 23035 pursuant to section 104(d)(2) 4/ of the Act, citing a violation of 30 C.F.R. § 75.200 5/ for failure to comply with the miner's roof-control plan.

The order of withdrawal noted that the area affected by this order was the No. 5 entry on the No. 4 unit, 027 section. The order, which was issued at 8:30 p.m., was terminated at 10 p.m., when "the entire area was temporarily supported and roof bolts were installed."

The operator mined the No. 4 unit, 027 section, on a five-entry system. The method used to mine was such that coal was simultaneously cut, mined, and loaded. A bridge-haulage mechanism, consisting of three connected segments, was attached to a continuous miner. The bridging linked the miner directly to the belt line which was located in the No. 3 entry.

The operator encountered adverse roof conditions in the No. 5 entry on December 5, 1978. The conditions began along the right rib of the entry and

4/ Section 104(d)(2) of the Act reads as follows:

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

5/ 30 C.F.R. § 75.200 reads as follows:

"Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives."

extended across the face areas. As the continuous miner was removed from the face area, a portion of the top fell. In so doing, it knocked out timbers and pulled out roof bolts. Tests performed on the roof indicated that the roof's condition continued to deteriorate. Because of this, the roof-bolting crew was removed and three or more cribs were placed in the center of the entry. The most inby crib was 8 feet from the face. The area left without roof support extended approximately 8 feet from this crib and more than 20 feet from rib to rib. A danger board was placed on the most outby crib and no one was permitted in the area. The operator did not permit entry of either machinery or employees into the area until after Order No. 23035 was issued.

The No. 5 entry had already been driven the length of the pillar. The operator decided, therefore, to approach the area from the crosscut rather than subject its employees to the hazard presented by the adverse conditions in the No. 5 entry. The operator proceeded cautiously to mine the last open crosscut between entries No. 4 and No. 5 (hereinafter, the 4 right crosscut). Cuts were made to depths of 10 feet rather than to the usual 20-foot depth. Roof bolts of 8 to 9 feet in length with plates measuring 6 inches x 16 inches were used, rather than the usual 3- or 4-foot bolts and 6 inch- x 6-inch plates. In addition, the roof-bolting cycle was changed so as to afford the operator of the continuous miner greater protection.

The operator holed through from the crosscut into the No. 5 entry during the day shift on December 14, 1978. The dimensions of this hole were 2 feet x 3 feet. By the end of the day shift, the roof in the 4 right crosscut had been bolted up to the face. No unusual roof problems had been encountered in the 4 right crosscut.

James Cole, the section foreman in charge of the section during the second shift on December 14, 1978, was on the No. 4 unit at the time the inspector issued Order No. 23035. The 9- to 10-foot cut which completed the breakthrough into the No. 5 entry had been made at approximately 6:30 p.m. The roof bolter was in the process of bolting this newly cut area when the inspector arrived. One row of bolts and four temporary posts had been installed. No miner or equipment had ventured under the unsupported or bad roof in the No. 5 entry.

In the order of withdrawal, the inspector described the pertinent condition or practice as follows:

> The roof control plan was not being complied with in the No. 5 entry in that a side cut was made where a crosscut from No. 4 entry entered into the right rib of the No. 5 entry. An area 20 feet wide and eight feet in length approaching an installed crib was not temporarily or permanently supported and evidence indicates that machinery was permitted to work inby. See page 8, paragraph 11, (a) and (b) of the roof control plan.

Although the inspector wrote on the order under "action to terminate" that mine management abated the condition by supporting the entire area with roof bolts, Mr. Cole testified that the inspector allowed work to continue after two safety jacks were set in the No. 5 entry, inby the right side of the 4 right crosscut.

Paragraph 11 of the roof-control plan provides as follows:

> (a) Sidecuts shall be started only in areas that are supported with permanent roof supports. During development, except where old workings are involved, working places shall not be holed through into accessible areas that are not supported on 5-foot maximum spacing lengthwise and crosswise to within 5 feet of the face.
>
> (b) When new openings are created and/or sidecuts are made, the newly exposed area shall be supported with temporary or permanent supports in accordance with the development plan, or a row of posts on 4-foot maximum spacing installed across the mouth of the opening before any machinery is permitted to work inby.

The record establishes that the mining procedure utilized by the operator to cope with the roof problems in the No. 5 entry placed it in violation of paragraph 11, sections (a) and (b), of its roof-control plan. Although a sidecut was not started from the area in the No. 5 entry that was not supported with permanent roof supports, the operator holed through from the 4 right crosscut into the No. 5 entry despite the absence of support in the No. 5 entry. That is, a working place was holed through into an accessible area that was not supported on a 5-foot maximum spacing lengthwise and crosswise to within 5 feet of the face, thereby violating paragraph 11, section (a). In completing the breakthrough from the 4 right crosscut, the operator violated paragraph 11, section (b), in that machinery was permitted to work inby roof which had not been supported with temporary or permanent supports in accordance with the development plan and no row of posts been placed across the mouth of the opening into the No. 5 entry.

At the hearing, the tenor of Inspector Keith's account of the alleged violation conformed with that of Respondent's witnesses, but it diverged significantly in matters of detail. Respondent called four witnesses to testify in its behalf at the hearing. Three of these four witnesses--Willard Bourne, James Cole, and Clarence Preston--were section foremen at the Paragon Mine during the time period material herein. The fourth, Ernest Marcum, was Respondent's safety inspector. These witnesses who directly participated in the mining process provided an accurate account of the events and conditions existing prior to the issuance of Order No. 23035. The inspector, whose recollection was faulty as to some details, had no direct knowledge of the sequence of events which led to the conditions but drew his conclusions regarding this sequence from observations of conditions which prevailed at the time he issued the order. Nevertheless, the inspector observed conditions

which were in violation of the roof control plan and, even with the testimony of Respondent's witnesses which is accepted as being accurate in detail, the record clearly establishes the existence of the violation.

The negligence of the operator in allowing the occurrence of this violation was slight. Although temporary support should have been provided in the unsupported area of the No. 5 entry before permanent support was placed in the area of the last cut, proper mining procedure had been otherwise followed by the operator. After being confronted with working top in the No. 5 entry on December 5, 1978, the operator proceeded with caution to make the best of the situation.

Although the negligence of the operation was not of the degree asserted by Petitioner based on the observations of the inspector, the gravity of the violation was substantial. The roof-bolting crew was at work adjacent to the area of unsupported and bad roof in the No. 5 entry. If the roof had started falling, the fall could have continued into the area in which the bolting crew was working. The type of injury to be expected in the event such an accident occurred would be a fatality or serious injury.

The operator demonstrated a normal degree of good faith in the abatement of this condition.

The operator's history of prior paid violations from December 15, 1976, through December 14, 1978, at the Paragon Mine is as follows: Respondent's history of violations reflects a total of 153 prior paid violations in 1977 and 212 prior paid violations in 1978. The number of prior paid violations of 30 C.F.R. § 75.200 amounted to 4 in 1977 and 25 in 1978.

The parties stipulated that penalties assessed herein will not adversely affect the operator's ability to continue in business. The parties also agreed that the 1978 production figure of 1,377,448 tons is representative of the operator's average annual tonnage and that the size of Respondent is that of a medium operator.

Assessments

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

Order No.	Penalty
23000	$200
23035	$200

ORDER

It is hereby ORDERED that Respondent pay the sum of $400 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

Issued:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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25 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceedings Docket No. KENT 80-155 A.O. No. 15-02709-03071V Camp No. 1 Mine
v.		
PEABODY COAL COMPANY,	Respondent	Docket No. KENT 80-156 A.O. No. 15-02069-03011 Sinclair Strip Mine Docket No. KENT 80-157 A.O. No. 15-05046-03058H Alston No. 3 UG Mine

DECISIONS

Appearances: George Drumming, Jr., Attorney, U.S. Department of Labor, Nashville, Tennessee, for petitioner;
Thomas Gallagher, Esquire, St. Louis, Missouri, for respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings were docketed for hearings in Evansville, Indiana, June 26, 1980, along with another proceeding involving the same parties. The parties made a proposal to settle these dockets without the need for an evidentiary hearing and they were afforded an opportunity to present their arguments in support of their proposed settlement on the record.

These cases are civil penalty proceedings initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, through the filing of civil penalty proposals for a total of five alleged violations of certain mandatory safety standards promulgated pursuant to the Act. Respondent filed timely answers contesting the citations, requested hearings in Evansville, but as indicated above, the parties subsequently proposed to settle the cases. The citations, initial assessments, and the proposed settlement amounts are as follows:

Docket No. KENT 80-155

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
0798644	7/27/79	75.400	$1,500	$ 500
0798285	7/31/79	75.1101-7(b)	1,500	500
0798291	8/14/79	75.200	1,500	1,500

Docket No. KENT 80-156

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
0799651	10/11/79	77.807	$ 180	$ 180

Docket No. KENT 80-157

Citation No.	Date	30 C.F.R. Section	Assessment	Settlement
0797795	8/9/79	75.400	$3,000	$1,500

DISCUSSION

Docket No. KENT 80-155 concerns three citations. Citation No. 0798291 concerns a violation of the mine roof-control plan and abatement was achieved within an hour after the issuance of the citation. The proposed settlement is for 100 percent of the initial proposed settlement.

Citation No. 0798644 concerns an alleged accumulation of loose coal, rock, and some float coal dust along a belt and belt idlers. Respondent argued that its records reflected that during the third shift on the day before the citation issued, eight belt shovelers were working on the belt. On the day the citation issued, four belt shovelers were working. Thus, respondent argues that it was making a good faith effort to keep the belt clean of accumulations (Tr. 8). Abatement was achieved the same day the citation issued by cleaning and rock dusting the belt and respondent exercised good faith compliance (Tr. 7).

Citation No. 0798285 concerns a water sprinkler system which provided protection for only 23 feet of a belt conveyor drive. However, respondent pointed out that section 75.1101-7(b) is intended to provide fire protection over the belt drive which normally is 35 to 40 feet in length. In this case, the belt drive being used on the day of the inspection was a portable drive approximately 18 feet long. Consequently, while the existing water spray system afforded protection for only 23 feet it did in fact extend over the 18-foot portable belt drive and afforded fire protection (Tr. 8, 11).

In addition to the foregoing, petitioner asserted that respondent is a large operator, that its prior mine history of violations is not excessive for an operation of its size, and that each citation here in question resulted from ordinary negligence. While the conditions cited were serious,

respondent exhibited good faith abatement and the penalties agreed to will not adversely affect respondent's ability to continue in business.

Docket No. KENT 80-156 concerns an alleged violation of section 77.807 for failure to adequately protect a drill trailing cable operating at the pit high wall from being run over by mobile equipment. Although respondent recognizes that section 77.807 deals with high voltage transmission cables, while section 77.604, which was not cited, specifically covers trailing cables, it nonetheless agreed to pay the full assessment of $180 and it did so because it believes that MSHA could establish the fact of violation, that it could amend its pleadings to cite the more appropriate section 77.604, and respondent candidly conceded that it was aware of the specific section it had violated and would not be prejudiced by any amendment to the pleadings (Tr. 15-19).

Petitioner asserted that the inspector who issued the citation was available to testify regarding the citation and that he would testify there is not very much difference in a trailing cable and a high-voltage cable (Tr. 16). Petitioner also asserted that the violation was serious, that it resulted from ordinary negligence, and was abated in good faith. Further, petitioner asserted that respondent's mining operations are large, that the penalty will not adversely affect its ability to remain in business, and that the previous history of citations at the mine is not excessive (Tr. 14).

Docket No. KENT 80-157 concerns an alleged accumulation of loose coal in a belt entry, and float coal dust on the mine floor and belt-control box (Tr. 20). Petitioner again asserted that the mine operation is large, that the previous history of violations at the mine site in question was not excessive. The conditions cited were serious, resulted from ordinary negligence, and payment of the proposed settlement amount will not adversely affect respondent's ability to remain in business (Tr. 20).

With regard to the circumstances surrounding the cited conditions, respondent asserted that had the case proceeded to hearing, it would present the testimony of the union belt walker who walked the area prior to the inspector and observed nothing of consequences, and particularly no imminent danger. Further, the mine manager would dispute the inspector's measurements concerning the accumulations and would also testify that the cited coal dust was in fact dust from rock which was being transported on the belt. The area of the alleged accumulation was approximately 12 inches high and 8 feet long, and not 14 feet long as described by the inspector (Tr. 19-24).

Petitioner agreed that the conditions were abated in good faith and that the loose coal was apparently loaded out immediately (Tr. 25, 29).

CONCLUSION

After careful review and consideration of the arguments presented by the parties in support of the proposed settlement disposition of these cases, I find that they are reasonable and in the public interest and they

are approved. The total settlement amount of $4,180 for the five contested citations is reasonable considering all of the circumstances presented in these cases.

ORDER

Respondent IS ORDERED to pay civil penalties in the amounts indicated above, totaling $4,180, within thirty (30) days of the date of these decisions. Upon receipt of payment by the petitioner, these cases are dismissed.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

25 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-192-M MSHA CASE NO. 05-02337-05005
v.	DOCKET NO. WEST 79-305-M MSHA CASE NO. 05-02337-05009
CLIMAX MOLYBDENUM COMPANY, Respondent.	MINE: CLIMAX MILL AND CRUSHERS

DECISION

APPEARANCES:

Robert Bass, Esq., and Eliehue Brunson, Esq., Office of T. A. Housh, Regional Solicitor, United States Department of Labor, Kansas City, MO. for the Petitioner,

Richard W. Manning, Esq., Climax Molybdenum Company, Golden, Colorado for the Respondent.

Before: Judge John J. Morris

WEST 79-192-M

Citation 331477

Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent, Climax Molybdenum Company, failed to provide handrails for the protection of its employees. MSHA asserts Climax thereby violated 30 CFR 57.11-2, [1] a regulation promulgated under the statutory authority of the Federal Mine Health and Safety Act of 1969 (amended 1977), 30 U.S.C. § 801 et seq.

1/ The cited standard reads as follows:
57.12-30 Mandatory. Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

ISSUE

The issue is whether Climax violated the standards.

FINDINGS OF FACT

The evidence is uncontroverted. I find the following facts to be credible.

1. In the Climax Mill, there was an unguarded elevated walkway 30 feet in length (Tr 6 - 7, 16, R1).

2. The walkway, five feet above the concrete, was 12 to 14 inches wide (Tr 6 - 9).

3. A worker positioned himself on the planks in order to rotate the pipe every three years. According to maintenance records, the pipe had not been rotated in six years (Tr 24).

4. In order to move the 30 inch pipe, it is necessary to remove the handrails.

5. No worker would be on the walkway other than to change, rotate, or remove the pipe (Tr 25).

6. When the pipe is changed, rotated, or removed, workers tie off with safety lines (Tr 25).

DISCUSSION

Climax contends that the cited area is not a walkway as defined in 30 C.F.R. 57.11-2. The basis for the argument is that the 2 x 12 planks do not lead to anything other than a blank walk. In addition, a worker must cross over the 30 inch pipe to reach the area.

I reject Climax's argument. MSHA defines tunnelway but not a walkway. Webster [2] indicates one definition of a walkway is as follows:

> A passageway in a place of employment (as a factory or restaurant) designed to be walked on by the employees in the performance of their duties.

Climax's employees use this area to gain access to the pipe. It accordingly constitutes a walkway.

The evidence, however, establishes that to perform their duties the handrails must be removed. The area is not otherwise used by workers. These facts establish impossibility of compliance with the regulation.

While the Commission has not addressed this defense, it is the writer's view that it is an affirmative defense. Respondent must show that compliance is functionally impossible. Further, alternative effective protection must be used to protect the workers. Here the Climax workers tied off when using the walkway. The facts establish the defense of impossibility of performance. OSHA Review Commission cases on this defense are Everhart Steel Construction Company, OSHA Docket No. 3217 (April, 1975); Hughes Brothers, Inc., No. 12523 (July 1978); Julius Nasso Concrete Corporation, et. al. No. 16012 (December 1977).

Climax has established impossibility of compliance and I therefore conclude that Citation 331477 should be vacated.

SETTLEMENTS

During the hearing, Climax moved to withdraw its notice of contest as to the four remaining citations in this case. Petitioner does not object and pursuant to Commission Rule 2700.11 the motions should be granted.

2/ Webster's Third New International Dictionary, unabridged, 1976.

Citation 331860

MSHA in this penalty proceedings charges Climax failed to provide handrails for a storage area thereby violating 30 C.F.R. 57.11-2. [3]

The evidence is uncontroverted and I find the following facts to be credible.

7. A flat roof shed was located inside a larger building (Tr 31-44).

8. The 10 foot high shed was 7 feet deep at the top; it had no handrails (Tr 31, 32, 42, G1).

9. It was 7 feet beneath the roof of the larger building at the front of the shed angling to zero feet at the back (Tr 41-43, G1, R2, R4).

10. At the time of the inspection there were empty cardboard boxes a foot from the edge of the roof of the shed (Tr 36, 38, 40).

DISCUSSION

To establish a prima facie violation of a standard, petitioner must establish two things. First, that the described factual situation falls within the terms of the standard. Second, that there were one or more employees who were exposed to the hazard or who had access to the hazardous condition. MSHA's proof of the first category fails. The top of the shed is not one of the areas described in the standard. It is not a crossover, an elevated walkway, an elevated ramp, nor a stairway.

It follows that Citation No. 331860 should be vacated.

3/ Note 1.

SETTLEMENT

During the hearing, Climax moved to withdraw its notice of contest as to Citation 332562. Petitioner does not object. Pursuant to Commission Rule 2700.11, the motion should be granted. [4]

CONCLUSIONS OF LAW

CASE WEST 79-192-M

1. Respondent established the defense of impossibility of compliance with 30 C.F.R. 57.11-2 (Facts 1 - 6).

2. Citation No. 371477 and the proposed penalty therefor should be vacated.

3. On respondent's motions to withdraw the following citations and their respective proposed penalties should be affirmed:

Citation Numbers 329264, 329265, 329268, 329273

CASE WEST 79-305-M

4. Respondent did not violate 30 C.F.R. 57.11-2 and Citation 331860 should be vacated together with proposed penalty.

5. On respondent's motion, Citation No. 332562 and the proposed penalty should be affirmed.

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

ORDER

CASE WEST 79-192-M

Citation No. 331477 and all proposed penalties therefor are vacated.

4/ The motion to vacate appears on pages 42 - 43 in the case involving the parties. The caption is noted as Docket WEST 79-303-M, WEST 79-304-M, WEST 79-306-M.

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

ORDER

CASE WEST 79-192-M

Citation No. 331477 and all proposed penalties therefor are vacated.

Citations No. 329264, 329265, 329268, and 329273 and the proposed penalties therefor are affirmed.

CASE WEST 79-305-M

Citation No. 331860 and the proposed penalty therefor are vacated.

Citation No. 332562 and the proposed penalty therefor are affirmed.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

25 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings Docket Nos. BARB 77-266-P BARB 76X465-P
v.	:	
JIM WALTER RESOURCES, INC.,	:	No. 4 Mine Brookwood, Tuscaloosa County, Alabama
COWIN AND COMPANY, INC., Respondents	:	

DECISIONS

Appearances: J. Philip Smith, Trial Attorney, U.S. Department of Labor, Arlington, Virginia, for the petitioner;
Robert W. Pollard, Esq., Birmingham, Alabama, for the respondent, Jim Walter Resources, Inc.;
William H. Howe, Esq., Washington, D.C., for the respondent, Cowin and Company, Inc.

Before: Judge Koutras

Statement of the Proceedings

These proceedings are consolidated civil penalty proceedings filed under sections 109(a)(1) and 109(c), of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 819(a)(1) and (c), charging the respondents with an alleged violation of mandatory safety standard 30 C.F.R. § 77.1903(b), for failure to use certain ANSI standards as a guide during shaft construction. The petitions for assessment of civil penalties filed against the respondents seek civil penalty assessments for the alleged violation which was cited in a section 104(b) notice of violation issued by MSHA mine inspector Robert K. Kuykendall on June 16, 1975. The notice issued after an investigation of a fatal accident which occurred on June 9, 1975, at the production shaft being constructed by respondent Cowin and Company at respondent Jim Walter Resources, Inc., No. 4 Mine, located at Brookwood, Tuscaloosa County, Alabama. (Jim Walter Resources, Inc., was formerly known as U.S. Pipe.)

On January 19, 1976, MSHA filed petitions for assessment of civil penalty, pursuant to section 109(c) of the 1969 Act, against two individual

employees of Cowin and Company: Earl Hosmer (BARB 76-211-P) and James Hosmer (BARB 76-212-P). Each of these individual respondents moved for dismissal on the ground that the underlying notice was invalid since it had been improperly issued to Cowin and Company, an independent contractor. By order dated April 20, 1976, MSHA was allowed to withdraw the petitions without prejudice.

On July 20, 1976, MSHA issued a modified notice, naming Jim Walter Resources as the operator instead of Cowin and Company. Then, on August 2, 1976, MSHA again filed petitions for assessment of civil penalty pursuant to section 109(c), this time against Cowin and Company, Earl Hosmer (BARB 76X466-P and James Hosmer (BARB 76X467-P). More than a year later, on July 13, 1977, MSHA filed a petition for assessment of civil penalty, pursuant to section 109(a) of the 1969 Act, against Jim Walter Resources (BARB 77-266-P).

By order dated December 20, 1977, all four cases were consolidated for hearing. Subsequently, the two individual respondents who were employees of Cowin paid penalties agreed upon with the Office of Assessments, and were dismissed by me as parties on May 19, 1978.

Jim Walter Resources remains as a respondent, against which penalties are sought pursuant to section 109(a) of the 1969 Act. Cowin remains as a respondent, under MSHA's theory that as a corporation and independent construction contractor, Cowin may be penalized under section 109(c) of the 1969 Act for knowingly authorizing, ordering, or carrying out a violation of the Act charged to Cowin's coal mine operator customer, Jim Walter Resources.

After several continuances at the request of the parties, hearings were held at Birmingham, Alabama, on May 16 and 17, 1978, and the parties appeared and were represented by counsel. Posthearing proposed findings and conclusions, with supporting briefs, were filed by the parties, and on October 19, 1978, I rendered decisions wherein I vacated the citation and dismissed the cases. Thereafter, on November 21, 1979, the Commission reversed my decisions and remanded the cases to me for further adjudication in accordance with the remand order. Subsequent to the remand, respondents filed an appeal in the U.S. District Court of Appeals for the District of Columbia Circuit seeking review of the Commission's decision reversing my decisions. By order of the court on January 30, 1980, the appeal was voluntarily dismissed without prejudice pursuant to Rule 42(b), F.R. App. P., and the cases were redocketed pursuant to the original Commission remand and are now before me for further adjudication.

The basis for my original vacation of the notice of violation issued in these proceedings was my belief that by failing to apprise the respondents of the specific ANSI standards allegedly not used as a guide, MSHA deprived the respondents of any reasonable opportunity to know the specific charges against them and deprived the respondents of a full and fair opportunity to defend said charges. As pointed out by me at page 37 of my October 19, 1978, decision:

> Forcing an operator to forage among the detailed, technical, and I might add, somewhat confusing standards which have not been revised for some 18 years, to ascertain precisely what he is being charged with is basically unfair, particularly in a case where an operator is charged under section 109(c) with a knowing violation.

And, at page 41:

> [W]here a respondent is charged with a knowing violation, specificity should be the touchstone of any notice issued to an operator charging him with a violation.

In order to determine the issues which remain for trial and to determine a schedule for any additional hearings, an informal conference was held in my office on February 12, 1980, and counsel for petitioner and Cowin appeared and participated therein. Although notified of the conference, counsel for respondent Jim Walter Resources, Inc., did not appear, nor did he participate. Subsequently, on February 13, 1980, I issued an order inviting all parties to file any additional pleadings or arguments so as to bring this matter to finality. In response to that order, the parties filed the following pleadings.

February 21, 1980

Petitioner filed a motion for leave to amend its proposals for assessment of civil penalties to charge respondent Cowin as an operator of the mine pursuant to section 109(a) of the 1969 Act, or in the alternative, as a statutory agent of respondent Jim Walter Resources, Inc., pursuant to section 109(c) of the Act. In support of its motion, petitioner asserted that the proposed amendment merely changes the charges as to the legal capacity under which Cowin committed the alleged violation, and if granted, would leave respondent Jim Walter Resources, Inc., charged in Docket BARB 77-266-P as the owner-operator of the mine pursuant to section 109(a), and respondent Cowin in Docket BARB 76X465-P as an operator of the mine pursuant to section 109(a), or, in the alternative, as a statutory agent of corporate operator Jim Walter Resources, Inc., pursuant to section 109(c).

March 6, 1980

Respondent Cowin filed a motion to dismiss the proposal for assessment of civil penalty against it on the ground that, as an independent contractor, it cannot be charged as an agent of corporate operator Jim Walter Resources, Inc., under section 109(c), and in support of its motion, Cowin restated by reference its previous arguments advanced in pages 11 through 16 of its post-hearing brief previously filed in these proceedings, as well as the recent Fourth Circuit decision in Cowin and Company, Inc. v. Federal Mine Safety and Health Review Commisson, et al., No. 78-1825, December 28, 1980.

March 7, 1980

Petitioner filed an opposition to Cowin's motion to dismiss, and in support thereof, relied on its previously filed posthearing brief (p. 15), and the points and authorities set forth in its memorandum in support of its motion to amend filed February 21, 1980.

March 17, 1980

Respondent Jim Walter Resources, Inc., filed an opposition to petitioner's motion to amend its proposals for assessment of civil penalty, seeking to name Cowin as an operator pursuant to section 109(a) of the 1969 Act. In support of its opposition, respondent Jim Walter Resources, Inc., argued that the Fourth Circuit decision is binding in this case, that the Commission's remand granted no authority for MSHA to seek an amendment of its pleadings, and that the granting of the motion to name Cowin as an operator presents a new theory of "Dual operator's [sic] for one mine." Respondent Jim Walter Resources asserted that there can be but one operator of the mine, and if Cowin is found to be the operator of the mine, Jim Walter Resources, Inc., must be dismissed from the case.

On April 1, 1980, I issued an order ruling on the aforesaid motions filed by the parties, and they are as follows:

1. Jim Walter's motion that it be dismissed as a party-respondent was DENIED.

2. Relying on the Fourth Circuit decision noted above, I GRANTED Cowin's motion to dismiss it as section 109(c) party-respondent and accepted the argument that it may not be charged as a statutory agent of Jim Walter.

3. Cowin's motion to be dismissed as a party-respondent under section 109(a) was DENIED.

4. Petitioner's motion to amend its pleadings to name Cowin as a section 109(a) party-respondent was GRANTED, and petitioner's alternative motion to name Cowin as a statutory agency of Jim Walter under section 109(c) was DENIED.

In addition to the aforesaid rulings, the parties were directed to identify any issues remaining for adjudication by me in accordance with the remand, and were afforded an opportunity to request any additional hearings or conferences, including the submission of any additional arguments in support of their respective positions. Thereafter, on April 7, 1980, respondent Cowin requested that I certify for interolocutory review by the Commission pursuant to Commission Rule 74, 29 C.F.R. § 2700.74(a), a portion of my April 1, 1980, order denying its motion to be dismissed as a party-respondent in these proceedings. I denied the request for certification by order issued April 24, 1980. Subsequently, by petition filed with the Commission on May 5,

1980, Cowin sought interlocutory review by the Commisson of my order denying its request for certification, and on May 12, 1980, the Commission denied Cowin's petition.

Issues Presented

In its original decisions of November 21, 1979, reversing and remanding these cases to me, the Commission stated as follows:

> We accordingly reverse and remand this case for further proceedings. In so doing we note that while numerous standards and regulations have been promulgated in implementation of the 1969 Act, a civil penalty sanction is authorized under section 109(a) only for a violation of a mandatory standard or other provisions of the Act. In addition to the other issues raised, in remanding we instruct the judge to address the threshhold question of whether 30 CFR § 77.1903(b) is a mandatory safety standard for which a civil penalty may be assessed or whether the regulation is merely advisory.

On May 23, 1980, in response to my order of April 1, 1980, directing the parties to identify the issues remaining for adjudication on remand, respondent Cowin filed the following statement of issues:

> (a) Whether 30 CFR § 77.1903(b) is a mandatory safety standard for which a civil penalty may be assessed or whether the regulation is merely advisory?
>
> (b) Whether the Secretary has bypassed applicable MSHA regulations and prejudiced Cowin by charging it as an operator at the administrative hearing stage, thereby denying Cowin access to MSHA's penalty assessment procedures?
>
> (c) If 30 CFR § 77.1903(b) is a mandatory safety standard, was there a violation of that standard, as alleged by petitioner?
>
> (d) If a violation occurred, what is the amount of the civil penalty which should be assessed?

On May 21, 1980, petitioner filed its response to my order of April 1, 1980, and identified the issues as follows:

> (a) Whether 30 CFR § 77.1903(b) is a mandatory safety standard for which a civil penalty may be assessed under section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969, or whether the regulation is merely advisory.
>
> (b) If 30 CFR 77.1903(b) is a mandatory safety standard, whether the violation of said standard as charged against each of the respondents in fact occurred at the No. 4 Coal Mine.

(c) If so, the amount of civil penalty which should be assessed against each of the Respondents pursuant to section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969.

Discussion

Although given ample opportunity to do so, respondent Jim Walter Resources, Inc., has failed to respond to any of my post-remand orders and has apparently opted not to file any additional arguments or to request any further hearings. Under the circumstances, I can only conclude that it has waived its right to present any additional defense with respect to its position in this matter as a party-respondent, and any decision that I render in these dockets insofar as it may affect Jim Walter Resources is made on the basis of the record presently before me. With respect to the remaining parties, they are in agreement that these cases may now be decided by me without further hearings on the basis of the present record, including all of the additional arguments filed by the parties after the Commission's remand on November 21, 1979.

Findings and Conclusions

Is 30 C.F.R. § 77.1903(b) a mandatory safety standard or merely advisory?

Section 77.1903(b) states as follows: "The American National Standards Institute, 'Specifications For The Use of Wire Ropes For Mines,' M 11-1-1960, or the latest revision thereof, shall be used a guide in the use, selection, installation, and maintenance of wire ropes used for hoisting."

Respondent Cowin argues that section 77.1903(b) is not a mandatory standard for which a civil penalty may be assessed, but merely an advisory standard which incorporates the voluntary ANSI guidelines and recommendations. In support of this assertion, respondent states that the ANSI wire rope standards incorporated by section 77.1903(b) were developed as recommendations and that the specific ANSI sections relied on by the petitioner as the basis for the alleged violation are also written in advisory terms. Respondent also argues that section 77.1903(b) did not change the ANSI standards from advisory to mandatory by incorporating them as a guide, and that the advisory language of the standards "should be," "recommended," and "advisory" are retained totally intact.

In support of its arguments, respondent cites the testimony of MSHA technical specialist Fred Williams during the hearings (Tr. 332-334), and concludes that it is evident that the drafters of section 77.1903(b), including Mr. Williams, deliberately chose not to use the mandatory "shall," but rather, intended to leave it up to each contractor to use its judgment to determine which recommendations to follow. Respondent also points out that since the wording of section 77.1903(b) differs from that of any other section of Subpart T in that it is the only section which provides that a standard shall be used as a guide, while the other sections set forth

specific standards that must be met, it is evident that section 77.1903(b) was intended to retain the advisory character of the ANSI standards.

Respondent cites two cases decided under the Occupational Safety and Health Act, Pan American Airways, 1975-1976 OSHD 20,674 (May 5, 1976), and Edward Hines Lumber Co., 1976-1977 OSHD 21,136 (September 29, 1976), in support of its argument that where ANSI standards have been the source for regulations under OSHA they have been found to be advisory and not mandatory, and quotes from the opinion of OSHRC Commissioner Moran in Pan American that "A violation of the Act's general duty clause cannot be predicated on a regulation which is no more than a recommendation."

