

AUGUST 1979

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

Secretary of Labor, MSHA, v. Olga Coal Company, HOPE 79-113-P.

Secretary of Labor, MSHA, v. Valley Camp Coal Company, MORG 78-46-P.

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

Secretary of Labor, MSHA, v. Kenny Richardson, BARB 78-600-P.

Review was denied in the following cases during the month of August:

Secretary of Labor, MSHA, v. Texas Utilities Generating Co., DENV 79-82-P.

Secretary of Labor, MSHA, v. Magma Copper Company, DENV 78-574-PM.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 3, 1979

SECRETARY OF LABOR, MINE SAFETY :
AND HEALTH ADMINISTRATION, :
(MSHA) :
: :
v. : Docket No. DENV 78-31-P
: :
KAISER STEEL CORPORATION :

DECISION

This penalty proceeding arises under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976) (amended 1977) ["the 1969 Act"]. In this decision, Administrative Law Judge Koutras found that Kaiser Steel Corporation violated the mandatory standard at 30 CFR 75.316 1/ and assessed a \$1,000 penalty. Kaiser's petition for discretionary review of the judge's decision was granted by the Commission.

On February 1, 1977, a Mining Enforcement and Safety Administration (MESA) inspector visited Kaiser's York Canyon Mine No. 1. At a working face, he observed what he considered to be an excessive concentration of float coal dust, extending 15-20 feet from the face, including the area where the continuous miner operator was seated at the machine's controls. He measured both the volume and velocity of air and found it inadequate, with only 1900 cubic feet of air per minute and a mean velocity of 18 feet per minute being delivered to the working face. Kaiser's approved ventilation plan required at least 3000 cubic feet at a minimum velocity of 45 feet per minute. In determining the cause of the substandard air supply, the inspector discovered that one road check curtain was rolled up and another was partially torn. He also observed that the auxiliary fan and ventilation tubing system, being used to pull the air away from the face area and into the return course, had about 387 feet of tubing. The maximum permissible length of exhaust tubing specified in the ventilation plan is 400 feet. The inspector then

1/ 30 CFR §75.316 provides in pertinent part:
Ventilation system and methane dust control plan.

[Statutory Provisions]

A ventilation system and methane dust control plan and revisions thereof suitable to the conditions and mining system of the coal mine and approved by the Secretary shall be adopted by the operator ... The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face....

79-8-1

issued the notice at issue. Kaiser immediately abated the condition by repairing the road curtains and reducing the length of tubing in order to move the blower fan closer to the working face.

It is not disputed 2/ that a violation occurred. The issues on review are limited to the judge's finding that Kaiser was negligent and the relevance of that finding to the amount of the penalty assessed. 3/ Kaiser argues that the judge erred in finding: that Kaiser's "positioning of the ventilation tubing in conjunction with the auxiliary fan was the primary cause of the lack of required air velocity"; 4/ that Kaiser "failed to exercise reasonable care to insure that the required velocity of air at the working face was maintained"; and that Kaiser's "failure to exercise reasonable care in the circumstances resulted in ordinary negligence." We conclude that the judge's negligence finding is supported by substantial evidence.

Whether the placement of the fan and tubing was the primary cause of the substandard air volume and velocity need not be reached. There is ample record evidence to support a finding that it was a cause of the reduced air flow. The inspector testified that the repair of the road curtain alone would not have remedied the inadequate air flow if the tubing and fan were not functioning properly. The inspector also testified, and Kaiser's foreman agreed, that friction and resistance to air flow increase as exhaust tubing length is increased, thereby reducing the effectiveness of an auxiliary exhaust fan. Further, Kaiser's foreman testified that on other occasions when inadequate air flow was detected, the exhaust fans were moved closer to obtain proper ventilation at the face.

2/ Kaiser admitted that the air volume and velocity at the working face were below the levels required by its approved ventilation plan.

3/ Section 109(a) of the 1969 Act provides in pertinent part:

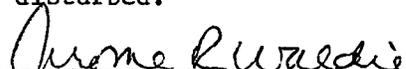
(1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard ... shall be assessed a civil penalty by the Secretary ... which penalty shall not be more than \$10,000 for each such violation.... In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation. [Emphasis added].

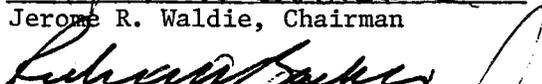
4/ The question of causation is relevant to Kaiser's argument that it was not negligent because the judge found no negligence on Kaiser's part with respect to the failure to properly maintain the road curtains.

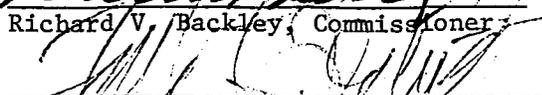
Finally, both the foreman and inspector agreed that after the tubing was shortened and the fan was moved closer to the face, in conjunction with the proper positioning of the road curtains, proper air flow was obtained. Therefore, we reject Kaiser's argument that record evidence does not support a finding that the placement of the fan and tubing was not a cause of the inadequate air flow.

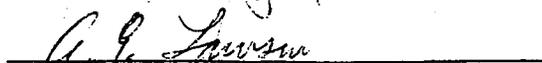
The judge's conclusion that Kaiser failed to exercise reasonable care to insure that the required volume and velocity of air were maintained at the face is also supported by substantial evidence in the record. The Act imposes on the operator "a high degree of care to insure the health and safety of persons in the mine." U.S. Senate, Committee on Labor and Public Welfare, Legislative History, 94th Cong., 1st Sess. at 1515. The inspector observed considerable float coal dust extending 15 to 20 feet from the face. The continuous miner operator was situated within the area of the dust concentration. The inspector's tests revealed that only 1900 cubic feet of air at a velocity of 18 feet per minute was being delivered to the face, substantially less than the airflow requirements specified in Kaiser's ventilation plan. The fact that the 387 feet of exhaust tubing being used fell within the 400 foot maximum permitted in the ventilation plan does not excuse the failure to maintain the required air velocity at the face. Kaiser was aware of the interrelationship between length of tubing and amount of air flow. Further, the foreman's pre-shift examination was made at the last open crosscut, not at the face, and he admitted that satisfactory air velocity readings at the last open crosscut do not guarantee that required velocity is being maintained at the face. For these reasons, we affirm the judge's conclusion that Kaiser was negligent in failing to maintain the required volume and velocity of air at the working face.

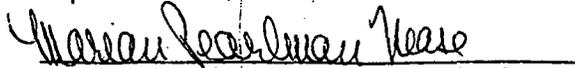
In assessing a \$1,000 penalty for this violation, the judge fully considered the criteria set forth in section 109 of the Act. The penalty is appropriate and will not be disturbed.


Jerome R. Waldie, Chairman


Richard V. Backley, Commissioner


Frank F. Jestrab, Commissioner


A. E. Lawson, Commissioner


Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 3, 1979

SECRETARY OF LABOR, : Docket No. DENV 77-7-P
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : IBMA No. 77-50
: :
v. : :
CAMBRIDGE MINING CORPORATION :

DECISION

This penalty proceeding arises under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 *et seq.* (1976) (amended 1977). On July 11, 1977, Administrative Law Judge Morehouse found that Cambridge Mining Corporation had violated 30 CFR §75.200, 1/ and assessed a civil penalty of \$50. On appeal, 2/ Cambridge argues that no violation occurred.

In finding a violation, the judge credited the testimony of the inspector who described a spalling condition along an unsupported rib in a working place. The judge found:

Here it is clear that the 40 or 50 feet in question in the first entry did have "loose ribs" as observed by the inspector and as evidenced by respondent's decision to place wire mesh and gunnite on the ribs and not have the men work in that area until the gunniting took place. "Working place" means the area of a coal mine inby the last open crosscut ... and the regulation cited above requires working places to be supported or otherwise controlled adequately to prevent persons from falls of the roof or ribs. It is true that respondent had made plans to adequately support the ribs with steel mesh and gunnite and had made the decision to have the men work in another entry until this was done. However, the evidence does not support the conclusion that the men had been withdrawn or specifically instructed by respondent not to go into that area and there had been no danger signs posted. It, therefore, must be concluded that this particular area was not adequately controlled.

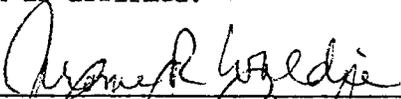
1/ Section 75.200 provides, in pertinent part:

... 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.

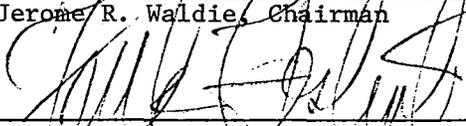
2/ The appeal was pending before the Board of Mine Operations Appeals as of March 8, 1978. Accordingly, it is before the Commission for disposition. Section 301 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. §961 (1978).

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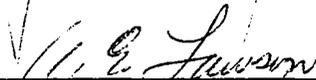
We conclude that the judge's determination that unsupported loose ribs existed in violation of 30 CFR §75.200 is supported by the evidence. Accordingly, the judge's decision is affirmed.



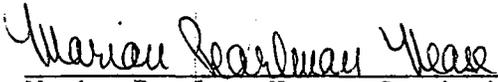
Jerome R. Waldie, Chairman



Frank F. Jestrab, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

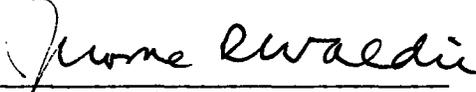
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 3, 1979

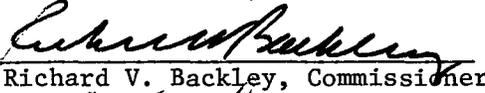
ISLAND CREEK COAL COMPANY :
 :
 v. : Docket No. PIKE 79-18
 :
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH :
 ADMINISTRATION (MSHA), :
 :
 UNITED MINE WORKERS OF AMERICA :

DECISION

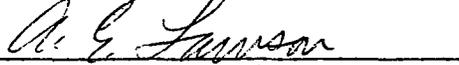
The administrative law judge's dismissal of Island Creek Coal Company's application for review is affirmed.



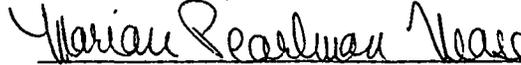
Jerome R. Waldie, Chairman



Richard V. Backley, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

79-8-3

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 15, 1979

LOCAL UNION 5869, DISTRICT 17, : Docket No. HOPE 76-231
UNITED MINE WORKERS OF AMERICA :
v. : IBMA No. 76-106
YOUNGSTOWN MINES CORPORATION :

DECISION

This case involves an application for compensation under section 110(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976) (amended 1977) ["1969 Act"]. Applicants are miners seeking pay for four hours working time lost on December 9, 1975, as a result of a section 104(b) withdrawal order being issued to Youngstown Mines Corporation (Youngstown). 1/

On November 7, 1975, a Mining Enforcement and Safety Administration (MESA) representative issued a notice to Youngstown pursuant to section 104(b) of the 1969 Act, requiring abatement by November 10, 1975, of a violation of 30 CFR §75-1704 for failure to maintain required travelable passageways, to be designated as escapeways. Between November 7 and December 4, 1975, several intermittent work stoppages occurred, in which the applicants participated. During this period, the MESA representative extended the abatement period on several occasions. These extensions indicated that work was in progress to abate the violation, that work stoppages had occurred, and that additional time was needed to obtain compliance. On December 9, 1975, the MESA representative issued a withdrawal order to Youngstown which stated in pertinent part: "Necessary action to abate upon the expiration of extensions of time was not taken."

1/ Section 104(b) of the 1969 Act provided for issuance of a withdrawal order in the event an operator failed to abate a violation of a mandatory safety or health standard within the abatement period prescribed by the notice of violation and any extensions of that period.

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The withdrawal order was issued on the afternoon shift, all miners on that shift were withdrawn from production work and were detailed to the work of abating the violation for the balance of the shift. ^{2/} As a result every miner on this shift worked in the abatement process for the balance of the shift and therefore received pay for the entire shift. The evening shift, which included the applicants began work at 3:45 p.m., the regular starting time for that shift. All miners were assigned to the abatement work. On this shift, however, the applicants worked for only four hours and were then sent home. The applicants were paid for the first four hours of the evening shift--the hours they worked on abatement--but not for the remaining four hours of the shift.