Finally, respondent argues that the petitioner's assertion that while the particular ANSI standards themselves may not be mandatory, it is nevertheless mandatory for an operator to use them as a guide is a totally artificial distinction that contorts the meaning of the term "mandatory" and invites arbitrary application of section 77.1903(b). Even under the petitioner's theory, respondent maintains that a company may adopt wire rope practices which do not conform with the ANSI recommendations as long as the company uses those standards as a "guide." Respondent suggests that this means that under the petitioner's theory, whether or not a penalty is assessed does not depend upon whether the company's practices conformed with identifiable mandatory standards, but depends upon whether the practices were sufficiently guided by the ANSI recommendations. Thus, if two companies adopted the same wire rope practices which did not conform with the ANSI recommendations, the company that used the recommendations for guidance would not be subject to a penalty, but the company that did not use them as a guide would be subject to a penalty. Respondent concludes that the Act did not intend such arbitrary results, and that since the ANSI standards underlying section 77.1903(b) are advisory only, section 77.1903(b) is not a mandatory safety standard for which a penalty may be assessed.

Petitioner takes the position that section 77.1903(b) is a mandatory rather than an advisory safety standard, and argues that not only was 30 C.F.R. § 77.1903(b) properly promulgated as a mandatory safety standard pursuant to the rulemaking procedures of the 1969 Act, but respondent Cowin actively participated in said rulemaking proceedings (p. 19 of Petitioner's Posthearing Brief, filed August 28, 1978). Moreover, petitioner asserts that respondent Cowin specifically stated in its shaft-sinking plans (submitted to and approved by MESA) that it would comply with the mandatory safety standard under 30 C.F.R. § 77.1903(b); i.e., it would use the ANSI Standards ("Specifications For The Use of Wire Ropes For Mines," M11.1-1960) as a guide in the use, selection, installation, and maintenance of wire ropes used for hoisting at the mine construction site (pp. 6-7 of Petitioner's Posthearing Brief).

In response to respondent's assertions that section 77.1903(b) should be deemed advisory because the incorporated ANSI standards therein consistently use only the words "should be," "recommended," and "advisable," rather than mandatory words for their application, petitioner states that this is simply not true and points out that sections 5.2.1, 6.3.1.1, and 6.3.1.2 are the

most important ANSI standards which respondent failed to use as a guide in this case, and that section 5.2.1 states that "care must be exercised in handling to avoid kinking of the wire rope," etc; section 6.3.1.1 starts out by stating that "it is essential that tread diameters of sheaves and drums be liberal," etc; and section 6.3.1.2 starts by stating that "it is essential that head, idler, knuckle, and curve sheaves and grooved drums have grooves which support the rope properly." Petitioner asserts that it was the use of the K4UL tugger hoist wire rope with an undersized sheave and undersigned drum which caused the kinking, crushing and breaking damage to said rope which in turn led to its failure and the fatal accident (pp. 5 and 8-14 of Petitioner's Posthearing Briefs).

Regarding respondent's reliance on the Pan American Airways and Edward Hines Lumber Co., cases, supra, petitioner submits that these cases are clearly distinguishable from the instant proceedings in that in Pan American Airways the regulation in question (use of the color yellow to mark tripping and similar physical hazards), which was derived from an ANSI Standard, was held to be unenforceable because it failed to tell the employer which objects were required to bear the caution markings, and thus amounted to a recommendation only. However, petitioner maintains that the important distinguishing factor of that case is that the Secretary of Labor had adopted the ANSI standard involved as a mandatory safety standard pursuant to section 6(a) of the Occupational Safety and Health Act of 1970 (the "OSH Act"), without following the rulemaking procedures provided for under section 6(b) of said Act. In this same connection, petitioner cited the later OSHA case of Kennecott Copper Corporation, 1976-1977 OSHD par. 20,860 (July 8, 1976), wherein the Occupational Safety and Health Review Commission specifically held that the Secretary of Labor's adoption of an ANSI standard (concerning scaffold guarding) as a mandatory standard, by changing the word "should" to "shall", was improper for failure to follow the rulemaking procedures under section 6(b) of the OSH Act.

In Edwind Hines Lumber Co., supra, the second OSHD case cited by respondent, petitioner asserts that it involved a standard which provided that "power controls and operating controls should be located within easy reach of the operator," and it was held to be advisory only because the language was not revised to make the standard mandatory when it was adopted from the ANSI source. Petitioner submits that this case is also distinguishable from the one at bar since 30 C.F.R. § 77.1903(b) specifically uses the word "shall" and therefore is clearly mandatory.

In summary, petitioner maintains that section 77.1903(b) is clearly not voluntary or advisory because it specifically states that the ANSI standards, "Specifications For The Use Of Wire Ropes for Mines," M11.1-1960, shall be used as a guide in the use, selection, installation, and maintenance of wire ropes for hoisting. This regulation is obviously a mandatory safety standard and was properly promulgated as such pursuant to the rulemaking procedures of the 1969 Act.

Finally, petitioner argues that section 77.1903(b) has been in effect now for over 9 years, having been published in final form in the Federal

Register on May 22, 1971 (36 F.R. 9364), and that under the 1969 Act, neither the Interior Board of Mine Operations Appeals nor an administrative law judge had the power to invalidate a regulation promulgated by the Secretary of the Interior. This power resided solely in the U.S. courts. Buffalo Mining Company, 2 IBMA 226 (1973); Peabody Coal Company, 4 IBMA 137 (1975). Petitioner asserts that under section 101(d) of the Federal Mine Safety and Health Act of 1977, the exclusive means of challenging the validity of a mandatory health or safety standard is by filing a petition in the appropriate U.S. Court of Appeals prior to the 60th day after such standard has been promulgated, and that this obviously applies to new or revised standards promulgated under the 1977 Act. As for the mandatory health and safety standards promulgated under the 1969 Act, section 301(b)(1) of the Federal Mine Safety and Health Amendments Act of 1977 specifically provides that said standards shall remain in effect until such time as new or revised standards are issued by the Secretary of Labor under the new 1977 Act. Thus, under the old law (the 1969 Act) and under the new law (the 1977 Act), the exclusive power to invalidate a mandatory health or safety standard lies within the U.S. courts. No court challenge of 30 C.F.R. § 77.1903(b) has been filed by either respondent herein, or by anyone else for that matter, and said mandatory safety standard has been specifically continued in effect by the Amendments Act of 1977. Accordingly, petitioner submits that the Commission and its administrative law judges lack authority to declare the subject regulation invalid.

During the course of the prior adjudication in these proceedings, the arguments presented by the parties addressed the issue of whether section 77.1903(b) was a validly promulgated standard, and whether the ANSI requirements were validly incorporated by reference as part of the requirements of that section. In its posthearing brief filed with me on August 28, 1978, respondent Cowin conceded that the ANSI wire rope standard was an integral part of section 77.1903(b), and its argument that this section is invalid was limited to the contention that the ANSI standards were invalidly incorporated by reference because of lack of proper notice and failure by the Director of the Federal Register to give his approval to their incorporation as part of section 77.1903(b). This contention was originally raised by respondent Jim Walter in a motion to dismiss filed August 15, 1977, which I denied on September 21, 1977, and again when I rendered by decisions.

In my findings and conclusions made in my original decisions of October 19, 1978, I found that section 77.1903(b) was a validly promulgated standard and that the ANSI standards were validly incorporated by reference as part of that section (Decision, pp. 24-25). Further, I also discussed the fact that Cowin conceded that the ANSI standards were an integral part of section 77.1903(b), that it participated in the proposed rulemaking proceedings when the standards found in Part 77 were being proposed as mandatory safety standards before the Department of the Interior, that Cowin's shaft-sinking plans submitted to the Department prior to the issuance of the notice of violation included certain assurances by Cowin that it will comply with the requirements of section 77.1903(b), and that Cowin had never taken exception or complained that the ANSI standards were not incorporated by reference in section 77.1903(b). In addition, I also took note of the fact that part

of Jim Walter's prior history of violations included four separate instances where it had been cited for violations of section 77.1903(b), and paid the civil penalties assessed for those violations (Decision, p. 25; Exh. G-25).

When these proceedings were before the Commission on the appeal taken by the petitioner with respect to my original decision, respondent Cowin characterized section 77.1903(b) as "a mandatory safety standard" (p. 5 of Brief, filed January 8, 1979, p. 1422 of Commission's official record). In arguing that the practical effect of the notice of violation served on Cowin in these proceedings was to charge it with violating the ANSI standards, Cowin again conceded that "these standards are incorporated, by reference, into 30 C.F.R. § 77.1903(b)" (p. 7 of Brief). Further, during the course of the May 16, 1978, hearing, Cowin's counsel asserted that notwithstanding the opinions of the witnesses with respect to the interpretation and application of section 77.1903(b), "the standard speaks for itself * * * and should stand on its own right" (Tr. 265). As for the intentions of the rulemakers when they promulgated the standard, Cowin's counsel again asserted that "whatever the intention and opinion of the rulemaker, the standard has to speak for itself" (Tr. 269).

The 1969 USA Standards M11.1-1960 dealing with the specifications for and use of wire ropes for mines, Exhibit G-8, contains the following introductory language explaining the intent of the standards:

> A USA Standard implies a consensus of those substantially concerned with its scope and provisions. A USA Standard is intended as a guide to aid the manufacturer, the consumer, and the general public. The existence of a USA Standard does not in any respect preclude anyone, whether he has approved the standard or not, from manufacturing, marketing, purchasing, or using products, processes, or procedures not conforming to the standard. USA Standards are subject to periodic review and users are cautioned to obtain the latest editions. Producers of goods made in conformity with a USA Standard are encouraged to state on their own responsibility in advertising, promotion material, or on tags or labels, that the goods are produced in conformity with particular USA Standards. [Emphasis added.]

In further explanation of the work of the American National Standards Institute, the last page of Exhibit G-8 contains the following pertinent statement: "The Standards Institute provides the machinery for creating voluntary standards. It serves to eliminate duplication of standards activities and to weld conflicting standards into single, nationally accepted standards under the designation "American National Standards." [Emphasis added.]

The 1977 ANSI standards for Base Mounted Drum Hoists, Exhibit R-2, states as follows, at page 2, section V:

> Mandatory rules of this Standard are characterized by the use of the word "shall". If a provision is of an advisory nature it is indicated by the use of the word "should" and is a recommendation to be considered, the advisability of which depends on the facts of each situation.

The difficulty with the regulatory language shall be used as a guide lies in the fact that it lends itself to a somewhat ambiguous application. For example, if an operator refers to a particular ANSI standard as a guide but then decides not to adopt or follow it and instead follows the manufacturer's specifications, which may be different from the ANSI guides, is he in violation? Since the ANSI standards are incorporated by reference as part of section 77.1903(b), may the ANSI standards characterized as "recommendations" also be considered incorporated as "recommendations" thereby rendering them advisory? Conversely, may the incorporated ANSI standards which use the language "shall" be considered mandatory? Further, one may conclude that the language in section 77.1903(b), "shall be used as a guide," is mandatory, but that any reference to or reliance on any specific ANSI standards may be considered advisory depending on the wording of the particular standard. Arguably, for purposes of a civil penalty assessment, the regulatory language "shall be used as a guide" may support a penalty assessment if it is established that a mine operator failed altogether to use any of the standards as guides. Conversely, a valid argument could be made that if MSHA relies on any specific incorporated ANSI standard to support a proposed penalty assessment, it must first establish that the incorporated standard relied on to support a civil penalty is couched in mandatory rather than advisory terms. And, if it is determined that the specific incorporated ANSI standard relied upon to support a penalty assessment is advisory rather than mandatory, it would logically follow that the fact that it was not used as a guide would be irrelevant. To hold otherwise would place an operator in a position of being subjected to a civil penalty for failing to use as a guide an advisory ANSI standard, which standing alone could not serve as the basis for a civil penalty assessment.

The foregoing situations illustrate the problem presented by the nebulous language of subsection (b), and in my view it would have been more desirable to simply require that the ANSI standards be used without qualification. In other words, deletion of the words "as a guide" would go a long way in clearing up the ambiguity. An inference may be made that since there is no statutory authority vested in the American National Standards Institute to promulgate binding mandatory safety standards pursuant to the Act, MSHA incorporated them by reference as a matter of expediency rather than proposing and promulgating them through the rulemaking process and then adopting them individually as part of Title 30, Code of Federal Regulations. However, it would appear from the record here presented, that even though recognizing the ambiguous language, MSHA nonetheless opted not to incorporate any specific mandatory language as part of section 77.1903(b). What it did was to incorporate the entire ANSI requirements as guides whether they applied to shaft construction or not, and this conclusion is illustrated by the testimony of MSHA's witness Fred Williams, a participant in the drafting of the particular

standard in question (Tr. 331-336, May 17, 1978, hearing). Mr. Williams stated that the ANSI standards were not incorporated as regulations because "anyone in the shaft sinking business knows which ones to pick out and apply" (Tr. 334). However, he candidly admitted that the manner in which the particular wire rope in question in this case was installed on the drum is not covered by an ANSI standard, and he indicated that respondent should probably have been charged with a violation of section 77.1907(d), since the rope in question was not installed in accordance with that standard (Tr. 271).

A further illustration of the confused application of the ANSI requirements in this case is reflected in the testimony of Inspector Kuykendall with regard to the asserted safety factor of 5 to the rope which broke. He conceded that there are no ANSI standards that require such a safety factor (Tr. 185). Further, although MSHA's case is bottomed in part on the contention that the rope may have been installed with "hand-held" tension and may have been wound in the "wrong direction," thereby contributing to the alleged crushing and peening of the rope, MSHA's expert witness Alameddin, who conducted the laboratory analysis of the rope and prepared a report of the suspected causes of the rope failure, candidly admitted that the ANSI standards do not prohibit installing a rope with hand-held tension and do not mention winding it in the wrong direction. He also admitted that in conducting his laboratory analysis, he did not limit his findings to the ANSI standards, and relied on other industry and manufacturers' recommendations in selecting the sheave and drum winches used in conjunction with the rope in question.

In view of the foregoing discussion, and in order to determine the specific ANSI requirements relied upon by MSHA in support of the alleged violation, reference must be made to that part of the accident report which the Commission believes composes the essential elements of the alleged noncompliance, namely, the ANSI requirements dealing with (1) the minimum ratio of drum or sheave diameter to the rope diameter, and (2) the excessive wear on the wire rope in question and the specific ANSI standards relied on by MSHA. Analysis and discussion of these requirements follows.

In its most recently filed arguments, respondent Cowin identifies the specific ANSI standards relied on by MSHA in support of the alleged violation as: 6.3.1.1; 6.3.1.5.1, .2, .3, and .4; 5.2.1; and 6.5.2.1. Petitioner's posthearing briefs cite the following ANSI standards which MSHA believes were not complied with: 5.2.1; 6.3.1.1, .3; 6.3.1.4.1, .2, .3, and .4; and 6.5.2.1. Respondent argues that the consistent use of the words "should be," "recommended," and "advisable" in these ANSI standards, rather than the mandatory "shall be" clearly reflects that the standards are recommendations and that compliance with them is voluntary rather than compulsory. Respondent maintains that simply incorporating them by reference does not change the advisory nature of the standards and their advisory nature remain totally intact. Petitioner's reply to this argument is that the most important ANSI standards allegedly not followed by respondent, namely 5.2.1, 6.3.1.1, and 6.3.1.2, use such words as "care must be exercised in handling to avoid kinking of the wire rope"; "it is essential that tread diameters of sheaves and

drums be liberal"; and "it is essential that head, idler, knuckle, and curve sheaves and grooved drums have grooves which support the rope properly." In short, petitioner asserts that the use of such terminology clearly indicates the mandatory rather than advisory nature of the cited ANSI standards.

I have carefully reviewed the specific language of all of the aforesaid ANSI standards relied on by the parties and in each instance I can find no language which supports any finding that they are mandatory. As correctly stated by the respondent in its arguments, the use of the words "should be," "recommended," and "advisable" are consistently used. As a matter of fact, I have been unable to find anyplace where the term "shall" is used, and I cannot conclude that the use of words "must" and "essential" render the standards mandatory. Under the circumstances, and after careful review and consideration of the arguments presented by the parties, I conclude and find that the respondent has the better part of the argument. I conclude that the specific ANSI standards relied on by MSHA in support of the alleged violation in this case are advisory guides for voluntary use by the industry. Since they are incorporated by reference as part and parcel of section 77.1903(b), I further find that for enforcement purposes they carry the weight of advisory rather than mandatory requirements for which an operator may be assessed civil penalties for noncompliance. In other words, I conclude that MSHA may not rely on an advisory ANSI standard as the basis for an assessment of a civil penalty, and section 77.1903(b) may not be used to support such a penalty proposal. Although I have consistently concluded that section 77.1903(b) is a validly promulgated standard, the question of whether it is mandatory and may support an assessment of a civil penalty in a situation where MSHA cites it is, in my view, dependent on whether the facts in any given case establish that the specific incorporated ANSI standard relied on by MSHA is advisory or mandatory and the question of whether an operator's failure to use any ANSI standard as a "guide" amounts to a violation of section 77.1903(b) would likewise be dependent on whether the particular standard which was not so used is couched in mandatory or advisory language. Thus, on the facts of this case, even if I were to make a finding that respondent failed to use any of the ANSI standards as guides, the crucial question would be whether the particular standards themselves are deemed advisory or mandatory. Since I have concluded that they were the former, it matters not that they were not used as guides. Failure to use a nonmandatory ANSI standard incorporated by reference as part of section 77.1903(b), does not in my view constitute a violation for which a civil penalty assessment may be levied.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED that Notice of Violation 2 REK, June 16, 1976, charging a violation of 30 C.F.R. § 77.1903(b), be VACATED, and that the petition for assessment of civil penalties as to the named respondents in these proceedings be DISMISSED.

Additional Findings and Conclusions

Since my findings and conclusions as to whether the cited standard is mandatory or advisory are dispositive of these cases it is not necessary for

me to address the other issues identified by the parties. However, I feel compelled to make findings and conclusions concerning respondent Cowin's contention that it was somehow prejudiced by the failure of MSHA to afford it access to the Part 100 assessment procedures at the time I ruled that Cowin could be named as a party-respondent under section 109(a) of the 1969 Act, and these follow below.

Has the respondent Cowin been denied access to MSHA's Part 100 assessment procedures, and if so, has Cowin been adversely prejudiced in this regard?

Respondent maintains that by permitting the petitioner to amend its pleadings to name Cowin as a section 109(a) party-respondent, it has been denied access to the procedural rights afforded under 30 C.F.R. 100.1 et seq. Respondent points out that these procedures provide that each notice of violation and order of withdrawal shall be reviewed by the Office of Assessments, which shall make a determination as to the amount of the penalty, if any, based on six enumerated criteria (Section 100.2). The operator is then issued an order of assessment (along with work sheets showing how the penalty was computed), and the operator may: (1) pay the penalty; (2) request a conference; or (3) request a hearing (Sections 100.4(b) and (c)). If a conference is scheduled (and it must be arranged if requeested by the operator), the Office of Assessments may reevaluate the penalty based on additional information presented to it, or may decide not to assess a penalty at all. (Section 106). The operator then has the option of paying the penalty or seeking a hearing, where an administrative law judge may make a de novo determination of the amount of penalty to be assessed, if any.

Respondent argues that since it was originally charged as an agent rather than as an operator, it was not afforded the procedural benefits provided in MSHA's penalty assessment procedures. It was not served with an order of assessment and proposed penalty prepared by the Office of Assessments, and was not afforded the opportunity for a conference where the penalty could have been reevaluated or dropped. By amending the petition at the hearing stage to charge Cowin as an operator, respondent concludes that the petitioner has bypassed the preliminary penalty assessment procedures required under Part 100, and has deprived it of significant procedural benefits. Since the petitioner's failure to follow its own assessment rules and regulations has caused actual prejudice to the respondent by depriving it of significant procedural benefits, respondent maintains that the petition for assessment of civil penalty should be dismissed, citing United States ex rel Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); Brennan v. Gilles and Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974); United States v. Heffner, 420 F.2d 809, 811 (4th Cir. 1969); Atlantic Marine, Inc. v. Occupational Safety and Health Review Commmission, 524 F2d 476 (5th Cir. 1975); Equal Employment Opportunity Commission v. Hickey-Mitchel Company, 507 F.2d 944 (8th Cir. 1974).

It is clear from the record in this case that the two civil penalty cases filed by the petitioner against the two individual Cowin employees were disposed of by settlement when they paid civil penalties for the violation in

question (Tr. 5, May 16, 1978, hearing). Although respondent agreed to the settlement disposition of those two cases without an admission of guilt, the fact is that the cases were disposed of by settlement and it seems clear to me that respondent Cowin was well aware of the issues and the terms of the settlement. While Cowin did not admit any guilt for the violation, it did agree and concede that the paid settlements for the violation could be considered as part of its history of prior violations (Tr. 6), and since Cowin and MSHA engaged in prehearing discovery, including interrogatories, it seems clear they were not oblivious to the issues presented.

With respect to MSHA's proposal for assessment of a civil penalty against Cowin in this matter, the record reflects that MSHA specifically proposed a civil penalty assessment of $10,000 for the alleged violation, and a penalty of $5,000 against respondent Jim Walter Resources (Tr. 352-353). These proposals were served on the respondents in accordance with the applicable statutory and regulatory procedures, and the respondents filed timely answers contesting the proposed civil penalty assessments.

With respect to the size of Cowin's operations, testimony adduced at the prior hearing reflects that Cowin is a well-recognized shaft construction company and MSHA produced evidence concerning the size of the mining operation in question and the number of employees employed in this operation (Tr. 348).

With regard to the abatement efforts by the respondents, MSHA presented testimony in this regard (Tr. 349-352), and took the position that the conditions cited were abated in good faith and any increases in any penalty assessment is not warranted because of respondents' failure to timely abate the violation.

With respect to the effect of the proposed civil penalty on respondent Cowin's ability to remain in business, that matter was also covered by the May 16, 1978, hearing and Cowin's counsel stated that while it would affect the respondent's business, it would not affect its ability to continue in business (Tr. 349).

As for respondent's Cowin's prior history of violations, that matter was also covered by the May 16, 1978, hearing (Tr. 342-348) and MSHA's computer printouts reflecting that prior history was received in evidence and is part of the original trial record (Exhs. G-25 and G-26).

In view of the foregoing record, and considering the totality of the circumstances presented in these proceedings, I fail to understand the basis for respondent Cowin's present assertions that it has somehow been prejudiced by MSHA's failure to afford it an opportunity to have the violation considered under Part 100 of MSHA's assessment procedures. In my view, all of the statutory criteria found in section 110 of the Act have been thoroughly presented and considered, and Cowin has had more than ample opportunity to be heard on those criteria. More significantly, I assume that during the course of the prior adjudication of this case, the parties considered the possibility of

a settlement. Since the two individual cases were in fact settled without trial, it seems obvious to me that the reason the present case progressed to the hearing stage was that the parties could not settle it. In short, the case progressed beyond the contest stage and the hearing held on May 16, 1978, was de novo and a complete record was made, including the receipt of testimony and evidence touching on the criteria required to be considered by me before any civil penalty assessments is levied. Further, it is clear that a section 109 civil penalty proceeding is de novo and that the penalty assessed therein is to be determined irrespective of any prior proposed assessment, Boggs Construction Company, 6 IBMA 145 (1976); Black Watch Coal Corporation, 6 IBMA 252 (1976); Peggs Run Coal Company, Inc., 8 IBMA 27 (1977).

In view of the foregoing, I conclude and find that respondent Cowin has been afforded all of its procedural rights during the assessment stage of these proceedings and its arguments to the contrary are rejected.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

25 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	
	:	Docket No. DENV 79-587-PM
Petitioner	:	A.O. No. 13-00750-05002F
v.	:	
	:	Rock Valley Pit & Plant
ROCK VALLEY CEMENT BLOCK AND TILE,	:	
Respondent	:	

DECISION

Appearances: Jaylynn K. Fortney, Attorney, U.S. Department of Labor, Kansas City, Missouri, for the petitioner; Robert J. Larson, Esquire, Sioux City, Iowa, for the respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent on March 30, 1979, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with one alleged violation of mandatory safety standard 30 C.F.R. § 56.9-22. Respondent filed a timely answer contesting the citation, and a hearing was held in Sioux City, Iowa, on May 1, 1980. Posthearing briefs were waived by the parties, but they were afforded an opportunity to present oral arguments on the record at the hearing, and the arguments have been considered by me in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

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

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

Issues

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

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

Stipulations

The parties stipulated to the following (Tr. 13-19):

1. Respondent's mining operation at the Rock Valley Pit and Plant is a small operation in that 7,150 man-hours are worked on an annual basis, and the mine employs five parttime workers, three of whom are engaged in year-round operations at the mine site.

2. Respondent's mining operations at the mine site in question are subject to MSHA's regulatory jurisdiction and are covered by the Act.

3. The Rock Valley Pit and Plant has no prior history of citations under the Act.

4. Joint Exhibit J-1 is a diagram of the mine area where the inspection in question took place.

5. On the date of the inspection in question, no berms were present in the area or on the alleged roadway cited by the inspector.

6. At the time of the inspection in question, four pieces of equipment were being utilized in the area depicted by Exhibit J-1, namely, two panel trucks, a rubber-tired front-end loader, and a track-type front-end loader.

7. The parties do not dispute the fact that a fatality occurred at the mine on May 22, 1978, when a front-end Michigan

loader went over an embankment characterized by MSHA as an alleged elevated haulway or road causing fatal injuries to the loader operator (Tr. 27-31).

8. The parties agree that abatement was achieved by sealing off the dike area where the accident occurred (Tr. 71).

Discussion

The section 104(a) Citation No. 177404, issued by the inspector on May 25, 1978, describes the following condition or practice which the inspector believed constituted a violation of 30 C.F.S. § 56.9-22: "The outer bank on the 12 foot wide elevated haulroad on top of the south dike was not provided with a berm to prevent a piece of equipment from driving over the edge of the roadway."

Petitioner's Testimony and Evidence

MSHA inspector Kenneth R. Harris testified as to his mining background and confirmed that he went to the mine on May 24, 1979, at the instructions of his supervisor, for the purpose of investigating a fatality which had occurred there on May 22. He was accompanied by MSHA special investigator Larry Nichols. He described the mining operation as a sand and gravel dredging operation and indicated that this was his first visit to the mine. Upon arriving at the mine, he met with company president Conrad Van Zee and informed him of the purpose of his visit. He was taken to the accident site by Mr. Van Zee, and the loader which was involved in the accident had been removed to the maintenance shop and Mr. Van Zee informed him that it was moved there so as to preclude any further damage to it from flooding from the nearby Rock River. He identified Exhibit J-1 as a sketch of the accident scene (Tr. 19-25).

Inspector Harris testified that the roadway depicted in Exhibit J-1 was elevated 10 feet on the inside and outside, was 12 feet wide, and he described it as U-shaped or "horseshoe" shaped. Material was being excavated from the back end of a pit by means of a wheel-tracked loader and two dump trucks and the material was used to construct a dike for flood-control purposes. No dredging operations were taking place in the immediate area. The material was transported by the trucks in a one-way circular direction on the top of the dike, and after being dumped it was leveled out by the loader, and the process was then repeated. No berms were present on the dike roadway where the trucks and loader were operating. He identified the outer bank of the dike roadway as that portion facing the river on the right side of the one-way traffic pattern as depicted on Exhibit J-1 (Tr. 32-38).

On cross-examination, Inspector Harris testified that the dike construction activities in question were taking place approximately 300 feet west of the river, and he did not know whether the river appeared to be flooding but indicated that he simply took Mr. Van Zee's word for it. Actual dredging

operations were taking place some 300-400 yards to the east of the dike location, and a screening tower was located between the two locations. He described the loader which was involved in the accident as a rubber-tired medium-sized machine, indicated that the tires were about 5 feet high, and he estimated the loader engine size as 150 to 200 horsepower. He also indicated that the berm guidelines require berms of a sufficient size to restrain vehicles and that as a general rule the berm should be as high as the axle height of the largest piece of equipment operated on the elevated roadway (Tr. 38-46).

Mr. Harris stated that the question as to whether a 2-1/2-foot berm would have prevented the front-end loader in question from going over the embankment would depend on the speed of the vehicle and the width of the berm. He considered the building of the dike to be a mining operation and the materials being used for this purpose on the day in question was compacted field dirt and clay but not sand and gravel. The trucks hauled the material to the top of the dike where it was layered and leveled by the loader. The area was not a regularly used passageway for vehicles or pedestrians other than the trucks traveling the area where the dike was being constructed.

Mr. Harris could not define a "roadway" and he indicated that the definition of a "roadway" was included as part of the regulatory standards in question. He confirmed that he issued the citation in question and that he used the word "haulroad" to describe the material being hauled on the road in question during the construction of the dike. He could not cite the specific regulatory definition of the term "haulroad." Since equipment and people were driving on the road, he believed the area cited was a haulroad, and the citation issued because there were no berms (Tr. 47-56). The width of the "roadway" at the point where the accident happened was 31 feet (Tr. 59).

On redirect, Inspector Harris stated that dredging operations would have in time been conducted at the dike area, characterized the material being excavated to construct the dike as overburden, and stated that abatement was achieved by closing off the roadway entrance and exit ramps (Tr. 60-61).

In response to bench questions, Inspector Harris stated that he did not know how long the dike construction had been going on, had never inspected the facility prior to his visit, and no one from mine management offered an explanation as to why berms were not constructed. Based on his experience at other mines, he stated that berms are constructed from earthen material or quarry rock, but indicated that he has never previously encountered a situation where a dike was being constructed as in the instant case (Tr. 63-67).

Respondent's Testimony and Evidence

Conrad Van Zee, president, Rock Valley Cement Block and Tile Company, testified that his company conducts a surface-mining operation which consists of pumping sand and gravel out of water. He described the mining operation, and stated that it includes the removal of overburden to reach the underlying

sand and gravel. The operation also includes the sizing, washing, and stockpiling of the mined material which is pumped through a pipeline or conveyor belts to an aggregate plant. Trucks are used only to haul the stockpiled materials to customers. His company also operates a readymix cement plant and manufactures concrete block. The mining operation is conducted from May to the middle of November. During the winter months, three of the five employees are engaged in plant and dredge repair work (Tr. 82-88).

Mr. Van Zee confirmed that he obtained a copy of the 1977 mandatory safety standards, and he indicated that his company is safety-conscious and has always followed the requirements of the law as closely as possible. He also confirmed that he familiarized himself with the standards as best he could but was never furnished a copy of the inspector's handbook. He has never been cited for other than minor infractions, and since May 22, 1978, has received two citations for a faulty ungrounded light plug and failure to sufficiently guard a piece of equipment. Abatement of cited infractions has always been immediate, and apart from minor cuts, he has had no lost-time accidents other than the one in question in this case (Tr. 88-91).

Mr. Van Zee described the dike construction activities taking place on the day in question and characterized them as efforts to prevent water from the river coming onto the mine and filling the pit. He stated that the primary purpose of the activity was to extend the dikes around the mine property. The dike was used only for flood protection and he asserted that the dike in question did not have a roadway on the top of it where vehicles or pedestrians traveled. He confirmed that the width of the top of the dike was 12 feet and that this width was determined to be adequate to withstand the water pressure. He had never been previously cited for any dike deficiencies either before or after the accident in question and the instant case presents the first occasion where he was informed by MSHA that a berm was required (Tr. 91-95).

Mr. Van Zee indicated that he did not consider the top of the dike to be an elevated roadway, and in his opinion a roadway is one that is regularly used for haulage by trucks on a day-to-day or year-to-year basis, and he could not recall discussing the matter with the inspector at the time the citation issued. None of the other dikes on the mine property had berms, and the mine had never been previously cited for failure to construct such berms. He has not been able to find the definition of a "roadway" as that term is used in the regulations and he has never been informed by MSHA that the failure to have berms on the dikes constituted a violation. He confirmed that the height of the loader wheels were 5 feet and he described its operation as well as the procedure for constructing the dike. Earlier dike construction utilized a crawler to push the material, but trucks were subsequently used when the dirt supply was exhausted (Tr. 96-102).

Mr. Van Zee confirmed that he went to the accident scene and he described the extent of the slope embankment where the loader overturned as a "gentle slope" and he believed that a piece of equipment could be driven there without fear of tipping over. He believed that the accident occurred when the loader

operator, for some unexplained reason, began to back down the slope and while attempting to compensate for this caused the weight of the loader to shift, thereby causing it to flip over. In his view, the existence of a berm would not have prevented the loader from going over the edge (Tr. 102-107).

On cross-examination, Mr. Van Zee stated the dike in question was a continuation of an existing dike which would eventually go around the perimeter of the entire mine property. Construction of the original dike began in 1963, but it was constructed by a contractor and no vehicles traveled at the top of the dike during that time. He was aware of the fact that berms are required on an elevated haulway, and he described the method and procedure used for the construction and continuation of the dike. Vehicles and men worked on the top of the dike for 2 days building it up from an 8-foot level to the 12-foot level as it existed on the day of the accident. It would have taken an additional 2 days to complete the short duration dike project. He conceded that a hazard does exist when men and equipment are working on the top of an elevated area without guard railings or berms (Tr. 116-127). He also indicated that the top of the dike was never used for haulage operations and he has never considered it to be a roadway (Tr. 128). In his view, a haulroad or roadway is one which is used to transport the product being mined, namely sand and gravel, and he does not consider the dike area in question, which was used to transport material for constructing the dike to be such a haulroad or roadway (Tr. 129-130). He had no previous occasion to construct berms at the mine because there are no elevated haulroads there (Tr. 134). Although dike construction was taking place on the day in question, sand and gravel would eventually be taken out (Tr. 137). The loader met the required applicable safety standards and it was not cited for any infractions (Tr. 138). Mr. Van Zee also indicated that had overburden been removed and traveling over the dike area on a regular day-to-day basis, he would consider it to be a roadway (Tr. 143).

Findings and Conclusions

Fact of Violation

MSHA asserts that it has established that the roadway in question was elevated, that vehicle traffic used it, and the fact that the berm standard is found in a section of the regulations entitled "loading, hauling or dumping" does not limit the application of the standard strictly to such enumerated activities. MSHA asserts further that its evidence has established that men and materials were transported along the dike roadway, that it was elevated, and since it had no berms, a violation has been established (Tr. 151-154).

Respondent takes the position that since the cited safety standard does not define the term "roadway," it is impossible for a mine operator to ascertain whether he is in violation, and it is unfair to penalize an operator in such a situation. Respondent asserts further that it had been previously inspected by MSHA and had never been cited for any berm violations. Respondent also argues that the so-called "roadway" was merely used as a casual

access to the top of the dike and that the area was never intended to be used as a roadway and was not constructed for that purpose. Conceding that "haulage" was being done, respondent asserts that it was for the purpose of building a dike rather than for the removal and transportation of mined materials over a roadway (Tr. 156-159).

In addition to the lack of a regulatory definition of the term "roadway," respondent also suggested that the construction of the dike in question was not "mining" within the meaning of the Act, and that MSHA has produced no evidence to establish that sand and gravel was being mined or transported over the so-called roadway at the time of the inspection (Tr. 62-63; 78).

In view of the foregoing arguments, the issues to be addressed are as follows:

1). Whether the dike construction activities were "mining" activities within the meaning of the Act.

2). Whether the dike area in question, which was not protected by berms, may be considered a roadway within the meaning of the cited standard.

3). If the answer to Issue No. 2 above is in the affirmative, was the roadway elevated?

4). If the answer to Issues Nos. 2 and 3 are in the affirmative, has a violation been established by MSHA by a preponderance of the evidence?

Issue No. 1--Mining Activity

It seems clear from the testimony presented in this case that on the day of the accident, and at the time the citation was issued, respondent was in the process of constructing a dike to prevent possible flood waters from a nearby river from coming onto and inundating the mine property. In this connection, top soil or dirt, loosely characterized as overburden, was being removed by a loader and transported by truck to the top of the dike where it was dumped and then layered, smoothed out, and compacted by the loader which went over the embankment. It is also clear that no sand or gravel was being dredged or "mined" during this time (Tr. 62-64), and MSHA conceded this fact (Tr. 64).

"Overburden," as defined by section 56.2, means "material of any nature, consolidated or unconsolidated, that overlies a deposit of useful materials or ores that are to be mined." On the facts presented in this case, I conclude that the materials removed for use in the dike construction fall within this definition, particularly in light of Mr. Van Zee's candid admission that the sand and gravel underlying the removed materials would eventually be mined (Tr. 137).

I am not persuaded by the fact that sand and gravel was not being excavated at the time of the inspection, and I find that the removal and loading

of the top soil and other materials used for the dike construction, as well as the actual construction of the dike itself, was an integral part of the mining process. The removal of the material served two purposes. First, it was used to construct a dike whose purpose was to prevent water from possibly inundating the mine. Second, the removal of the material also facilitated the removal of sand and gravel, since it is clear that these materials would eventually be mined and removed from the pit area where the trucks were loading. In addition, Mr. Van Zee confirmed the fact that the dike construction was an on-going project, that the particular dike project in question was a continuation of an existing dike began in 1963, and that it would eventually cover the perimeter of the mine property.

The definition of the term "coal or other mine" found in section 3(h)(1) of the Act, particularly subsection (c), includes, "lands, excavation, * * * workings, structures, or other property including impoundments, retention dams, * * * used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits * * *."

I conclude and find that the facts presented support a conclusion that the dike construction activities in question were mining activities within the meaning of the Act and that the dike itself was an integral and inseparable part of the mine. Accordingly, respondent's arguments and suggestions to the contrary are rejected.

Issue No. 2: Was the Dike Area in Question a "Roadway" Within the Meaning of Section 56.9-22?

It seems clear from the arguments advanced by the respondent that it believes that the construction to be placed on the term "roadways" as used in section 56.9-22 is one that would require berms only in those instances where the road is regularly used day in and day out as a regular truck route for haulage of materials which have been mined. Respondent believes that since the alleged roadway in question was used only for the purpose of dike construction on a short-term or sporadic basis, and since pedestrians and vehicular traffic did not use the area as a regular haulage route, the dike area in question was not a roadway within the meaning of section 56.9-22.

The term "roadway" is not defined by Part 56 of the regulations. Respondent's position on this question suggests that since section 56.99-22 is found under a regulatory heading--"Loading, hauling, dumping," the term roadway, along with the requirements for berms, should only apply in circumstances which clearly show that the mined materials are regularly and systematically loaded and hauled out of the mine along clearly defined haulage roadways designated and regularly used for such purposes. In short, respondent suggests a narrow and restrictive interpretation and application of the berm standard, the thrust of which is seemingly centered on the frequency and duration for which the "roadway" may be used.

After careful consideration of the arguments presented by the parties, and particularly the facts presented in this case, I conclude that

petitioner's position is correct and that respondent's restrictive interpretation must be rejected, and my reasons for these conclusions follow.

The intent of the safety standard in question is to provide protection for men and equipment which are required to travel along elevated roadways while performing work connected with the mining process, and respondent has conceded this fact (Tr. 127). The evidence adduced establishes that overburden, as defined by section 56.2, was being removed and loaded at the dike construction site, and respondent clearly intended to utilize the pit area from which the materials were moved as part of its regular dredging operation (Tr. 125). Thus, it seems clear to me that materials were in fact being loaded. Next, the materials were loaded onto dump trucks and hauled along a clearly defined route, dumped, and leveled by a loader until the required dike height was achieved. The fact that this particular project was of a relative short duration is not critical in my view. Section 56.9-22 makes no mention as to the frequency or duration for which such roadways are used. An elevated roadway utilized for a week by trucks and other equipment is no different, from one used for longer periods of time. A potential hazard along an unprotected roadway remains a hazard whether it be of short or long duration, and I believe that section 56.9-22 is intended to prevent such hazards in both such circumstances.

Although the dike construction in question on the day the citation issued may have been of relatively short duration, it seems clear to me from Mr. Van Zee's testimony that it was a continuation of an existing dike system that would eventually ring the perimeter of the entire mine property. And, while the method of construction apparently varies between the use of a loader which pushes materials to form the dike and the use of trucks to haul the materials to the top of the dike, in those instances where trucks and loaders are used to move materials to the top of the dike, I conclude that the area traveled by such trucks and personnel are roadways within the meaning of section 56.9-22. Consequently, if such areas are elevated and unprotected on the outer banks, berms are required.

Issue No. 3--Elevated Roadway

Inspector Harris described the roadway in question and indicated that it was elevated some 10 feet on the inside and outside bank, and was approximately 12 feet wide. The flow of traffic was in a one-way direction as depicted on Exhibit J-1, and the outer bank was that portion of the roadway facing the river, and the width of the roadway at the point where the accident occurred was 31 feet.

Mr. Van Zee agreed with the stated width of the roadway, and while he characterized its slope at the point of the accident as a "gentle slope," he indicated that the dike had been constructed to a height of 12 feet at the time of the accident.

I conclude and find from the testimony and evidence presented in this case that the dike roadway in question was elevated above the surrounding

terrain and pit areas where materials were being removed for the dike construction. Accordingly, I conclude that petitioner has established that the roadway in question was "elevated" within the meaning of section 56.9-22.

Fact of Violation

Respondent conceded and stipulated that no berms were present at the location cited by the inspector. In view of my findings and conclusions that the dike area was an elevated roadway, and in view of the fact that it is clear that the outer bank of that elevated roadway, that is, the elevated portion facing the river which ran along the mine property at the approximate scene of the accident, was not protected by a berm, I conclude and find that petitioner has established a violation of section 56.9-22, and the citation issued in this case is AFFIRMED.

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

The parties agree that respondent is a small mine operator and I adopt this as my finding. I also find that the civil penalty assessed by me in this matter will not adversely affect respondent's ability to remain in business.

History of Prior Violations

Respondent's mining operation at the Rock Valley Pit and Plant has generated no citations prior to the one in question, and petitioner agrees that respondent's safety record is "quite good" (Tr. 154). I adopt these facts as my findings on prior history and this is reflected in the civil penalty assessed by me in this case.

Good Faith Compliance

Abatement was achieved timely by sealing the dike roadway area off and the inspector considered this adequate abatement (Tr. 70-71). I conclude and find that the respondent exercised good faith in achieving compliance in this case.

Gravity

Although there is no conclusive evidence that a berm would have prevented the accident which occurred in this case, I believe that it is reasonable to assume that a berm would at least have served as a warning to the loader operator that he was approaching the edge or slope of the roadway embankment. Further, respondent candidly conceded that a hazard does exist when men and equipment are working in elevated areas without berms or guards. Accordingly, I find that the violation in this case was serious.

Negligence

Respondent has established that it has never been previously cited for failure to install berms or guards on any of its other dikes. Although this is no defense to the violation, it does support respondent's assertion that it reasonably believed that the elevated dike area characterized by MSHA as a roadway after the fact was not a roadway requiring a berm. Further, this is not the first time that MSHA has been prompted by a fatality to apply a safety standard requiring berms to an elevated area that presents a hazard. See my decision in MESA v. Peabody Coal Company, VINC 77-102-P, issued December 13, 1977, where I specifically invited MESA to reexamine the identical regulatory language found in the berm standard applicable to surface coal mines and surface work areas of underground coal mines, 30 C.F.R. § 77.1605(k), for the purpose of communicating understandable, rational, and workable guidelines for the application of this standard to the mining industry.

As the parties in this case recognize, the term "roadway" is not defined in Part 56. Surprisingly, section 56.2 defines the term "highway" (public street, alley or public road), and the term "travelway," but does not define haulage road or roadway. Judges Moore and Broderick have grappled with the term "roadway" in prior cases involving section 55.9-22, MSHA v. El Paso Rock Quarries, DENV 79-139-PM, Judge Moore, December 17, 1979, MSHA v. Cleveland Cliffs Iron Company, VINC 79-240-PM, Judge Broderick, December 3, 1979, and one would think that MSHA would take note of these decisions and amend Part 56 of the standards and cure the ambiquities that apparently still exist with the interpretation of this standard, ambiquities which I suggest result from the broad and ambiguous language of the berm standard itself.

Although Mr. Van Zee conceded that equipment and men working in an unguarded elevated dike area were exposed to a potential hazard, I find him to be an honest, candid, and credible witness and accept his explanation as to his interpretation of the standard as reasonable. Under the circumstances, and after careful consideration of all of the facts and circumstances here presented, I conclude that the respondent could not reasonably have known of the violation and accordingly was not negligent.

Penalty Assessment

The parties entered into a proposed settlement of this cases but it was rejected by me when it was filed at the hearing and my rejection was based on the fact that I considered it to be untimely, (Tr. 4-9; Exh. P-1). In addition, at the conclusion of the hearing, petitioner's counsel recommended a civil penalty somewhat lower than that proposed by MSHA's Office of Assessments ($2,500).

It is clear that I am not bound by the initial proposed assessment made in this case by the petitioner's Office of Assessment. This case was heard de novo and my finding and conclusions are made on the basis of the evidence and testimony adduced by the parties. Based on the fact that there is no

direct evidence that the fatality which occurred in this case was the result of the failure to provide a berm at the scene of the accident, and based further on the respondent's size, its immediate corrective action, the fact that it has no prior history of citations under the 1977 Act, and my finding of no negligence on its part, I conclude that a civil penalty of $850 is appropriate and reasonable in the circumstances.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $850 within thirty (30) days of this decision. Upon receipt of payment by the petitioner, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

25 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-303-M MSHA CASE NO. 05-02337-05007
v.	DOCKET NO. WEST 79-304-M MSHA CASE NO. 05-02337-05008
CLIMAX MOLYBDENUM COMPANY, Respondent.	MINE: CLIMAX MILL

DECISION

APPEARANCES:

Robert Bass, Esq., and Eliehue Brunson, Esq., Office of T. A. Housh, Regional Solicitor, United States Department of Labor, Kansas City, Missouri
for the Petitioner,

Richard W. Manning, Esq., Climax Molybdenum Company, Golden, Colorado
for the Respondent.

Before: Judge John J. Morris

WEST 79-303-M

Citation 329190

Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent, Climax Molybdenum Company, failed to guard electrical equipment. MSHA asserts that Climax thereby violated 30 C.F.R. 51.12-30,[1] a regulation promulgated under the statutory authority of the Federal Mine Safety and Health Act of 1969 (amended 1977), 30 U.S.C. § 801 et seq.

1/ The cited standard provides as follows:

> 57.12-30 Mandatory. When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

ISSUE

The issue is whether Climax violated the regulations.

FACTS

The evidence is uncontroverted. I find the following facts to be credible.

1. During an inspection the MSHA inspector observed insulated electrical wires leading from a motor (Tr 6, 10, 26).

2. The motor, which was cited for the violation of the standard, lacked a junction box with a bushing. It was one of 5 motors on the premises (Tr 6).

3. The inspector was of the opinion that motor vibration could work the wires loose (Tr 8).

4. The Climax electrical foreman indicated this 900 r.p.m. motor had been in use in the mid 1920s (Tr 23).

5. The motor has a ground wire attached to the frame (Tr 12).

6. The wires are insulated and there was neither a shock hazard nor a dangerous condition (Tr 19, 24, 25).

7. Climax's remaining four motors at this location were designed to have junction boxes (Tr 19, 23).

DISCUSSION

The federal inspector concedes he is not an electrical expert (Tr 11). The uncontroverted evidence shows that this particular motor was not hazardous. It was designed without a junction box.

On these facts, I conclude that motor was not potentially dangerous as that term is defined in 30 C.F.R. 57.12-30.

Citation 331894

MSHA charges Climax did not guard certain electrical connections thereby violating 30 C.F.R. 57.12-23. [2]

The evidence is essentially uncontroverted. I find the following facts to be credible.

8. In a 2 to 3 foot wide walkway the MSHA inspector observed uninsulated bus bars (solid copper bars carrying 440 volts) (Tr 45 - 47).

9. The bars, more than 8 feet above the floor, were guarded by elevation (Tr 69, 71).

10. There was a 6 foot ladder located within 5 feet (Tr 45).

11. Workers frequently carry conduit or wire (Tr 45 - 47).

12. The National Electrical Code applies to surface facilities. Under the Code live parts of 600 volts or less are guarded by location if they are elevated 8 feet or more above the floor (Tr 67, R5, R6).

13. The area was further protected by an insulated mat on the floor (Tr 66 - 67, 72).

DISCUSSION

This citation should be vacated. The National Electrical Code provides that bus bars are protected by location if 8 feet above the floor. This

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2/ The cited standard provides as follows:

> 57.12-23 Mandatory. Electrical connections and resistor grids that are difficult or impractical to insulate shall be guarded, unless protection is provided by location.

interpretation by a recognized electrical authority is confirmed by a document issued by the Department of Labor construing its own standard (R7). Petitioner's objection to the document is again overruled. The exhibit was an admission against petitioner's interest. It's authenticity is established by the Climax electrical superintendent who identified it as written by, and obtained from MSHA (Tr 72 - 76).

At trial MSHA seeks to establish that a location is guarded by height only if it is 10 feet above the adjoining surface (Tr 49). For the above stated reasons I reject MSHA's view. It appears that the ten foot requirement only applies on the outside of buildings (Tr 58).

The electrical connections here were at least 8 feet above the ground. They are accordingly "protected by location" as that term is used in 30 C.F.R. 57.12-23.

MOTION

During the hearing petitioner moved to vacate the citations 329188 and 329191.

Pursuant to Commission Rule 2700.11 the motions should be granted.

WEST 79-304-M

Citation 331868

Petitioner charges Climax failed to guard bus bars thereby violating 57.12-23. [3]

The evidence is conflicting. I find the following facts to be credible.

3/ The cited standard provides as follows:

> 57.12-23 Mandatory. Electrical connections and resistor grids that are difficult or impractical to insulate shall be guarded, unless protection is provided by location.

14. There were uninsulated bus bars above the switch gears. Bus bars, made of copper, measured 4 inches wide and 1/4 to 1/2 inch thick (Tr 87 - 89 - 97, 105 - 106).

15. The bars, carrying 440 volts, were located above a 3 foot wide walkway (Tr 87 - 92).

16. The bars were 8 feet 6 inches above the floor resting on 4 inch insulators, or a total of 106 inches above the floor (Tr 100 - 102).

17. The area under the bus bars can only be entered by opening a metal gate. Only the Climax electricians have keys to the gate (Tr 103).

18. There is no reason for anyone to be under the bus bars with rods, pipes, or anything of that nature (Tr 104).

19. The National Electrical Code provides that an area is protected by location if, as here, it is more than 8 feet above the ground (Tr 104 - 105).

20. There were insulating mats on the floor (Tr 104).

DISCUSSION

The inspector indicated the bus bars were ninety inches (7 feet, 6 inches) above the floor but Climax's electrical superintendent indicated the bottom of the bus bar was 118 inches (9 feet, 10 inches) above the floor. I have accepted Climax's version since the person in charge of the area would ordinarily make a more accurate measurement than an inspector who was engaged in looking into various areas.

The discussion concerning the prior citation is equally applicable here. In short, 8 feet or more above the floor constitutes "protection by location" as that term is used in 30 C.F.R. 57.12-23.

CONCLUSIONS OF LAW

WEST 79-303-M

Citation 329190 and the proposed penalty therefor should be vacated. (Facts 1 - 7)

Citation 331894 and the proposed penalty therefor should be vacated. (Facts 8 - 13)

Citations 329188 and 329191, on petitioner's motion, should be vacated.

WEST 79-304-M

Citation 331868 should be vacated. (Facts 14 - 20).

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

ORDER

In Docket Number 79-303-M, Citations 329188, 329190, 329191, and 331894 are vacated.

In Docket Number 79-304-M, Citation 331868 is vacated.

John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
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25 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION(MSHA),		Civil Penalty Proceeding
	Petitioner	Docket No. LAKE 79-280-M
v.		A.O. No. 11-02667-05002
OZARK-MAHONING COMPANY,	Respondent	Denton Shaft Mine

DECISION

Appearances: Michele M. Fox, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Mr. M. L. Hahn, Safety and Industrial Relations Director, Ozark-Mahoning Company, Rosiclare, Illinois, for Respondent.

Before: Judge Edwin S. Bernstein

On June 10, 1980, I conducted a hearing pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 801 et seq., and 29 C.F.R. § 2700.50 et seq., and issued the following decision from the bench:

This is my bench decision with regard to the proposed settlement in this case. The parties have proposed settlements of the four citations in this case as follows:

Citation No. 367103 for $81.00, a reduction from the amount initially proposed, which was $114.00;

Citation No. 367104 for $78.00, a reduction in the amount initially proposed, which was $98.00;

Citation No. 367106 for $128.00, a reduction from the amount initially proposed, which was $160.00;

Citation No. 367107 for $157.00, a reduction from the amount initially proposed, which was $210.00.

Upon consideration of the motion of the parties and the arguments presented at this hearing on that motion, I approve the settlements proposed for all four citations. My reasons are as follows:

With respect to Citation No. 367103, the citation stated the limit switches were not operating on the hoist. The Secretary of Labor alleged a violation of the mandatory safety standard at 30 C.F.R. § 57.9-2, which reads: "Equipment defects affecting safety shall be corrected before the equipment is used."

The parties have stipulated, and I find with respect to this citation and all other citations, that Respondent was a small operator; it had a small number of previous violations; The assessment of the penalty proposed either initially or in connection with this settlement would not adversely affect Respondent's ability to continue in business; and Respondent achieved rapid, good faith compliance in connection with all citations.

With respect to Citation No. 367103, I find ordinary negligence and moderate gravity. In approving the settlement, I am impressed by the fact that there was a deadman switch on the hoist which did provide protection against the accident envisioned by the citation. Therefore, I approve the settlement proposed and assess a penalty of $81.00 for that citation.

Citation No. 367104 stated that a safe means of access was not provided to the sheave wheels and bucket dump on the head frame. The Secretary of Labor alleged a violation of the mandatory safety standard at 30 C.F.R. §57.11-1, which reads: "Safe means of access shall be provided and maintained to all working places." In approving the settlement of this citation, I am impressed by the contentions of the parties that there was less exposure than the Secretary of Labor had anticipated, in that only one maintenance person was exposed and that man had a safety belt, and that there was rapid abatement of this violation. Therefore, I assess a penalty in the amount of $78.00 in connection with Citation No. 367104.

Citation No. 367106 alleged that the barrier at the shaft opening was not adequate. The Secretary of Labor alleged a violation in connection with that citation of the mandatory safety standard at 30 C.F.R. § 57.19-100, which reads: "Shaft landings shall be equipped with substantial

safety gates so constructed that materials will not go through or under them; gates shall be closed except when loading or unloading shaft conveyances." The parties have indicated that a chain eighteen inches from the ground was installed at the opening; that the opening did have a door; and that it was company policy to have that door closed, although that door was open for a thirty-minute period at the time that the citation was issued. There was a question as to whether the door and the chain constituted a substantial bulkhead. I find that because the door was provided, and because this matter does involve that question, a reduction in penalty to $128.00 is appropriate in connection with Citation No. 367106, and I assess a penalty of $128.00 for that citation.

Citation No. 367107 alleged a man was observed riding the edge of the bucket while being hoisted out of a shaft. The Secretary of Labor alleges that this constituted a violation of a mandatory safety standard at 30 C.F.R. § 57.19-68, which reads: "Men shall enter, ride, and leave conveyances in an orderly manner." The parties indicate that at the time the citation was issued the inspector observed a man riding the edge of a bucket and the four men who were riding the bucket jumped out of the bucket before the door had closed. Respondent contended that it did not feel that sitting on the edge of the bucket and jumping out, in this case, was disorderly. Another standard at 30 C.F.R. § 57.19-74 reads:

"Men should not ride the bail, rim, or bonnet of any shaft conveyance, except where necessary for the inspection and maintenance of the shaft and lining." This standard is not mandatory. It is advisory. I think Respondent now realizes that this conduct was a violation and upon considering all the criteria in connection with this citation, including rapid, good faith compliance, I will accept the settlement and agree to the proposed penalty of $157.00, and I assess a penalty in that amount for Citation No. 367107.

I hereby affirm this bench decision.

ORDER

Respondent is ORDERED to pay $444 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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25 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings	
	:	Docket Nos.	A.O. Control Nos.
v.	:	LAKE 79-238	11-00588-03041
	:	LAKE 79-239	11-00588-03044
OLD BEN COAL COMPANY,	:	LAKE 79-251	11-00588-03042
Respondent	:	LAKE 79-252	11-00588-03043
	:	Mine No. 21	
	:		
	:	LAKE 79-240	11-00589-03039
	:	LAKE 79-241	11-00589-03041
	:	LAKE 80-40	11-00589-03043
	:	LAKE 80-80	11-00589-03045
	:	Mine No. 24	
	:		
	:	LAKE 79-242	11-02392-03020
	:	LAKE 80-66	11-02392-03022
	:	LAKE 80-81	11-02392-03024
	:	Mine No. 25	
	:		
	:	LAKE 79-243	11-00590-03040
	:	LAKE 79-244	11-00590-03044
	:	Mine No. 26	

DECISION

Appearances: William C. Posternack, Esq., and Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois; Robert Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Robert J. Araujo, Esq., Chicago, Illinois, for the Respondent.

Before: Judge Edwin S. Bernstein

On March 18 and 19, 1980, a hearing was held in Chicago, Illinois, to determine if, as alleged in 17 citations referred to in these 13 consolidated

docket numbers, Respondent violated the Federal Mine Safety and Health Act of 1977 (the Act) and the regulations in Volume 30, Code of Federal Regulations (C.F.R.), and, if so, what penalties should be assessed in accordance with the criteria set forth in Section 110(i) of the Act.

The parties stipulated, and I find, that:

1. Four of Respondent's mines are the subject of the citations involved in these proceedings. They are Mine 21, Mine 24, Mine 25, and Mine 26.

2. Each of these mines is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, and I have jurisdiction over this matter.

3. The inspectors who issued the citations and order were duly authorized representatives of the Secretary of Labor and properly served the citations on Respondent.

4. Respondent is an average size operator.

5. The mines listed above are large mines in terms of production.

6. Respondent has an average history of previous violations.

7. If a violation is found, the amount of penalty proposed by Petitioner for each item in issue will not affect Respondent's ability to remain in business.

The citations were heard in the following order:

1. Citation No. 776637, contained in Docket No. LAKE 80-66, which alleged that Respondent violated the standard at 30 C.F.R. § 75.520.

2. Citation No. 777024, contained in Docket No. LAKE 80-80, which alleged that Respondent violated the standard at 30 C.F.R. § 70.210(b) in failing to take respirable dust samples.

3. Citation No. 773508, contained in Docket No. LAKE 79-238, which alleged that Respondent violated the standard

at 30 C.F.R. § 70.100(b) in connection with respirable dust samples taken at Respondent's mine by Petitioner's inspector.

4. The citations contained in the remaining docket numbers, in which Petitioner alleged that Respondent violated the standard at 30 C.F.R. § 70.100(b) in connection with respirable dust samples which were taken by Respondent.

Harold Pearce testified for Petitioner and George Verley testified for Respondent in connection with Citation No. 776637. Wolfgang Kaak testified for Petitioner and Michael T. O'Day testified for Respondent in connection with Citation No. 777024. Kirby Webb and Mary Nowakowski testified for Petitioner in connection with Citation No. 773508. Thomas Tomb, David Stritzel, and Paul Parobeck testified for Petitioner in connection with the remaining citations.

Citation No. 776637

The standard allegedly violated, 30 C.F.R. § 75.520, reads: "All electric equipment shall be provided with switches or other controls that are safely designed, constructed, and installed."

Citation No. 776637 describes the following condition or practice:

> The distribution box at the bottom of "B" shaft was not safely designed and constructed in that it contained no apparatus to monitor the grounding circuit and the receptacles were not arranged for the ground conductor to be broken last. The distribution box was serving a pump at the shaft sump and a car puller. Terry Earhart (maintenance foreman) is supervised by Dan Wilkerson, chief elect. The primary power on box is 480 VAC.

Harold Pearce, the MSHA inspector who issued the citation, testified that the box was approximately three feet long, three feet wide, 12 to

18 inches deep, and was hung on a wall about three feet off the ground. The box contained circuit breakers and one micro switch which was incorporated into the receptacle. Mr. Pearce testified that in his opinion the box was not safely designed because it was not installed with the necessary safety controls. He stated that the box should have had a ground-monitoring system, which is a fail-safe system that prevents the system from being energized. Such a system serves as a control device, but is not used to turn off the power manually.

Mr. Pearce testified that the box was located in a five-foot-wide passageway at the underground base of a lift, and that approximately 305 men were required to pass through this passageway when going to their jobs and when leaving at the end of the shift. Because of this location and the shock hazard presented by the lack of a ground monitoring system, he considered the box to be unsafe.

George Verley, the safety director at the mine, testified that the box furnishes power to the sump pump and the lift. He agreed that the box had no ground check circuit to break the power if there was a ground failure. He explained that the box was operated automatically, and that there were no manually operated switches or controls on it.

In its excellent posthearing brief, Respondent conceded that the condition alleged by MSHA existed. However, Respondent challenged the applicability of the cited standard to this condition, and claimed that the citation was insufficiently specific to support a finding of violation.

Respondent contended that "[t]he condition cited by Inspector Pearce focuses on the ground check monitoring circuit which is neither a switch nor a control required by § 75.520." Respondent's Brief at 12. Respondent cited various dictionary definitions of the term "switch" to support its contention that "the switches or other controls to which § 75.520 refers are devices used to energize or deenergize the power in a piece of electrical equipment." Id. at 13; emphasis in original. Respondent argued that the terms "control" and "switch" are synonymous. Old Ben urged that since a ground check monitoring circuit is an automatic safety device, rather than a manually operated device, it is not a "switch or other control."

I accept the basic definition of a switch as a device which energizes or deenergizes the power in a piece of electrical equipment. However, I do not believe that a device which would otherwise be classified as a switch ceases to be so classified simply because it operates automatically. Respondent failed to provide any explanation for the words "or other controls" after the word "switches" in Section 75.520, aside from the conclusory assertion that the terms are synonymous. I believe that the phrase "or other controls" is sufficiently broad to include automatically operated controls, such as the circuit breakers in this case. This remedial standard is to be liberally interpreted to better effectuate the remedial purposes and policies of the underlying statute. 1/ The standard refers, inter alia, to devices which deenergize a piece of electrical equipment. A ground check monitoring circuit does precisely that. Accordingly, I find that this device is covered by Section 75.520.

1/ See cases cited in note 10, infra, and accompanying text.

Respondent's second argument was that the citation must be vacated because it does not describe with sufficient particularity the nature of the violation. Respondent argued that the citation refers not to the language of Section 75.520, but rather to 30 C.F.R. § 75.902. That standard provides, in pertinent part, that "low- and medium-voltage resistance grounded systems shall include a fail-safe ground check circuit to monitor continuously the grounding circuit to assure continuity which ground check circuit shall cause the circuit breaker to open when either the ground or pilot check wire is broken * * *." It adds that "[c]able couplers shall be constructed so that the ground check continuity conductor shall be broken first and the ground conductors shall be broken last when the coupler is being uncoupled."

I agree with Respondent that the language of the citation more closely resembles Section 75.902 than Section 75.520. However, I do not believe that this renders the citation fatally defective. The issue here is not whether MSHA could have cited a "better" standard in its citation, but whether Respondent violated the standard which was cited. 2/

2/ As the Commission held in Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Jim Walter Resources, Inc. and Cowin and Company, 1 FMSHRC Decs. No. 8 at 1827 (1979), even if the notice of violation does not sufficiently specify the standard violated, the notice is not necessarily invalid. The Commission explained:

> The primary reasons compelling the statutory mandate of specificity is [sic] for the purpose of enabling the operator to be properly advised so that corrections can be made to insure safety and to allow adequate preparations for any potential hearing on the matter. We find that these purposes of section 104(e) have been satisfied here. The operators do not claim any difficulty in being able to identify and thereby abate the allegedly violative condition. Nor does it appear that either Jim Walter or Cowin was deprived of notice sufficient to enable them to defend at hearing. They did not

The uncontroverted testimony of the MSHA inspector indicated that the distribution box in question was not safely designed and constructed. Therefore, Respondent violated 30 C.F.R. § 75.520 as alleged.

As stipulated to by the parties, Respondent was an average size operator; however, the mine in question was large, Respondent had an average history of previous violations, and payment of the penalty recommended would not affect Respondent's ability to continue in business. With respect to negligence, I find that the operator should have been aware of the condition. As to gravity, the inspector testified that 305 men were exposed to the shock hazard created by this violation. Finally, I note that the condition was rapidly abated. Upon consideration of these criteria, I assess a penalty of $250.

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fn. 2 (continued)

> request more specific notice of the alleged violations in pre-hearing motions, nor did they request a continuance when evidence regarding alleged noncompliance with specific ANSI standards was introduced at the hearing. Instead, they defended on the merits. The operators did not claim prejudice in preparing a defense until the post-hearing brief where the claim appears in a perfunctory footnote.