Applicants filed this claim under section 110(a) of the 1969 Act claiming entitlement to compensation for the four hours of the evening shift that they did not work. Section 110(a) provided, 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 parties filed a joint stipulation of facts and waived an evidentiary hearing. On June 18, 1976, Administrative Law Judge Kennedy issued his decision. He granted the application and awarded four hours compensation, with six percent interest from December 9, 1975, the day of idlement, until the compensation is paid. Youngstown appealed the judge's decision and its appeal is before the Commission for disposition. ^{3/}

^{2/} Section 104(d) of the 1969 Act provided, in pertinent part: "The following persons shall not be required to be withdrawn from, or prohibited from entering, any area of the coal mine subject to an order issued under this section: (1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order"

^{3/} Section 301 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. §961 (1978).

Youngstown first contends that section 110(a) obligates an operator to pay compensation only for the first four hours of the next working shift following issuance of a withdrawal order. It argues that a withdrawal order has the effect of "officially idling" the miners even if it does not bring about their actual idlement. According to Youngstown, the applicants were "idled" for the first four hours of the evening shift, even though they performed abatement work during that period pursuant to section 104(d). Because they were paid for this four-hour period, Youngstown contends the applicants have been paid all compensation due under section 110(a).

We reject Youngstown's interpretation of section 110(a). Section 110(a) provides that if a section 104 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 . . . but for not more than four hours of such shift." In the instant case, after performing four hours of abatement work the miners were sent home. At the time that they were sent home the withdrawal order was still outstanding. But for the withdrawal order, the miners would have worked and received compensation for the final hours of their shift. Therefore, the miners were "idled" by the order within the meaning of section 110(a) for the last four hours of their shift and are entitled to compensation. Section 110(a) does not say that compensation thereunder is limited to the first four hours of the succeeding shift. Rather, the plain words of section 110(a) require the payment of compensation in these circumstances.

Youngstown's reliance on the decision of the Interior Department's Board of Mine Operations Appeals in Island Creek Coal Co., 5 IBMA 276 (1975), is misplaced. In Island Creek, a section 104(b) withdrawal order was issued at 7:15 a.m. The night shift had ended at 7:00 a.m.; the day shift began at 7:30 a.m. The day shift employees were able to work for the first four hours of their shift before their facility was closed as a result of the withdrawal order. The UMWA filed an application for compensation on behalf of the miners. The administrative law judge rejected the UMWA's claim that the order issued "during" the day shift. The judge found that the order was issued prior to the start of the day shift and, therefore, that the day shift was the "next working shift" within the meaning of section 110(a). He also held, however, that the fact that the day shift employees worked for four hours after the order issued (for which they were paid) did not negate section 110(a)'s requirement that the miners be paid for the four hours that they were "idled."

The UMWA appealed the judge's decision to the Board and argued that the judge erred in finding that the order was not issued "during" the day shift. The Board affirmed the judge's decision, stating:

[T]he order in question was not issued "during the shift" and . . . the miners on the day shift commencing at 7:30 a.m. are logically on the "next working shift" entitled to full compensation by the operator at their regular rates of pay for the period they were idled, but for not more than 4 hours of such shift. 5 IBMA at 284.

Thus, although the Board did not specifically address the issue, it affirmed the judge's conclusion that the miners were entitled to four hours compensation even though they were compensated for work performed during the initial four hours of the shift. Therefore, in spite of the reliance placed on it by Youngstown, Island Creek actually supports the result reached by the judge in the present case. 4/

The second issue raised by Youngstown is whether unlawful or unauthorized work stoppages by the miners seeking compensation should bar a compensation award if the work stoppages contribute directly to the failure to timely abate a violation, and thus to the issuance of

4/ Youngstown's further argument that the reporting pay provision of its collective bargaining agreement supports its interpretation of section 110(a) is also rejected. The assertion that Congress patterned section 110(a) compensation rights after the reporting pay provision in the industry collective bargaining agreement is supported only by reference to the Board's statement in Island Creek, supra, that "we are inclined to believe that the provisions of section 110(a) of the Act were designed with knowledge of and perhaps as an extension of the industry practice for payment of reporting pay." 5 IBMA at 283. The Board, however, did not cite any support for its "belie[f]", nor does Youngstown cite any legislative history or other authority. This is too scant a basis to equate statutory rights with private collective bargaining agreement provisions. Furthermore, the Board's phrase "extension of the practice" can be read to mean the granting of additional rights, not merely statutory adoption of existing contractual rights. Finally, as discussed above, the Board's views regarding "industry practice" and the intent of section 110(a) did not preclude it from affirming an award of compensation for the second four hours of the next working shift in that case.

the withdrawal order upon which the claim for compensation is based. 5/ Youngstown argues that in enacting section 110(a) Congress did not contemplate that compensation would be paid where, as contended here, the order causing the miners to be idled resulted from the conduct of the miners. To do so, Youngstown asserts, is to reward "wrongdoing" on the part of the miners and to work an "injustice" on Youngstown. We affirm the judge's rejection of Youngstown's asserted defense for the following reason. 6/

We believe that important policy considerations dictate that an unlawful or unauthorized work stoppage defense should not be entertained by the Commission in a compensation case. 7/ To hold otherwise would require the Commission to determine in each such case whether a work stoppage violated the collective bargaining agreement or was otherwise unauthorized or unlawful. Such a determination is intimately involved with the specialized law of union-management relations and would thrust the Commission into resolution of issues which should be resolved by the grievance-arbitration process or by other tribunals with direct jurisdiction over such disputes.

5/ The parties stipulated that "[n]one of the work stoppages ... were authorized by the Respondent or by the Wage Agreement by which the parties hereto are governed in their relationship with one another."

6/ We do not base our decision on the ground that the argument raised by Youngstown is an untimely challenge to the validity of the withdrawal order. Although work stoppages, lawful or otherwise, might provide a basis for extending an abatement period, this does not answer the question here. It may well be that safety conditions fully warrant the issuance of a withdrawal order for failure to abate even though such failure is due solely to an unauthorized or unlawful work stoppage. Thus, the employer may concede the necessity of withdrawal and still be consistent in arguing against compensation to those responsible for the work stoppage and consequent failure to abate.

7/ Furthermore, on the record before us, we find the connection between the work stoppages and the failure to abate too tenuous to support a conclusion that the work stoppages were the cause of the failure to abate. (See Judge's Decision at n. 7.)

Not entertaining a work stoppage defense in compensation cases will not work an injustice to operators, for they are left with other more appropriate remedies for financial harm caused by unlawful work stoppages (e.g., arbitration or damage actions under section 301 of the Taft-Hartley Act, 29 U.S.C. §185). Other forums are more appropriate than the Commission for resolving issues so closely related to collective bargaining and union-management relations. 8/

The third issue raised by Youngstown on appeal is whether the judge erred in including interest in the award of compensation. The Board of Mine Operations Appeals rejected a claim that interest is awardable under section 110(a) of the 1969 Act in UMWA v. Rushton Mining Co., 3 IBMA 231 (1974), aff'd on other grounds sub nom., Rushton Mining Co. v. Morton, 520 F.2d 716 (3d Cir. 1975). The Board's decision in Rushton, however, is void of any rationale for disallowance, except for the observation that section 110(a) does not expressly provide for such relief. Courts of appeals have considered an analogous issue under the National Labor Relations Act and have overwhelmingly subscribed to the allowance of interest in backpay awards. 9/ In Philip Carey Manufacturing Company v. NLRB, 331 F. 2d 720, 729-731 (6th Cir. 1964), cert. denied, 379 U.S. 888, the Sixth Circuit held:

8/ Our decision is limited to the work stoppage defense asserted here. We do not foreclose the assertion of other affirmative defenses in compensation cases.

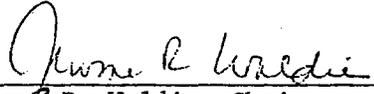
9/ Reserve Supply Corp. of Long Island v. NLRB, 317 F.2d 785 (2d Cir. 1963); International Brotherhood of Operative Potters v. NLRB, 320 F.2d 757 (D.C. Cir. 1963); NLRB v. Globe Products Corp., 322 F.2d 694 (4th Cir. 1963); Marshfield Steel Co. v. NLRB, 324 F. 2d 333 (8th Cir. 1963); Revere Cooper & Brass, Inc. v. NLRB 325 F.2d 132 (7th Cir. 1963); NLRB v. George E. Light Boat Storage, Inc., 373 F.2d 762 (5th Cir. 1967).

It is well established that the omission of a mention of interest in statutes which create obligations does not show necessarily a Congressional intent to deny interest. [Citing Rodgers v. United States, 332 U.S. 371, 373]. . . .

It is recognized under our legal system that wage-earners are heavily dependent upon wages, which more often than not constitute the sole resource to purchase the necessities of life from day to day. . . . Many wage-earners who are deprived of their wages doubtlessly find it necessary to borrow money to sustain themselves and their families, paying rates of interest at six percent or higher.

As under the National Labor Relations Act, we believe that the purposes of the compensation provision under the 1969 Act are best served by allowing interest on compensation awards, even though the Act does not expressly provide for interest. Accordingly, we decline to follow the Board's decision in Rushton Mining Co., supra.

For the foregoing reasons, the decision of the judge awarding compensation and interest is affirmed.



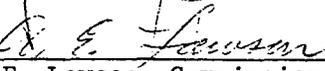
Jerome R. Waldie, Chairman



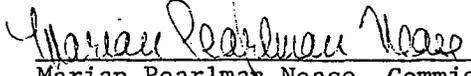
Richard V. Backley, Commissioner



Frank R. Jestrab, Commissioner



A. E. Lawson, Commissioner



Marian Pearlman Nease, Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS

AUGUST 1, 1979 - AUGUST 31, 1979

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

AUG 7 1979

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WILK 79-59-PM
Petitioner : A/O No. 28-00393-05002
v. :
: Docket No. WILK 79-100-PM
NEW JERSEY ZINC COMPANY, : A/O No. 28-00393-05003
Respondent :
: Sterling Mine & Mill

DECISION

ORDER TO PAY

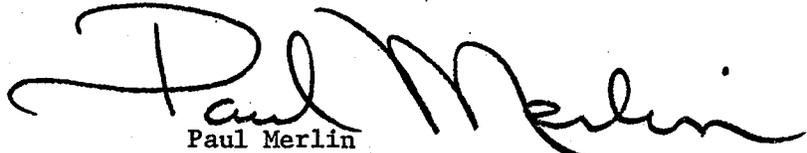
The above-captioned actions are two petitions for the assessment of civil penalties for thirty-two alleged violations of the Act.

At the hearing on July 5, 1979, the Solicitor moved to withdraw two of the violations on the grounds that the conditions described were not covered by the cited standards. The Solicitor's explanations were accepted from the bench and the two items in question were dismissed.

The originally assessed amount for the remaining items was \$2292. The Solicitor advised at the hearing that the parties had agreed to settle these items. He explained each of them individually in detail. Most of them did not present particularly serious violations and in many instances the Solicitor stated that he was not prepared to prove the existence of negligence. Even more importantly, the operator had no prior history of violations and the cited violations in fact, occurred during the first inspection of this mine under the 1977 Act. The recommended settlements totalled \$1603. In view of the circumstances which are fully set forth in the administrative transcript of the hearing, the recommended settlements are approved.

ORDER

The operator is ORDERED to pay \$1603 within 30 days from the date of this decision.


Paul Merlin
Assistant Chief Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 7, 1979

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WILK 79-83-PM
Petitioner : A.C. No. 28-00510-05001
v. :
 : Docket No. WILK 79-127-PM
GEORGE F. PETTINOS, INC., : A.C. No. 28-00510-05002
Respondent :
 : Docket No. YORK 79-1-M
 : A.C. No. 28-00510-05003
 :
 : Manumuskin Plant & Dredge

DECISION

Appearances: Anthony C. Genetto, Esq., Office of the Solicitor,
U.S. Department of Labor, New York, New York, for
Petitioner;
Western C. Overholt, Esq., Philadelphia, Pennsylvania,
for Respondent.

Before: Chief Administrative Law Judge Broderick

Statement of the Case

On January 23, 1979, a petition for assessment of civil penalty was filed by the Mine Safety and Health Administration seeking penalties for 20 alleged violations of mandatory health and safety standards promulgated under the Federal Mine Safety and Health Act of 1977 (WILK 79-83-PM). Similar petitions were filed in Docket Nos. WILK 79-127-PM (March 9, 1979), for two alleged violations and YORK 79-1-M (April 2, 1977), for three alleged violations. Answers were filed on February 28, 1979, March 26, 1979, and April 18, 1979, respectively, requesting a hearing in each case. On April 17 and April 19, 1979, these three dockets were consolidated and scheduled for hearing. A hearing was held in Philadelphia, Pennsylvania, on May 23, 1979. Vernon R. Denton and Arthur J. Toscano testified on behalf of Petitioner. No witnesses were called by Respondent.

The parties stipulated that the annual man hours of employment at Respondent's facility would fall in the 60,000 to 400,000 range. There were 19 employees at the plant at the time of inspection. On the basis of these facts, I find that Respondent is a medium-sized

operator for the purposes of determining the appropriateness of the penalties to the size of the operator's business. There is no evidence that the penalties will affect Respondent's ability to continue in business.

The record establishes that Respondent in the case of each violation found herein to have occurred, made a good faith effort to achieve rapid compliance after notification of the violation.

A review of Respondent's history of previous violations shows that no increase of the penalties is warranted on that basis.

Findings are hereafter made with respect to the occurrence, gravity and attendant negligence of each violation.

Findings of Fact

I. WILK 79-83-P

(1) Citation No. 204556, issued May 2, 1978, alleged a violation of mandatory standard 30 CFR 56.12-18 which requires that principal power units shall be labeled to show which units they control. Four to five of Respondent's pump house switches on the dredge were not labeled. The inspector testified that Respondent abated the citation on the same day by extraordinary means. I find that a violation of 30 CFR 56.12-18 was established. The violation was not serious and was not caused by Respondent's negligence.

(2) Citation No. 204557, issued May 3, 1978, alleged a violation of mandatory standard 30 CFR 56.11-1, which requires walkways and ramps to have handrails. A 10- to 12-foot span of wooden walkway which provided access to the pipeline was unsecured. The inspector testified that the violation was abated in good faith on the same day. I find that a violation of the mandatory standard contained in 30 CFR 56.11-1 did occur. The violation was serious because of the possibility of injury, but was not the result of negligence. I also find that Respondent took extraordinary steps to comply after the citation was issued.

(3) Citation 204558, issued May 2, 1978, alleged a violation of mandatory standard 30 CFR 56.12-4, which requires that lights which present a shock or burn hazard shall be guarded. Respondent's pump house had an unguarded wall-mounted light located 6 feet above the floor. The inspector testified that Respondent abated the citation by installing a guard. The inspector also testified that the violation was neither serious nor the result of negligence. I find that the violation was not serious, was not negligent and was abated rapidly and in good faith.

(4) Citation No. 204559, issued May 2, 1978, alleged a violation of 30 CFR 56.11-27 which requires that scaffold and working platforms

shall be maintained in good condition, provided with handrails and properly secured. The inspector testified that a wooden plank at the top of the wash plant which connected the walkway to a window had no handrails or tow bar and lacked secure planking. An employee who slipped could fall 12 feet onto concrete. Respondent removed the planking. The inspector testified that he terminated the citation because the hazard no longer existed. The inspector further stated that the foreman did not know how long the scaffolding had been there, however, it had not been used by any employee. I find that the violation was not serious. I further find that Respondent abated the violation rapidly and in good faith.

(5) Citation No. 204560, issued May 2, 1978, alleged a violation of 30 CFR 56.11-12 which requires openings above, below or near travelways through which men or materials may fall to be protected by railings, barriers or covers. The inspector testified that an unguarded and uncovered opening existed at the bottom landing of the wet plant ladder. He stated that an employee could injure himself if he slipped, and fell into the 10-foot by 16-foot opening. The inspector stated that the Respondent exhibited good faith in abating the violation. I find that a violation of 30 CFR 56.11-12 occurred. The evidence shows that the condition was known or should have been known to the Respondent. I find that the violation was serious and was due to Respondent's negligence. Respondent did, however, abate in good faith.

(6) Citation No. 204613, issued May 2, 1978, alleged a violation of 30 CFR 56.11-27 which requires that scaffolds and working platforms be substantial in construction and provided with handrails. The inspector testified that an elevated platform around the wash plant had two open sides without railings. He stated that a worker could fall 10 feet from the platform onto the roof and possibly to the floor, which would result in injury. The inspector further stated that the Respondent took extraordinary steps to gain compliance by stopping production and welding metal railings on all sides of the platform. He stated that such condition should have been known to management although the platform was only used occasionally. I find that a violation did occur which was known or should have been known to the Respondent. I find that Respondent was negligent. Because of the possibility of serious injury, the violation was serious. Respondent abated the violation in good faith.

(7) Citation No. 204614, issued May 2, 1978, alleged a violation of 30 CFR 56.12-13 which requires that permanent splices and repairs made in power cables be insulated to a degree at least equal to that of the original and sealed to exclude moisture. The inspector testified that a long leaf cord with insulation damage in several places was in contact with a steel ladder. The inspector stated that there was high humidity and any further damage to insulation might energize the ladder causing an arc or a shock. The inspector stated that the management was or should have been aware of the damage

because they had purchased a new light. The cord had been inadequately repaired. I find that a violation occurred. I further find that the Respondent was aware or should have been aware of the condition and therefore the violation resulted from Respondent's negligence. The violation was moderately serious because it could have resulted in a serious injury to an employee. I find that the Respondent abated the violation promptly and in good faith.

(8) Citation No. 204615, issued May 2, 1978, alleged a violation of 30 CFR 56.20-3 which requires that all workplaces, passageways and storerooms must be kept clean, orderly and free from protruding nails, splinters, holes, or loose boards. The inspector testified that the fourth gate metal walkway which was located 10 feet above the concrete floor of the wet plant was not kept clear of trip hazards. He stated that there were accumulations of links of pipe and other materials on this walkway. He further testified that the violation was abated immediately by removal of the obstructing material. I find that a violation occurred. It did not result from the Respondent's negligence. Because of the possibility of injury, I find that the violation was moderately serious. The Respondent abated the violation promptly and in good faith.

(9) Citation No. 204616, issued on May 2, 1978, alleged a violation of 30 CFR 56.11-2 which requires that crossovers, elevated walkways, elevated ramps and stairways be of substantial construction, provided with handrails, and maintained in good condition. The inspector testified that a plank at the back end of the dry and wash plant was unsecured from the floor to the walkway. The plank which also had no railing, was 10 feet above the ground. Although the walkway was only used occasionally, injury was probable. The inspector stated that the violation was abated by securing the plank at one end and tying a tight line across the plank to serve as a hand line until original railing could be designed. I find that a violation of 30 CFR 56.11-2 was established because of the absence of railing and security for the wooden plank walkway. The condition was known or should have been known to the Respondent and the violation was the result of Respondent's negligence. Because of the possibility of serious injury from this violation, I find that it is serious. Respondent promptly and in good faith abated the condition.

(10) Citation No. 204617, issued on May 2, 1978, alleged a violation of 30 CFR 56.16-6 which requires that valves on compressed gas cylinders shall be protected by covers when being transported or stored and by a safe location when the cylinders are in use. The inspector testified that a compressed gas cylinder without protective valves was on a cart in Respondent's plant. If the cylinder fell off the cart or the cart overturned, the cylinder might explode. The Respondent abated the citation by protecting the entire top of the gauge assembly with a cover. The inspector further testified that the Respondent could not have known or predicted the hazard. I find

that a violation of 30 CFR 56.16-6 was established; that there is no evidence that the violation should have been known to the Respondent and therefore that the violation did not result from Respondent's negligence. The violation was not serious and Respondent abated the violation promptly and in good faith.

(11) Citation No. 204618, issued on May 2, 1978, alleged a violation of 30 CFR 56.12-25 which provides that all metal enclosing or encasing electrical circuits be grounded or provided with equivalent protection. The inspector testified that a rigid conduit, which contained a three-conductor cable for the 240 AC motor was broken. He stated that if the motor faulted, the housing would be energized and would present a safety hazard. Respondent abated the violation by replacing a whole section of the rigid conduit. The inspector stated that Respondent was not negligent and that injury was improbable because the motor was elevated slightly above the ground. I find that a violation did occur. However, there is no evidence that the Respondent was aware or should have been aware of this condition. The condition therefore, did not result from Respondent's negligence. The violation was moderately serious because although an injury is unlikely to have occurred, if it had occurred, it would have been serious. I find that Respondent abated in good faith.

(12) Citation No. 204561, issued on May 3, 1978, alleged a violation of 30 CFR 56.14-1 which provides that gears, sprockets take-up pulleys and similar exposed moving machine parts which may be contacted by or cause injury to persons must be guarded. The inspector testified that he observed an unguarded V-belt in the bagger compressor. The Respondent abated the citation by removing the motor. I find that a violation of 30 CFR 56.14-1 was established. The evidence does not indicate that the violation was due to Respondent's negligence. The condition was moderately serious, but it was abated promptly and in good faith.

(13) Citation No. 204562, issued on May 3, 1978, alleged a violation of 30 CFR 56.14-1 in that the head pulley of the shuttle guard was not guarded on the walkway side. Petitioner and Respondent have proposed a settlement of \$40. I approve this settlement and find that Respondent was not negligent and demonstrated good faith in installing a guard.

(14) Citation No. 204563, issued on May 3, 1978, alleged a violation of 30 CFR 56.11-27 in that the elevated platform by the bagger station did not have a railing. Petitioner and Respondent propose a settlement of \$38. I approve this settlement and find that Respondent failed to exercise reasonable care, but was not reckless. Abatement was prompt and in good faith.

(15) Citation No. 204564, issued May 3, 1978, alleged a violation of 30 CFR 56.14-1 in that the tail pulley for the return cooler

conveyor was not adequately guarded. Petitioner stopped production and installed a guard to abate the citation. Petitioner and Respondent proposed a settlement of \$44. I approve this proposed settlement and find that the violation could not have been known to the Respondent. Respondent demonstrated good faith in promptly abating the citation.

(16) Citation No. 204566, issued May 3, 1978, alleged a violation of 30 CFR 56.11-27 in that the scaffold for the tripping arm of the No. 27 tower did not have railings. Respondent installed an interim guard on a rail in rapid compliance with the citation. The Petitioner and Respondent agreed to a proposed settlement of \$38. I approve the settlement and find that the condition cited could not have been known to the Respondent. The Respondent demonstrated good faith in its extraordinary and rapid abatement of the violation.

(17) Citation No. 204568, issued May 3, 1978, alleged a violation of 30 CFR 56.14-1 in that the V-belt drive of the wheel mounted car loader was not guarded. Respondent paid two men overtime to fabricate a guard to abate the citation. Petitioner and Respondent agreed to a proposed settlement of \$38. I approve this settlement and find that the condition could not have been known to Respondent. I also find that extraordinary steps were taken to comply with the regulation.

(18) Citation No. 204619, issued May 3, 1978, alleged a violation of 30 CFR 56.12-32 in that the cover for the juncture box was damaged and not properly secured. Respondent replaced a damaged cover on the juncture box by replacing the entire unit. Petitioner and Respondent agreed to a proposed settlement of \$26. I approve this settlement and find that the condition could not have been known by the operator. Respondent abated the violation in good faith.

(19) Citation No. 204620, issued May 3, 1978, alleged a violation of 30 CFR 56.12-34 in that the hanging light bulbs at the second set of screens were not guarded. Respondent abated the citation by bringing in electrical contractors who installed guards on lighting fixtures throughout the plant area. Petitioner and Respondent agreed to a proposed settlement of \$38. I approve the settlement and find that the condition could not have been known or predicted by the Respondent. Respondent abated the violation in good faith.

(20) Citation No. 204569, issued on May 4, 1978, alleged a violation of 30 CFR 56.5-50 because Respondent's employees were exposed, without protective hearing equipment, to noise levels of 145 percent where the permissible noise level was 100 percent. Respondent abated the citation by instructing the employees in hearing protection and by posting warning signs. The parties agreed to settle the matter for a payment of \$32. I approve the settlement.

II. WILK 79-127-PM

(21) Citation No. 204600, issued June 7, 1978, alleged a violation of 30 CFR 56.20-11 which requires visible warning signs to be posted in areas where health or safety hazards exist, that are not immediately obvious to employees. Respondent did not have signs posted in an area where there was danger of inhaling respirable dust. Respondent abated the citation by installing several signs and instructing his men in the wearing of respirators. Petitioner and Respondent proposed a settlement of \$122 which I approve.

(22) Citation No. 219272, issued on September 22, 1978, alleged a violation of 30 CFR 56.20-3 which requires that all service rooms, floors and workplaces be kept clean, orderly and in a dry condition. The inspector testified that the floor in the dry mill wash room/store room was slippery and wet and covered with toilet paper. The room had a sink, toilet, portable type air compressor, metal storage cabinet and drum of lubricant grease. I find that the evidence shows that this constituted a work place under 30 CFR 56.20-3, and that a violation was established. The violation was not the result of the Respondent's negligence, but it was serious because of the possibility of injury. I find that the condition was abated rapidly and in good faith.