To the same effect is the following statement made by the U.S. Court of Appeals for the District of Columbia Circuit in National Realty and Construction Company, Inc. v. Occupational Safety and Health Review Commission, 489 F.2d 1257, 1264 (1974):

> So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue. This follows from the familiar rule that administrative pleadings are very liberally construed and very easily amended. The rule has particular pertinence here, for citations under the 1970 Act are drafted by non-legal personnel, acting with necessary dispatch. Enforcement of the Act would be crippled if the Secretary were inflexibly held to a narrow construction of citations issued by his inspectors. [Footnotes omitted.]

Citation No. 777024

Petitioner contended that Respondent violated the standard at 30 C.F.R. § 70.210, which requires operators to take respirable dust samples and forward them to MSHA under certain defined conditions. Respondent did not take and forward to MSHA any samples for the period between March 30, 1979 and May 9, 1979 for Section 098 at Mine No. 24, although Petitioner directed Respondent to take such samples for this period of time. Respondent's defense was that it was not required to take the samples pursuant to 30 C.F.R. § 70.210 because a sufficient number of "normal production shifts" did not take place between these two dates.

Wolfgang Kaak, the MSHA inspector who served the citation, testified that from March 29, 1979 to April 18, 1979, this section was producing coal, but from April 19, 1979 through May 9, 1979, it was idle due to a roof fall. He stated that MSHA required dust samples to be taken on all production shifts, and that MSHA's computer would void those samples which were taken during shifts when production was significantly below normal.

Michael O'Day, Respondent's chief mine inspector, identified Respondent's Exhibits 1 through 37. Exhibits 1 through 7 were Respondent's monthly production summaries for Mine 24 from September 1978 through March 1979. These records proved that Respondent's average production for the period from November 1978 through March 1979 was 42.67 shuttle cars of coal per shift. Exhibits 8 through 37 were daily production reports which showed the number of shuttle cars of coal produced during each shift from March 30, 1979 through May 9, 1979. This evidence proved that there were only five days during this period when more than 42.67 shuttle cars of coal were produced during one or

more shifts. These were (a) March 30, when one shift produced 51 shuttle cars; (b) April 3, when 60 shuttle cars were produced during one shift; (c) April 5, when 61 shuttle cars were produced during one shift; (d) April 6, when 50, 47, and 45 shuttle cars of coal were produced during three shifts; and (e) April 10, when 60 shuttle cars were produced during one shift.

The standard in question reads:

> Section 70.210 Original sampling cycle; establishment of basic sample.
>
> (a) Samples of respirable dust with respect to each working section of a coal mine shall be taken on 10 consecutive normal production shifts, each of which is worked on a separate calendar day, beginning with a normal production shift completed on or after December 30, 1972, except that, with respect to working sections located in multisection mines, original sampling may be conducted in accordance with the provisions of § 70.241 of this part. An original sampling cycle shall be begun with respect to each working section of a coal mine no later than the 11th day upon which normal production shifts are worked in that section. For each working section, this series of 10 samples, or a series of 10 samples submitted in accordance with the provisions of § 70.230 of this part, shall constitute the basic sample with respect to that working section.
>
> (b) Where a working section is opened after December 30, 1972, the original sampling cycle required in accordance with the provisions of paragraph (a) of this section shall be begun on a normal production shift (as defined in § 70.220) on the first production day in such working section and thereafter on consecutive production shifts (as defined in § 70.220).

Respondent contended that it did not violate the standard because "there were not a sufficient number of normal production shifts (each of which is worked on a separate calendar day) in which it could have obtained the requisite number of dust samples (ten) prior to May 9, 1979 when the citation was issued." Respondent's Brief at 21.

Respondent contended that the critical phrase in 30 C.F.R. § 70.210 is "normal production shift." This term is defined at 30 C.F.R. § 70.220(b)(1) as follows:

> (1) "Normal production shift" (as differentiated from a maintenance shift) means a shift during which the amount of coal produced in a working section is representative of the average amount of coal produced in such working section during all production shifts worked during the life of such working section or during the six months immediately preceding such production, whichever is the shorter period. With regard to a new working section, a "normal production shift" means a shift during which the amount of coal produced is comparable to the amounts produced during normal production shifts in other comparable working sections.

Respondent argued that it had, at most, only five normal production shifts between March 30 and May 9, 1979. I am unable to accept Respondent's reasoning. The definition of "normal production shift" at 30 C.F.R. § 70.220(b)(1) speaks of a shift during which coal production is representative of the average production in the section during either the life of the section or the six-month period immediately preceding such production. The definition does not require that coal production be equal to or greater than the relevant average. Respondent's argument is based on Mr. O'Day's testimony as to the number of shifts "which met or surpassed the average production" during one of the periods specified in the definition. See Respondent's Brief at 25. Respondent's challenge is thus based on an incorrect interpretation of the phrase "representative of" in Section 70.220(b)(1).

Nevertheless, I believe that this citation must be vacated. I find that there were not ten shifts during the relevant period when production on the section was "representative of" the 42.67 shuttle car average over the previous six months. Admittedly, on each of the five days listed above,

production on one or more shifts surpassed the 42.67 car average. There was thus at least one "normal production shift" on each of these days. Further, on April 9, 1979, when one shift produced 42 cars of coal, there was a "normal production shift." There also may have been a "normal production shift" on April 4, 1979, when 37 cars were produced on one shift. This would bring the total number of "normal production shifts, each of which is worked on a separate calendar day," to seven. During the remainder of the period under scrutiny, all working shifts on the section yielded between 10 and 28 shuttle cars of coal. I do not find that production on any of these shifts was "representative of" the 42.67 shuttle car average figure. Thus, at best, the section had seven "normal production shifts, each of which is worked on a separate calendar day." The regulation states that 10 such shifts must take place before an operator's duty to establish a basic sampling cycle arises. Since no duty arose on Respondent's part, there was no violation of 30 C.F.R. § 70.210. Therefore, Citation No. 777024 is VACATED.

The 15 Citations Issued Pursuant to 30 C.F.R. § 70.100(b)

The remaining 15 citations involved Petitioner's contention that the cumulative concentration of respirable dust in Respondent's mine areas exceeded allowable levels as those levels are defined in 30 C.F.R. § 70.100(b). That standard reads:

> Effective December 30, 1972, each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

The samples which resulted in the issuance of Citation No. 773508, in Docket No. LAKE 79-238, were taken by the MSHA inspector, while the samples which resulted in the issuance of the other 15 citations were taken by Respondent and evaluated at Petitioner's laboratory.

Respondent's only evidence with regard to these citations consisted of Petitioner's responses to its requests for admissions. 3/ Respondent's defense was that, as a matter of law, the Secretary of Labor's procedures and regulations do not comply with the applicable statutes.

3/ Request No. 1 read: "The Secretary and the Secretary of Health, Education and Welfare, as of October 8, 1979, have not approved any device for the taking of accurate samples of respirable dust in the mine atmosphere to which each miner in the active workings is exposed."

Petitioner's answer to that request read as follows:

> Denied. The Secretary of Interior and the Secretary of Health, Education and Welfare approved devices for taking accurate samples. Pursuant to Section 301(c)(2) of the Amendments Act, 30 U.S.C. § 301(c)(2), the devices approved by the Secretary of Interior remain in effect until modified by the Secretary of Labor.

Request No. 2 read: "The Secretary and the Secretary of Health, Education and Welfare, as of October 8, 1979, have not approved a device for measuring respirable dust."

Petitioner's answer to that request read as follows:

> Denied. The Secretary of Interior and the Secretary of Health, Education and Welfare have approved devices for measuring respirable dust. Pursuant to Section 301(c)(2) of the Amendments Act, 30 U.S.C. § 961(c)(2), the devices remain in effect until modified by the Secretary of Labor.

With regard to these citations, the parties further stipulated, and I find:

8. The respirable dust samples upon which the citations were based were taken with MSA (Mine Safety Appliance) Model G respirable dust sampling devices. These devices were initially approved for use by the Secretary of the Interior and the Secretary of Health, Education, and Welfare under 30 C.F.R. Part 74 and said approval has not been withdrawn or rescinded.

9. With the exception of Citation No. 773508 (Docket No. LAKE 79-238) all respirable dust samples were taken by Respondent through duly authorized and trained personnel pursuant to 30 C.F.R. Part 70.

10. Citation No. 773508 (Docket No. LAKE 79-238) was based upon samples taken by an MSHA inspector during the course of an inspection.

11. All respirable dust samples collected by Respondent were taken with properly calibrated and functioning MSA Model G devices. The samples were properly sealed and mailed to the MSHA laboratory in Pittsburgh, Pennsylvania.

12. Citation No. 9940663 (Docket No. LAKE 79-238) was issued on February 1, 1979, and is based upon 10 respirable dust samples taken pursuant to 30 C.F.R. Part 70. The 10 samples collected indicated an average concentration of 2.24 milligrams of dust per cubic meter of air in the working environment of the high risk occupation in Section 048-0 of Mine No. 21.

13. Citation No. 773508 (Docket No. LAKE 79-238) was issued on April 11, 1979, and is based upon three samples taken by the inspector to determine compliance with the respirable dust standard set forth at 30 C.F.R. § 70.100(b). The samples collected indicated an average concentration of 3.6 milligrams of dust per cubic meter of air in the working environment of the shear operator in Section 090 of Mine No. 21.

14. Citation No. 9940684 (Docket No. LAKE 79-239) was issued on April 5, 1979, and is based upon 10 respirable dust samples taken pursuant to 30 C.F.R. Part 70. The 10 samples collected indicated an average of 2.17 milligrams of dust per cubic meter of air in the working environment of the high risk occupation in Section 100-0 of Mine No. 21.

15. Citation No. 9940664 (Docket No. LAKE 79-240) was issued on February 1, 1979, and is based upon six respirable dust samples taken pursuant to 30 C.F.R. Part 70. The six samples had a cumulative concentration of 23.7 milligrams of dust per cubic meter of air in the working environment of the high risk occupation in Section 97-0 of Mine No. 24.

16. Citation No. 9940688 (Docket No. LAKE 79-240) was issued on April 13, 1979, and is based upon 10 respirable dust samples taken pursuant to 30 C.F.R. Part 70. The 10 samples collected indicated an average concentration of 2.17 milligrams of dust per cubic meter of air in the working environment of the high risk occupation in Section 88-0 of Mine No. 24.

17. Citation No. 9940693 (Docket No. LAKE 79-241) was issued on May 2, 1979, and is based upon nine respirable dust samples taken pursuant to 30 C.F.R. Part 70. The nine samples collected indicated a cumulative concentration of 25.4 milligrams of dust per cubic meter of air in the working environment of the high risk occupation in Section 99-0 of Mine No. 24.

18. Citation No. 9940694 (Docket No. LAKE 79-241) was issued on May 17, 1979, and is based upon 10 respirable dust samples taken pursuant to 30 C.F.R. Part 70. The 10 samples collected indicated an average concentration of 2.11 milligrams of dust per cubic meter of air in the working environment of the high risk occupation in Section 84-0 of Mine No. 24.

19. Citation No. 9940674 (Docket No. LAKE 79-242) was issued on February 22, 1979, and is based upon nine respirable dust samples taken pursuant to 30 C.F.R. Part 70. The nine samples collected indicated a cumulative concentration of 21 milligrams of dust per cubic meter of air in the working environment of the high risk occupation in Section 10-0 in Mine No. 25.

20. Citation No. 9940690 (Docket No. LAKE 79-243) was issued on April 18, 1979, and is based upon 10 respirable dust samples taken pursuant to 30 C.F.R. Part 70. The 10 samples collected had an average concentration of 2.52 milligrams of dust per cubic meter of air in the working environment of the high risk occupation in Section 002-0 of Mine No. 26.

21. Citation No. 9940689 (Docket No. LAKE 79-244) was issued on April 13, 1979, and is based upon 10 respirable dust samples taken pursuant to 30 C.F.R. Part 70. The

10 samples collected had an average concentration of 2.52 milligrams of dust per cubic meter of air in the working environment of the high risk occupation in Section 081-0 of Mine No. 26.

22. Citation No. 9940678 (Docket No. LAKE 79-251) was issued on March 14, 1979, and is based upon nine respirable dust samples taken pursuant to 30 C.F.R. Part 70. The nine samples had a cumulative concentration of 21.0 milligrams of dust per cubic meter of air in the working environment of the high risk occupation in Section 104-0 of Mine No. 21.

23. Citation No. 9940659 (Docket No. LAKE 79-252) was issued on January 22, 1979, and is based upon five respirable dust samples taken pursuant to 30 C.F.R. Part 70. The five samples had a cumulative concentration of 26.5 milligrams of dust per cubic meter of air in the working environment of the high risk occupation in Section 70-0 of Mine No. 21.

24. Citation No. 9940706 (Docket No. LAKE 80-40) was issued on June 26, 1979, and is based upon 10 respirable dust samples taken pursuant to 30 C.F.R. Part 70. The 10 samples had an average concentration of 2.15 milligrams of dust per cubic meter of air in the working environment of the high risk occupations in Section 017-0 of Mine No. 24.

25. Citation No. 9940700 (Docket No. LAKE 80-66) was issued on June 4, 1979, and is based upon 10 respirable dust samples taken pursuant to 30 C.F.R. Part 70. The 10 samples had an average concentration of 2.16 milligrams of dust per cubic meter of air.

26. Citation No. 9940703 (Docket No. LAKE 80-81) was issued on June 18, 1979, and is based upon nine respirable dust samples taken pursuant to 30 C.F.R. Part 70. The nine samples had a cumulative concentration of 26.6 milligrams of dust per cubic meter of air.

27. Although Respondent has stipulated to the average concentration of dust per cubic meter of air found in the samples collected and used by Petitioner as the basis for the citations in issue, Respondent does not stipulate that said samples establish violations of the Act or that the dust collected and weighed is respirable and has a causal relationship to pneumoconiosis.

With regard to Citation No. 773508, which involved samples taken by an MSHA inspector, Petitioner's witnesses were the MSHA inspector and the MSHA lab technician who calibrated the sampler.

Mr. Kirby Webb, an MSHA coal mine inspector based at the Benton, Illinois, office, testified that he took samples at Respondent's Mine No. 21, Section ID90, on April 5, April 9, and April 10, 1979. This was a working section on which a longwall mining machine was used. For sampling, Mr. Webb utilized an MSA Model G dust sampler on each occasion. On each date, he took five samplers into the mine at the beginning of the shift. Before bringing the samplers into the mine, they were calibrated by Mary Nowakowski, an MSHA lab technician at the Benton office. At the start of the shift, before distributing the samplers, Mr. Webb checked the air flow and adjusted it by use of a screw provided for that purpose. He sampled at five locations on the shift, placing samplers near the shear operator, jack man, shuttle car operator, repairman, and at a fifth location that he does not recall. The samplers were placed approximately three feet from the working face. Each sampler remained in the section during the eight hour shift, except for possibly half an hour when, if the individual who had the sampler went to lunch, he might have taken it with him. Mr. Webb returned to the section to check the devices approximately three times.

At the end of the shift, around 3:50 p.m., Mr. Webb collected the samplers. He returned to his office and removed the cassettes from the pumps, dried the cassettes by use of a desiccator, weighed the samples, and noted the net weight gain of each one. He then put the samples in a plastic bag and left them to be mailed for testing.

Mary Nowakowski testified that she was a mining and engineering technician at MSHA's Benton office. She described her duties as to "calibrate and maintain the personal dust samplers and . . . maintain records on the maintenance and calibration of each pump, and . . . weigh and record the samples collected on the dust pumps." She stated that she examines any samples which have a weight gain of "1.8 or greater" under a microscope to check for oversized particles, and then sends the samples to the Pittsburgh Technical Support Center for quartz analysis. She also testified that she desiccates and weighs certain operators' samples.

Thomas F. Tomb testified that he is a supervisory physicist in the dust branch of the Pittsburgh Technical Support Center. This facility processes all dust samples that are collected by coal mine operators in the continental United States. He has considerable experience in respirable dust research, and has authored a number of professional publications on the subject. Mr. Tomb focused his testimony on the use of the MSA Model G unit. He stated that this device, which was used to establish the violations in these cases, was approved by the National Institute for Occupational Safety and Health of the Department of Health, Education, and Welfare for performance, and by the Department of the Interior for intrinsic safety (i.e., to ascertain whether it would be safe to use in explosive atmospheres).

The personal sampler which was submitted into evidence consists of a pump which is worn on the miner's belt and a collection unit which is worn on the miner's chest connected by a rubber hose. 4/ Mr. Tomb described the

4/ A personal sampling unit is worn by the individual miner during a working shift to measure the amount of dust to which he is exposed. Personal

relative efficiency of personal samplers and MRE devices in screening out dust particles which are too large to be respirable. In support of this testimony, Petitioner introduced into evidence a graph which depicted the percentage of various sized dust particles which will be collected by these two devices, and compared these percentages with the accepted percentages of similarly sized particles which will be deposited in the lungs after being inhaled. See Petitioner's Exhibit 24, attached as an Appendix to this Decision. Mr. Tomb stated that in his opinion, the MSA Model G represented "the state of the art" in personal respirable dust sampling equipment.

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fn. 4 (continued)
units are to be distinguished from units such as the MRE Gravimetric Dust Sampler, developed by the Mining Research Establishment of England's National Coal Board. The latter device is considerably larger in size and is placed in a particular area of the mine, rather than worn by an individual miner.

In Eastern Associated Coal Corporation, 7 IBMA 14, 30 (1976), the Interior Board of Mine Operations Appeals described the operation of a personal air sampler as follows:

> * * * This device is a unit which is purchased by an operator and worn by the individual miner. Each device is supposed to duplicate the behavior of the human respiratory system which draws in air, filters larger particulates, and allows others to reach the lungs. Air is drawn into a sampler by a pump and battery-driven motor. It passes through a nylon cyclone 10 mm. in diameter which is supposed to separate the respirable from the nonrespirable particulates. Theoretically, only the former reaches the filter where the particulates are captured. The filter is the analog of the lobes of a human lung.
>
> The manufacturer of the personal air sampler weighs each filter before sealing it in the device and records the weight on an attached data card. After the sample is collected, the sampler is forwarded to a MESA laboratory. * * *
>
> At the laboratory, each sampler is opened and among other things the filter is weighed so that a comparison can be made with the weight recorded on the data card by the manufacturer. Theoretically, the result reflects the weight of the particulates which were being deposited on the lungs of the wearer of the sampler at the time the sample was taken.

Mr. Tomb discussed the various "sampling cycles" which the regulations require MSHA to employ in order to determine compliance with the respirable dust standard at 30 C.F.R. § 70.100(b). He was asked whether a violation of Section 70.100(b) could be established on the basis of fewer than 10 samples. He replied in the affirmative, explaining that the regulations require compliance with the 2.0 milligram standard as an average over 10 shifts. Thus, once the cumulative concentration of dust in a set of samples exceeded 20 milligrams, a violation would be established. For example, one of the citations involved in these cases was based upon only six samples. The cumulative weight of the dust in these samples was 23.7 milligrams. Mr. Tomb justified the issuance of the notice of noncompliance in this case by stating that "if you added the other four samples, assuming that the concentration of those four samples was zero, and divided the cumulative concentration by ten, you still would have exceeded the respirable dust standard of 2.0 milligrams per cubic meter." Mr. Tomb was unaware of any statutory or regulatory authority which provided for a determination of compliance or noncompliance with the standard on the basis of fewer than 10 samples, but he stated that such a procedure is set forth in the MSHA inspector's manual. 5/

Paul Parobek, a supervisory chemist for MSHA who directs a laboratory that processes dust samples, also testified. He described the procedures which his facility employs for determining whether dust samples comply with

5/ At the hearing, Respondent indicated that it would challenge the Secretary's compliance with his own regulations in issuing citations which were based on fewer than ten samples. However, after the hearing, Respondent withdrew this issue from its contest.

the standard. In brief, the personal sampler units collect respirable dust on a filter which is encapsulated in a plastic cassette. The cassette is pre-weighed before being used in the sampler. After it is used for a complete working shift, it is returned to the laboratory, placed in a desiccator to remove any accumulated moisture, and reweighed. By comparing the weights before and after sampling, the amount of respirable dust to which the miner was exposed during the shift can be determined. Procedures also exist for determining whether a particular sample may have been contaminated by over-sized particles. These procedures involve a microscopic examination of the sample with a special device which allows the laboratory technician to recognize oversized particles.

Petitioner's final witness, David Stritzel, stated that he is a supervisory coal mine technical specialist with MSHA. His duties include managing a group of engineers and other specialists who work in the fields of respirable dust, noise control, roof control, ventilation, and certain enforcement activities relating to electrical problems. He testified that he was familiar with Respondent's operations in Illinois, and that in his opinion, Respondent had the worst record of any company in the Benton subdistrict of compliance with the respirable dust standards.

Applicable Statutes and Regulations

Section 202(e) of the Federal Coal Mine Health and Safety Act of 1969 (the 1969 Act) provided, prior to amendment:

> References to concentrations of respirable dust in this title means the average concentration of respirable dust if

measured with an MRE instrument or such equivalent concentrations if measured with another device approved by the Secretary and the Secretary of Health, Education, and Welfare. As used in this title, the term "MRE instrument" means the gravimetric dust sampler with four channel horizontal elutriator developed by the Mining Research Establishment of the National Coal Board, London, England.

Section 318(k) of the 1969 Act provided, prior to amendment:

For the purpose of this title and title II of this Act, the term -

* * * * * * *

(k) "respirable dust" means only dust particulates 5 microns or less in size * * *

Section 202 of the Federal Mine Safety and Health Amendments Act of 1977 (the Amendments Act) reads:

(a) Section 202(e) of the Federal Coal Mine Health and Safety Act of 1969 is amended to read as follows:

"(e) References to concentrations of respirable dust in this title mean the average concentration of respirable dust measured with a device approved by the Secretary and the Secretary of Health, Education, and Welfare."

(b) Section 318(k) of the Federal Coal Mine Health and Safety Act of 1969 is repealed.

Section 301(c)(2) of the Amendments Act reads:

All orders, decisions, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges (A) which have been issued, made, granted, or allowed to become effective in the exercise of functions which are transferred under this section by any department or agency, any functions of which are transferred by this section, and (B) which are in effect at the time this section takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, revoked, or repealed by the Secretary of Labor, the Federal Mine

Safety and Health Review Commission or other authorized officials, by any court of competent jurisdiction, or by operation of law.

Section 307 of the Amendments Act reads:

> Except as otherwise provided, this Act and the amendments made by this Act shall take effect 120 days after the date of enactment of this Act. * * * The amendment to the Federal Coal Mine Health and Safety Act of 1969 made by section 202 of this Act shall be effective on the date of enactment.

Section 202(b)(2) of the 1977 Act reads:

> Effective three years after the date of enactment of [the 1969 Coal Act], each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

Section 202(e) of the 1977 Act reads:

> References to concentrations of respirable dust in this title mean the average concentration of respirable dust measured with a device approved by the Secretary and Secretary of Health, Education, and Welfare.

30 C.F.R. § 70.100(b) reads:

> Effective December 30, 1972, each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

Decision for the Citations Issued Pursuant to 30 C.F.R. § 70.100(b)

Respondent argued that there is no valid respirable dust program because the 1977 Act specifically delegated the authority to approve

respirable dust measuring devices to the Secretary of Labor and the Secretary of Health, Education, and Welfare, and since the Secretary of Labor has not done this, "the fundamental requirement of Section 202(e) [of the 1977 Act] has not been met." Respondent's Brief at 35, 42. I disagree.

The 1969 Act contained two definitions of respirable dust. Section 202(e) stated:

> References to concentrations of respirable dust in this title means the average concentration of respirable dust if measured with an MRE instrument or such equivalent concentrations if measured with another device approved by the Secretary and the Secretary of Health, Education, and Welfare * * *. 6/

Section 318(k) of the 1969 Act stated, "'respirable dust' means only dust particulates 5 microns or less in size * * *."

In Eastern Associated Coal Corporation, Docket No. MORG 73-131-P et al. (December 16, 1974), the contractor challenged the dust program which the Department of the Interior developed after the 1969 Act, alleging that the statutory definitions were inconsistent. Eastern claimed that the MRE instrument and other instruments approved by the Secretaries of the Interior and Health, Education and Welfare and used as a basis for such citations did not screen out particulates larger than five microns in size. Judge Moore agreed and vacated the citations based upon his finding "that the instruments do collect particles larger than the statutory definition of respirable dust."

6/ Section 3(a) of the 1969 Act defined "Secretary" as "the Secretary of the Interior or his delegate."

On appeal, the Interior Board of Mine Operations Appeals (IBMA) first reversed Judge Moore's decision (see 5 IBMA 185 (1975)), but then affirmed it upon reconsideration (see 7 IBMA 14 (1976)). The decision applied to the MRE instrument as well as two personal samplers approved by the two Secretaries.

The Board stated:

> On the basis of the record as described above, we find that MESA has been systematically ignoring the legislative definition of the term "respirable dust" as meaning "* * * only dust particulates 5 microns or less in size." * * * [I]t follows that the data memorialized in these notices, purporting to show alleged concentrations of "respirable dust," represent as well the weight of some particulates which are oversize if the legislative 5-micron definition is applicable. [Emphasis by the Board.]

7 IBMA at 34.

The Eastern Associated decision triggered prompt congressional action. Section 202 of the Amendments Act of 1977 repealed the five-micron definition and rewrote Section 202(e) of the 1969 Act to define respirable dust as "the average concentration of respirable dust measured with a device approved by the Secretary and the Secretary of Health, Education, and Welfare." 7/

7/ There is little doubt that the deletion of the five-micron definition was a direct result of the Board's decision in Eastern Associated Coal Corporation. Respondent directed my attention to the Conference Committee Report on the 1977 Act, which stated that the changes were made "in order to eliminate apparently conflicting definitions of respirable dust which have threatened to interfere with the civil penalty enforcement of the dust sampling program established in Section 202 of the Coal Act." Respondent's Brief at 44, quoting S. Rep. No. 95-461, 95th Cong., 1st Sess. 63 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 1341 (1978).

The Senate Report on the 1977 Act contained the following explanation of these changes:

> Respirable Dust
>
> Section 318 of the Federal Coal Mine Health and Safety Act of 1969 is amended by deleting subsection (k) which defines respirable dust in terms of dust particles 5 microns or less in size. The new definition in subsection (e) defines respirable dust in terms of average concentration, a method of determining the amount of dust in a mine atmosphere on the basis of weight. Since all devices approved by the Secretary and the Secretary of Health, Education and Welfare measure respirable dust on the basis of weight, arther [sic] than particle size, this amendment is necessary to make the definition of respirable dust conform to the approved method of sampling.

S. Rep. 95-181, 95th Cong., 1st Sess. 51 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 639 (1978).

The pivotal issue in connection with these citations involves the interpretation of Section 202(e), as amended. The statute defines respirable dust as dust measured by "a device approved by the Secretary and the Secretary of Health, Education, and Welfare." If this phrase is read as meaning "a device to be approved by the Secretary of Labor and the Secretary of Health, Education, and Welfare subsequent to the effective date of this section," the citations must be vacated. This is because there were no such approvals as of the dates the citations were issued. On the other hand, if the statute means "a device approved since the effective date of the 1969 Act by the Secretary of the Interior and the Secretary of Health, Education, and Welfare," the citations must be affirmed.

Respondent's argument is based upon three recent decisions in which Judge Moore concluded that, "there is not and never has been a valid enforceable respirable [dust] program * * *." MSHA v. Olga Coal Co., Docket No. HOPE 79-113-P (1979); MSHA v. Alabama By-Products, Docket No. SE 79-110 (1980); and MSHA v. North American Coal Corp., Docket No. LAKE 79-118 (1980). 8/

In Olga, he stated:

> * * * While it is true that section 301(c)(2) of the Amendments Act does provide that regulations under the old Act will remain in effect until reversed by the Commission or other appropriate authority, that does not have the effect of perpetuating the old definition of respirable dust. That definition was specifically repealed on November 9, 1977, and the Amendment was specifically made effective on the date of enactment rather than 120 days later as were the other provisions of the Act. The new definition of respirable dust is dependent upon a device "approved by the Secretary [of Labor] and the Secretary of Health, Education and Welfare." As far as I have been able to determine, the Secretary of Labor has not joined the Secretary of Health, Education and Welfare in approving devices for the collection of respirable dust. If that is true, there has been no effective standard since November 9, 1977.

As I stated in my recent decision in MSHA v. Kanawha Coal Company, Docket Nos. WEVA 80-40 et al. (June 24, 1980), I have great respect for Judge Moore, an able and articulate judge. However, on this issue, I respectfully disagree with his conclusions. 9/

8/ The Commission granted the Secretary of Labor's petition for review of the Olga case on August 7, 1979, and the Secretary of Labor's petition for review of the Alabama By-Products case on March 5, 1980. However, neither case has been decided.

9/ As stated by Commission Rule 73, 29 C.F.R. § 2700.73, "[a]n unreviewed decision of a Judge is not a precedent binding upon the Commission." Therefore, although I accord considerable weight to a fellow judge's views, where I disagree, I am not bound by his decision.

It is a fundamental rule of statutory construction that a statute should not be interpreted to defeat its obvious intent. In Wilson v. United States, 369 F.2d 198, 201 (D.C. Cir. 1966), the Court stated, "[t]he literal meaning of a statute cannot be followed where it leads to a result contrary to legislative intention as revealed by the legislative history or other appropriate sources." In Perry v. Commerce Loan Company, 383 U.S. 392, 400 (1966), the Supreme Court stated: "Frequently, * * * even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." This cannon of statutory interpretation has even been applied in criminal cases. In United States v. Braverman, 373 U.S. 405, 408 (1963), the Supreme Court stated: "We have considered the statute before us in light of the salutary rule that criminal statutes should not by interpretation be expanded beyond their plain language. But neither can we interpret a statute so narrowly as to defeat its obvious intent."

Another canon of statutory interpretation is that remedial statutes are to be liberally construed to advance the remedies intended. 10/ It is clear

10/ See 3 Sands, Sutherland Statutory Construction § 60.01. In St. Marys Sewer Pipe Company v. Director of the United States Bureau of Mines, 262 F.2d 378, 381 (3rd Cir. 1959), the Court made the following comments concerning the 1952 Federal Coal Mine Safety Act:

> The statute we are called upon to interpret is the outgrowth of a long history of major disasters in coal mines. * * * It is so obvious as to be beyond dispute that in construing safety or remedial legislation narrow or limited construction is to be eschewed. Rather, in this field liberal construction in light of the prime purpose of the legislation is to be employed.

Similar statements were made by the courts under the 1969 Act. See Reliable Coal Co. v. Morton, 478 F.2d 257, 262 (4th Cir. 1973); Phillips v. IBMA

that an essential purpose of the 1969 Act and the 1977 Amendments Act was to protect miners against coal workers' pneumoconiosis, commonly known as "black lung," which is caused by the inhalation of respirable coal dust particles. Thus, Section 2 of the 1969 Act, as amended, states that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner." The balance of Section 2 also stresses the importance of protecting the health of miners. Title IV, dealing with black lung benefits, specifically provides benefits to miners who are disabled by coal workers' pneumoconiosis.

Finally, Section 201(b) of the 1969 Act stated:

> Among other things, it is the purpose of this title to provide, to the greatest extent possible, that the working conditions in each underground coal mine are sufficiently free of respirable dust concentrations in the mine atmosphere to permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupation-related disease during or at the end of such period.

Thus, it is clear that one of the essential purposes of this legislation was to prevent miners from contracting pneumoconiosis as a result of inhaling respirable coal dust, and to require mine operators to maintain an atmosphere as free as possible from such dust.

---

fn. 10 (continued)
500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975); Freeman Coal Mining Company v. IBMA, 504 F.2d 741, 744 (7th Cir. 1974); International Union, UMWA v. Kleppe, 532 F.2d 1403, 1406 (D.C. Cir. 1976), cert. denied, 429 U.S. 858 (1976).

Turning to the legislation in question, Section 202 of the Amendments Act reads:

> a. Section 202(e) of the Federal Coal Mine Health and Safety Act of 1969 is amended to read as follows:
>
> "(e) References to concentrations of respirable dust in this title mean the average concentration of respirable dust measured with a device approved by the Secretary and the Secretary of Health, Education, and Welfare."
>
> b. Section 318(k) of the Federal Coal Mine Health and Safety Act of 1969 is repealed.