III. YORK 79-1-M

(23) Citation No. 220101, issued November 15, 1978, alleged a violation of 30 CFR 56.11-2 which requires crossovers, elevated walkways, stairways to be of substantial construction and properly maintained. The planking of the wooden walkway above the water on the east side of the dredge were deteriorated and poorly maintained. Respondent assigned three men to abate the citation. Petitioner and Respondent proposed the amount assessed (\$66) as a settlement and I approve the settlement.

(24) Citation No. 220103, issued November 15, 1978, alleged a violation of 30 CFR 56.11-12 which requires openings above, below and near travelways through which men or materials may fall, be protected. The railing to protect men from falling from the head box and the wash platform was not maintained. Petitioner and Respondent agreed upon the amount assessed (\$66) as a settlement, and I approve this settlement.

(25) Citation No. 220106, issued November 15, 1978, alleged a violation of 30 CFR 56.14-1 which requires guarding of exposed moving machine parts which may cause injury to persons. The inspector testified that the chain drive of the 65 wet elevator was not adequately guarded. The Respondent abated the citation by installing a new guard to completely enclose the chain. I find that a violation of 30 CFR

56.14-1 was established. The violation was not the result of Respondent's negligence, but was moderately serious because of the possibility that a serious injury would result. Respondent abated the condition in good faith.

Conclusions of Law

1. The undersigned administrative law judge has jurisdiction over the parties and the subject matter of this proceeding.
2. At all times relevant to this proceeding, Respondent was subject to the provisions of the Federal Mine Safety and Health Act of 1977.
3. Except as otherwise found herein, Respondent violated the mandatory health and safety standards as charged in the notices of violation.
4. The penalties hereafter assessed are based on my findings that the violations occurred, and on a consideration of the following criteria with respect to each violation: The operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violations and the demonstrated good faith of the operator in attempting to achieve rapid compliance.

ORDER

Based on the foregoing findings of fact and conclusions of law, Respondent is assessed the following penalties (including herein the contested citations and the proposed settlement agreements):

<u>Notice</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Penalty</u>
204556	05/02/78	56.12-18	\$ 25
204557	05/02/78	56.11-1	75
204558	05/02/78	56.12-4	25
204559	05/02/78	56.11-27	75
204560	05/02/78	56.11-12	100
204613	05/02/78	56.11-27	100
204614	05/02/78	56.12-13	75
204615	05/02/78	56.20-3	50
204616	05/02/78	56.11-2	100
204617	05/02/78	56.16-6	25
204618	05/02/78	56.12-25	35
204561	05/03/78	56.14-1	35
204562	05/03/78	56.14-1	40
204563	05/03/78	56.11-27	38
204564	05/03/78	56.14-1	44

204566	05/03/78	56.11-27	38
204568	05/03/78	56.14-1	38
204619	05/03/78	56.12-32	26
204620	05/03/78	56.12-34	38
204569	05/04/78	56.5-50	32
204600	06/07/78	56.20-1	122
219272	09/22/78	56.20-3	75
220101	11/15/78	56.11-2	66
220103	11/15/78	56.11-12	66
220106	11/15/78	56.14-1	50
Total			<u>\$1,393</u>

ORDER

Respondent is ORDERED to pay penalties in the total amount of \$1,393 within 30 days from the date of this decision.

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

Distribution:

Anthony C. Genetto, Esq., Office of the Solicitor, U.S. Department of Labor, 1515 Broadway, New York, NY 10036 (Certified Mail)

Western C. Overholt, Jr., Esq., 1200 Western Savings Fund Building, Broad and Chestnut Streets, Philadelphia, PA 19107 (Certified Mail)

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

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

ACC 6 1979

KENNECOTT COPPER CORPORATION, : Application for Review
Applicant :
v. : Docket No. DENV 79-457-M
: Citation No. 336249; 2-13-79
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Bingham Canyon Mine
ADMINISTRATION (MSHA), :
Respondent :

DECISION

Appearances: James B. Lee, Esq., and James M. Elegante, Esq., Parsons Behle & Latimer, Salt Lake City, Ut, for Applicant; Stephen P. Kramer, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent.

Before: Administrative Law Judge Michels

This proceeding involves an application for review of Citation No. 336249, issued at Applicant's Bingham Canyon Mine on February 13, 1979, charging a violation of 30 CFR 55.12-45. Kennecott Copper Corporation filed its application on March 13, 1979, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). MSHA filed an answer on March 30, 1979, admitting the issuance of the citation and asserting that it was properly issued.

A hearing was held in Salt Lake City, Utah, on May 15 and 16, 1979. Both parties were represented by counsel. No representatives of the miners appeared as a party; however, representatives of certain unions appeared as witnesses for the Applicant and testified in opposition to the MSHA charge. These were Joseph Dispenza, President of United Steel Workers Local 485 (Tr. 180-186); Robert D. Nicholls, Executive Board, Local 1081, International Brotherhood of Electrical Workers (IBEW) (Tr. 186-196); Arthur Don Beals, Business Manager, (IBEW) (Tr. 196-200); Ben E. McAlester, Jr., Secretary of United Transportation Union Local 1615 (Tr. 214-218). Mr. Dispenza also wrote a letter to the Federal Mine Safety and Health Review Commission on April 19, 1979, protesting a requirement that the steel towers be grounded to the track.

On July 26, 1979, pursuant to the Commission's Interim Procedural Rules at 29 CFR 2700.15(a), Applicant filed a motion requesting permission to withdraw its application for review. As grounds for its proposed action, Applicant advised that MSHA has concluded that the

citation involved in this proceeding was "issued in error because the 1978 National Electrical Code was not properly incorporated by reference at 30 CFR 55.12-45, upon which the citation was based." Attached to Applicant's motion was a copy of a letter from Respondent's attorney confirming this information. Subsequently, on July 31, 1979, Respondent filed a copy of the notice which vacated Citation No. 336249. This notice of vacation provides:

The citation was issued in error, based on Mandatory Standard 55.12-45, which makes reference to the National Electric Code. The Office of the Federal Register rules that regulations concerning incorporation by reference must specify the edition incorporated, and that the incorporation is limited to the material as it exists on the effective date of the regulation. Mandatory Standard 55.12-54 was promulgated in the Federal Register in 1969, and reference to the National Electric Code of 1978, is invalid. Refer to Part 51.8(c) F.R. 23614, November 4, 1972.

After considering the above circumstances, Applicant's motion to withdraw it's application for review is hereby GRANTED. This proceeding is DISMISSED. 1/


Franklin P. Michels
Administrative Law Judge

Distribution:

James B. Lee and Kent W. Winterholler, Esqs., Parsons, Behle & Latimer, 79 South State Street, Salt Lake City, UT 84111
(Certified Mail)

Stephen P. Kramer, Esq., MSHA Trials Branch, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Mr. Joe Dispenza, President, Local No. 385, United Steelworkers of America, 1056 South Second East, Sandy, UT 84044 (Certified Mail)

Mr. David Bennett, President, Local 392, United Steelworkers of America, Kennecott Copper Corporation, Magna, UT 84044
(Ceritifed Mail)

1/ I recommend that the Exhibit A-17, which is a heavy piece of electrical equipment, be returned to the Applicant.

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

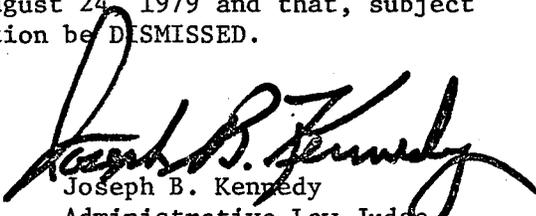
AUG 9 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. MORG 78-46-P
Petitioner : A.O. No. 46-01483-02023V
: v. : Valley Camp Coal No. 1 Mine
: VALLEY CAMP COAL COMPANY, :
Respondent :

DECISION AND ORDER ON MOTION
TO APPROVE SETTLEMENT

Upon remand, the parties move for approval of a settlement reducing the amount of the penalty assessed from \$10,000 to \$7,000. For the reasons set forth in the motion and based upon my independent evaluation and de novo review of the circumstances, I find the penalty proposed is in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the amount of the penalty agreed upon, \$7,000, on or before Friday, August 24, 1979 and that, subject to payment, the captioned petition be DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

Distribution:

Ronald B. Johnson, Esq., Schrader, Stamp & Recht, 816 Central
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Edward H. Fitch, Esq., U.S. Department of Labor, Office of the
Solicitor, 4015 Wilson Blvd., Arlington, VA 22203

Harrison Combs, Esq., United Mine Workers of America, 900 15th
Street, N.W., Washington, DC 20005 (Certified Mail)

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

AUG 9 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. MORG 78-46-P
Petitioner	:	A.O. No. 46-01483-02023V
	:	
v.	:	Valley Camp Coal No. 1 Mine
	:	
VALLEY CAMP COAL COMPANY,	:	
Respondent	:	

MEMORANDUM OPINION

As the order in this matter indicates, I make it a practice in considering motions to approve settlements under section 110(k) of the Act to make an independent evaluation and to conduct a de novo review of the circumstances and particularly the evidence relating to the gravity and negligence involved in the violations charged. Furthermore, I fully and candidly discuss these evaluations with counsel and the parties.

It has recently come to my attention that the Chairman of the Subcommittee on Health and Safety of the House Committee on Education and Labor, Mr. Gaydos, disapproves of the practice and feels that if a judge during the course of a settlement conference expresses views about the sufficiency of a penalty or indicates that the amount of the penalty may be increased if the facts as to culpability are proved at an evidentiary hearing he may be accused of attempting to "intimidate" or "penalize" an operator for insisting on a hearing. 1/

1/ The object of the Congressman's solicitude was John S. Lane & Son., Inc., of Westfield, Massachusetts. The company operates 3 sand and gravel pits that produce 1,250,000 tons of aggregate annually. The operator admitted the violations charged and contested only the amounts of the penalties assessed. The operator paid \$573.00 in settlement of seven violations for an average of \$82.00 per violation. Four other violations were withdrawn at the suggestion of the presiding judge. The penalties for these violations totalled \$136.00. Mr. Gaydos' informant was Leland B. Seabury, Esq. counsel for the operator.

On the other hand, Congressman Gaydos found nothing intimidating about the judge's recommendation that the government withdraw four charges he considered unsupported by the evidence disclosed during settlement discussions. If that strikes one as being somewhat biased against even-handed enforcement it may only be attributable to the fact that the Congressman relied on an ex parte account from a disgruntled operator who so firmly believed he was coerced that his counsel failed to appeal the case to the Commission.

I have previously and publicly made clear that I do not consider it my function to "rubber stamp" settlement proposals. 2/ See, Pomerleau Bros., WILK 79-4-PM, D&O of February 13, 1979; Kaiser Steel Corporation, DENV 79-430-P, D&O of June 4, 1979; Alabama By-Products, BARB 78-2, et al., D&O of May 31, 1979. Certainly there is no purpose in discussing settlement with the parties if the judge is not prepared to be honest and forthright about his views or policy with respect to the issues.

When I disapprove a settlement, I think the parties are entitled to know why. And when I tell the parties that based on my evaluation of a violation I think the amount proposed is insufficient to deter future violations and ensure voluntary compliance but that I am prepared to approve an increased amount, I am not attempting to intimidate anyone.

2/ In Pomerleau, I noted:

The plain language of section 110(k) and the legislative history of the Act convincingly establish that the Presiding Judge is charged with responsibility for making just such an independent evaluation and de novo review of proposed settlements. To approve settlements merely on the basis of unsubstantiated representations of counsel with respect to gravity, negligence and the adequacy of penalties imposed by the Assessment Office would be violative of the Commission's duty "for reviewing the enforcement activities of the Secretary of Labor." Comments of Senator Williams at Confirmation Hearing, Federal Mine Safety and Health Review Commission, (Aug. 28, 1978), page 1.

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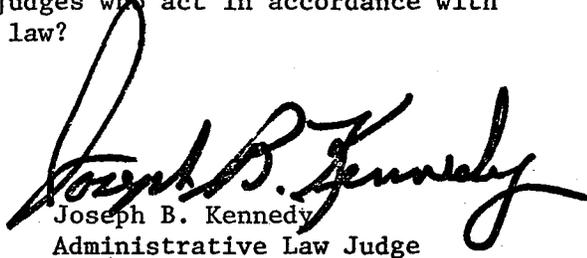
The sooner operators, and especially the noncoal operators, are disabused of the notion that they have nothing to lose and everything to gain by filing a notice of contest of every penalty assessed, the sooner the enforcement program will become more manageable and respected.