As I read the amended Section 202(e), the word "approved" is ambiguous and is subject to two possible definitions. It can mean, as contended by Respondent, devices to be approved in the future. Alternatively, it can mean devices which have been approved as well as devices which may be approved in the future. Since either meaning is plausible, I interpret this language to have the meaning which would effectuate the purposes of Congress and maintain the continuity of a respirable dust program which Congress considered essential.

Respondent argued that the word "Secretary," as used in Section 202(e), means the Secretary of Labor because Section 102(b)(1) of the Amendments Act amended Section 3(a) of the 1969 Act to read: "For the purpose of this Act, the term 'Secretary' means the Secretary of Labor or his delegate." Prior to amendment, "Secretary" meant "the Secretary of the Interior or his delegate."

Section 307 of the Amendments Act stated:

> Except as otherwise provided, this Act and the amendments made by this Act shall take effect 120 days after the date of

> enactment of this Act * * *. The amendment to the Federal Coal Mine Health and Safety Act of 1969 made by section 202 of this Act shall be effective on the date of enactment.

Thus, although the amendments in Section 202 of the 1977 legislation were made effective immediately, the change in definition of "Secretary" from "Secretary of the Interior" to "Secretary of Labor," as well as the balance of the Act, did not become effective until 120 days later. When Section 202(e) was amended, the "Secretary" was the Secretary of the Interior and not the Secretary of Labor and, as indicated, the Secretary of the Interior had approved the device involved in this case. The fact that the effective date of all other sections of the Act was delayed 120 days, while this section was made effective immediately, further convinces me that Congress intended that there be a valid and enforceable respirable dust program upon enactment of the statute.

A further indication of Congress' intent to avoid the "lapse situation" urged by Respondent is Section 301(c)(2) of the Amendments Act. That provision preserves all "orders, decisions, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges" which were in effect when the enforcement functions were transferred from the Department of the Interior to the Department of Labor. I do not feel that this provision could have been drafted with any greater clarity, breadth, or decisiveness. This savings clause preserved the approvals of dust devices which were made under the 1969 Act until MSHA ruled otherwise.

Finally, I believe that in deleting the five-micron definition of respirable dust from the Act in 1977, Congress was simply rectifying an error which

it had made when it passed the 1969 Act. On April 8, 1980, MSHA promulgated final rules on the definition of respirable dust and the procedures for sampling it in underground coal mines. See 45 Fed. Reg. 23990-24005 (1980). While I do not believe that the new rules themselves have any relevance to the citations at issue, the explanatory material which accompanied the new rules sheds considerable light on the rise and fall of the five-micron definition.

The new regulations define "respirable dust" as "dust collected with a sampling device approved by the Secretary and the Secretary of Health, Education, and Welfare in accordance with Part 74 (Coal Mine Dust Personal Sampler Units) of this title." They add that "Sampler device approvals issued by the Secretary of the Interior and the Secretary of Health, Education, and Welfare are continued in effect." 45 Fed. Reg. 24000-24001, 24004 (1980) (to be codified in 30 C.F.R. § 70.2(n) and § 75.2(k)). The definition of "respirable dust" in the new regulations is thus consistent with Section 202(e) of the Act as amended in 1977. The size definition which previously appeared at 30 C.F.R. § 75.2(k) has been deleted.

In explaining this change in the regulations, MSHA stated that (45 Fed. Reg. 23994):

> Commenters also suggested that the definition of respirable dust should include a particle size limitation. The final rule defines respirable dust as dust collected wtih [sic] sampling device[s] approved by the Secretary and the Secretary of Health, Education, and Welfare. This definition is consistent with the definition of respirable dust in section 202(e) of the Act. Approvals for devices

issued by the Secretary of the Interior and the Secretary of HEW under the Coal Act and Part 74 of 30 CFR are continued in effect by virtue of the provisions of the Federal Mine Safety and Health Amendments Act of 1977.

The previous definition of respirable dust prior to the 1977 Act was "only dust particulates 5 microns or less in size" (30 CFR 70.2(i)). This definition was based on an incorrect interpretation of the original definition of respirable dust developed by the British Medical Research Council (BMRC). According to the BMRC "a selective size sampling device meeting these requirements would have a 50 percent sampling efficiency for 5 micron spherical particles of unit density, and an absolute cut-off for similar particles of size greater than 7.1 (micron) diameter." The MRE device was designed according to the BMRC definition, and used in the epidemiological studies upon which the 2.0 mg/m^3 dust standard in the 1969 Coal Act was based. [Citation omitted]

By prescribing the 5 micron diameter as the absolute cutoff, rather than the 50 percent efficiency diameter as determined by the BMRC, the previous definition of respirable dust was rendered incompatible with the performance of the MRE instrument or any other instrument for sampling respirable dust. Consequently, the Interior Board of Mine Operations Appeals determined that citations based upon this definition were unenforceable. (Eastern Associated Coal Corporation * * *).

To retain a definition of respirable dust based on a 5 micron particle size limitation would perpetuate these problems. Congress recognized this potential and in the 1977 Act defined respirable dust in terms of approved sampling devices. This same concept is adopted in the final rule * * *. [Emphasis added.]

This suggests that the five-micron definition was a mistake from the day the 1969 Act was signed into law. The BMRC research which the definition was based upon did not prescribe an absolute five-micron cutoff. Rather, it called for defining respirable dust in terms of a device which had a 50 percent sampling efficiency for five-micron spherical particles, and an absolute cutoff for similar particles 7.1 microns in size.

This position is supported by a review of the legislative history of the 1969 Act. During the consideration of that Act, Congress had a proposed definition of respirable dust before it which was identical to the BMRC definition. On January 16, 1969, Senator Randolph introduced S. 355, which called for dust sampling with the use of "a gravemetric [sic] sampling device having the following characteristics for particles of unit density spheres or its equivalent: 2 microns and less will pass 98 percent; 5 microns will pass 50 percent; 7.1 microns will pass 0 percent." Section 301(b). The same proposed definition appeared in Section 32(b) of S. 1094, introduced on February 19, 1969 by Senator Williams. Two other bills, S. 1300 (introduced on March 4, 1969 by Senator Javits) and S. 1907 (introduced on April 22, 1969 by Senator Cook) did not define respirable dust in this manner, but simply stated that dust was to be measured by an MRE instrument. See Section 202(a)(2) of S. 1300 and Section 202(b) of S. 1907. I do not think the definition in the first two bills was inconsistent with the definition in the latter two. As Petitioner's Exhibit 24 demonstrated, the sampling efficiencies set forth in S. 355 and S. 1094 represented precisely the efficiency of the MRE device described in S. 1300 and S. 1907.

With this background in mind, it is easy to see why the Interior Board of Mine Operations Appeals was compelled to strike down the dust program which had come into being under the 1969 Act. The strict five-micron cutoff which appeared in the 1969 Act was unattainable with the technology which an MRE device or its equivalent represented. The MRE was only 50 percent efficient in screening out particles larger than five microns in size, and had an absolute cutoff of 7.1 micron particles.

When the 1977 Amendments Act came before the Congress, the legislators recognized the error made in the 1969 Act, and deleted the five-micron definition from the statute. In my opinion, their intention was to indicate their approval of the MRE and other devices approved by the Secretaries, both before and after the effective date of the new law. Their intention was not, as Respondent would have me believe, to scuttle the entire respirable dust program until such time as the Secretary of Labor and the Secretary of Health, Education, and Welfare had approved new devices for measuring respirable dust.

In its brief, Respondent extensively discussed the merits of the deleted five-micron definition, and chastised the Secretary for "consider[ing] as respirable dust whatever is captured by the personal sampler unit's filter." Respondent's Brief at 45. Upon passage of the 1977 Act, MSHA was given a clear Congressional mandate to proceed with the respirable dust program with all due dispatch, unhampered by a size-based definition which was not only technologically impracticable, but held legally insufficient in Eastern Associated Coal. Respondent argued that "there is a rational basis supporting its contention that respirable dust is that particulate which measures five microns or less in size." Respondent's Brief at 52. It is not my function to determine whether there is a rational basis in fact for such a conclusion. As a matter of law, the five-micron standard no longer exists. Respondent attempted to, in effect, reargue the Eastern Associated Coal case. Such an approach must fail because, as I have pointed out, the Congress has made that decision a nullity. 11/

11/ Respondent also called attention to two actions taken by the Secretary of Labor which, in Respondent's view, bolster its contention that respirable dust is still defined as dust particulates five microns or less in size.

The Congress has, therefore, defined respirable dust as that which is collected by a device approved either by the Secretary of the Interior and the Secretary of Health, Education, and Welfare before the effective date of Section 202 as amended by the 1977 Act, or by the Secretary of Labor and the Secretary of Health, Education, and Welfare thereafter. Accordingly, I find that Respondent violated 30 C.F.R. § 70.100(b) as alleged with respect to the 15 citations at issue.

In determining the amount of an appropriate penalty for these citations, most of my evaluations of the criteria in Section 110(i) of the Act discussed during my consideration of Citation No. 776637 apply. However, one point which was raised at hearing and vigorously debated by the parties in their briefs deserves further discussion.

Mr. Stritzel, one of Petitioner's witnesses, testified that Respondent had the worst record of any company in MSHA's Benton subdistrict of compliance with the respirable dust standards. In its brief, Respondent questioned the

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fn. 11 (continued)
The first of these is the Secretary's continued policy of screening certain dust samples for "oversized particles," a practice which Petitioner characterized as "nothing more than an additional check." The second is the Secretary's continued use of the five-micron definition in his regulations up until April 8, 1980, when the new rules discussed above were put into effect. See 30 C.F.R. § 75.2(k) (1979). In my view, while both of these actions indicated that the Secretary was still, to some extent, relying upon the five-micron definition, neither made the Labor Department's respirable dust program unenforceable. It is axiomatic that when the Congress amends an enforcement provision, that enactment automatically supersedes any regulations or practices promulgated in reliance on the pre-existing provision. Regulations have the force and effect of law only when they are not inconsistent with a statute. See General Services Administration v. Benson, 415 F.2d 878, 880 (9th Cir. 1969). Additionally, I note that 30 C.F.R. § 75.2(k) is a safety standard. The corresponding health standard formerly appeared at 30 C.F.R. § 70.2(i), and was repealed shortly after the enactment of the 1977 Amendments Act.

statistics upon which Mr. Stritzel relied. Respondent's analysis of the evidence proved that Mr. Stritzel's figures may have been between 58 and 122 percent greater than the actual figures which reflect the number of citations and withdrawal orders issued to Respondent for respirable dust violations during 1977 and 1978. Therefore, I do not accept Mr. Stritzel's conclusion concerning Old Ben's record of compliance with the dust standard. 12/

Upon consideration of the criteria in Section 110(i) of the Act, I assess a penalty of $100 for each violation of 30 C.F.R. § 70.100(b), for a total of $1,500. 13/

ORDER

Citation No. 777024 is VACATED. With respect to the remaining 16 citations involved in these cases, Respondent is ORDERED to pay $1,750 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein
Administrative Law Judge

12/ Respondent also contended that the methods of mining which it employs at its Benton mines (longwall and borer-type) produce more coal dust than other methods. Respondent claimed that its "higher [dust] levels are attributable to the type of mining practiced in the Old Ben mines rather than to some villainous plot to frustrate the mine health standards concerning respirable dust." While Petitioner's witness, Mr. Stritzel, apparently conceded that these types of mining produce more dust than other types, I do not believe it is necessary for me to consider whether the higher accumulations of dust in Respondent's mines are the result of technological innovation or a "villainous plot."

13/ The 15 citation numbers are 9940663, 773508, 9940684, 9940664, 9940688, 9940693, 9940694, 9940674, 9940690, 9940689, 9940678, 9940659, 9940706, 9940700, and 9940703.

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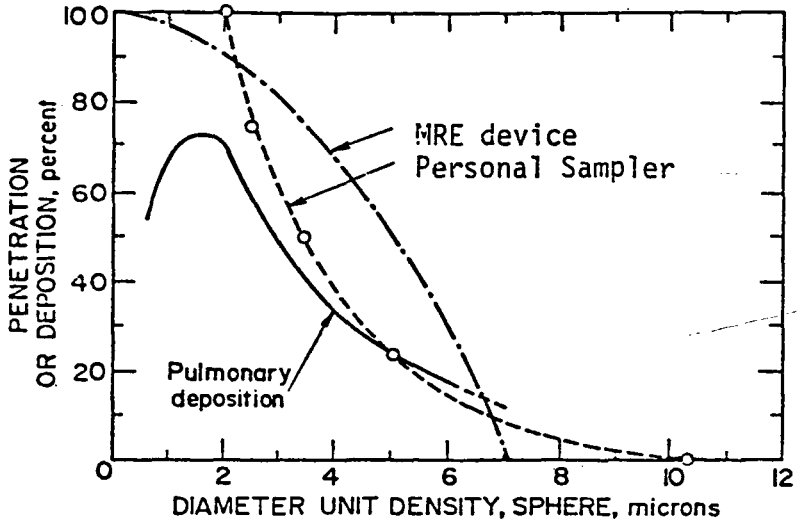
APPENDIX - PETITIONER'S EXHIBIT 24



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

25 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CLIMAX MOLYBDENUM COMPANY, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-301-M MSHA CASE NO. 05-02257-05003 MINE: CLIMAX OPEN PIT

DECISION

APPEARANCES:

Robert Bass, Esq., and Eliehue Brunson, Esq., Office of T. A. Housh, Regional Solicitor, United States Department of Labor, Kansas City, Missouri,
for Petitioner,

Richard W. Manning, Esq., Climax Molybdenum Company, Golden, Colorado
for the Respondent.

Before: Judge John J. Morris

Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent, Climax Molybdenum Company, failed to immediately notify MSHA of an accident on mine property. MSHA asserts Climax thereby violated two standards promulgated under authority of the Federal Coal Mine Health and Safety Act of 1969 (amended 1977), 30 U.S.C. § 801 et seq.

STATEMENT OF THE CASE

Climax allegedly violated 30 C.F.R. 50.10 and 30 C.F.R. 50.12. The standards provide as follows:

Subpart B - Notification, Investigation, Preservation of Evidence

§ 50.10 Immediate Notification.
If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot

contact the appropriate MSHA District or Subdistrict Office, it shall immediately contact the MSHA Headquarters Office in Washington, D. C., by telephone, toll free at (202) 783-5582

§ 50.12 Preservation of Evidence.
Unless granted permission by a MSHA District Manager or Subdistrict Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

FINDINGS OF FACT

The evidence is essentially uncontroverted. I find the following facts to be credible.

1. Climax employee Roger Persichini was injured on November 6, 1978 when a truck tire weighing approximately 7,000 pounds fell on him (Tr 15 - 39).

2. Persichini suffered fractures of the left femur, the pelvis, and the right hip (Tr 83).

3. An initial examination took place in the Climax infirmary. It was conducted by Dr. James Bane and Nurse Anderson (Tr 88, 98).

4. The medical personnel in the infirmary were familiar with Persichini's medical profile from previous examinations. His history identified him as a healthy white male (Tr 75 - 94). 5. In the infirmary, Persichini's vital signs were stable and he was cooperative (Tr 74 - 94).

6. The injured man was removed to St. Vincent's Hospital in Leadville, Colorado. Thereafter, he was transferred to St. Anthony's Hospital in Denver, Colorado (Tr 87, 88).

7. James Keith, the Climax safety director was advised by the Climax nurse and physician that Persichini's condition was serious but not life threatening (Tr 48 - 74).

8. On November 7, 1978, Persichini, while in St. Anthony's Hospital, developed a fat embolism. A fat embolism, which can occur as a result of a fracture of a large bone, normally does not develop until twelve hours after the fracture. Such a condition is not life threatening (Tr 88, 95 - 102).

9. The fractures, according to the Climax physician, were serious but not life threatening (Tr 95 - 102).

10. Climax's head nurse, Ann Anderson, continually monitored Persichini's condition while he was hospitalized. She terminated this monitoring when she visited him in St. Vincent's Hospital on November 9, 1978 (Tr 74-94).

11. Persichini returned to work on November 11, 1979 (R1).

12. Climax reported the accident to MSHA on Form #7000-1 on November 10, 1978 (R1).

13. Climax did not preserve the accident scene (Tr 73).

ISSUE

The primary issue is whether Climax violated the standard. The underlying fact issue is whether the injuries to Persichini had a "reasonable potential to cause death."

DISCUSSION

Petitioner, in his post trial brief, initially contends that the injury sustained by Persichini constituted an accident as defined by 30 C.F.R. 50.2(h)(2). Secondly, petitioner asserts that the Climax safety director did not rely on the medical opinions of the company nurses and physicians. Thirdly, MSHA argues that the accident scene must be preserved when there is a serious injury until mine management has determined whether the accident

is reportable under 30 C.F.R. 50.10. Finally, MSHA declares that an operator must notify MSHA "whenever the injury is serious and there exists any question as to whether it is life threatening." In short, MSHA says the operator should err on the side of immediate notification.

I reject the above arguments. Concerning the first contention, it appears that 30 C.F.R. 50.2(h)(2) defines as accident as follows:

> (h) "Accident" means (2) An injury to an individual at a mine which has a reasonable potential to cause death.

Simply stated, MSHA did not establish a factual situation within the above definition of an accident.

I agree with MSHA that remedial legislation should be broadly construed; however, there must first be operative facts to establish the applicability of the regulation.

MSHA's reliance on Secretary v. Hecla Mining Company 1 MSHC 2270 is misplaced. In that case Administrative Law Judge George A. Koutras ruled, as I do, that no reasonable potential for death was shown in the case. In Hecla, the victim was taken to the hospital and moved to intensive care.

MSHA misconstrues it's regulation. Immediate reporting is not required if the accident is serious and there exists "any question" as to whether it is threatening.

As a general rule the strained construction of a standard relating to safety and health should be avoided. Cf Diamond Roofing Company v. OSHRC 528 F 2d 645 (5th Cir., 1976), Dunlop v. Ashworth 538 F 2d 562 (4th Cir., 1976); Brenner v. OSHRC (Ron M. Fregen, Inc.) 513 F 2d 713 (8th Cir., 1975); Usery v. Kennecott Copper Corp. 577 F 2d 1113 (10th Cir., 1977).

MSHA's second contention that the Climax safety director did not rely on the opinions of its medical staff ignores the evidence to the contrary (See Fact 7 and 9).

MSHA's third argument that an operator must preserve the site until management has determined whether the accident is immediately reportable misconstrues the regulations. An operator may be acting at its peril in not preserving the site if it develops that the injury does have a reasonable potential for death. However, the necessity to preserve does not occur until the reasonable potential for death has arisen.

MSHA's final contention that notification is required "whenever there exists any question as to whether it is life threatening" lacks merit. If MSHA desires a regulation in line with the above requirements, then it should redraft one under its rule making procedures.

At trial, MSHA argued that immediate reporting was required due to a combination of circumstances. Namely, the injuries were serious, a fat embolism developed, intensive care was required, and Persichini was moved to three different treatment facilities.

In considering the above elements, I rule as a matter of law, that a "serious injury" is necessarily something less than one that has "a reasonable potential for death." Climax's evidence shows that a fat embolism is not "life threatening." Further, intensive care is a facility where more specialized nursing care and observation are available. Finally, the evidence shows that the transfer to three medical facilities [1] was due to the areas of specialization of the particular facilities.

1/ Climax infirmary, St. Vincent Hospital in Leadville, Colorado; then St. Anthony's Hospital in Denver, Colorado.

CONCLUSIONS OF LAW

1. MSHA failed to prove that worker Persichini sustained an injury that had a reasonable potential for death and accordingly Climax did not violate 30 C.F.R. 50.10.

2. Persichini sustained an occupational injury as defined by 30 C.F.R. 50.2(e).[2]

3. If no immediate notification was required by 30 C.F.R. 50.10, then no violation of 30 C.F.R. 50.12 can occur.

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

ORDER

Citations 333661 and 333662 and all proposed penalties therefor are vacated.

John J. Morris
Administrative Law Judge

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2/ This definition provides as follows: (e) "Occupational injury" means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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28 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceeding Docket No. WEVA 80-323 A.C. No. 46-00889-03012R
v.		
		Juanita No. 1 Mine
COAL RESOURCES, INC.,	Respondent	

DECISION APPROVING SETTLEMENT

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
S. J. Angotti, Esq., Morgantown, West Virginia, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., the "Act"). On June 10, 1980, at a hearing held in Morgantown, West Virginia, Petitioner proposed a settlement agreement conditioned on the payment by Coal Resources, Inc., of a penalty of $6,000. I have considered the evidence and stipulations submitted and conclude that the proposal is appropriate when considering the criteria set forth in section 110(i) of the Act.

The citation at bar charges a serious violation of section 103(a) of the Act in that an MSHA inspector was forcibly denied entry to conduct an authorized inspection. On September 11, 1979, Inspector Albert Borda arrived at the operator's Juanita No. 1 Mine in Everettville, West Virginia, to conduct a regular inspection but before he could do so he was threatened, physically attacked and seriously injured by John Laurita a representative and official of the operator.

At hearing, the statement of Inspector Borda was submitted as undisputed evidence. The operator waived its right to require the inspector to testify under oath and waived its right to cross-examination. The statement reads as follows: 1/

1/ Transcript at 7.

I was assigned to a regular inspection at the Juanita No. 1 Mine, Coal Resources, Inc., Everettville, Monongalia County, West Virginia, MSHA ID. No.46-00889, by Steve Kuretza. I left Fairmont Field Office at 7:10 a.m. and drove to the mine. I arrived at the mine at 7:45 a.m.. I saw a highlift operator putting coal in a coal truck. Everything looked normal. I proceeded to the mine office and was met by Pat Rundle. I told him I was there to start a regular inspection of the mine. He mentioned an OSM -- that's Office of Surface Mining -- man was there the day before. Pat Rundle, Mine Operator, said that an OSM man said they needed more gravel on the roadways, drainage was coming out of the mine, they could be fined $25,000, and all the agencies of the government is [sic] killing them. I proceeded to the office and bathhouse with my clothes and equipment, sat [sic] them on the bench and was getting ready to change clothes. The phone rang and Pat answered it. He talked approximately one minute. Pat said that John Laurita wanted to talk to me. He told me I had fined him $750, you fucking son-of-a-bitch. He told me not to go underground until he got there. He mentioned a trailing cable fine again $750. I told him I don't set fines; they have an assessment office for that. He said, you son-of-a-bitch I'll be right over. I told Pat Rundle we weren't the only cause of all these problems; Reclamation and OSM have been there too. Pat said the Government is running the coal business trying to do away with the small operators. We would be better off if this country was Communist. This conversation was the general tone until John got there. John Laurita arrived at the mine in a four-wheel jeep truck, blue and white. He parked on the other side of the tracks across from the mine office. He was walking across toward me. I was sitting on a bench outside. He asked me what I was looking at, you son-of-a-bitch. I told him I looked at anything that moved it attracted my attention. He said I ought to kill you, you son-of-a-bitch for fining me that $750 for that cable. He said I don't even want you on my property. He said I hope I never see you on this property again; I don't care if you never come back. John motioned for me to go in the building. He closed the door behind us. He said something about a woman in Morgantown in the funeral home, his sister-in-law who had five kids. Then he said I ought to split your head wide open with an ax. I bent over to pick up my clothes from the bench. John Laurita pushed me and I lost my balance and fell on the floor. After falling he grabbed my shirt and tore two buttons and tore my T-shirt and placed scratches on my face and chest. I reached out to stop him with my left arm. He continued to keep me on the floor. John Laurita told Pat Rundle to find him an ax. Pat Rundle was trying to break it up and get John Laurita away from me. Pat Rundle more or less forced him away from me

allowing me to get up. John Laurita followed me and he went to the left and I went to the right toward my government car. I drove toward his jeep to leave. He was blocking the roadway and since I couldn't get through I turned left and crossed over the mainline track with my government car on to the other roadway that allows supplies to be brought in on that side. As I proceeded away from the mine John Laurita was standing on the same roadway I was leaving on. As I was leaving the mine site John Laurita picked up part of a fish-plate and acted as if he was going to throw it toward the car. He hesitated and did not throw it. I left the mine and returned to the Fairmont Field Office.

Dr. Shen K. Wang, M.D., of the orthopedic clinic in Fairmont, West Virginia, examined Inspector Borda later the same day. According to Doctor Wang, Borda suffered four fractured ribs as well as multiple abrasions on the left side of the face, chin, and chest. 2/

Based on this undisputed evidence it is clear that the attack upon Inspector Borda was not the result of mere negligence but was intentional and malicious and therefore represents the highest degree of culpability. Serious injuries were not only probable but were intended and did in fact result from the incident. The penalty of $6,000 here ordered against Coal Resources is a severe but appropriate sanction.

I have also noted in accepting this penalty in settlement that the operator produces about 100 tons of coal a day, has a moderate history of violations (and no violations of a similar nature) and has not denied entry to or threatened MSHA inspectors since this incident. I do observe however that MSHA now sends inspectors to the Coal Resources facility in pairs raising some question as to whether all parties are convinced that abatement is permanent.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay the agreed penalty within 30 days of this order.

Gary Melick
Administrative Law Judge

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S. J. Angotti, Esq., 212 High Street, Morgantown, WV 26505 (Certified Mail)

2/ Transcript at 10.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

29 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	
Petitioner,	)	CIVIL PENALTY PROCEEDING
v.	)	DOCKET NO. WEST 79-196-M
DUVAL CORPORATION,	)	A/O NO. 02-00144-05004
Respondent.	)	Mine: Sierrita Mine

DECISION

Appearances:

Mildred L. Wheeler, Esq., Office of the Regional Solicitor, United States Department of Labor, 450 Golden Gate Avenue, Box 36017, San Francisco, California 94102
for the Petitioner,

Lina S. Rodriguez, Esq., Bilby, Shoenhair, Warnock & Dolph, P.C., 2 East Congress Street, Tucson, Arizona 85702
for the Respondent.

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

This case, heard under the provisions of the Federal Mine Safety and Health Review Act of 1977, 30 U.S.C. § 801 et seq., arose out of inspections conducted at Respondent's mine in Sahuarita, Arizona on November 29, 1978, and March 20 and 21, 1979. As a result of those inspections, five citations were issued, of which only three were actually tried, since Respondent admitted at the hearing the violations alleged in Citations 378683 and 378684 (Tr. 9). [1]

1/ A $130.00 penalty was initially proposed for each of these citations. Since Respondent did not contest the appropriateness of these penalties, they stand as final assessments.

Petitioner seeks an order assessing civil penalties for Respondent's alleged violations of 30 CFR § 55.12-13,[2] 30 CFR §55.14-1 [3] and 30 CFR §55.14-45.[4]

Citation number 378682 charges that Respondent violated 30 CFR §55.12-13 by using a permanently spliced cable which lacked a bonded outer jacket. Respondent does not dispute Petitioner's allegation that the outer jacket was loose. Instead, it contends that the loose condition of the jacket presented no danger because the five cables bound by the jacket were individually wrapped and sealed; furthermore, Respondent argues, the cable was located in an isolated area.

Citation number 378685 charges that Respondent violated 30 CFR §55.14-1 by failing to adequately guard a pinch point between the belt drive and the pulley on a back-up water pump. Respondent contends that the standard is inapplicable because the pump was infrequently used and because the pinch point, due to the machine's construction and surroundings, could not be contacted except intentionally.

2/ Mandatory. Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be: (a) Mechanically strong with electrical conductivity as near as possible to that of the original; (b) Insulated to a degree at least equal to that of the original and sealed to exclude moisture; and (c) Provided with danger protection as near as possible to that of the original, including good bonding to the outer jacket.

3/ Mandatory. Gears; sprockets; chains; drive, head, tail and take-up pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

4/ Mandatory. Welding operations shall be shielded and well ventilated.

Citation number 377036 charges that Respondent violated 30 CFR §55.14-45 because one of its employees was welding on the teeth of a shovel bucket without using a curtain to protect other persons from being harmed by the light flashes. Respondent contends that the welder was operating from inside the shovel bucket, with his back to the open end, and thus provided adequate shielding. Furthermore, Respondent argues, there was no danger presented regardless of the adequacy of the shielding because the sun's brightness diffused the welding flash and no one was close enough to be harmed.

ISSUES

1. With regard to Citation Number 378682, the issue is whether the outer jacket of the permanently spliced cable was well bonded.

2. With regard to Citation Number 378685, the issue is whether the pinch point between the belt drive and the pulley on the back-up pump was adequately guarded.

3. With regard to Citation Number 377036, the issue is whether the welding operation at Respondent's shovel bucket was shielded.

FINDINGS OF FACT AND DISCUSSION

Citation 378682

1. A trailing cable on one of Respondent's shovels was permanently spliced (Tr. 46).

2, The outer jacket of the cable was loose and the splice connection was exposed (Tr. 46 - 48, 120, 126).

Violation:

This citation should be affirmed. The mandatory standard at 30 CFR §55.12-13 requires that all permanently spliced power cables have well

bonded outer jackets. The undisputed evidence is that the power cable in question was permanently spliced and had a loose outer jacket (see Tr. 120, 126). A violation of the standard was therefore shown.

Respondent's safety supervisor suggested that the jacket served no safety purpose because each wire within the cable was individually wrapped (Tr. 114 - 118). The same witness, however, admitted that one of the purposes served by the outer jacket is to prevent moisture from reaching the wires (Tr. 132 - 133).

Respondent also argues that its ground-fault system would automatically de-energize the cable in the event of a short circuit or upon contact with water, a vehicle or a piece of machinery (see Tr. 120-122). Assuming the system to be faultless, it does not relieve Respondent of its duty, under this standard, to make sure that its power cables are well bonded. Furthermore, Respondent's Safety Supervisor conceded that the loss of the outer jacket coupled with another safety defect could present a "safety problem" (Tr. 127 - 128), characterizing the potential for an electrical accident even with the trip devices as "not impossible, but improbable" (Tr. 129).

Penalty:

The parties stipulated to the following: Respondent is a large operator [5] and had received 33 citations within the two years preceding the inspection which gave rise to this case. [6]

5/ The parties stipulated that Duval Corporation operates at 4,781,356 manhours per year, and that its Sierrita Mine, in Sahuarita, Arizona, operates at 1,379,444 manhours per year (Tr. 6). According to the tables found at 30 CFR §100.3(b), these figures indicate that the mine and the controlling company are "large".

6/ Using the table at 30 CFR §100.3(c), these figures indicate a relatively favorable prior history.

Respondent was negligent in that it failed to exercise reasonable care to prevent the violation.

The gravity of the violation was low. Although the thorough wrapping of each cable and Respondent's ground-fault system does not vitiate the violation, they are relevant to a determination of the danger posed by the violation. These precautions substantially reduced the possibility of harm.

Respondent demonstrated good faith by installing a new, watertight cable sleeve (Tr. 48).

Giving due consideration to the factors discussed above, I conclude that a reasonable and appropriate penalty is $50.00.

Citation 378685

3. Respondent has a back-up water pump which is used only when the automatic pump breaks down (Tr. 58, 137).

4. On the back-up pump there is a pinch point created by the belt drive and the pulley (Tr. 54).

5. The pump is located in an isolated area and is surrounded by a walkway and a railing (Tr. 143, 136, 58).

6. The machine itself guards the pulley (Tr. 139). A wire cover extends over the fan belt and a brace bar extends diagonally from the top to the bottom of the machine (Tr. 138).

This citation should be vacated. The pinch point on Respondent's back-up water pump was not guarded with equipment specifically designed for that purpose. It was guarded by the location and design of the pump, however. The machine was located in an isolated area and was surrounded by a walkway which, in turn, was surrounded by a railing (Tr. 143, 136, 58; See Exhibit R-U). A wire cover extended over the fan belt and a brace bar extended diagonally from the top to the bottom of the machine (Tr. 138; See

Exhibits R-S and R-T and Tr. 144-145.) If a worker fell toward the pump, he would hit the cross-bar (Tr. 143).

There was no reason to attend the machine except to turn it on and off. When starting or stopping the pump, a worker stands on a walkway beside the engine; to reach the pinch point, he would have to purposely extend his arm toward the engine (Tr. 143). There is no need to approach the pinch point except to replace the belt or to repair the alternator, in which case the machine would first be shut down (Tr. 147).

For these reasons I find that the guarding requirement imposed by 30 CFR §55.14-1 was met.

Citation 377036

7. At Respondent's mine in Sahuarita, Arizona, on November 29, 1978, a worker was welding on the wear plates of a shovel bucket, used to pick up ore and load it into trucks (Tr. 12 - 13; 78 - 79).

8. Although the welding operation was not shielded by a curtain, the welder was inside the bucket, surrounded on all but one side by the bucket walls; and the welder himself was positioned at the open end, facing the bucket's interior (Tr. 13; 80 - 81).

This citation should be vacated. The standard at 30 CFR §55.14-45 states: "Welding operations be shielded and well ventilated." The standard does not specify how they must be shielded. In this case, the welding operation was shielded on three sides by the shovel bucket and on the fourth side by the welder himself. The standard was therefore met.

CONCLUSIONS OF LAW

1. This Commission has jurisdiction over the subject matter and parties to these proceedings.

2. Respondent violated the regulations as alleged in Citations 378682, 378683 and 378684.

3. Respondent did not violate the regulations as alleged in Citations 378685 and 377036.

ORDER

Citations 378685 and 377036 are vacated. Citations 378682, 378683 and 378684 are affirmed, and penalties of $50.00, $130.00 and $130.00 respectively, are assessed therefor.

It is further ordered that Respondent pay $310.00 within 30 days of this decision.

Jon D. Boltz
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

3 0 JUL 1980

ISLAND CREEK COAL COMPANY,	:	Contest of Citations
Contestant	:	
v.	:	Docket No. KENT 79-216-R
	:	Citation No. 712200; 6-15-79
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Big Creek No. 2 Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEVA 79-183-R
	:	Citation No. 635499; 5-7-79
	:	
	:	Docket No. WEVA 79-184-R
	:	Citation No. 635500; 5-7-79
	:	
	:	Birch No. 2-A Mine
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 80-72
Petitioner	:	A.C. No. 46-01459-03053
v.	:	
	:	Birch No. 2-A Mine
ISLAND CREEK COAL COMPANY,	:	
Respondent	:	

SUMMARY DECISION

These consolidated cases involve three citations charging violations of section 103(f) of the Federal Mine Safety and Health Act of 1977 (the Act). Section 103(f) reads in part:

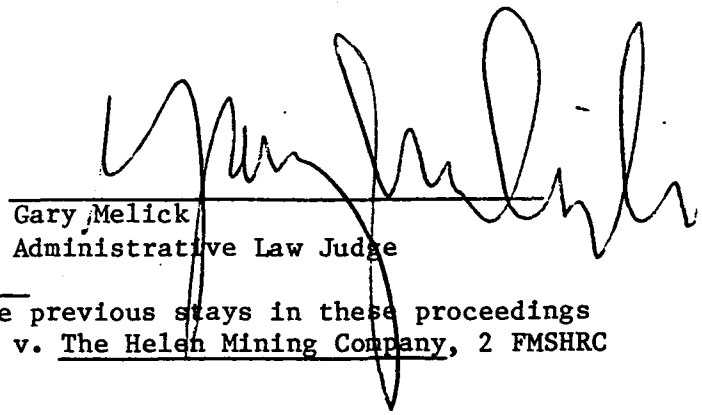
> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions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

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

The parties in these cases have reached factual stipulations that the inspections giving rise to the citations at bar were all spot inspections, the type of inspections classified by the Commission as "nonregular" inspections in the Kentland-Elkhorn and Helen Mining decisions. There is therefore no issue as to any material fact. Under the circumstances, I find as a matter of law that Island Creek did not violate section 103(f) of the Act as charged in the citations at bar. 29 C.F.R. § 2700.64(b).

Accordingly, the motions for summary decision filed in these cases are GRANTED, and Citation Nos. 635499, 635500 and 712200 are VACATED. The civil penalty proceeding, Docket No. WEVA 80-72, is DISMISSED. 1/

In connection with these cases Island Creek also seeks damages against MSHA in amounts equal to the wages it paid its employees as a result of the citations issued in these cases. Island Creek claims that it paid these wages to the miners representatives against its will, under protest and as a direct result of MSHA's erroneous interpretation of the Act. Island Creek requests that the damages be awarded as a setoff and credit against any future civil penalties that might properly be assessed by MSHA against it in other administrative proceedings before the Commission. It cites no authority in support of its proposition. It is clearly beyond the scope of my authority to grant any such remedy. Island Creek's remedy, if any, lies in an independent action against the employees who may have been erroneously overpaid. Under the circumstances Island Creek's claims for damages are DENIED.



Gary Melick
Administrative Law Judge

1/ Island Creek's motions to dissolve previous stays in these proceedings are of course granted. See Secretary v. The Helen Mining Company, 2 FMSHRC 778 (March 21, 1980).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SKYLINE TOWERS NO. 2, 10TH FLOOR
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FALLS CHURCH, VIRGINIA 22041

(703) 756-6230

31 JUL 1980

ITMANN COAL COMPANY, Applicant	:	Application for Review
v.	:	Docket No. WEVA 80-9-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
and	:	
LOCAL UNION NO. 9690, DISTRICT 29, UNITED MINE WORKERS OF AMERICA, Complainant	:	Complaint for Compensation
v.	:	Docket No. WEVA 80-129-C
ITMANN COAL COMPANY, Respondent	:	
and	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
v.	:	Docket No. WEVA 80-211
ITMANN COAL COMPANY, Respondent	:	A.C. No. 46-01576-03038H
	:	Itmann No. 3B Mine

DECISION

Appearances: Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Itmann Coal Company;
James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Secretary of Labor, Mine Safety and Health Administration;
Mary Lu Jordan, Esq., Washington, D.C., for United Mine Workers of America.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

On September 13, 1979, an inspector employed by the Mine Safety and Health Administration (hereinafter MSHA) issued an order of withdrawal for all areas of Mine No. 3B of the Itmann Coal Company (hereinafter Itmann). The order of withdrawal was based upon the inspector's finding of an imminent danger pursuant to section 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 817(a) (hereinafter the Act). The order also alleged a violation of 30 C.F.R. § 75.329. On September 28, 1979, Itmann filed an application for review of that order. On December 6, 1979, Local Union No. 9690, District 29, United Mine Workers of America (hereinafter UMWA) filed a complaint for compensation under section 111 of the Act, 30 U.S.C. § 821. On February 26, 1980, MSHA filed a proposal for assessment of civil penalty. The three cases were consolidated pursuant to Procedural Rule 12 of the Federal Mine Safety and Health Review Commission, 29 C.F.R. § 2700.12.

A hearing was held in Charleston, West Virginia, on April 14, 15, and 16, 1980. Carl Worthington testified on behalf of MSHA. Bernard B. Shrewsberry and Arnold Rogers testified on behalf of the UMWA. Frank Beard, John Zachwieja, Harry Farmer, and Arvil R. Bailey testified on behalf of Itmann. All three parties filed posthearing briefs.

ISSUES

1. Whether the order of withdrawal due to imminent danger was properly issued.

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

3. Whether employees at the mine were idled by the order in question and, if so, whether they are entitled to receive compensation and, if so, the amount of compensation which they are entitled to receive.

APPLICABLE LAW

Section 107(a) of the Act, 30 U.S.C. § 817(a), provides as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Section 3(j) of the Act, 30 U.S.C. § 802(j), states: "'imminent danger' means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

Section 111 of the Act, 30 U.S.C. § 821, provides as follows:

> If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was

issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. Whenever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of title 5, United States Code.

Section 110(i) of the Act, 30 U.S.C. § 820(i), provides in pertinent part as follows:

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

Section 303(z)(2) of the Act, 30 U.S.C. § 863(z)(2) and 30 C.F.R. § 75.329 provide in pertinent part as follows:

> [A]ll areas from which pillars have been wholly or partially extracted and abandoned areas, as determined by the Secretary or his authorized representative, shall be ventilated by bleeder entries or by bleeder systems or equivalent means, or be sealed, as determined by the Secretary or his authorized representative. When ventilation of such areas is required, such ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of such mine from the hazards of such methane and other explosive gases. Air coursed through underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split. When sealing is required, such seals shall be made in an approved manner so as to isolate with with explosion-proof bulkheads such areas from the active workings of the mine.

STIPULATIONS

The parties stipulated the following:

1. Itmann is the owner and operator of the Itmann No. 3 Mine located in Wyoming County, West Virginia.

2. Itmann and the Itmann No. 3 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over all three proceedings.

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

5. A true and correct copy of the subject order and termination were properly served upon the operator in accordance with section 107(d) of the 1977 Act.

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

7. The appropriateness of the penalty, if any, to the size of the coal operator's business should be determined based upon the fact that in 1979, the Itmann No. 3 Mine produced an annual tonnage of 535,357 (No. 3A equals 388,481 and No. 3B equals 146,876) and the controlling company, Itmann Coal Company, had an annual tonnage of 1,627,963.

8. The history of previous violations should be determined based on the fact that the total number of assessed violations in the preceding 24 months is 382 and the total number of inspection days in the preceding 24 months is 832.

9. The alleged violation was abated in a timely manner and the operator demonstrated good faith in attaining abatement.

10. The assessment of a civil penalty in these proceedings will not affect the operator's ability to continue in business.

11. That by a certain closure order dated October 2, 1969, issued in accordance with section 203(a)(1) of the Federal Coal Mine Safety Act, as amended, and as modified on October 9, 1969, the area described on the face of said order and modification was closed (see operator's Exhibit No. 2). Approximately 10 years later on September 13, 1979, Imminent Danger Order No. 0640580 was issued pursuant to section 107(a) of the 1977 Act as a result of an inspection in part of the same area which was still under the above-mentioned closure order.

12. The miners on the day shift of September 13, 1979, were paid by Itmann for the balance of their shift after the order was issued and the miners scheduled to work the afternoon shift on September 13, 1979, were paid for 4 hours of that shift.

13. The maximum number of days' wages to which the miners who were idled by this order would be entitled is 5 days' wages.

SUMMARY OF THE EVIDENCE

On October 2, 1969, a federal mine inspector issued an order of withdrawal due to imminent danger for the entire Sugar Run section of Itmann No. 3 Mine. The order was based on a finding of "loose coal, coal dust, and float dust * * *." One week later, following a cleanup and rock dusting of part of the affected area, the order was revised to reopen part of the affected area "to a point 100 feet inby the junction of the West Mains and that the Closure Orders remain in effect in all areas inby this point." Rather than attempting to abate the conditions that led to the closure orders for the part of the mine that remained closed, Itmann chose to abandon that part of the mine. Under 30 C.F.R. § 75.329, Itmann had the choice of sealing the abandoned area or ventilating the area by bleeder entries or bleeder systems. Itmann chose to ventilate the abandoned part of the mine. A ventilation plan for that purpose was approved by MSHA.

In 1977, MSHA officials met with Itmann management to discuss the Government's concern about the accumulation of explosive methane gas in the abandoned areas of Itmann's No. 3B Mine. The Itmann No. 3B Mine is classified by MSHA as very gassy because it liberates 1,700,000 cubic feet of methane in 24 hours. Following that meeting, MSHA inspectors traveled the bleeder system in the abandoned areas of this mine in 1978 and found that the bleeder system was working properly. No violations were found in 1978. According to Frank Beard, Vice President of Operations at Itmann, one more inspection of the abandoned area prior to the time of the issuance of the instant order was performed by an MSHA inspector.

On September 13, 1979, Inspector Carl Worthington was assigned to conduct a ventilation saturation inspection of the abandoned areas of the mine. He initially checked the methane content of the air coming from the abandoned area at the point where it entered another split of air. He found .63 percent methane at this place. He then entered the abandoned area and continued to test for methane and air velocity. At a point approximately 1,500 feet inby the point where the two splits of air meet, he found 1.11 percent methane and 840 cubic feet of air per minute. At a point approximately 2,200 feet inby the two splits of air, he found 1.78 percent methane and very slight movement of air. He continued inby until he reached a room approximately one-half mile inby the first point. At that place, he found methane as recorded on the digital methanometer at 9 percent and as subsequently analyzed in bottle samples between 9.0 and 10.21 percent and no movement of the air as demonstrated by the release of a chemical smoke cloud. Thereupon, he ordered the safety lamp extinguished and informed Itmann that it had a section 107(a) order of withdrawal.

Inspector Worthington testified that he issued the order of withdrawal for the following reasons: (1) methane in the range of 9 percent is explosive; (2) the methane could be ignited by a spark from a roof fall and there was a high potential for roof falls in this area; (3) the volume of methane in the explosive range filled the room from floor to roof; and (4) an explosion in the abandoned area could disrupt the ventilation and contaminate the active working sections of this mine with poisonous gas. He further testified that the accumulation of explosive methane was caused by stoppings which

were crushed and leaking. Hence, the air coursed through the bleeder system was "short circuited" before it entered the gob area.

With regard to the probability of an ignition of the methane which would affect the miners working in the active West Main workings, Inspector Worthington expressed his opinion that such an occurrence was "very possible" and "not remote." On cross-examination by Itmann's counsel, he testified that he would place the probability of such an occurrence at that time in the 50-50 range. He feared a probable disaster in which poisonous gases would be coursed into the active workings of the mine resulting in serious injury or death to the 60 miners working there. On cross-examination, the inspector testified concerning his knowledge of approximately 10 incidents in his district where methane had been ignited by roof falls. He conceded that none of those incidents occurred at this mine but further stated that this mine had a history of methane ignitions and liberation of methane.

As part of his order of withdrawal, Inspector Worthington alleged that Itmann violated 30 C.F.R. § 75.329. He testified that the bleeder system for the abandoned area was inadequate to "dilute, render harmless, or carry away methane" because the stoppings were crushed and there was no ventilation of the area where methane in the explosive range was found. Inspector Worthington stated that he released a chemical smoke cloud in the room where the high concentration of methane was found and "smoke would not move; it just mushroomed up against the top; there was no movement at all there." He further testified that Itmann knew or should have known of this condition notwithstanding the 1969 closure orders for the following reasons: Itmann

personnel had been in the abandoned areas while accompanying MSHA inspectors; and Itmann prepared a mine map of the abandoned area which was marked for the route of travel to avoid roof falls into the place where the accumulation of methane was found. Itmann's approved plan for the ventilation of the bleeder system required it to travel the bleeder system "if safe." At no time prior to the issuance of the order herein did Itmann assert that it would be unsafe to travel the bleeder system.

Following the issuance of the order, the mine was closed for 10 working days until the condition was abated. At the time the order was terminated only .9 percent methane was found in the area where there had been 10 percent previously.

Bernard Shrewsberry, a safety inspector employed by the UMWA, testified that he had witnessed "balls of fire" resulting from sandstone roof falls in other mines. Arnold Rogers, a UMWA safety committeeman at Itmann No. 3 Mine, testified that he witnessed sparks resulting from roof falls and roof bolts that had been subjected to pressure in Itmann Mine No. 1.

Itmann does not challenge MSHA's evidence concerning the percentage of methane found or the fact that there was no movement of air in the area where explosive methane was found. Rather, Itmann posits its defense on its interpretation of 30 C.F.R. § 75.329 and the conclusion that no imminent danger existed. Itmann's position and evidence are as follows: (1) the proper place to take a methane reading to determine whether 30 C.F.R. § 75.329 has been violated is at the point where air coming from the abandoned area enters another split of air; (2) the possibility of a roof fall igniting the methane

where it was found in the explosive range is less than 1 percent; and (3) even if there were an ignition of methane, the explosion would not affect ventilation to the active workings of the mine which would endanger the health and safety of the miners and any possible explosion could certainly not cause serious injury or death to any miner.

Itmann's Vice President Frank Beard testified that prior to the issuance of the order in controversy, there had been two meetings between MSHA and Itmann concerning the problem of methane developing in the abandoned area of Itmann's No. 3B Mine. MSHA advised Itmann that the abandoned areas would be inspected for methane and ventilation. At no time prior to the issuance of the order herein, did Itmann contend that the 1969 closure orders prevented it from inspecting the abandoned areas. However, Mr. Beard stated that based upon his 16 years of coal mine employment, he never knew of any operator which traveled its bleeder system and inspected it for methane. He believed that it was dangerous to send men into this abandoned area. Itmann was never told by MSHA to take methane readings inside the abandoned area. For the foregoing reasons, Vice President Beard stated that there was no way Itmann could have been aware of this violation.

On the issue of the possible existence of an imminent danger, Vice President Beard testified that he had observed roof falls at 3B and other mines but had never seen any such fall emit a spark. However, he conceded that methane in the range of 9 to 10 percent was the most dangerous and that the lack of air flow would increase the hazards connected with the presence of methane. He further conceded that the presence of float coal and coal

dust would increase the severity of any possible explosion and the extent of the area affected. Based upon Inspector Worthington's testimony of 10 prior ignitions of methane in the 700 mines in this district, Vice President Beard attempted to compute a probability of such an ignition in the area as less than 1 percent. Although he indicated that he had some experience with coal mine explosions, he conceded that no one could be sure what route an explosion would take. He further stated, "I don't know if it would have done any damage to any other part of the mine down in the area where the people * * * were working at that time." He did not think that an explosion would affect the active workings of the mine but if it short circuited the ventilation of the mine, the miners would know the ventilation was disrupted and would have 30 to 35 minutes to walk out of the mine.

John Zachwieja, who had been superintendent of the 3B Mine for approximately 2 months at that time of this order, corroborated much of the testimony of Vice President Beard. In addition, Superintendent Zachwieja expressed his opinion that 30 C.F.R. § 75.329 only requires the operator to keep bad air off the active workings of the mine. He testified that Itmann 3B has a resident MSHA inspector on the premises every day because of the amount of methane liberated. He also conceded that roof bolts subject to pressure could pop out and cause sparks and that the lack of air movement in the abandoned area would cause him concern. However, he contended that there was no imminent danger because the probability of a roof fall causing an ignition of methane was "nil" and no matter how much air was put into the abandoned gob area, it would never remove all of the methane. He further stated that the area between the place where the two splits of air met and

the place where methane was found in the explosive range was filled with roof falls which had occurred during the 10 years of closure, the top had sagged, and roof bolts were broken.

Section foreman Eugene Kaiser stated that when he was an hourly employee in 1970, he helped to drive two entries in the closed area to establish the bleeder system at the suggestion of the Federal Government.

The UMWA and Itmann stipulated the identity of miners affected by the order of withdrawal, their daily rates of pay, and the number of days that they worked during the time this mine was closed by the order as set forth in the Appendix hereto and incorporated herein. The parties further stipulated that no more than 10 working days would have been scheduled at the Itmann No. 3B Mine had no order been issued.

EVALUATION OF THE EVIDENCE

Imminent Danger

The definition of the term "imminent danger" is identical in the 1969 and 1977 Acts. In interpretating the 1969 Act, the Interior Board of Mine Operations Appeals required that before an imminent danger could be found to exist, the evidence must establish that "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 Corp., 2 IBMA 197, 212 (1973). Thereafter, this "as probable as not" standard was approved by the Fourth and Seventh Circuit Courts of Appeals. Eastern Associated Coal Company v. IBMA, 491 F.2d 277 (4th Cir. 1974); Freeman Coal Mine Co. v. IBMA, 504 F.2d 741, 745 (7th Cir. 1975); and Old Ben Coal Corp. v. IBMA, 523 F.2d 25 (7th Cir. 1975).

However, in enacting the 1977 Act, the Senate Committee on Human Resources stated:

> 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.

Leg. Hist. of the Federal Mine Safety & Health Act of 1977, 95th Cong., 1st Sess. (hereinafter Leg. Hist. 1977 Act) at 38.

Earlier this year, the Federal Mine Safety and Health Review Commission (hereinafter Commission) announced that:

> "We . . . do not adopt or in any way approve the 'as probable as not' standard . . . . With respect to cases that arise under the [1977 Act], we will examine anew the question of what conditions or practices constitute an imminent danger."

Pittsburg & Midway Coal Mining Co. v. MSHA, IBMA 76-57, April 21, 1980.

Hence, in cases involving imminent danger orders under the 1977 Act, there is no longer a requirement that MSHA prove that "it is just as probable as not" that the accident or disaster would occur. In light of the legislative history of the 1977 Act, it is doubtful that any quantitative test can be applied to determine whether an imminent danger existed. Rather, each case must be evaluated in the light of the risk of serious physicial harm or death to which the affected miners are exposed under the conditions existing at the time the order was issued.

I agree with the Senate Committee on Human Resources that imminent danger cannot "be defined in terms of a percentage of probability that an accident will happen . . . ." Therefore, I reject the testimony of Inspector Worthington that the probability of such an occurrence was 50 percent. Likewise, I reject Itmann's evidence that the possibility of such occurrence was approximately 1 percent or nil. I find that the facts of the instant case establish the following: (1) A large volume of methane in the most explosive range of 9 to 10 percent existed in an abandoned area of the mine where there was no effective ventilation; (2) roof falls of sandstone and roof bolts can cause sparks sufficient to ignite methane in the range of 9 to 10 percent; (3) there is a history of roof falls in the abandoned area of this mine; and (4) an ignition of methane at the point where it was found in the explosive range in the abandoned area of this mine could result in a severe explosion which could affect the ventilation of the active workings of the mine, and expose the miners at these places to death or serious physical harm before the condition could reasonably be abated. Although I have rejected the inspector's estimate of a 50-percent chance of this occurrence, I find that the evidence of record supports his other testimony that the occurrence of the above potential accident is "very possible" and "not remote." Based upon the legislative history of the 1977 Act, and the decision of the Commission in Pittsburg & Midway Coal Mining Company v. MSHA, supra, I conclude that under the facts herein, the inspector acted properly in issuing the order of withdrawal due to imminent danger because there was a reasonable expectation that the condition which he found could cause death or serious physical harm before it could be abated.

Violation of Mandatory Safety Standard

The pertinent part of section 303(z)(2) and 30 C.F.R. § 75.329 is as follows:

> When ventilation of such areas is required, such ventilation shall be maintained so as continuously to dilute render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases. Air coursed through underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane when tested at the point it enters such other split.

It should be noted that this regulation was mandated by section 303(z)(2) of the Act which was carried over in its entirety from the same section in the 1969 Federal Coal Mine Health and Safety Act.

MSHA and the UMWA contend that this section requires that when a ventilation system is used in an abandoned area, a two-pronged test be met: (1) the ventilation system continuously dilute, render harmless, and carry away methane and other explosive gases; and (2) air from abandoned areas which enters another split of air shall not contain more than 2 percent methane. Itmann contends that this regulation should be read as a whole and, if read as a whole, only requires one thing: that air from abandoned areas which enters another split of air shall not contain more than 2 percent methane.

The legislative history of section 303(z)(2) of the 1969 Act indicates that Congress intended for there to be a two-pronged test regarding ventilation of abandoned areas. The Conference Report states in pertinent part:

> When ventilation is required, the Secretary or his inspector must be satisfied that the ventilation in such areas will be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from hazards of such methane and other explosive gases. * * * As an additional safeguard when ventilation is required, the conference agreement provides that air coursed through underground areas from which pillars are wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split. The managers intend that this latter provision not be construed as permitting accumulations of methane near or in the explosive range in the pillared or abandoned areas on the basis that the methane in the return does not exceed such percentage. [Emphasis added.]

Leg. Hist. of the Federal Coal Mine Health and Safety Act of 1969, 91st Cong., 2d Sess. (hereinafter Leg. Hist. 1969 Act) at 1044.

Section 303(z) of the 1969 Act was derived from sections 303(p), (q) and (r) of the original House Bill. In the House Report, the intent of those sections is stated. The Report states in pertinent part:

> Methane, however, also accumulates in areas from which pillars have been removed and in other abandoned areas of a mine. These areas are often inaccessible because the roof has been deliberately allowed to fall or caving has otherwise occurred. In these cases, it is not usually possible to determine methane concentrations without great physical risk, and in many instances, the areas are completely inaccessible. In addition, during the time pillars are being removed and the roof permitted to fall in a planned sequence, ventilation of the area can best be accomplished with present technology by ventilating the area in a systematic manner.
>
> These pillared and abandoned areas that are no longer being mined are not tested as frequently as working places, nor can they be given the same attention a working place receives. Consequently, these areas represent a great potential source of explosions, which can lead to widespread underground destruction with attendant loss of life.
>
> Sections 303(p), (q), and (r) are all directed toward solving this difficult problem. It is the intent of these

> three sections to require that the areas of mines described above be made as safe as present technology will permit so that the possibility of disasters from this source can be reduced or eliminated. There is general agreement among mining and safety engineers that bleeder systems are difficult to maintain in satisfactory conditions over long periods of time and they do not eliminate explosive concentrations of gas in the gob because of bypassing of air when the gob area extends over long distances. Sections 303(p), (q), and (r) require that when bleeder entries or systems or equivalent means are permitted instead of sealing, they shall be effective. This means that, where no superior method of ventilation is available, one of these may be approved by an authorized representative of the Secretary. When bleeder entries or systems are approved, they shall be used only under conditions where they can be adequately maintained, over short distances. Bleeder air shall not contain more than 2 volume per centum of explosive gases when sampled at a point immediately before entering another split of air.

Leg. Hist. 1969 Act at 578-79.

This language makes it clear that Itmann's argument on this issue is incorrect. Just because the percentage of methane is below 2 percent does not mean that an operator has not violated this section of the Act. Even if the percentage of methane in the air from the abondoned area which enters another split of air is below 2 percent, the operator violates this section if it has not maintained ventilation "so as continuously to dilute, render harmless, and carry away methane and other explosive gases" in the abandoned area. The legislative history states that this regulation means that "such ventilation will be adequate to insure that no explosive concentrations of methane or other gases will be in this area." Leg. Hist. 1969 Act at 1044.

All parties concede that the methane content of the air from the abandoned area of this mine at the point where it entered another split of air was less than 2 percent. However, I have already found that 30 C.F.R. § 75.329 also requires that the ventilation of the abandoned area "be

maintained so as continuously to dilute, render harmless, and to carry away methane and explosive gases within such areas . . . ." Inspector Worthington testified that there was no movement of the air at the place where methane in the explosive range was found. Itmann presented no evidence to contradict this testimony. Accordingly, I find that Itmann violated 30 C.F.R. § 75.329 by failing to maintain ventilation of the abandoned area of its mine as required by this regulation. Itmann's belated assertion that it was unsafe for its employees to travel the abandoned area and that any such travel would be in violation of the 1969 closure orders is rejected and will be discussed under the criteria for assessing a civil penalty.

Civil Penalty

Since I have found that Itmann violated 30 C.F.R. § 75.329, the next issue is the amount of the civil penalty to be assessed. In assessing a civil penalty, the six criteria set forth in section 110(i) of the Act shall be considered. As pertinent here, I have considered Stipulations Nos. 7 through 10 concerning Itmann's previous history, size of business, ability to continue in business, and good faith in attempting to achieve rapid compliance. The remaining criteria to be discussed are whether Itmann was negligent and the gravity of the violation.

Itmann was notified by MSHA late in 1977 that the Government was concerned about the possible accumulation of explosive gases in the abandoned area of this mine. During the 2 years after that notice, MSHA inspected the abandoned area on two occasions prior to the inspection on which the instant order was issued. At no time prior to the issuance of this order did Itmann claim that it was unsafe to travel the abandoned area or that such travel

would be in violation of the 1969 closure orders for the abandoned section. The evidence establishes that Itmann prepared a mine map of the abandoned areas showing roof falls which had occurred since the 1969 orders and assigned its employees to accompany MSHA inspectors into the abandoned area without protest. The conclusion to be drawn from this evidence is that Itmann knew that it was required to properly ventilate the abandoned area and could not rely solely upon the percentage of methane at the point were the air coming out of the abandoned area entered another split of air. Hence, its failure to adequately ventilate the abandoned area of the mine constitutes ordinary negligence.

In upholding the order of withdrawal based on imminent danger herein, I have previously found that miners employed in the active workings of the mine were exposed to serious physical harm or death due to the condition that existed. The evidence establishes that more than 40 miners worked in the affected area on each shift for three shifts a day. Therefore, I find that this was a very serious violation.

Based upon the evidence of record and the criteria set forth in section tion 110(i) of the Act, I conclude that a civil penalty of $2,000 should be imposed for the violation found to have occurred.

Entitlement of Miners

Section 111 of the Act provides in pertinent part:

> If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested

parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for 1 week, whichever is the lesser.

The purpose of the section is outlined at page 634 of the Legislative History of the 1977 Act which states:

Miners entitlements resulting from closure orders

As the Committee has consistently noted, the primary objective of this Act is to assure the maximum safety and health of miners. For this reason, the bill provides at Section 112 [enacted as section 111] that miners who are withdrawn from a mine because of the issuance of a withdrawal order shall receive certain compensation during periods of their withdrawal. This provision, drawn from the Coal Act, is not intended to be punitive, but recognizes that miners should not lose pay because of the operator's violations, or because of an imminent danger which was totally outside their control. It is therefore a remedial provision which also furnishes added incentive for the operator to comply with the law.

I have already found the following facts to be established by the preponderance of the evidence: (1) Itmann's 3B Mine was closed by an order properly issued under section 107 of the Act; (2) Itmann failed to comply with the mandatory safety standard set forth at 30 C.F.R. § 75.329 and that failure caused the mine to be closed; and (3) the mine in question was closed for 10 working days. Based upon the above findings, it follows that all miners who were idled by this order are entitled to full compensation "at their regular rates of pay for such time as the miners are idled by such closing, or for 1 week, whichever is the lesser." Itmann and the UMWA stipulated the identity of the miners affected by the order, their daily rates of pay, the number of days they worked and the number of days they were idled during the time this mine was closed. These stipulations are included the Appendix to this decision which is attached hereto and incorporated herein.

However, Itmann and the UMWA disagree on the amount of compensation owed. Itmanns position is as follows:

> Section 111 only provides for the miner to be compensated for a maximum of one week (5 days). Therefore, any time that an individual was permitted to work by Itmann during the ten (10) day period must be subtracted from the maximum five (5) day compensable period to determine compensation due.

By way of illustration, Itmann contends that a miner who worked for 5 of the 10 days that the mine was closed would be entitled to no compensation under section 111.

On the other hand, the UMWA's position is as follows:

> The UMWA contends that the number of days worked by a particular miner should be subtracted from the total number of days that the 3B mine would have been in operation between September 13 and September 28, 1979, had the order not been issued (in this case 10 days) in order to determine how many days a miner was actually idled by the order. If the period of time the miner was idled is five or more days, the miner would be awarded only five days compensation. If the period of time the miner was idled is less than five days, then the miner would be awarded compensation only for the one, two, three or four days the miner was actually idled.

Applying the UMWA's position to the prior illustration, the UMWA contends that the miner who worked for 5 of the 10 days the mine was closed would be entitled to 5 days' wages under section 111 of the Act.

While the specific issue concerning the determination of "all miners who are idled due to such order . . . ." under section 111 of the 1977 Act has not been decided by the Commission, a similar issue has been addressed in three recent cases. In Youngstown Mines Corporation, Docket No. HOPE 76-231, August 15, 1979, the union sought compensation under section 110(a) of the 1969 Act. MESA issued a withdrawal order under section 104(b) of the 1969

Act because the operator failed to abate a violation. All workers on the shift when the order was issued were assigned to abatement work. The workers on the next shift (the night shift) were also assigned to abatement work. After 4 hours they were sent home. Section 110(a) of the 1969 Act provides in pertinent part:

> If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title, all miners working during the shift when such order was issued who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift * * *. [Emphasis added.]

The miners on the night shift were paid for the first 4 hours of the shift (the time they worked on abatement), but were not paid for the remainder of the shift. The miners filed a claim for compensation for the 4 hours of the shift they did not work.

On appeal, the operator contended that section 110(a) requires that an operator compensate the next working shift only for the first 4 hours following a withdrawal order. The operator argued that the miners were idled by the withdrawal order for the first 4 hours of their shift even though they worked on abatement during that time and that they were only entitled to compensation for those first 4 hours.

The Commission rejected the operator's interpretation of section 110(a). The Commission held that the miners were idled after they stopped work and were entitled to compensation for those 4 hours that they were idled because of the withdrawal order. The Commission reasoned that but for the withdrawal

order, the miners would have worked the entire shift. Therefore, they were idled for 4 hours by the order. They were entitled to compensation for those 4 hours. The reasoning in Youngstown Mines, Inc., was affirmed by the Commission in Kanawha Coal Company, Docket No. HOPE 77-193, September 28, 1979, and in Peabody Coal Company, Docket No. 77-50, November 14, 1979.

In the instant case, Itmann contends that under section 111 "any time that an individual was permitted to work by Itmann during the ten (10) day period must be subtracted from the maximum five (5) day compensable period to determine compensation time." Under the reasoning of Youngstown Mines, Inc., supra, this argument is rejected. The miners were idled by the withdrawal order. The amount of time that they were idled is the period of withdrawal minus the period of alternate work which they performed. They are entitled to be compensated for that period, up to a maximum of 1 week.