Furthermore,

1. When I tell the Solicitor I do not think a charge is warranted in view of the disclosures made during the course of settlement discussions, I consider I am doing only what fairness requires, and
2. When I tell the operator my evaluation leads me to believe a violation is more serious than he is willing to concede and warrants a penalty larger than that proposed, I consider I am doing only what section 110(k) of the Act requires, and
3. When I tell the operator that if he is not content with my evaluation he should realize the hearing is de novo and that I may be required by the evidence to assess a much larger as well as a much smaller penalty, I am again doing only what candor and the law requires.

And if a lawyer with that knowledge tells his client to settle because he feels coerced and intimidated and not because he believes he cannot win the case then I suggest the operator needs a new lawyer. Based on my feedback from counsel, I find it is in the interest of the parties and of fair and efficient enforcement for the judge to divulge his reasons for denying a settlement, including his views as to the amount of the penalty he would consider warranted if the operator is found guilty as charged.

After all, any competent lawyer knows that regardless of the judge's views or findings an arbitrary assessment is subject to reversal on appeal. What then is to be gained by ill-informed and intemperate threats to "stomp" judges who act in accordance with their conscientious view of the law?


Joseph B. Kennedy
Administrative Law Judge

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

AUG 9 1979

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-320-PM
Petitioner : A/O No. 02-00842-05003
v. :
MAGMA COPPER COMPANY, : Docket No. DENV 79-321-PM
Respondent : A/O No. 02-00151-05003
: Docket No. DENV 79-433-PM
: A/O No. 02-00842-05001
:
: Docket No. WEST 79-32-M
: A/O No. 02-00842-05002
:
: San Manuel Mill and Mine

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor,
Department of Labor, for Petitioner MSHA;
N. Douglas Grimwood, Esq., Twitty, Sievwright &
Mills, Phoenix, Arizona, for Respondent.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed under section 110 of the Act by the Secretary of Labor, Petitioner, against Magma Copper Company, Respondent.

The cases were duly noticed for hearing and were heard as scheduled on June 19, 1979. At the hearing, pursuant to agreement of the parties and in accordance with the regulations, the subject docket numbers were consolidated for hearing and decision.

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

1. The operator is the owner and operator of the subject Magma Copper Company, its mine and mill.
2. The operator, its mine and mill, are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The administrative law judge has jurisdiction of these cases.
4. The inspectors who issued the subject citations were duly authorized representatives of the Secretary, and all witnesses who will testify for both the Secretary and the operator are generally accepted as experts in mine safety.
5. True and correct copies of the subject citations were properly served upon the operator.
6. Copies of the subject citations and termination of the violations in issue in these proceedings are authentic and may be admitted into evidence for purposes of establishing their issuance but not for the purpose of establishing the truthfulness or relevancy of any statements asserted therein.
7. Imposition of any penalty will not affect the operator's ability to continue in business.
8. All alleged violations were abated in good faith.
9. The operator has no history of prior violations.
10. The operator is large.

Citation Nos. 377156 and 377157

The Solicitor moved to withdraw the petition with respect to Citation Nos. 377156 and 377157. The motion was granted from the bench.

Citation No. 376720

The Solicitor moved to withdraw from the petition Citation No. 376720 without prejudice. This item is the penalty aspect of the "walkaround" provision involving the operator which is presently before the Commission. The motion to withdraw without prejudice was granted from the bench.

Citation No. 377123

The Solicitor moved to have a settlement approved for Citation No. 377123 in the amount of \$56 which was the originally assessed amount. In view of the Solicitor's representation of moderate gravity and because of the operator's lack of previous history, the recommended settlement was approved from the bench.

Citation No. 347618

The Solicitor moved to have a settlement approved for Citation No. 347618 in the amount of \$114 which was the originally assessed

amount. In view of the Solicitor's representation that occurrence of the feared accident was unlikely and because of the operator's lack of previous history, the recommended settlement was approved from the bench.

Citation No. 376616

This citation, as amended, alleged a lack of guarding for rod mill Nos. 1, 9, 6, 8, and 10. The operator admitted the lack of guarding, and the originally assessed penalty of \$210 was imposed from the bench.

Citation Nos. 376703, 376704, 376619, and 376701

Since these citations contained the same condition and alleged the same violation as those set forth in Citation No. 376616, as amended, they were dismissed from the bench.

Citation No. 376705

This citation, as amended, alleged a lack of guarding for the Nos. 13, 15, 16, 17, 18, 19, and 20 ball mills. The operator admitted the lack of guarding, and the original assessed penalty of \$280 was imposed from the bench.

Citation Nos. 376706, 376707, 376708, 376709, 376710, and 376712

Since these citations contained the same conditions and alleged the same violations as those set forth in Citation No. 376705, as amended, they were dismissed from the bench.

Citation No. 377135

This citation, as amended, alleged a lack of guarding for regrind mill Nos. 1 and 2. The operator admitted the lack of guarding, and the originally assessed penalty of \$80 was imposed from the bench.

Citation No. 377136

Since this citation contained the same condition and alleged the same violation as set forth in Citation No. 377135, as amended, it was dismissed from the bench.

Citation No. 377129

This citation, as amended, alleged a lack of guarding for belt drives on secondary crusher Nos. 1 and 2. The operator admitted the lack of guarding, and the originally assessed penalty of \$80 was imposed from the bench.

Citation No. 377130

Since this citation contained the same condition and alleged the same violation as set forth in Citation No. 377129, as amended, it was dismissed from the bench.

Citation No. 377131

This citation, as amended, alleged a lack of guarding for belt drives on tertiary crusher Nos. 1, 2, 3, and 4. The operator admitted the lack of guarding, and the originally assessed penalty of \$160 was imposed from the bench.

Citation Nos. 377132, 377133, 377134

Since these citations contained the same conditions and alleged the same violations as those set forth in Citation No. 377131, they were dismissed from the bench.

Citation No. 376614

The Secretary and the operator introduced documentary exhibits and testimony with respect to this citation. Upon the conclusion of the testimony, counsel for both parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to present oral argument and receive a decision from the bench. After considering the evidence and oral argument, a decision was rendered from the bench as follows (Tr. 60-62):

I find a violation existed. Section 57.14-1 requires that gears, sprockets, chains, drive, head, tail and takeup pulleys, fly wheels, couplings, shafts, saw blades, fan inlets, and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded. The machinery here was a drive shaft and a coupling. These items fall squarely within the mandatory standard. In addition, I believe the evidence from both the inspector and the operator's witness demonstrates that these parts may be contacted by persons and may cause injury. It is not necessary under this mandatory standard to establish precisely the probability of injury or of contact by individuals. It is enough that there may be contact and that there may be injury. Both those elements are present here.

I further find that as the Solicitor admitted (Tr. 53), the violation was of minimal gravity. The inspector and the operator's assistant safety director were in conflict with respect to whether an individual or

his clothes could get caught in the moving drive shaft. The drive shaft was moving at two seventy (270) rpm's so that if someone tripped or fell, injury could result. However, I recognize that in accordance with the evidence people are not usually in the area in question, and that when equipment is being serviced, it is supposed to be turned off. It is a truism that if everyone did what they were supposed to do, the mining industry would not be as hazardous as it is. Therefore, I cannot find that the violation was nonserious. I find that the gravity was substantially reduced because the likelihood of an accident occurring was remote.

I further find the operator was negligent. This equipment should have been guarded. The guard that was present could have been moved a little closer, and although it would not have completely covered the coupling, it would have to some extent, reduced the danger.

I take note of the decisions furnished by the operator's counsel with respect to the accessibility of certain equipment to employees as a condition for the finding of a violation. That may be the rule under the Occupational Health and Safety Act. It has never been the rule under the Mine Safety Act. I further recognize that at least one administrative law judge of the Federal Mine Safety and Health Review Commission has held that where the evidence does not establish the necessity of a guard, a violation does not exist. I further note, however, that the decision in that case which is Great National Corporation, Docket No. DENV 77-59-P, also is based upon the ground that the relevant machinery was in any event, adequately guarded. As counsel for the operator pointed out, I am not bound by a decision of another administrative law judge. In my view, the mandatory standard is clear in covering this situation. It is not for me to substitute my judgment for that of the Secretary in writing the regulations, as long as the regulations are not inconsistent with the Act.

I also take into account, in accordance with the stipulations, that the operator has no prior history of violations, that the violation was abated in good faith, and that the operator is large in size. Taking all the statutory factors into account, a penalty of fifty dollars (\$50) is assessed.

Citation No. 377125

The Secretary and the operator introduced documentary exhibits and testimony with respect to this citation. Upon conclusion of the

testimony, counsel for both parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to present oral argument and receive a decision from the bench. After considering the evidence and oral argument, a decision was rendered from the bench as follows (Tr. 84-86):

I find a violation existed. Section 57.20-3 directs that workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly. The area in question is on the east side of the conveyor belt. Admittedly, a wider walkway exists on the west side of the beltway. The area in question is approximately two and a half (2-1/2) feet wide. Nevertheless, the area on the east side which is the area covered by the citation, is the only way to reach the east side of the beltway. It was open-ended, and furthermore, the evidence demonstrates that maintenance and cleanup people did walk through this area. Moreover, these people were in this area to perform their assigned tasks. In addition, the area was available for complete transit from one end to the other, to any individual who should be so inclined. I recognize that, as I stated before, a wider walkway existed on the west side of the beltway, on the west side of the conveyor belt. Nevertheless, people do not always do what is expected of them, and a great many of the mandatory standards are written to restrict the individual's freedom of action, in order sometimes to protect them from themselves.

Accordingly, I hold that the area covered by the citation was a passageway within the purview of the mandatory standard. The existence of the cited materials is undisputed. Moreover, the inspector's estimate that the accumulation had been there for several days also is undisputed. Based upon all this evidence, I find once again that a violation existed.

The inspector testified a person could slip and fall because of the debris. The hazard was increased because the passageway was an incline and was narrow. Based upon this evidence, I find the violation was serious.

The operator's mill superintendent stated that the operator has a cleanup plan whereby this area is cleaned every three to five days. However, the inspector's estimate that the accumulation cited in the order had existed for several days, is uncontradicted. Based upon the estimate that the accumulation in question existed for several days, I find the operator was negligent.

In accordance with the stipulations of the parties, I find the operator has no history of previous violations, that the violation was abated in good faith, that the operator is large in size, and that the imposition of any penalty will not affect the operator's ability to continue in business. A penalty of eighty-five dollars is imposed.

Citation Nos. 347617 and 347406

The Secretary and the operator introduced documentary exhibits and testimony with respect to both these citations at the same time. Upon the conclusion of the testimony, counsel for both parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to present oral argument and receive a decision from the bench. After considering the evidence and oral argument, a decision was rendered from the bench as follows (Tr. 136-139):

The following is a decision with respect to Citation Nos. 347617 and 347406, both of which involve the same mandatory standard and identical facts. Section 57.12-32 requires that inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs. There is no dispute that covers were not present on the two brake release switches involved in the two subject citations. The evidence indicates that heavier wiring had been placed in the switches and that the existing covers would not fit over them. According to the operator's witness, the covers had been off for a month. This is far too long a time to fall within the exception in the mandatory standard for repairs. Covers such as these simply cannot be off indefinitely, especially where, as discussed hereafter, the hazard presented by their absence was so great.

The brake release switches were located in the hoist pit. In order to reach the hoist pit, a man would have to go down into the basement and then back up again, six feet of stairs into the hoist pit. The hoist pit was not directly accessible from the surface. These factors do not, however, affect the existence of a violation. Covers were required. They were not provided and indeed they had not been provided for a very long period of time. Therefore, the mandatory standard was violated.

One of the inspectors testified that there was enough voltage in the exposed wiring to electrocute an individual, if he touched the open wiring. The testimony also shows that electricians and maintenance people such as greasers worked in this area. Even if these people were

experienced, they should not have been exposed to this hazard. Moreover, as the inspector stated, the floor was greasy and a man could slip and reach out, thereby touching the brake release switch, and electrocuting himself. Experience would be no protection against such an involuntary reaching out. Based upon this testimony, I find the violation was extremely serious.

I recognize that there usually was a hydraulic oil pan at the top of the stairs leading to the hydraulic pit, and that it would impede an individual from readily touching the switch. This, however, is not a defense either to the existence of a violation or to the conclusion of extreme gravity. The hydraulic oil pan was not designed and indeed, did not function as some sort of guard. It certainly did not replace the need for a cover. One of the inspectors testified that fittings in the hoist pit were greased approximately once a week. So, at least, once a week or so, the hydraulic oil pan had to be removed for the greaser to get into the area. Moreover, an individual could step into the pan and get into the area. It is no answer to say that a sensible or experienced man would not do this. The Mine Safety Act is designed to protect experienced and sensible people from doing the unexpected. The Mine Safety Act limits the freedom of individuals for their own protection.