However, Stipulation No. 12 in this matter provides that miners on the day shift of September 13, 1979, were paid by Itmann for the balance of their shift after the order was issued (4 hours) and the miners who were scheduled to work the evening shift on that day were paid for 4 hours of that shift. Hence, all miners on the day and evening shift have already received one-half day's wages as compensation under this order. Section 111 clearly provides that the maximum amount of compensation that can be awarded under section 111 due to a closure order is 1 week. Stipulation No. 13 in this case provides that the maximum number of days' wages to which miners who were idled by the order would be entitled to 5 days' wages. Since the miners on the day and afternoon shifts have already received one-half day's wages, the period for which they can receive compensation is the number of days

they were idled minus the 4 hours for which they have already been compensated. The maximum compensation which they can receive in this matter is 4-1/2 days' wages. Since the miners on the midnight shift received no compensation under this order, the period for which they can receive compensation is the number of days they were idled up to 5 days.

I have applied the foregoing principles to the schedules of miners employed in this mine and the amount of compensation due to each miner is set forth in the Appendix. For the day and evening shift, the amount of compensation due each miner is determined by multiplying the stipulated period for which they were idled by the order minus the 4 hours for which they have already been compensated (up to 4-1/2 days) times their daily rate of pay. For the midnight shift, the amount of compensation due each miner is determined by multiplying the stipulated period they were idled by the order (up to 5 days) times their daily rate of pay. The total amount of compensation owed by Itmann to the 148 miners idled by this order is $46,194.73.

The only remaining issue is the amount of interest, if any, which is awardable in this matter. The UMWA contends that the miners are entitled to 12 percent interest on the compensation owed. Itmann does not address this issue in its brief. The UMWA concedes that "in the cases decided to date, the Commission has awarded interest at the rate of 6 percent per annum . . . ." However, the UMWA argues that the Commission should follow the precedent of the National Labor Relations Board which, in 1977, abandoned 6 percent interest on back pay awards and followed the Internal Revenue Service "adjusted prime interest rate" which is currently 12 percent. The policy supporting the higher rate of interest is as follows: to encourage prompt compliance with Commission orders; to encourage the operators to comply with

the health and safety provisions of the Act; and to fully compensate the miners for their losses. I am aware that other judges of the Commission have awarded interest in excess of 6 percent per annum. Although the UMWA presents a persuasive argument in support of its position in favor of higher interest, I am constrained to follow the decision of the Commission in Peabody Coal Company, Docket No. VINC 77-50, November 14, 1979, where it modified a judge's decision on interest to a rate of 6 percent per annum from the date compensation was due up to the date on which payment is made. If this policy is to be changed, it is for the Commission to make the change.

There is no evidence of record to establish the precise dates on which each of the miners was idled. However, since the order in question was issued on September 13, 1979, I find that the amount of compensation ordered paid herein was due to each of the miners 1 week thereafter: September 20, 1979. Therefore, Itmann is ordered to pay each miner the amount of compensation due as set forth in the Appendix plus interest at the rate of 6 percent per annum from September 20, 1979, to the date payment is made.

ORDER

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

IT IS FURTHER ORDERED that Itmann pay the sum of $2,000 within 30 days of the date of this decision as a civil penalty for the violation of 30 C.F.R. § 75.329.

IT IS FURTHER ORDERED that Itmann pay the amount of $46,194.73 as compensation to the 148 individual miners as set forth in the Appendix which is attached hereto and incorporated herein plus interest at the rate of 6 percent per annum from September 20, 1979, to the date payment is made.

James A. Laurenson, Judge

Distribution by Certified Mail:

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APPENDIX

DAY SHIFT

Miners	Daily Rate	Days Worked	Days Idled	Days of Compensation Due	Amount of Compensation Due
Paul Hypes	70.38	3	7	4-1/2	$316.71
David Goode	70.38	1	9	4-1/2	316.71
Kenneth Woods	70.38	1	9	4-1/2	316.71
Jerry Christian	70.38	0	10	4-1/2	316.71
Kenny Dancy	75.68	3	7	4-1/2	340.56
Patricia Cook	70.38	4	6	4-1/2	316.71
Rickey Tawney	70.38	3	7	4-1/2	316.71
Phyllis Alfrey	70.38	4	6	4-1/2	316.71
Danny R. Mitchem	70.38	3	7	4-1/2	316.71
Shirley Rollins	70.38	2	8	4-1/2	316.71
Ronnie Reed	70.38	2	8	4-1/2	316.71
Jimmy Clyburn	70.38	4	6	4-1/2	316.71
James Whitlow	70.38	2	8	4-1/2	316.71
Freddie Fox	70.38	2	8	4-1/2	316.71
Shales Elkins	69.38	10	0	0	0
James Elswick	78.92	5	5	4-1/2	355.14
Bobby Linsey	70.96	1	9	4-1/2	319.32
Douglas Morgan	70.96	0	10	4-1/2	319.32
Phillip Martin	70.38	7	3	2-1/2	175.95
Richard Mutterback	72.74	0	10	4-1/2	327.33
Ernest Carroll	70.38	0	10	4-1/2	316.71
Dominick Delgrande	78.92	9	1	1/2	39.46
Ronnie Tignor	70.38	3	7	4-1/2	316.71
Milton Parsell	70.96	5	5	4-1/2	319.32
Harrison Belcher	70.96	3	7	4-1/2	319.32
Loren McGrady	75.68	5	5	4-1/2	340.56
Melvin Thorn	72.74	5	5	4-1/2	327.33
David Repass	78.92	6	4	3-1/2	276.22
David Chipman	78.92	5	5	4-1/2	355.14
Jack Garretson	78.92	0	10	4-1/2	355.14
Gary Lilly	78.92	2	8	4-1/2	355.14
Larry E. Bailey	78.92	5	5	4-1/2	355.14
Carlos Hatfield	70.38	5	5	4-1/2	316.71
Deward Dillion	78.92	10	0	0	0
Frank Campbell	72.74	3	7	4-1/2	327.33
Johnny Lane	78.92	4	6	4-1/2	355.14
Doug Perkins	78.92	0	10	4-1/2	355.14
Thomas Bailey	72.74	5	5	4-1/2	327.33
Charles Lindsay	65.79	7	3	2-1/2	164.48
Terry Acord	70.38	4	6	4-1/2	316.71
Leon Bailey	72.74	4	6	4-1/2	327.33
Ronald Campbell	78.92	0	10	4-1/2	355.14

DAY SHIFT (continued)

Miners	Daily rate	Days Worked	Days Idled	Days Compensation Due	Amount of Compensation Due
Rose Sansom	70.38	0	10	4-1/2	$316.71
Frankie Campbell	75.68	0	10	4-1/2	340.56
Frank Chipman	72.74	5	5	4-1/2	327.33
Michael Brubaker	70.38	2	8	4-1/2	316.71
Frank Crites	72.74	3	7	4-1/2	327.33
Rodney Mitchem	70.38	3	7	4-1/2	316.71
Kenner Dancy	78.92	2	8	4-1/2	355.14
Robert Bailey	72.74	2	8	4-1/2	327.33
Sherry Osborne	70.38	3	7	4-1/2	316.71
Charles Dancy	78.92	5	5	4-1/2	355.14
Gary Puckett	78.92	4	6	4-1/2	355.14
Walter McKinney	70.38	5	5	4-1/2	316.71
Wayne Pennington	78.92	9	1	1/2	39.46
Garland Morgan	75.68	5	5	4-1/2	340.56
Billy J. Farruggia	78.92	9	1	1/2	39.46
Virgil Harden	78.92	5	5	4-1/2	355.14
Robert Bryson	78.92	2	8	4-1/2	355.14
Gary Naylor	78.92	4	6	4-1/2	355.14
Darrell Worley	78.92	5	5	4-1/2	355.14
Paul Blankenship	75.68	4	6	4-1/2	340.56

EVENING SHIFT

Miners	Daily Rate	Days Worked	Days Idled	Days of Compensation Due	Amount of Compensation Due
Charles Cole	80.52	6	4	3-1/2	$281.82
Jess Cole	80.52	6	4	3-1/2	281.82
John Cunningham	74.34	6	4	3-1/2	260.19
Terrell Miller	74.34	7	3	2-1/2	185.85
Roy Hall	80.52	3	7	4-1/2	362.34
Richard Bekker	80.52	1/2	9-1/2	4-1/2	362.34
James Repass	80.52	6	4	3-1/2	281.82
Robert Payne	80.52	0	10	4-1/2	362.34
Randy Lambert	80.52	0	10	4-1/2	362.34
Thomas Johnson	80.52	6	4	3-1/2	281.82
Steve Lester	80.52	0	10	4-1/2	362.34
Johnny Hollingshead	74.34	0	10	4-1/2	334.53
Roger Hollingshead	80.52	0	10	4-1/2	362.34
Edward Gendron	80.52	8	2	1-1/2	120.78
Jerry Lusk	80.52	5	5	4-1/2	362.34
William Thompson	74.34	0	10	4-1/2	334.53
Freddy Dunford	74.34	6	4	3-1/2	260.19
Gary Shrewsbury	77.28	6	4	3-1/2	270.48
Ward Johnson	80.52	9	1	1/2	40.26
Richard T. Gray	80.52	5	5	4-1/2	362.34
Mert Privett	80.52	9	1	1/2	40.26
Galen Clay	71.98	7	3	2-1/2	179.95
Quincy Murdock	71.98	7	3	2-1/2	179.95
Shirley Altizer	71.98	8	2	1-1/2	107.97
Larry Rogers	71.98	5	5	4-1/2	323.91
James Archie	71.98	7	3	2-1/2	179.95
Jimmy Trent	71.98	1	9	4-1/2	323.91
Charles Cadle	71.98	0	10	4-1/2	323.91
John Becklehimer	80.52	6	4	3-1/2	281.82
Jack Goff	72.56	0	10	4-1/2	326.52
Roger Lester	80.52	4-1/2	5-1/2	4-1/2	362.34
Richard Blackburn	80.52	3-1/2	6-1/2	4-1/2	362.34
John Hughes	71.98	2	8	4-1/2	323.91
Darrell Lilly	71.98	9	1	1/2	35.99
Johnnie Farley	77.28	0	10	4-1/2	347.76
Allen Proffitt	71.98	1-1/2	8-1/2	4-1/2	323.91
Ernest Mullins	71.98	10	0	0	0
Jimmie Kincaid	71.98	2	8	4-1/2	323.91
George Adkins	80.52	5-1/2	4-1/2	4	322.08
A. Sizemore	80.52	3-1/2	6-1/2	4-1/2	362.34
William Ramsey	77.28	4	6	4-1/2	347.76
Danny Stabbs	74.34	1	9	4-1/2	334.53
David Blankenship	74.34	7	3	2-1/2	185.85

MIDNIGHT SHIFT

Miners	Daily Rate	Days Worked	Days Idled	Days Compensation Due	Amount of Compensation Due
William Faulkner	75.14	3	7	5	$375.70
Stephen Scott	75.14	3	7	5	375.70
Richard L. Belcher	81.32	0	10	5	406.60
Ronnie Shrewsbury	81.32	0	10	5	406.60
Richard Howell	81.32	4	6	5	406.60
Mark Hylton	75.14	2	8	5	375.70
Joseph Pierce	81.32	9	1	1	81.32
William Peters	81.32	3	7	5	406.60
Danny Tiller	75.14	0	10	5	375.70
Donald Skaggs	81.32	5	5	5	406.60
Carl Belcher	81.32	1	9	5	406.60
Esther O'Dell	72.78	7	3	3	218.34
Bennie Webb	78.08	2	8	5	390.40
Jack Casteel	81.32	0	10	5	406.60
Arnold Rogers	81.32	8	2	2	162.64
James Lankford	75.14	2	8	5	375.70
Charles Marquis	75.14	5	5	5	375.70
Deborah Meadows	72.78	5	5	5	363.90
Jerry Rotenberry	81.32	2	8	5	406.60
Granville McKinney	81.32	0	10	5	406.60
Roger Bailey	75.14	0	10	5	375.70
Bernard Atwood	81.32	6	4	4	325.28
Larry G. Bailey	81.32	5	5	5	406.60
Brett Duncan	75.14	5	5	5	375.70
Alan Handy	81.32	6	4	4	325.28
Roy Osborne	81.32	9	1	1	81.32
Frank Echols	81.32	4	6	5	406.60
John McKinney	81.32	2	8	5	406.60
Gregory Hatfield	81.32	4	6	5	406.60
Hubert Scott	68.92	10	0	0	0
Roger Redden	73.36	2	8	5	366.80
William Jones	73.36	6	4	4	293.44
James Cooper, Jr.	81.32	3	7	5	406.60
Stanley Wriston	72.78	3	7	5	363.90
Raymond Ortiz	72.78	5	5	5	363.90
Clyde McKinney	78.08	3	7	5	390.40
Bernard Campbell	72.78	5	5	5	363.90
Darrell Doss	72.78	4	6	5	363.90
Ronald Winston	72.78	2	8	5	363.90
Johnny Hopkins	72.78	7	3	3	218.34
Larry Lovejoy	72.78	7	3	3	218.34
William Duncan	72.78	0	10	5	363.90
George Cook	72.78	0	10	5	363.90
Robert Mullins	72.78	6	4	4	291.12
Paul Christian	72.78	6	4	4	291.12
Clarence Dickens	81.32	7	3	3	243.96
Bobby Bailey	81.32	6	4	4	325.28

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

31 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
Petitioner	:	Docket No. LAKE 79-51-M
v.	:	A.C. No. 11-02666-05001
	:	North American Pit
NORTH AMERICAN SAND AND GRAVEL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Charles W. Barenfanger, Jr., President, North American Sand and Gravel Company, Vandalia, Illinois, for Respondent.

Before: Judge Charles C. Moore, Jr.

The hearing in the above case was scheduled to commence at 10 a.m. on June 11, 1980, in the Fayette County Courthouse in Vandalia, Illinois. The contract court reporter did not arrive that morning as scheduled and it was not until noon that we were able to obtain a local court reporter and commence the hearing. I realize that this wasted time was a hardship on Respondent but I do not believe it would be proper to consider this inconvenience in mitigation of any assessed penalties.

It was stipulated that Respondent is a small operator but is able to afford the penalties assessed by the Assessment Office. Jurisdiction was also stipulated. There was no prior history of violation.

Normally, this mine is operated by two people who start the day by doing maintenance on various equipment and getting the screens and shaker conveyors, etc., running. Thereafter, these two employees operate front-end loaders and move the sand and gravel from place to place. Most of the time, no one is in actual charge of the operation. When present, however, Mike Themig does direct the operations of the pit. Neither of the two employees who worked at the pit during the time of the inspection in this case is still employed there and Mike Themig was out of town for several days during the inspection. Only Inspector Aubuchon was able to testify as to the conditions in the pit at the time of the inspection.

It was Mr. Themig's testimony that an important part of a machine was broken and that there could be no production pending the receipt of this piece of machinery. I have no reason to doubt the testimony, but the fact remains that Inspector Aubuchon did observe the machinery running and the bulldozers operating and regardless of whether there was any actual production, the equipment was operating. Whatever dangerous situations existed were just as dangerous whether or not there was production. In this connection, one of Respondent's arguments was that if it had completely shut down the plant during the inspection, no citations could have been issued. That is not a correct statement of the law. While it is true that if an operator took a guard off of a sprocket or chain for the purpose of working in that area while the machinery was not running, there would be no violation, but shutting a piece of equipment down for the purpose of an MSHA inspection does not serve to avoid the issuance of a citation. I have heard a number of cases where the plant operator, as a courtesy, ceased operations to facilitate the inspector's investigation, but in no instance did the fact that the operation had ceased prohibit the inspector from issuing citations.

Because basically only two miners operate in this pit, the inspector thought, with respect to all nine citations that he issued, that the probability of an accident was very low. I agree with the inspector's judgment because, for example, it would be very unlikely that a front-end loader operator would be injured by an unguarded V-belt or that he would be injured because the other front-end loader failed to have the required backup alarm. The improbability of injury, however, does not establish that there was no violation of a safety standard.

The nine alleged violations here involve failure to have backup alarms, failure to provide berms at dumping locations, failure to provide guards at dangerous locations, failure to have a guard in place at such a location, and the failure to have a block-out system when electric-powered equipment is being repaired. These nine citations were issued during the very first inspection and, in fact, the first visit that any MSHA official had made to the mine. All of the citations issued by the inspector were abated promptly and in good faith.

Citation Nos. 367287 and 367295 both allege that front-end loaders were not equipped with audible backup alarms in violation of 30 C.F.R. § 56.9-87. The evidence clearly establishes that the two articulated and wheel-type front-end loaders were not equipped with backup alarms and the drivers were not provided with observers to signal when it was safe to back up. The only factual question is whether the driver's view to the rear was obstructed. The inspector testified that the operator could not see a man 15 feet behind the rear portion of the front-end loader. Respondent offered a picture taken from the driver's compartment with the camera facing the rear, but the picture is inconclusive as to the operator's visibility. I find that the rearward visibility was obstructed and that backup alarms were required for these two pieces of equipment. In view of the circumstances already described, however, I find the negligence and gravity to be of a low order. A penalty of $10 is assessed for each of these citations.

Citation No. 367288 alleges a violation of 30 C.F.R. § 56.9-54 in that berms were not placed at the side of a ramp leading up to a hopper. The standard alleged to have been violated requires berms or bumper blocks to prevent overtravel and overturning at dumping locations and does not require berms at the side of the ramp. The hopper would prevent overtravel in the dumping area. The inspector may have intended to cite section 59.9-22 but no mention of that section was made at the hearing. The citation is accordingly vacated.

Citation Nos. 367290 and 367291 allege guards were not provided as required by 30 C.F.R. § 56.14-1. The inspector testified that while the pinch points involved in these two citations were high, they were nevertheless within reach. Respondent's Exhibit 3, a photograph, shows both the chain and drive pulley involved in these citations and indicates that they are both out of reach. I think the photograph, together with Mr. Themig's testimony, rebutted the prima facie case made by the inspector and left the Government with the burden of putting on rebuttal evidence as to the photograph. The Government failed to do so and in my opinion, failed to establish that these two violations existed. The citations are accordingly vacated.

Citation No. 367289 alleges a violation of 30 C.F.R. § 56.14-1 in that a chain drive and sprocket 4 to 5 feet off the ground was not guarded. Anyone shoveling in the area could have been injured. The violation was established and Respondent was negligent in allowing the condition to exist. Any injury caused would have been serious but as previously stated because of the way in which this mine was operated, the probability of an injury was low. A penalty of $10 is assessed.

Citation No. 367292 alleges a violation of 30 C.F.R. § 56.14-6 in that a chain drive pulley guard had been removed and not replaced before the machinery was started up. Again, the inspector was the only witness who observed the event and he testified that although the equipment was not running when he issued the citation, it was later operated without the guard in place. A violation was established but there was no evidence of negligence other than the fact that the violation occurred. The probability of injury was not high and a penalty of $10 is assessed.

Citation No. 367293 alleges a violation of 30 C.F.R. § 56.14-1 in that a self-cleaning tail pulley 3 or 4 feet off the ground was not guarded. A self-cleaning tail pulley is hazardous in itself without regard to any pinch points and Respondent was clearly negligent in allowing such a condition to exist. I find the violation occurred, that Respondent was negligent but that the probability of an injury was low. A penalty of $15 is assessed.

Citation No. 367294 alleges a violation of 30 C.F.R. § 56.12-16 in that there was no lock-out procedure to insure that the one working on electrical equipment would not be injured by someone else inadvertently starting the equipment. The inspector was told that when the equipment was being repaired, the fuses were taken out of the fuse box but when he looked at the fuse box while the equipment was down for repairs, the fuses were in place. But even

if the fuses had been removed, this is not the type of foolproof system that the regulation requires. If the person working on the equipment carried in his pocket the only fuses available or if the breaker box had been locked open and the worker carried the key, the regulation would have been satisfied. The evidence clearly establishes a violation and the failure to have such a lock-out system did amount to negligence but again the probability of an injury was low because only two workers were in the plant. A penalty of $15 is assessed.

ORDER

It is therefore ORDERED that Respondent pay to MSHA, within 30 days, a civil penalty in the total amount of $70.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, Eighth Floor, Chicago, IL 60604 (Certified Mail)

Charles W. Barenfanger, Jr., President, North American Sand and Gravel Company, P.O. Box 190, Vandalia, IL 62471 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

31 JUL 1980

CONSOLIDATION COAL COMPANY, Applicant	:	Application for Review
	:	Docket No. WEVA 79-129-R
v.	:	Order No. 804918
	:	April 16, 1979
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Robinson Run No. 95 Mine

DECISION

Appearances: Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Applicant;
David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Cook

I. Procedural Background

On May 14, 1979, Consolidation Coal Company (Applicant) filed an application for review pursuant to section 105(d) 1/ of the Federal Mine Safety

1/ Section 105(d) provides:
"If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104."

and Health Act of 1977, 30 U.S.C. § 815(d) (1978) (1977 Mine Act). Applicant seeks review of Order of Withdrawal No. 804918 issued at the Robinson Run No. 95 Mine on April 16, 1979, pursuant to the provisions of section 104(b) 2/ of the 1977 Mine Act. The application for review states, in part, as follows:

> 1. At or about 1400 hours on March 22, 1979, Federal Coal Mine Inspector, James D. Satterfield (A.R. 0502) representing himself to be a duly authorized representative of the Secretary of Labor (hereinafter Inspector) issued Citation No. 0804951 (hereinafter Citation) pursuant to the provisions contained in Section 104(a) of the Act to Howard F. Watson, Safety Escort, for a condition he allegedly observed during an "AAA" inspection (Safety and Health Inspection) in the Robinson Run No. 95 Mine, Identification No. 46-01318 located in Northern West Virginia. A copy of this Citation is attached hereto as Exhibit "A" in accordance with 29 C.F.R. Section 2700.21(b).
>
> 2. Therein Inspector Satterfield cited Consol for a violation of 30 C.F.R. § 75.1403 and alleged under the heading captioned "Condition or Practice" the following:
>
> "Mud and water had accumulated in and along the load track near the Robinson Run Portal from No. 35 to No. 50 Block. The flanges on the wheels of the rolling stock were throwing mud and water on the rails, making them wet and slick."
>
> 3. Inspector Satterfield directed that the condition be abated by 0800 hours on March 30, 1979.
>
> 4. Inspectors Satterfield and Allen issued three extensions of time permitted for abatement on March 30, 1979, April 5, 1979, and April 12, 1979. Copies of the extensions are attached hereto as Exhibits "B", "C" and "D" respectively.*

2/ Section 104(b) provides:

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

5. At or about 0905 hours on April 16, 1979, Inspector Bretzel W. Allen issued a Section 104(b) Order identified as No. 0804918 to Howard F. Watson, Safety Escort. He determined that the alleged violation described in the above-mentioned citation had not been totally abated within the period of time as originally fixed therein and that the period of time for abatement should not be further extended. Inspector Allen stated:

> Although some work had been done to correct the condition, mud (mine refuse) still was present in the clearance space from 7 to 26 inches deep and the mine cars had been dragging in it and at 3 locations between the rails between number 35 and 50 blocks, in the loaded track entry.

He further demanded that all persons except those referred to in Section 104(c) be withdrawn from "The loaded track entry between 35 and 50 blocks." The Order hereinabove described is the subject of this Application, and a copy thereof is attached hereto as Exhibit "E".

6. At or about 0100 hours on April 17, 1979, Inspector Allen issued a termination of said Order. A copy of this termination is attached hereto as Exhibit "F".*

7. Consol avers that the Order is invalid and void, and in support of its position states:

(a) That the conditions and practices described in the Order are inaccurate;

(b) That no violation of mandatory health or safety standard 30 C.F.R. § 75.1403 occurred, as alleged;

(c) That the Order was not issued pursuant to the same condition described in the Citation.

(d) That Consol had made a good faith effort to abate the described conditions or practices within the prescribed time period; and

(e) That it was unreasonable for the Inspector not to further extend the time for abatement and that said failure was an arbitrary and capricious act without basis in fact and without regard to the prevailing standards for the issuance of Section 104(b) Orders.

* * * * * * *

WHEREFORE, Consol respectfully requests that its Application for Review be granted and for all of the above and other

good reason, Consol additionally requests that the subject Order be vacated or set aside and that all actions taken or to be taken with respect thereto or in consequence thereof be declared null, void and of no effect.

In a footnote to paragraph 4 of the application for review, Applicant states the following:

> The extension of March 30, 1979, stated: "Additional time was granted to remove the mud and water from the load track, from 35 to 50 blocks, because the mine was idle 2 shifts due to a work stoppage." [SEE: Exhibit "B"]
>
> The extension of April 5, 1979, stated: "Part of the water has been removed from the loaded track entry between numbers 35 and 50 blocks. Additional time is needed to complete the cleaning of the entry." [SEE: Exhibit "C"]
>
> The extension of April 12, 1979, stated: "A drain ditch has been dug from number 35 to 50 block to drain the water from the track haulage entry. Additional time is needed to complete the cleaning of the entry." [SEE: Exhibit "D"]

In a footnote to paragraph 6 of the application for review, Applicant states the following: "The termination stated: 'The (mine refuse) mud was loaded into mine cars and removed from the loaded track entry between number 35 and 50 blocks.'"

The United Mine Workers of America (UMWA) and the Mine Safety and Health Administration (MSHA) filed answers on May 14, 1979, and May 25, 1979, respectively.

Pursuant to a notice of hearing issued on August 22, 1979, the first portion of the hearing was held on September 20, and September 21, 1979, in Washington, Pennsylvania. Representatives of MSHA and Applicant were present and participated. No one appeared to represent the UMWA (Tr. 4-6). 3/

During the hearing on September 21, 1979, it was noticed that the safeguard notice introduced into evidence by MSHA (Exh. M-4) was denominated 1 WSH, January 15, 1973, 30 C.F.R. § 75.1403 and that the safeguard notice referred to in the 104(a) citation underlying the subject order of withdrawal was denominated 2 WHB, January 15, 1973. Counsel for MSHA requested a continuance to permit the presentation of evidence to resolve the apparent ambiguity. The motion was granted.

3/ During the hearing on September 20, 1979, Applicant moved to dismiss the UMWA as a party to the proceeding (Tr. 6-7). An order granting Applicant's motion was issued immediately prior to the issuance of the decision in this case. Accordingly, the decision's caption reflects only the remaining parties.

On October 1, 1979, an order was issued continuing the hearing to reconvene on November 1, 1979, and, on October 10, 1979, a notice was issued designating a facility in the Somerset County Courthouse as the hearing site. On October 22, 1979, MSHA filed a motion for the issuance of two subpoenas duces tecum to require the production of documents at the November 1, 1979, hearing. Since the time permitted for filing a statement in opposition to the motion, 29 C.F.R. § 2700.8(b) and 2700.10(b) (1979), extended beyond November 1, 1979, telephone conferences were conducted on October 23, and 25, 1979, during which the undersigned Administrative Law Judge and representatives of the parties participated. Counsel for Applicant indicated that he would exercise his right to file a response to the motion but that his response would not be forthcoming until after November 1, 1979. Additionally, counsel for MSHA stated that he would request the hearing site be changed to Morgantown, West Virginia due to the ill health of an MSHA witness. The parties were unable to reach agreement on this point. In view of these considerations, an order was issued on October 26, 1979, cancelling the hearing and continuing the proceeding indefinitely.

Applicant filed its statement in opposition to MSHA's motion on November 1, 1979, and an order was issued on November 8, 1979, granting MSHA's motion for the issuance of subpoenas.

On November 19, 1979, MSHA formally requested a change of the hearing site, and no statement in opposition thereto was filed by Applicant. Accordingly, on December 18, 1979, an order was issued granting MSHA's request. Additionally, the order contained an amended notice of hearing scheduling the continued hearing to reconvene on January 29, 1980, in Morgantown, West Virginia. Subsequent thereto, an amended notice was issued changing the hearing date to January 28, 1980.

The continued hearing reconvened as scheduled with representatives of MSHA and Applicant present and participating. No one appeared to represent the UMWA. A schedule for the submission of posthearing briefs was agreed upon following the presentation of the evidence, but difficulties experienced by counsel necessitated a revision thereof. MSHA submitted its posthearing brief on April 17, 1980. Neither Applicant nor the UMWA filed posthearing briefs.

II. Witnesses and Exhibits

A. Witnesses

MSHA called as its witnesses James D. Satterfield and Bretzel W. Allen, MSHA inspectors; Nelson Starcher, chairman of the union safety committee at the Robinson Run No. 95 Mine; Neta Matthey, a secretary in MSHA's Clarksburg office; and Crystal Sharp, a supervisory clerk-typist in MSHA's Morgantown office.

Applicant called as its witnesses Richard Rieger, general superintendent of the Robinson Run No. 95 Mine; Donald Glover, shift safety inspector at the

Robinson Run No. 95 Mine; and Howard Watson, a safety inspector at the Robinson Run No. 95 Mine.

Both Applicant and MSHA called Carl Trickett, safety supervisor at the Robinson Run No. 95 Mine, as a witness.

B. Exhibits

1. MSHA introduced the following exhibits into evidence:

M-1 is a copy of Citation No. 804951, March 22, 1979, 30 C.F.R. § 7.1403.

M-3 is a copy of subsequent action No. 804951-1 issued on March 30, 1979, extending the time for abatement to 4:00 p.m., April 3, 1979.

M-4 is a copy of notice to provide safeguards No. 1-WSH, January 15, 1973, 30 C.F.R. § 75.1403.

M-5 is a copy of subsequent action No. 804951-2 issued on April 5, 1979, extending the time for abatement to 8:00 a.m., April 12, 1979.

M-6 is a copy of subsequent action No. 804951-3 issued on April 12, 1979, extending the time for abatement to 8:00 a.m., April 16, 1979.

M-7 is a copy of Order of Withdrawal No. 804918, April 16, 1979, 30 C.F.R. § 75.1403.

M-8 is a copy of the termination of M-7.

M-9 is a copy of M-4 placed in evidence to demonstrate that Applicant had in its possession notice to provide safeguards No. 1-WSH, January 15, 1973, 30 C.F.R. § 75.1403.

M-10 is a copy of a document in Inspector Satterfield's possession on March 22, 1979, listing notices to provide safeguards issued at the Robinson Run No. 95 Mine.

M-11 is a copy of a three page document pertaining to a request for documents from the Federal Records Center.

2. Applicant introduced the following exhibits into evidence 4/:

4/ Exhibits O-5 and O-6 are copies of notices to provide safeguards issued to the Robinson Run No. 95 Mine on October 1, 1979. The exhibits were ruled irrelevant and immaterial to the issues presented herein and, accordingly, were not received in evidence. Both exhibits have been placed in a separate envelope to be retained with the official record in this case in the event of appellate review (See Tr. 507-512).

O-1 is a general mine map of the Robinson Run No. 95 Mine.

O-2 is a blow-up drawing showing the area of the Robinson Run No. 95 Mine cited in M-1.

O-3 is a photograph of a track cleaning machine with the gathering arms closed.

O-4 is a photograph of the machine depicted in O-3 with the gathering arms open.

III. Issues

A. Whether Citation No. 804951's misdescription of the underlying safeguard notice (Exh. M-4) deprived Applicant of legally adequate notice of the violation charged.

B. If the misdescription did not deprive Applicant of legally adequate notice of the violation charged, then whether the condition cited in Citation No. 804951, March 22, 1979, constitutes a violation of the safeguard notice in that there was excess water on the track haulage road.

C. If the condition cited in Citation No. 804951 constitutes a violation of the safeguard notice, then whether the condition as to excess water on the track haulage road had been abated when Order No. 804918 was issued on April 16, 1979.

D. If the condition cited in Citation No. 804951 constitutes a violation of the safeguard notice which had not been abated when Order No. 804918 was issued on April 16, 1979, then whether Inspector Allen acted unreasonably in failing to further extend the time period for abatement.

IV. Opinion and Findings of Fact

A. Stipulations

1. Applicant owns and operates the Robinson Run No. 95 Mine (Tr. 19-20).

2. The Robinson Run No. 95 Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, Pub. L. No. 91-173, as amended by Pub. L. No. 95-164, 30 U.S.C. § 801 et seq. (Tr. 19-20).

3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105(d) of the 1977 Mine Act (Tr. 19-20).

4. The subject safeguard, notice, order, and any extensions and/or terminations thereof, were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Applicant at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein (Tr. 20).

5. On April 16, 1979, the Robinson Run No. 95 Mine had only one track cleaning machine of the type shown in Applicant's Exhibits O-3 and O-4 (Tr. 25).

B. The Condition of the Loaded Track Entry

On March 22, 1979, Federal mine inspector James D. Satterfield issued 104(a) Citation No. 804951 at Applicant's Robinson Run No. 95 Mine addressing alleged accumulations of mud and water existing in the loaded track entry from No. 35 block to No. 50 block. (Exh. M-1). The cited section of track haulage road was approximately 1,500 feet in length and was located approximately 3,500 feet from the mine portal (Tr. 31-32). Three subsequent actions were issued by Inspector Satterfield and Federal mine inspector Bretzel W. Allen between March 30, 1979, and April 12, 1979, which ultimately extended the time period for abatement to 8 a.m., April 16, 1979. (Exhs. M-3, M-5, M-6). The subject 104(b) order of withdrawal, Order No. 804918 (Exh. M-7), was issued by Inspector Allen at 9:05 a.m., April 16, 1979, after he came to the conclusion that the conditions described in Citation No. 804951 had not been abated and that the time period for abatement should not be further extended. Abatement was accomplished by 9 or 10 p.m. that evening, and the order was subsequently terminated. (Exh. M-8). The circumstances surrounding the issuance of the citation, extensions and order are set forth in detail in the following paragraphs.

Shortly after Inspector Satterfield began his tour of duty as a resident inspector at the Robinson Run No. 95 Mine in January, 1979, a meeting was held with top management officials to discuss the condition of the haulage tracks. In addition to Inspector Satterfield, Nelson Starcher, walkaround representative of the miners and chairman of the union safety committee; Tony Germondo, the general superintendent at the time; Carl Trickett, the safety supervisor; Willard Starcher and Jimmy Germondo were present and participated. Inspector Satterfield apprised mine management that the haulage tracks were in very bad condition. Specifically, discussions were held as relates to mud and water in and along the load tracks. As a result of these discussions, the inspector received a verbal commitment from mine management to assign an adequate number of people per shift to rehabilitate the track. The rehabilitation work envisioned alleviation of the drainage problems, removal of the mud and any other debris from along the track, raising the tracks and tightening the loose joints in the rails. A total of eight employees per shift were to be assigned to the project, with four employees assigned to drainage and four employees assigned to jacking and leveling the track and performing the other necessary maintenance work. In addition to the first meeting, two or three additional meetings were held.

The section of the loaded track entry from No. 35 to No. 50 block was on a grade ascending toward the portal. Most of the 1,500-foot section was characterized by a 6-percent grade with the exception of one level area in the vicinity of No. 48 block. The ribs in the cited haulage entry were curved, a characteristic attributable to the fact that the entry had been cut with a boring type mining machine. Inspector Satterfield testified that the entry was probably 12-1/2 to 13 feet wide at the widest part

of the curvature and approximately 12 feet wide on the bottom (Tr. 51). Inspector Satterfield did not provide a precise figure as relates to the clearance between the sides of the mine cars and the ribs, but testified that Applicant was in compliance with the minimum clearance criteria, i.e., 12 inches on the tight side and 24 inches on the walkway side with a possible maximum of approximately 4 feet in places. 5/ Considering the type of rails used in the Robinson Run No. 95 Mine, it is approximately 8 inches from the railroad ties to the top of the rail. The best available evidence reveals that the flanges on the mine car wheels extend approximately one inch below the top of the rail.

The evidence presented reveals that Inspector Satterfield made the observations prompting the issuance of Citation No. 804951 on March 22, 1979, while riding to the surface on a type of personnel carrier known as a jeep traveling at a rate of speed estimated at between 5 and 10 miles per hour. The vehicle in which the inspector was riding was following approximately 500 feet behind another vehicle which was also heading toward the surface. The inspector testified that from his vantage point on the personnel carrier, looking down the mine floor to the rails, he was definitely able to observe water and mud along the track. He testified that the entire 1,500 feet of rail between Nos. 35 and 50 block was wet and muddy and expressed the opinion that the condition had to have been caused by the wheel flanges of the other vehicle depositing mud and water atop the rails. Inspector Satterfield testified that he had walked through the area on prior occasions and that the last time he had stopped and observed the area between Nos. 35 and 50 block was around the first week in March, 1979. He testified that he decided to issue the citation because the area was getting progressively worse. The citation was issued at 4 p.m., Thursday, March 22, 1979, after arriving on the surface, and states that "[m]ud and water had accumulated in and along the load track near the Robinson Run Portal from No. 35 to No. 50 block. The flanges on the wheels of the rolling stock were throwing mud and water on the rails, making them wet and slick" (Exh. M-1).

Both the language of the citation and Inspector Satterfield's testimony reveal that the citation addresses itself solely to hazards posed to track mounted equipment as a result of wet or slick rails, an interpretation confirmed by the testimony of the other witnesses. The testimony of Inspectors Satterfield and Allen is rejected as unpersuasive to the extent it seeks to impose a broader interpretation. 6/

5/ It is understood that these figures are derived from 30 C.F.R. § 75.1403-8(b) and (c), which set forth criteria for other safeguards.

6/ Inspector Satterfield's testimony reveals two additional hazards posed to track mounted equipment by water saturated mine bottom in that: (1) track mounted equipment using the rails would have a tendency to cause the track to sink farther into the bottom and work loose the fishplates securing the rails and bolts, and (2) the spikes holding the rails to the ties lose their holding power when the ties become saturated with water (Tr. 60, 93). Arguably, elimination of these additional hazards could require the removal of more water from the entry than would be required to prevent either wet

The citation sets forth 8 a.m., March 30, 1979, as the termination due date and alleges a violation of mandatory safety standard 30 C.F.R. § 75.1403 which the evidence reveals is based upon Applicant's failure to comply with the requirements of Safeguard Notice 1 WSH, erroneously referred to in the citation as No. 2 WHB, issued on January 15, 1973. The safeguard notice provides, in part, that "[w]ater was over the main haulage track at the Nos. 3 and 4 block inby by the drift opening on the loaded track. All track haulage roads in this mine shall be kept free of excess water" (Exh. M-4).

The testimony of Inspector Satterfield is at variance with the testimony of Mr. Trickett as relates to the conditions existing from No. 35 to No. 50 block. The inspector's testimony identifies conditions existing in two distinguishable segments of the entry: the walkway side of the entry and the area that can be more narrowly identified as the area in and along the rails. As relates to the former, the inspector testified that accumulations varying from approximately six inches to approximately two feet in depth 7/ were present at various locations along the walkway side and that such accumulations represented both material cleaned from under the track in connection with the blocking of various sections and mud that had been cleaned from the sumps. The walkway was not as wet as the area between the rails because the actual track was lower than the walkway.

Fn. 6 (continued)
or slick rails per se or the clogging of the equipment's sanding devices. If the citation can be construed as encompassing these additional hazards, then it materially affects the determination as to how much water had to be removed from the cited portion of the loaded track entry in order to abate the citation. For the reasons set forth below, I conclude that the citation cannot be so construed.

A mine operator cited for an alleged violation of the 1977 Mine Act or the mandatory safety standards is accorded adequate notice if the condition or practice is described with sufficient specificity to permit abatement and to allow adequate preparations for any potential hearing on the matter. Jim Walters Resources, Inc., 1 FMSHRC 1827, 1979 OSHD par. 24,046 (1979); Old Ben Coal Company, 4 IBMA 198, 82 I.D. 264, 1974-1975 OSHD par. 19,723 (1975); Eastern Associated Coal Corporation, 1 IBMA 233, 79 I.D. 723, 1971-1973 OSHD par. 15,388 (1972). In determining whether adequate notice has been given, the inquiry need not be confined to the four corners of the citation. It is appropriate to consider other oral and written communications given to the operator. Jim Walters Resources, Inc., supra.

The citation, on its face, does not address itself to these additional hazards and there is no indication that either Inspector Satterfield or Inspector Allen ever expressly informed Applicant's agents that such hazards were, in fact, covered. Accordingly, the citation cannot be interpreted as encompassing these additional hazards.

7/ The inspector testified that he did not measure the depth of the water and mud on March 22, 1979. All estimates are based on visual observations made from the moving jeep (Tr. 69).

As relates to the actual track, the inspector testified that the mud and water did not extend from rib to rib, but that it definitely entailed the 6-foot width of the railroad ties. He provided a general description of the existing conditions at one point in his testimony by stating that the balls of the rails were level with the mine floor, but subsequently clarified the statement by asserting that for a distance of 1,000 feet only the balls of the rails were visible above the mud and water. However, he expressed the opinion that the flanges on the mine car wheels could actually touch mud for the entire 1,500-foot distance. Even the sections of blocked track were wet. In many areas, no clear cut distinction could be drawn between free flowing water and mud because what actually existed in those areas was a mixture having the consistency of a "slime-like gravy."

Inspector Satterfield testified that water paralleled the rails continuously, but was unable to establish the existence of any locations where water actually covered the track on March 22, 1979. His testimony reveals seven or eight swag areas where water from overflowing sumps would collect on occasion and sometimes cover the track in those areas.

Carl Trickett, the safety supervisor at the Robinson Run No. 95 Mine, walked along the track approximately 24 hours after the issuance of the citation and observed the existing conditions. 8/ He testified that he did not necessarily disagree with the basic information set forth in the citation, but testified that the entire area from No. 35 to No. 50 block was not in such condition that either the wheels or wheel flanges would deposit mud or water on the rails. He testified that he observed approximately three swag areas totaling approximately 75 or 100 feet in length where the wheel flanges could have picked up mud and/or water and deposited it on the track. At one point he testified that he did not observe any areas at the time where the water was actually over the rails, but subsequently testified that it covered the track in some areas.

I am inclined to accept the inspector's characterization of the conditions existing in the subject section of the loaded track entry because on March 22, 1979, he actually observed wet and muddy rails while following the other vehicle out of the mine. Mr. Trickett was not afforded the opportunity to make a similar observation because he did not observe any trips going through the area. To a certain extent, it appears that Mr. Trickett's evaluation of the extent of the conditions was based upon the presence of drag marks in the pavement. It is significant to note that in many areas no clear differentiation could be drawn between free flowing water and mud because the material in those areas had the consistency of "slime-like gravy." Under such conditions it is highly conceivable that drag marks would not be present in such areas even though the rolling stock actually achieved contact with the accumulations.

8/ Although some abatement work had been performed when Mr. Trickett conducted his inspection (Tr. 234), I find it improbable that the conditions were materially different than on March 22, 1979. This determination is based upon the testimony describing the extensive efforts necessary to eliminate the conditions cited in the citation.

On Friday, March 30, 1979, Inspector Satterfield returned to the mine and extended the time period for abatement to 4 p.m., April 3, 1979. The extension was granted because the mine had been idled for two shifts due to an unauthorized work stoppage (Exh. M-3). Subsequent to the issuance of the extension, Inspector Satterfield was hospitalized. Accordingly, the issuance of the March 30, 1979, extension ended his personal involvement in the activities surrounding the issuance of the withdrawal order.

On Thursday, April 5, 1979, Inspector Allen extended the time period for abatement to 8:00 a.m., April 12, 1979, citing the following justification therefor: "Part of the water has been removed from the loaded track entry between numbers 35 and 50 blocks. Additional time is needed to complete the cleaning of the entry" (Exh. M-5).

On Thursday, April 12, 1979, after walking the entire distance between No. 35 and No. 50 block, Inspector Allen extended the time period for abatement to 8 a.m., April 16, 1979, citing the following justifications therefor: "A drain ditch has been dug from number 35 to number 50 block to drain the water from the track haulage entry. Additional time is needed to complete the cleaning of the entry" (Exh. M-6). The inspector described the entry as "fairly wet," yet he found only three locations where, in his opinion, the wheel flanges could deposit water on the rails. Additionally, he testified that water covered the track for a distance of approximately ten feet in one area. 9/ Mud or mine refuse extended the entire distance from No. 35 to No. 50 block on the clearance side and a substantial portion, if not the vast majority, of this material had been placed there by the miners installing the drain ditch, which had been dug on the tight side of the entry. The material extracted during the ditch-digging operation had been deposited between the rails and between the rail and the rib on the clearance side such that the material was deepest in the vicinity of the rib. The inspector indicated that all of the mud or mine refuse would have to be removed from the clearance side, in addition to removal of the aforementioned water, before he would terminate the citation.

Applicant's witnesses testified that mine management intended to use the track cleaning machine over the weekend to remove the refuse, but was prevented from doing so because the machine burned out several motors.

At 9:05 a.m., on Monday, April 16, 1979, Inspector Allen issued 104(b) Order of Withdrawal No. 804918 in which he stated that: "[a]lthough some work had been done to correct the condition, mud (mine refuse) still was present in the clearance space from 7 to 26 inches deep, and the mine cars had been dragging in it at three locations between the rails between number 35 and 50 blocks, in the loaded track entry" (Exh. M-7).

9/ The inspector's testimony on this point appears to be at variance with the testimony of Messrs. Glover and Watson (Tr. 390-391, 411, 432-433). It is unnecessary to resolve this credibility issue due to the ultimate outcome of this case.

It appears that on April 16, 1979, no mud was actually in a position to be placed on the rails by the flanges of the mine car wheels. The mine refuse mentioned in the order of withdrawal appears to refer primarily to the material which had been placed in the clearance space on the walkway side of the entry, material that extended the entire distance from No. 35 to No. 50 block. The inspector testified that the mine cars could achieve contact with this material, drag it onto the track and precipitate a haulage wreck. However, his testimony reveals that he was, in substantial part, requiring Applicant to remove the material from the walkway side because it posed a hazard to pedestrian traffic as opposed to hazards posed to track-mounted equipment.

Of greater significance is the absence of standing water on the rails, the inspector's inability to recall any water over the rails on April 16, 1979, and his failure to mention the existence of wet or slick rails in the order of withdrawal.

C. The Validity of Citation No. 804951

A mine operator contesting the validity of a 104(b) order of withdrawal is entitled to challenge the existence of the violation set forth in the underlying 104(a) citation. United Mine Workers of America v. Andrus, 581 F.2d 888, 894 (D.C. Cir. 1978); Old Ben Coal Company, 6 IBMA 294, 301 n. 3, 83 I.D. 335, 1976-1977 OSHD par. 21,094 (1976). The language of sections 104(a) and 104(b) of the 1977 Mine Act indicate that the withdrawal order must be pronounced invalid where the underlying citation fails to describe a violation of either the 1977 Mine Act or a mandatory safety standard. In the instant case, the question as to whether a violation of 30 C.F.R. § 75.1403 occurred is governed by the language of the safeguard notice on which the citation is based.

Issues pertaining to the validity of the underlying 104(a) citation are set forth in Applicant's motion to dismiss and in the interpretation given to the safeguard notice.

1. Applicant's Motion to Dismiss

Citation No. 804951 states that it is based on Safeguard Notice No. 2 WHB, issued on January 15, 1973. Exhibit M-4, introduced in evidence as the safeguard notice referred to in the citation, bears identification number 1 W.S.H., January 15, 1973, 30 C.F.R. § 75.1403. During the hearing, Applicant cited this discrepancy as the basis for a motion to dismiss and advanced two arguments in support thereof. A ruling was held in abeyance.

Applicant's first argument asserts that MSHA introduced the wrong safeguard notice in evidence and, accordingly, failed to prove the correct underlying safeguard. MSHA's counterargument asserts that the reference in the citation is a clerical error because Safeguard Notice 1 W.S.H., January 15, 1973, 30 C.F.R. § 75.1403 was the only safeguard notice issued at the Robinson Run No. 95 Mine on January 15, 1973 (MSHA's Posthearing

Brief, pp. 11-12). Applicant's second argument asserts that any clerical error misdescribing the safeguard notice deprived Applicant of adequate notice and that the citation must stand or fall on the sole basis of the information appearing therein.

The evidence presented reveals that Exhibit M-4 is the correct safeguard notice underlying Citation No. 804951. Mr. Carl Trickett, appeared on behalf of MSHA pursuant to a subpoena duces tecum requiring him to produce "Safeguard Notice 2 WHB, issued January 15, 1973, if such document exists, and Safeguard 1 WSH of January 15, 1973." In response to the subpoena, Mr. Trickett caused a search to be made of Applicant's records. The search produced Safeguard Notice No. 1 WSH (Exh. M-9) but failed to produce a safeguard notice denominated 2 WHB, issued on January 15, 1973. Additionally, Inspector Satterfield searched MSHA's records and the search failed to produce a safeguard notice denominated 2 WHB, issued on January 15, 1973. Furthermore, the entries contained in Exhibit M-10 confirm MSHA's assertion that the citation's reference to Safeguard Notice No. 2 WHB, issued on January 15, 1973, is, in fact, a misdescription of Safeguard Notice No. 1 WSH, January 15, 1973, 30 C.F.R. § 75.1403.

The remaining question presented in this regard is whether the misdescription deprived Applicant of adequate notice. I answer this question in the negative because Applicant has shown no prejudice to the preparation or presentation of its case resulting from the clerical error. See, Jim Walters Resources, Inc., 1 FMSHRC 1827, 1979 OSHD par. 24,046 (1979); Old Ben Coal Company, IBMA No. 76-21 (FMSHRC, filed June 2, 1980). It could be argued that Applicant was prejudiced in its efforts to abate the citation as a result of the clerical error. The citation would appear to point to the existence of a safeguard notice requiring the removal of accumulations of both mud and water from haulage track entries in the Robinson Run No. 95 Mine whereas the actual safeguard notice, as construed in Part IV(C)(2) of this decision, requires only the removal of water from such areas (Exh. M-4).

Accordingly, it could be argued that the misdescription of the safeguard notice led Applicant to believe that the mud was in violation of a previously issued safeguard and that the mud had to be removed in order to avoid the issuance of a section 104(b) order or withdrawal. However, the evidence presented reveals that at the time of the hearing Applicant maintained records of safeguard notices issued at the Robinson Run No. 95 Mine during the month of January 1973. The testimony of Mr. Trickett reveals that no one at mine mine attempted to locate a safeguard notice denominated 2 WHB, issued on January 15, 1973, when Citation No. 804951 was issued. Such a search would have revealed not only the nonexistence of such safeguard notice but also the existence of the correct safeguard notice, and the results of such a search should have prompted Applicant to request the inspector to modify the citation to delete any reference to mud.

In view of these considerations, Applicant's motion to dismiss will be denied.

2. Construction of the Safeguard Notice

Safeguard Notice 1 WSH was issued on January 15, 1973, by Federal mine inspector Walter S. Hennis pursuant to the provisions of 30 C.F.R. § 75.1403 which provides that "[o]ther safeguards adequate, in the judgment of the authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." 30 C.F.R. § 75.1403-1(a) provides that: "Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-bymine basis under § 75.1403. Other safeguards may be required." [Emphasis added.] MSHA concedes that Safeguard Notice No. 1 WSH, January 15, 1973, 30 C.F.R. § 75.1403 was issued pursuant to the guideline set forth in the second sentence of 30 C.F.R. § 75.1403-1(a) (Tr. 18-19).

The safeguard notice requires only that "all track haulage roads in this mine shall be kept free of excess water", and contains no reference to mud. Citation No. 804951, however, cited Applicant for accumulations of both mud and water in the subject section of the entry. Additionally, the safeguard notice's statement that "water was over the main haulage track" indicates that the issuing inspector defined the term "excess water" as referring to either standing or flowing water.

A question is presented as to whether the safeguard notice can be construed as encompassing both mud and excess water. For the reasons set forth below, I answer this question in the negative.

I conclude that a safeguard notice must be strictly construed for two reasons. First, 30 C.F.R. § 75.1403 accords substantial power to a Federal mine inspector in that it authorizes him to write what are, in effect, mandatory safety standards on a mine-by-mine basis to minimize hazards with respect to transportation of men and materials in that mine. Failure to provide the safeguard within the time specified and the failure to maintain the safeguard thereafter renders the mine operator susceptible to the issuance of a withdrawal order and to the assessment of civil penalties. 30 C.F.R. § 75.1403-1(b). In short, the operator must comply with the requirements of a de facto mandatory safety standard promulgated without the protections or the opportunity to submit comments afforded in the rule making process applicable to the promulgation of industry wide mandatory safety standards. Accordingly, the safeguard notice should be written precisely so that there will be no question as to the performance required by the operator. 10/

Second, 30 C.F.R. § 75.1403-1(b) requires, in part, that the authorized representative of the Secretary shall advise the operator in writing "of a specific safeguard which is required pursuant to § 75.1403." [Emphasis added.] The specificity requirement contained in the guidelines provides an alternative basis for concluding that the safeguard notice must be strictly construed.

10/ See also Secretary of Labor, MSHA v. Jim Walter Resources, Inc., Docket No. BARB 78-652-P, 1 FMSHRC 1317 (September 4, 1979) (Franklin P. Michels, J.)

In view of these considerations, I conclude that any reference to mud contained in Citation No. 804951 must be deemed surplusage insofar as it forms the basis for a charge that Applicant violated the provisions of the safeguard notice, and that Applicant was properly cited only for the accumulations of water. 11/ The presence of the aforementioned water on March 22, 1979, was a violation of 30 C.F.R. § 75.1403.

D. Order of Withdrawal No. 804918

Applicant was clearly in violation of the requirements of the safeguard notice when the citation was issued on March 22, 1979. On April 16, 1979, there was no actual violation of the technical requirement of the safeguard notice because no water was over the rails or could be deposited atop the rails by the wheels of haulage equipment. However, there was mud in the clearance area and some mud along the rail which could be deposited onto the rails. This was not an actual violation because the March 22, 1979, citation lawfully cited Applicant only for water. The mud condition, however, was still a danger and all future safeguard notices should refer to mud as well as water.

However, assuming for purposes of argument that a violation still existed when the April 16, 1979, order was issued, the evidence presented establishes that Inspector Allen acted unreasonably by failing to further extend the time period for abatement in view of the short amount of time required to complete the work that day and in view of the fact that he had seen fit to grant other more lengthy extensions in the past when conditions were worse.

A well-founded argument could be advanced for the proposition that Applicant was not acting as rapidly as it should have acted in its abatement efforts at various times between March 22, 1979, and April 16, 1979. Consequently, a Federal mine inspector might have been justified in issuing an order of withdrawal at an earlier time. It is unnecessary to make such a determination in the instant case because the scope of appropriate inquiry is considerably more limited, confined, as it is, to an assessment of the determinations that a reasonable man, given an inspector's qualifications, should have made in determining whether the issuance of an order of withdrawal was justified or whether the facts warranted the issuance of another

11/ The Robinson Run No. 95 Mine is located in the Pittsburgh coal seam, a coal seam having fireclay bottom mud (Tr. 33-34). Inspector Satterfield testified that mud exists wherever water accompanies such mine bottom in an attempt to substantiate his belief that mud was encompassed by the safeguard notice. However, he admitted that the safeguard notice contains no express reference to mud even though it was written for the same mine in the same coal seam with the same type of bottom as was Citation No. 804951, and, accordingly, conceded that the safeguard notice dealt "primarily" with water (Tr. 40-42).

I am unable to accept the inspector's broad interpretation of the safeguard notice because the document makes express reference only to standing water, a condition that in no way encompasses the existence of mud as a safety hazard at the time of its issuance.

extension. To this extent, a consideration of past events is appropriate because it provides valuable insight into the type of determinations that the inspector should have made prior to concluding that a further extension was unjustified. Facts material to this issue appear in the following paragraphs.

Approximately 1,300 feet of drainage ditch had been dug on the tight side of the entry by April 5, 1979. The material extracted from the mine bottom during the ditch-digging operation had not been removed from the entry. Considering the conditions existing on April 5, 1979, the inspector testified that a four-man crew could clean approximately 20 to 25 feet per shift and that an eight-man crew could clean approximately 40 to 50 feet per shift (Tr. 175-176). Therefore, it can be deduced that it would have required between 37.5 and 75 shifts for a four-man crew to clean the entry and that it would have required between 30 and 37.5 shifts for an eight-man crew to clean the entry (see, e.g., Tr. 176). It should be noted that Inspector Allen would have used an eight-man crew to perform this task, if he had been the foreman (Tr. 175). The inspector also provided testimony as to the possibility of using the loading machine to expedite the cleaning operation (Tr. 176-178), but the testimony of Respondent's witnesses proves that the use of the loading machine would have been infeasible (see, e.g., Tr. 247).

The inspector's testimony indicates that when he inspected the area on April 12, 1979, he determined that no material had been cleaned from the area since the last extension was issued (Tr. 185-186). The April 12, 1979, extension allotted Applicant greater than five but less that six shifts, excluding the intervening weekend, to complete abatement (Tr. 115), and the inspector apprised mine management at the time that no further extensions would be given (Tr. 160-161). The extension was granted to permit Applicant to clean the area over the weekend (Tr. 392). The same day, mine management scheduled the track cleaning machine to clean the area on Saturday, April 14, 1979 (Tr. 249). It should be noted that approximately 800 feet of track can be cleaned with the machine in one shift (Tr. 301). However, Applicant was able to clean only a minimal amount of the track on April 14, 1979, because the track-cleaning machine burned up several motors (Tr. 252-255, 335). Difficulties experienced in obtaining replacement parts meant that the machine was not operational when the order was issued, but steps were being undertaken to assure its prompt repair (Tr. 334-336). In fact, a motor had to be borrowed from another mine (Tr. 355).

When Inspector Allen arrived at the mine on April 16, 1979, he was informed by mine management as to the difficulties experienced with the track cleaner (Tr. 143144, 190-191, 255-256). He did not direct any inquiries to mine management to determine the nature and extent of its abatement efforts since the time of the April 12, 1979, extension (Tr. 157), and did not inquire as to the steps Applicant proposed to undertake on April 16, 1979, to abate the condition. Such an inquiry would have revealed Applicant's decision to use the track cleaner as soon as it was repaired and would have revealed that a short extension was justified in view of the short amount of time required to abate the condition using the track cleaner. In fact, an additional extension was requested by Mr. Richard Rieger, the general superintendent, and Mr. Donald Glover, the shift safety inspector,

during a meeting held with the inspector after the order was issued. In requesting this extension, Mr. Rieger informed the inspector that an additional "shift or so" was needed to abate the condition (Tr. 352-353), while Mr. Glover apprised the inspector that the condition would be abated within 24 hours with the track cleaner. Instead, the inspector appears to have simply abandoned all hope that Applicant would abate the condition absent the issuance of a withdrawal order. He testified that, in his opinion, it would have been unreasonable to grant an additional extension because adequate time had already been given in the past, enough time, in his estimation, to have cleaned the area by hand (Tr. 154, 157-158).

However, the information available to the inspector when the April 12, 1979, extension was issued should have placed him on notice that Applicant could not be reasonably expected to hand clean the area by 8 a.m., April 16, 1979, because, by his own estimate, it would have required more than the intervening number of shifts to perform the task. The sole foreseeable methods of meeting the abatement deadline entailed the use of mechanized equipment only or the use of a combination of mechanized equipment and hand-cleaning crews. Yet, on April 16, 1979, Inspector Allen never attempted to ascertain the procedures Applicant was actually using to abate the condition. Such actions cannot be appropriately classified as those of a reasonable man. The appropriate inquiries would have apprised the inspector that a short extension was warranted, especially in view of the lengthy extensions granted in the past when conditions were worse. Accordingly, assuming that a violation existed on April 16, 1979, the order of withdrawal would have to be vacated based upon a finding that the inspector acted unreasonably by failing to further extend the time period for abatement for the short period as requested by Applicant.

In addition thereto, when the order was issued on April 16, 1979, the condition described in the citation for which Applicant was lawfully cited had been abated. 12/ The flanges of the mine car wheels would not have deposited water on the rails. Any water remaining in the cited 1,500-foot section of the loaded track entry posed no hazard of the type described in the original safeguard notice as relates to the track-mounted equipment using the rails. For this additional reason, the order of withdrawal would have to be vacated.

An additional consideration is worthy of mention at this time. The testimony reveals that the accumulations in the clearance space were more extensive on April 16, 1979, than on March 22, 1979, because the material extracted during the installation of the drainage ditch on the tight side of the entry had been deposited there. Inspector Allen's testimony reveals that the order of withdrawal addresses, in substantial part, hazards posed to pedestrian traffic using the walkway as a result of the accumulations deposited on the clearance side whereas Citation No. 804951 addresses only hazards posed to track mounted equipment. Section 104(b) of the 1977 Mine Act authorizes the issuance of an order of withdrawal based upon a finding

12/ In view of this finding, it is unneeessary to address Applicant's claim that the condition had been abated by April 12, 1979 (Tr. 12, 14).

by the authorized representative of the Secretary of Labor "(1) that a violation described in a citation issued pursuant to [section 104(a)] has not been totally abated within the time period as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended * * *" (emphasis added). The emphasized portion of the statute clearly indicates that a 104(b) order of withdrawal must be based on the continued existence of the same condition constituting the violation described in the underlying 104(a) citation. 13/ In substantial part, the mine refuse condition described in the 104(b) order of withdrawal falls within the safeguard notice issuance guideline set forth in 30 C.F.R. § 75.1403-8(d) which provides that "[t]he clearance space on all track haulage roads should be kept free of loose rock, supplies, and other loose materials," a guideline addressed to securing safe walkways for pedestrians using the haulage entries of underground coal mines. The 104(a) citation did not address such a problem. Since the condition termed "mine refuse" as described in the 104(b) order of withdrawal differs from the condition termed "mud * * * accumulated in and along the load track" as described in the 104(a) citation, the order of withdrawal, if otherwise valid, would have to be modified to delete any reference to the conditions in the clearance area posing a hazard to pedestrian traffic. Other proper procedures should have been carried out by the inspector to deal with that problem. 14/

13/ See also, 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 618 (1978), which states, in part, as follows:

"The Committee believe [sic] that rapid abatement of violations is essential for the protection of miners. A violation of a standard which continues unabated constitutes a potential threat to the health and safety of miners. Therefore, if the violation is not eliminated by abatement in the specified period of time, the miners should be withdrawn from the area affected by the violation until the violation is abated. Section 105(b) provides the Secretary with such authority upon a determination that the violation has not been totally abated within the original or subsequently extended abatement period, and that the abatement period should not be further extended."

and S. Rep. No. 95-461, 95th Cong., 1st Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 1326 (1978) (Conference Report), which states, in part, as follows:

"Section 105(b) (of section 201) of the Senate bill and the House amend ment, adopting Section 104(b) of the Coal Act, established substantially similar authority for the issuance of "failure to abate" withdrawal orders. In both versions, the issuance of such orders was to be based on findings of the Secretary or his authorized representative of the existence of the same set of circumstances."

14/ The testimony of Inspectors Satterfield and Allen clearly demonstrates that accumulations of mud which can be deposited atop the rails of haulage tracks pose serious hazards to miners vis-a-vis track-mounted equipment. Logically, one can infer from the tenor of their testimony that such hazards are well known and that the condition cited by Inspector Satterfield occurs in other underground mines throughout the coal mining industry. In view of this, it appears inappropriate to rely on the issuance of safeguard notices dealing with these hazards on a mine-by-mine basis when a mandatory safety standard applicable to all underground coal mines in the mining industry is clearly necessary to deal effectively with these hazards.

V. Conclusions of Law

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

2. Consolidation Coal Company and its Robinson Run No. 95 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

3. Federal mine inspectors James D. Satterfield and Bretzel W. Allen were authorized representatives of the Secretary of Labor at all times relevant to this proceeding.

4. Order No. 804918 was improperly issued and is therefore invalid.

5. All of the conclusions of law set forth in Part IV of this decision are reaffirmed and incorporated herein.

VI. Proposed Findings of Fact and Conclusions of Law

MSHA submitted a posthearing brief. Applicant did not submit a posthearing brief. Counsel for both parties set forth on the record various arguments and statements as to the issues. The brief, arguments and statements as to the issues, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

A. The prior determination granting Applicant's motion to dismiss the United Mine Workers of America as a party to the above-captioned case is REAFFIRMED.

B. Applicant's motion to dismiss, as set forth in Part IV(C)(1) of this decision, is DENIED.

C. Based on the findings of fact and conclusions of law set forth in Parts IV and V of this decision, the application for review is GRANTED and Order No. 804918 is herewith VACATED.

John F. Cook
Administrative Law Judge

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