Finally, although the inspector's testimony at that point was not entirely clear, I find that there was no pan in place on the day of his inspection. Accordingly, I state once again that the violation existed and that it was extremely serious. The absence of covers for one month demonstrates a high degree of negligence, especially in view of the serious hazard presented.

In accordance with the stipulations entered into by the parties, I find that the operator has no history of previous violations, that there was good faith abatement, that the imposition of a monetary penalty will not affect the operator's ability to continue in business, and that the operator is large in size.

I impose a penalty of two hundred and fifty dollars for each of these citations. I would state that were it not for the fact that the operator has no history of prior violations, the penalty would be much higher. I believe that the extreme gravity warrants the imposition of this penalty which is substantially more than the Solicitor recommended.

ORDER

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

In accordance with the foregoing determinations, the operator is ORDERED to pay \$1,615 within 30 days from the date of this decision.



Paul Merlin

Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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AUG 13 1979

UNITED STATES STEEL CORPORATION, : Applications for Review
Applicant :
v. : Docket No. BARB 79-276
: Order No. 240507
SECRETARY OF LABOR, : January 16, 1979
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. BARB 79-277
Respondent : Order No. 240508
: January 16, 1979
UNITED MINE WORKERS OF AMERICA, :
Respondent : Concord Mine
:
:
:
:

DECISION

Appearances: Billy M. Tennant, Esq., Pittsburgh, Pennsylvania,
for Applicant;
Terry Price, Esq., U.S. Department of Labor, Office
of the Solicitor, Birmingham, Alabama, for Respondent.

Before: Judge Forrest E. Stewart.

Two applications for review were filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 83 Stat. 742, 30 U.S.C. §§ 801-960 and applicable regulations.

The orders of withdrawal, dated January 16, 1979, alleged that a violation of section 75.316 of Title 30, Code of Federal Regulations, 1/ existed at the Concord Mine on that date.

1/ 30 CFR 75.316 provides:

"A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months."

Order No. 240507 alleged that the following condition or practice existed:

The Company's approved Ventilation System and Methane and Dust Control Plan was not being complied with, in that the line brattice was 19 feet and 10 inches from the deepest penetration of the working face of No. 18 room on No. 011 working section. The Company's approved plan states line brattice will be maintained to within 10 feet of the deepest penetration of all working faces.

Order No. 240508 alleged that the following condition or practice existed:

The Company's approved Ventilation System and Methane and Dust Control Plan was not being complied with, in that the line brattice was 20 feet and 6 inches from the deepest penetration of the working face of No. 19 room on No. 011 working section. The Company's approved plan states line brattice will be maintained to within 10 feet of the deepest penetration of all working faces.

It was established at the hearing that, as alleged in Order of Withdrawal No. 240507, the brattice extended only to within 19 feet 10 inches of the deepest penetration of the face in 18 Room. It was also established that the line brattice extended only to within 20 feet 6 inches from the deepest penetration of the face in 19 Room, as alleged in Order No. 240508. The evidence further established that no coal was actually being cut, mined or loaded when the inspector observed these conditions.

In a bench decision rendered at the hearing, the above-captioned applications for review were granted and Order Nos. 240507 and 240508 were vacated.

It was held that under the factual circumstances of this case, line brattice was required to be maintained to within 10 feet of the area of deepest penetration of all working faces (hereinafter 10-foot line brattice) only when coal was actually being cut, mined or loaded.

Although there is a general requirement for continuous use of line brattice to provide adequate ventilation in 30 CFR 75.302, 2/ the

2/ 30 CFR 75.302 reads, in pertinent part, as follows:

"Properly installed and adequately maintained line brattice or other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive, and noxious gases, dust, and explosive fumes, unless the Secretary or his authorized representative permits an exception to this requirement, where such exception will not pose a hazard to the miners." (Emphasis added.)

10-foot criteria is set forth in 30 CFR 75.302-1(a) which specifically requires line brattice at that particular distance only while coal is being cut, mined or loaded.

Petitioner has not alleged a violation of 30 CFR 75.302 and the evidence does not establish that the line brattice in place at the time of the inspection fails to meet the requirements of that section. What petitioner alleges is a failure to meet the 10-foot requirement as set forth in Respondent's approved ventilation plan which may contain additional requirements authorized by 30 CFR 75.302-1(a). This section reads in pertinent 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 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
* * *

This provision clearly designates the working face ^{3/} as that place at which brattice is to be maintained. The modifying phrase "from which coal is being cut mined or loaded" specifies the time at which brattice is to be maintained. All working faces must be provided with line brattice meeting the 10-foot criteria during that time period.

In argument, counsel stated that it was Petitioner's position that the modifying phrase "refers to a location or a place and not the duration." If this were the correct interpretation, and the phrase really referred to a place rather than a period of time, the inspector would have been able to cite a violation of 30 CFR 75.302-1(a), rather than relying on the language of the ventilation plan. The inspector indicated in his testimony that he understood that he would have been able to issue a citation under a regulation if coal were being cut, mined or loaded. In fact, if the location of the line brattice had been in violation of 30 CFR 75.302-1(a), the inspector should have invoked that section in order to be in compliance with MSHA policy that directed the issuance of citations for violations of specific requirements of regulations rather than identical requirements in ventilation plans. ^{4/}

^{3/} "Working face" is specifically defined in 30 CFR 75.2(g)(1) as "[A]ny place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle."

^{4/} This decision does not hold that the inspector may not cite an operator for violations of additional requirements in ventilation plans and it does not reach the legal issue as to the effect of a failure of an inspector to follow MSHA policy or guidelines.

As to the place where the requirement is effective, section 75.302-1(a) requires 10-foot line brattice at all working faces. The ventilation plan also requires 10-foot line brattice at all working faces. 5/

As to the time when the requirement is effective, section 75.302-1(a) requires 10-foot line brattice when coal is actually being cut, mined or loaded. The ventilation plan is silent as to the time when 10-foot line brattice is required during advance mining. This silence cannot be construed as adding additional requirements to those in the regulation which require 10-foot line brattice only while coal is being cut, mined or loaded. In order for the operator to be penalized for failure to maintain 10-foot line brattice at times other than those specified in the regulation, the approved plans should clearly state the additional requirements in such a way that the operator is informed of his obligations.

It is obvious that the operator did not intend that brattice must be maintained within 10 feet of the working face at all times when it submitted the ventilation plan and the roof control plan and that the district manager did not so intend when he approved those plans. As a practical matter, line brattice is maintained 10 feet from the deepest penetration of the working face in order to prevent the accumulation of methane and dust. The inspector testified that brattice is necessary principally at those times during which the cutting, mining or loading of coal being performed.

To construe the ventilation plan in a manner that would require 10-foot line brattice at all times, even while coal was not being cut, mined or loaded, would create a conflict with the roof control plan which contained a specific exemption. By the inspector's admission, there were times during which line brattice did not have to be maintained to within 10 feet of the face since the approved roof control plan specifically allowed the removal of line brattice during roof bolting operations. The provision for its removal was included because the line brattice presented a hazardous obstruction during bolting. The inspector mentioned one occasion on which this obstruction resulted in severe injury to a miner's arm.

The language "of all working faces" in Respondent's ventilation plan clearly does not mean that brattice be maintained at all times in all working faces. With regards to maintenance of brattice at working faces during advance mining, Respondent's ventilation plan imposes requirements no stricter than those contained in 30 CFR 75.302-1(a).

5/ With regard to advance mining, the ventilation plan reads in pertinent part that "line brattice will be maintained to within 10 feet of the area of deepest penetration of all working faces."

ORDER

The bench decision is hereby AFFIRMED. Accordingly, it is ORDERED that Order Nos. 240507 and 240508 are VACATED and the operator's applications for review are GRANTED.

Forrest E. Stewart

Forrest E. Stewart
Administration Law Judge

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

483 10 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. BARB 79-255-P
Petitioner : A/O No. 01-00550-03007V
v. :
: Boothton Strip Operations
BURGESS MINING AND CONSTRUCTION :
CORPORATION, :
Respondent :

DECISION

Appearances: Murray A. Battles, Esq., Birmingham, Alabama, for
Petitioner;
William E. Prescott, III, Esq., Birmingham, Alabama,
for Respondent.

Before: Judge Forrest E. Stewart

The operator was assessed a penalty of \$200 in a bench decision at a hearing held on May 25, 1979, for not providing adequate berms on the main haul road at its Boothton Strip Operations.

Citation No. 239933 which was issued on May 17, 1978, alleged that the following condition or practice existed:

Berms were not provided on the outer banks of the main haul road leading to and from the mine.

A subsequent citation dated May 22, 1978 stated:

Citation No. 239933 dated 5/17/78 is here by modified to show correct mine as Boothton strip operation. This citation is further modified to show the following. The condition of inadequate berms existed on the haulage road leaving to company pit No. 24. The foreman had to travel the road a minimum of twice a day, because it was the only means of access to the mine. The foreman who was a certified man said, that no berm needed to be provided, that there had never been a berm and no one told him he needed a berm. It appeared that a berm had been provided but had weathered down.

Citation No. 239933 was further modified by another citation dated May 22, 1978, which stated:

The citation number 239933 dated 5-17-78 is extended because of a misunderstanding concerning the violation. Citation No. 239933 dated 5-17-78 is hereby modified to state the following: the inadequate berm begins approximately 2 tenths of a mile from the concrete bridge that crosses the Cahaba River and extends for approximately 250 feet (on the right side of the road). From this point the condition exists for 3 tenths (on the left side of the road). Then at a distance of the 8 tenths of a mile from the bridge, the condition exists on both sides of the road approximately 100 feet. These conditions were viewed while entering the pit from the bridge side.

The citation was terminated on May 24, 1978, after additional berms were provided:

In its answer to the Petition to assess civil penalty, Respondent stated:

1. That no violation of 30 CFR 77.1605-k occurred.
2. That the road in question had been previously inspected and the location of necessary berms specifically pinpointed and berms constructed as required.
3. That the area in question did not require berms.

At the hearing, it was established that in 1972 a notice of violation had been issued for failure to have berms on the haul road and that Respondent had filed an application for review. After construction of berms on the portions of the 9-mile haul road designated by Petitioner, the notice of violation was terminated and Respondent withdrew its application for review.

On May 17, 1978, Inspector Franklin who was unaware of the 1972 violation and its abatement, issued citation No. 239933 because, in his judgement, additional berms were needed.

The hazardous conditions on most of the 9-mile haul road had been eliminated in 1972 by the installation of berms on the designated sections but a slight hazard still existed in the areas designated by the inspectors in 1978. Berms were required in the remaining areas under criteria issued by Petitioner in October 1972.

The primary issues here are whether or not there was a violation of the mandatory safety standard cited and the penalty which should be assessed if there was, in fact, such a violation. The criteria as set forth in section 105(b) of the Federal Mine Safety and Health Act of 1977, 30 USC § 820 are:

One, the appropriateness of the penalty to the size of the business of the operator charged.

Two, the operator's history of previous violations.

Three, whether the operator was negligent.

Four, the gravity of the violation.

Five, the demonstrated good faith of the operator charged in attempting to achieve rapid compliance of notification.

And six, the effect of the penalty on the operators' ability to continue in business.

The record supports a finding that the company produced somewhat less than half a million tons of coal per year at the time of the violation. The tonnage produced in the particular pit at which the violation was cited was not established; however, it was established that the pit at the time of the citations was not being extensively used and not much coal was being mined at the time.

The record shows that from May 15, 1977 until May 14, 1979 there were 56 paid violations in the total amount of \$6,105.60. Most of these violations were cited at the time of the inspection during which the instant case arose. For the size of the company and the size of the mine the record of violations is moderate.

It is found that the steepness of the embankment next to the roadway was such that berms or guardrails should have been installed under the criteria set forth in Government's Exhibit No. 7.

As to whether or not the operator was negligent, I find that at a prior inspection in 1972, a number of berms and guardrails were prescribed and that the operator complied with these requirements and installed these berms and guardrails. As a result of the abatement of this violation and these conditions and termination of the notice of violation, the operator withdrew its application for review. While this does not prevent a violation from issuing, it does bear on the questions of negligence and the gravity of the violation. The operator after complying with the requirements of the Bureau of Mines in 1972, continued to operate without any further notice that additional berms were required until the inspection was performed in 1978. Therefore, he had no way of knowing that additional berms or guardrails were required. The operator did not know that he was in violation and there is no indication that he unreasonably failed to take action to abate the condition for which the citation was eventually issued in 1978. The 1978 abatement also has some bearing on the gravity of the violation. It at least shows that the inspector at

that time considered the berms and the guardrails to be sufficient to meet the requirements of the law and possibly to make the operation safer. We do have evidence on the record that the embankments next to the sections of the roadway were steep and were of a nature as to cause a truck or an automobile to turn over and possibly cause injury to the occupant. Nevertheless, the greatest portion of the unguarded and unbermed roadway was effectively fitted with guards and had berms constructed on them in 1972. Only small portions of the nine miles of roadway remained unfitted with berms at the time of this citation.

It therefore would be improbable that injury or death would occur as a result of the operator's failure to have berms installed at the three locations where they had not been installed. At one point berms had not been installed for 250 feet on the right side of the road. At another point, they were missing for only three-tenths of a mile on the left side of the road. At the third point, they were missing for only 100 feet, on both sides of the road.

As to the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation, I find that the operator exercised good faith in abating the violation and erecting additional berms. Although the violation was not abated within the time allotted, the operator did have some foundation upon which to base a good faith argument as to whether berms were required by the regulation. After the original citation was modified to show the exact nature of the abatement to bring to the operator in compliance, the operator soon thereafter was successful in abating the condition.

The final criteria hearing upon the assessment of a civil penalty is the effect of the penalty on the operator's ability to continue in his business. The operator has presented nothing to indicate that an appropriate penalty in this case would prevent him from continuing in his business; therefore, I find that a penalty would not effect his ability to continue.

In view of the findings concerning the six statutory criteria, I find that the assessment of a penalty of \$200 is appropriate.

The bench decision issued on May 25, 1979 is AFFIRMED.

ORDER

Respondent is ORDERED to pay the amount of \$200 within 30 days of the date of this decision.



Forrest E. Stewart
Administrative Law Judge

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(Certified Mail)

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

AUG 10 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WILK 79-33-PM
Petitioner : A/O No. 43-00063-05001
v. :
: Websterville Quarry & Mill
WELLS-LAMSON QUARRY CO., INC., :
Respondent :

DECISION

Appearances: John Casler, Esq., Office of the Solicitor, U.S.
Department of Labor, Boston, Massachusetts, for
Petitioner;
Gary D. McQuesten, Esq., Richard E. Davis Associates,
Barre, Vermont, for Respondent.

Before: Judge Stewart

PROCEDURAL BACKGROUND

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

On November 28, 1978, Petitioner filed with the Mine Safety and Health Review Commission a petition for assessment of civil penalty for the seven violations included under this docket number. Respondent filed its answer to this petition on January 9, 1979. A hearing was held on April 11, 1979, in Montpelier, Vermont.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The violations alleged herein were observed by Federal Mine Inspector John Rouba in the course of a regular inspection of Respondent's Websterville Quarry and Mill. This inspection was conducted over a 3-day period in May, 1978.

The Websterville Quarry, an open-pit operation, is Respondent's only mine. Its 65 employees worked a total of 99,000 man-hours in

1978. The quarry did not operate on a profitable basis in 1978. There is, however, no indication on the record that any penalty assessed in this proceeding will have an adverse effect on the Respondent's ability to remain in business. There is no applicable history of prior paid violations.

Citation No. 211911 was issued because the inspector observed that one of Respondent's Euclid haulage trucks had an inoperative backup alarm. The driver of the vehicle had parked it and was waiting to be called to haul waste materials. This condition was in violation of 30 CFR 56.9-2 which requires that equipment defects affecting safety be corrected before the equipment is used. It was abated as quickly as was possible.

The driver of the truck said that he had disconnected the alarm because he was tired of listening to it. Robert Stewart, Respondent's general manager testified that the company had no knowledge of the condition. Nevertheless, negligence existed on the part of Respondent because mine management should have known of the inoperative alarm. The absence of an operative alarm was obvious and the condition had existed for about 1 week, a long enough period of time to warrant its discovery.

When the violation was observed by the inspector there were no workers in the vicinity of the vehicle. However, any of a number of employees could be exposed in the danger in the areas where waste materials are loaded onto the truck. In a noisy area, a worker might be unaware that the truck was backing up. If an accident were to occur, it could result in a fatality.

Citation No. 211912 was issued because the inspector observed unguarded gears on the rope drum of the hoist. This condition was in violation 30 CFR 56.14-1, which requires that gears which may be contacted by persons, and which may cause injury to persons, shall be guarded. The condition was rapidly abated.

The operator was negligent in that it knew of the condition yet failed to take steps to abate it. The gears had been unguarded for approximately 1 month. Mr. Stewart testified that the operator had waited to guard the gears until it could obtain the opinion of an inspector. Mine management did not seek information concerning a proper guard from MSHA during this time.

An accident was probable. As an employee entered the hoist room, he could reach out and touch the exposed gears. There were, however, some non-moving machine parts between the walkway and the gears. If an accident were to occur, the likely result would be mangling or loss of fingers or arms.

Citation No. 211913 was issued because the inspector observed unguarded resistor grids on a 220-volt hoist motor. It was impractical to insulate these grids and they were not protected by their location. This condition was in violation of 30 CFR 56.12-23. The inspector testified that Respondent did everything in its power to abate the condition immediately.

The operator was negligent in that it knew or should have known of the condition yet failed to abate it. The condition had existed for approximately 1 month and other grids in the vicinity had been guarded.

It was probable that the condition would result in an accident. A walkway led to the exposed grids. An individual who contacted two of the wires simultaneously could be electrocuted.

Citation No. 211914 was issued because several splices in the lead wires to a portable pump were insufficiently insulated. This condition was in violation of 30 CFR 56.12-13(b) which requires that splices in power cables be insulated to a degree at least equal to that of the original; and sealed to exclude moisture. The condition was corrected within the time set by the inspector for abatement.

The operator was negligent in that it should have known of the insufficiently insulated splices. The condition of the wire was visually obvious and the wire was located in front of a walkway in an area where supervisory personnel can be found much of the time.

It was probable that the condition would result in an accident. The area in which the wire was located was frequently damp. In the inspector's judgement, the splices could have been wet enough to cause a person who stepped on the wire or grasped it to suffer electrical shock. This electrical shock could result in injury ranging from burns to electrocution.

Citation No. 211915 was issued because railings had not been provided to prevent persons from falling off an elevated walkway. This condition was in violation of 30 CFR 56.11-2. It was promptly abated.

The operator was negligent in that it should have known of the condition. It was visually obvious that the area was without guards. In fairness, it must be noted that the condition had existed for approximately 15 years. Moreover, Inspector Rouba had personally inspected the area on 4 or 5 prior occasions but had not issued a citation.

The inspector testified that an accident was less than probable. The probability that an accident would occur was reduced by the

remoteness of the area and the fact that only a 4 foot section of the walkway was unguarded. If an accident were to occur a person could fall 6 feet into a pond of water which was below the walkway.

Citation No. 211916 was issued because a dry wooden platform or insulating mat had not been provided at the control panel for the roll lathe at the wire-saw mill. This condition was in violation of 30 CFR 56.12-20. It was immediately abated.

The operator was negligent in that it should have known of the condition. A mill foreman was in the area at all times.

The inspector testified that an accident would be probable if the panel became energized. The panel was equipped however, with ground fault indicator lights and circuit breakers. In the event that the panel became energized, the dampness of the area would increase the likelihood of accident and injury. The expected injury ranged from burns to electrocution.

Citation No. 211917 was issued because a shaft on the boiler make-up pump motor was unguarded. The shaft was located at floor level in the wire-saw mill boiler room. The inspector cited a violation of 30 CFR 56.14-1. This section requires that shafts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

Mr. Stewart testified that the boiler in question was used only during winter months. It had been shut down in April, 1978, and was to be used next in October. After the machine was shut down, maintenance was undertaken. The guard was taken off and left off to allow for adjustments upon completion of the maintenance. Because the machinery was not to be used until October, the shaft could not cause the injury contemplated in the regulation. The failure to guard the shaft on this boiler motor was, therefore, not in violation of section 56.14-1.

Citation No. 211918 was issued because access to the main mill plant control panel switches had not been kept clear of unnecessary materials. The walkway contained timber, boards and angle irons. This condition was in violation of 30 CFR 56.20-3(a). The inspector testified that the condition was corrected with an excellent degree of good faith.

The operator was negligent in that the condition was visually obvious. The operator knew or should have known of its existence.

It was probable that a tripping accident would occur because of the condition. Employees had to walk over these materials to get to the panel. The inspector observed Respondent's employees doing so. Minor injuries would be the expected result of a tripping accident in these circumstances.

ASSESSMENT

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.

<u>Citation No.</u>	<u>Penalty</u>
211911	\$72
211912	98
211913	72
211914	84
211915	84
211916	72
211918	72

ORDER

The civil penalty proceeding with respect to Citation No. 211917 is hereby DISMISSED.

The Respondent is hereby ORDERED to pay the sum of \$554 within 30 days of the date of this decision.

Forrest E. Stewart

Forrest E. Stewart
Administrative Law Judge

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OFFICE OF ADMINISTRATIVE LAW JUDGES
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ARLINGTON, VIRGINIA 22203

AUG 13 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WILK 79-13-PM
Petitioner	:	A.O. No. 30-00090-05001
	:	
v.	:	Potter Quarry and Mill
	:	
CUT SLATE, INC.,	:	
Respondent	:	

DECISION AND ORDER ON MOTION TO APPROVE SETTLEMENT

This matter was assigned to the presiding judge on May 19, 1979. A review of the record disclosed that on December 20, 1978, the operator filed an answer admitting the three violations charged but contending that in view of his prompt abatement of the hazards cited the penalties assessed should be forgiven and remitted. ^{1/} In 1976, the Board of Mine Operations Appeals held that the Mine Safety Act does not allow remittiturs, even for no-fault violations. R. M. Coal Company, 7 IBMA 64 (1976). Since the operator did not claim the penalties assessed were arbitrary or excessive except to the extent there was no provision for total remission and since there appeared to be no triable issue of fact, the parties were directed to confer and file a motion to approve settlement or appear at a prehearing conference in Arlington, Virginia on June 5 to discuss their differences.

When the operator refused to discuss settlement with counsel for the Secretary, reiterated his claim for remission, and requested the "matter be disposed of without requiring my attendance at a hearing" the presiding judge carefully reviewed the record and suggested that counsel for the Secretary again explain that abatement was no justification for dismissing a petition to assess penalties.

The presiding judge also took note of the fact that the operator objected to attending a prehearing settlement conference in Arlington, Virginia because of the time and expense involved. Since the presiding

^{1/} Respondent operates a small slate quarry near the town of Hampton, New York which is about 75 miles north of Albany-Troy, New York.

judge had attempted to give "due regard for the convenience and necessity of the parties" before issuing the notice of prehearing conference, the principal focus at this point was on the operator's expressed desire to have the matter resolved without even a pre-hearing.

When counsel advised that the operator insisted on total remission and when the operator also failed to appear at the prehearing conference, the presiding judge issued a decision and order of default assessing penalties in the amount originally proposed, namely \$170.00. 2/

Thereafter, the Commission acting on a complaint relayed by a congressional committee, directed the default assessment for review and invited briefs from the parties. Only the Solicitor responded with a brief that failed to set forth the facts revealed by the record. For example, the brief failed to note the operator's request that his claim for remission be disposed of on the basis of his answer and letter of August 8, 1978 without a hearing. The brief did suggest, however, that the matter be remanded to the presiding judge for a more detailed explanation of the factors considered in issuing the default assessment.

Instead, the Commission issued its decision of July 25, 1979 in which it erroneously assumed the only basis for the default assessment was the operator's failure to attend the prehearing conference of June 5, 1979. 3/ As I have indicated, and as the

2/ In view of the operator's claim of a travel imposition and the presiding judge's assumption it was made in good faith and not for the purpose of harrassment, the order of default was issued in the disjunctive. In other words, even if the operator had a valid excuse for not wanting to spend \$400.00 to argue his remission point in Arlington then he had no excuse for refusing to discuss settlement of the matter with Mr. Walsh (one of the Secretary's most able and competent lawyers) when the operator had admitted the violations charged, made no claim the penalties initially proposed were excessive and was resting his case solely on a claim of total remission that as a matter of law could not be considered.

3/ The Commission held that under section 5(a) of the APA, 5 U.S.C. § 554(b) and its rules of practice, the only factor relevant to a determination of the balance of convenience for a prehearing site is its distance from the situs of the operator's mine. Thus, the Commission held that "additional cost to the government" is not to be considered since considerations of "due process" and "appearances" of overreaching must be avoided at all costs. (Footnote 3 continued on page 3)

record clearly shows, that was not correct. The operator's failure to appear at the prehearing conference was only one of the two factors considered. The principal factor was the operator's failure

(Footnote 3 continued)

Until the Commission established this policy, the presiding judge believed that under the statute and the Commission's rules of practice he was required to "give due regard to the convenience and necessity of the parties" including the government agencies involved and "other relevant factors" including the comparative expense to the parties. Accordingly, he took official notice of the fact that to transport to and maintain the Secretary's counsel and the presiding judge in Rutland, Vermont, the hearing site nearest Hampton, New York, and return would cost the government agencies involved a minimum \$750.00, whereas the cost to the operator of sending one representative to discuss settlement in Arlington, Virginia would cost a minimum of \$400.00. The cost to the operator, of course, would actually be much less since it would be a business expense deductible from his income tax. Furthermore, in Arlington a Commission hearing room was available whereas in Rutland a hearing room had to be obtained from a state agency. Thus, when the presiding judge balanced the costs and convenience of the government agencies against that of respondent it appeared the balance of convenience favored holding the settlement conference in Arlington.

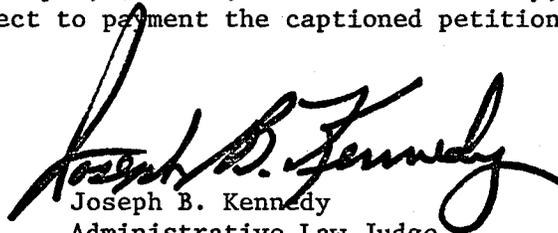
The only authority cited by the Commission for disregarding the plain language of the statute and its own rules was a case decided five years before passage of section 5(a) of the APA. Furthermore, the case involved the setting of a site for a protracted evidentiary hearing that involved the travel and maintenance of several witnesses not a single representative for a one day settlement conference. The cases that have interpreted section 5(a) since its passage in 1946 have uniformly held that "Due regard for the convenience and necessity of the parties cannot be divorced from the convenience of the agency." Burnham Trucking Co. v. United States, 216 F. Supp. 561, 564 (D. Mass. 1963) (3 Judge Court); Maremont v. F.T.C. 431 F. 2d 124, 129 (7th Cir. 1970). It is respectfully suggested that at its earliest opportunity the Commission reconsider its sweeping amendment of section 5(a) of the APA.

to advance a defense that required an evidentiary hearing, his admission of the three violations charged, and his failure to show or even claim that the penalties proposed were arbitrary or excessive, and his failure in the light of this to make a reasonable excuse for his refusal to discuss settlement with counsel for the Secretary. Contrary to the Commission's view, the operator was not penalized for asserting his right to contest the violations. He did not contest the violations only the Secretary's refusal to grant him a total remission, a type of relief not available under the Act with or without a hearing. 4/

Because of the views expressed by the Commission, after remand the matter was set for another prehearing, and, if necessary, evidentiary hearing in Rutland, Vermont. Shortly thereafter the operator agreed to pay the penalties assessed under the default order of June 5 and counsel for the Secretary filed a motion to approve settlement.

Based on my independent evaluation and de novo review, I find the penalties proposed, while on the low side, acceptable and in accord with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the penalty agreed upon, \$170.00, on or before Friday, August 24, 1979, and that subject to payment the captioned petition be DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

4/ Oversight committees and the Commission should resist the temptation to usurp the presiding judge's authority to regulate the course of adjudicatory proceedings, especially where they do not understand the details of the day-to-day happenings or the parties' litigating posture as reflected in the pleadings. See, Appalachian Power Co., 35 Ad. L. 2d 574, 578 (FPC 1974). The committees and the Commission are entitled to hold the judges accountable but they should do so on the basis of an informed understanding and not mere surmise. There is as strong a public interest in avoiding harrassment of the judges as the parties. Litigation brought merely to harrass is a wholly unredeemed burden and an affront to the administrative process.

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AUG 14 1979

CLIMAX MOLYBDENUM COMPANY,	:	Applications for Review
A Division of AMAX, Inc.,	:	
Applicant	:	Docket No. DENV 79-102-M
v.	:	Citation No. 333646
	:	
SECRETARY OF LABOR,	:	Docket No. DENV 79-103-M
MINE SAFETY AND HEALTH	:	Citation No. 333647
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. DENV 79-104-M
and	:	Citation No. 333648
	:	
OIL, CHEMICAL AND ATOMIC	:	Docket No. DENV 79-105-M
WORKERS' INTERNATIONAL UNION,	:	Citation No. 333649
LOCAL 2-24410,	:	
Respondent	:	Climax Mine

DECISION

Appearances: Hugh A. Burns, Esq., and Rosemary M. Collyer, Esq., Dawson, Nagel, Sherman & Howard, Denver, Colorado; W. Michael Hackett, Esq., Climax Molybdenum Company, for Applicant; Robert A. Cohen, Esq., and Edward C. Hugler, Esq., Office of the Solicitor, U. S. Department of Labor, for Respondent MSHA; David A. Jones Jr., Earl Dungan and Raphael Moure, Oil Chemical and Atomic Workers' International Union, Local No. 2-24410, for Respondent Union.

Before: Administrative Law Judge Michels

These proceedings are applications for review of citations brought by Climax Molybdenum Company, Applicant, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. Applicant contested the merits of the citations, each of which charge a violation of mandatory standard 30 CFR 57.5-5 in that the silica bearing dust level for the surveyed miners allegedly exceeded the allowable concentration and it also contested the reasonableness of the length of the abatement time fixed in the citations.

The matters were first scheduled for hearing for February 27, 1979, but the hearing date was continued at the request of the parties. After a number of prehearing conferences, some of which were by telephone, these matters finally were set for hearing on July 9, 1979, in Denver, Colorado.

On July 2, 1979, Respondent filed a motion to dismiss alleging (a) that MSHA determined, upon review of the discovery material, that it could not "sustain the particular violations alleged", (b) that Climax has indicated it will continue to work on dust control, and (c) that for these reasons MSHA will vacate the citations. In effect Respondent requested dismissal on the ground of mootness.

Applicant opposed this motion and requested a full hearing. The parties were given an appropriate schedule within which to file the legal memoranda or positions on the issue of dismissal. A full opportunity was granted to the parties including the Local Oil, Chemical and Atomic Workers' Union, to discuss their positions on this issue at a conference in Denver, Colorado, held July 9, 1979.

Thereafter, on July 10, 1979, a ruling was made from the bench granting MSHA's motion to dismiss. This decision, with a few grammatical corrections, is set forth below:

Decision from the Bench

ADMINISTRATIVE LAW JUDGE MICHELS: The hearing will come to order.

As I stated before we went on the record, this is a continuation of the prehearing conference that began yesterday, at which time the parties presented their positions on the motion to dismiss which has been submitted by MSHA. And as I announced then, I would attempt to rule on that today. So I'll proceed to do that. This will be a ruling from the bench, and I think it will be self-explanatory. So this is the ruling on Respondent's motion to dismiss.

On July 2, 1979, MSHA moved to dismiss these proceedings on the following grounds: (a) based on its prehearing review, Counsel determined that it "cannot sustain the particular violations alleged;" (b) that Climax has shown indications that it will continue to work on the control of the dust at Climax Mine; and (c) that the citations are to be vacated. And I should note that subsequent filing has indicated that the notices are in fact now vacated.

Respondent Local No. 2-24410 of the Oil, Chemical and Atomic Workers Union has not filed a written response to

this motion, but its representatives have stated on the record that they concur in the motion to dismiss. And so they have been in effect heard on the motion.

On July 9, 1979, the Applicant herein filed a memorandum in opposition to MSHA's motion to dismiss. It has argued (a) that the presiding Judge has jurisdiction under the Act to direct the relief which it seeks regarding the interpretation and application of the dust control standard; (b) the controversy is not rendered moot by MSHA's vacation of the citations; and (c) that the case is not moot because justiciable issues have survived the vacation of the citation.

This issue, that is of the request for dismissal, was thoroughly argued, as I previously stated, during the pre-hearing conference yesterday. The parties are prepared for hearing pursuant to my instructions. However, it is my view, as I indicated at the conference yesterday, that the matter of the vacating of the citations and the request for dismissal is an issue which properly should be decided at this time before going to hearing. I will, therefore, proceed to make my decision. This is based upon the submissions of the parties, the arguments made on the record, and upon a review of the cases which have been submitted and submitted with the legal briefs.

I will enter a formal written order hereafter affirming this decision from the bench. And I would reserve the right, however, to make necessary corrections in such formal order.

Now, at this time I would ask that the parties bear with me for a rather lengthy statement that I have in which I want to elaborate on the reasons for my decision. And that decision is that I will grant the motion to dismiss.

I have studied the cases cited by the Applicant, and I will say quite briefly, because of the shortness of the time, that I am not convinced that these establish a clear basis for the continuing litigation in these proceedings where the charging documents have been vacated by the Government.

The Applicant as I understand it relies in part on the rule announced in the Southern Pacific Terminal Company v. Interstate Commerce Commission, 219 U.S. 498 (1910), in which the Court held to the effect that short term orders capable of repetition yet evading review are not dismissible on the grounds of mootness. It is my view that these

proceedings do not present an issue as precisely defined as it was in the Southern case; and further, that there is no evidence these citations are continuing or repetitive.

In Eastern Associated Coal Corporation, also cited by the Applicant, the Board permitted review of a vacated imminent danger order because there was a major issue left unresolved; that is, the continued issuance of such orders in circumstances where imminent danger did not exist. The operator in such instance, as I view it at least, was directly and immediately affected by future orders, because they would result in a closure of its mine.

Now, I recognize that an operator may also be affected by a citation, so I don't make a big point of that distinction because the Commission in its Energy Fuels decision, Denver 78-410, May 1, 1979, did point out the effect citations could have and did extend the right to a review of citations in appropriate circumstances. However, I believe it is clear that an operator nevertheless would not be affected so directly.

Moreover, at least it seems to me, in Eastern the problem was one of a recurring and continuing nature and like that in Southern, all the time evading review. It was a clear and precise issue under a particular provision of law as to which review might otherwise be denied to the operator. Such considerations do not in my view exist in these proceedings. There is no single issue of a clear and precise nature. The issues in fact as phrased by the operator are of a wide and varied nature, covering detailed questions which may arise in a litigated proceeding.

There is no evidence that issuance of the citations is a matter of repetition under circumstances which the operator is continually denied a review. It is possible that similar issues may arise in a future case or in future cases of a related nature. But there is no reason to believe on this record that in such a case the operator would not receive a full review of the merits.

Accordingly, I believe that such cases cited by the Applicant as supporting its request for a full hearing are distinguishable and are not sound precedent for the action it seeks. The Applicant also relies on a series of cases for the asserted proposition that "a case is not rendered moot where there is a need for a determination of the question involved to serve as a guide to the public agency which may" -- parts at this point are omitted -- "act again in the same manner." There is no showing here of the

issuance of citations in prior situations and their vacation which would suggest a continuing practice or the need to determine a question for guidance.

This is not to say that there will be no similar citations in the future. But if so, that future occasion would be the time to consider the possibility of the need for a decision to provide the guidance. Counsel for MSHA in his argument has clearly suggested, at least it seems to me, that some mistakes have been made. As a result, he has informed the Court that procedures have been modified and a policy directive is to be issued shortly. Thus, there is every reason to believe that the mistakes or errors of the past, if any, are not to be repeated.

Furthermore, these cases, that is the pending cases, are not the type in which it can be said with confidence that the issues in subsequent cases will be the same. In all probability they will be different. The testing will no doubt take place on different miners in different places and under different circumstances. While the general considerations may be the same, it seems clear that the facts will differ in relevant and important detail. Thus, a decision on the merits in these proceedings would not necessarily be dispositive of charges in other subsequent cases.

My principal difficulty, however, with the request to hold a hearing in spite of the vacation of the citations is that such a hearing would probably not accomplish anything that cannot now be accomplished or decided on the record as it stands. The Applicant analogizes this situation to that of a plaintiff-defendant in a civil case under the Federal Rules. Applicant has made no suggestion, however, that short of a summary judgment a plaintiff in a civil suit would gain more than Applicant will receive here; namely, a dismissal of the action.

The question of what is to be gained by a full trial is a very real one. As I view this, it is a foregone conclusion that MSHA will not succeed because it has declared it cannot prove its case. Thus, any hearing would be wholly one-sided in which the Court would receive a more detailed showing of the Applicant's position and further proof that it is entitled to dismissal. But if it is entitled to dismissal [after a hearing] and a decision to that effect, it is entitled to that on the record as it now exists. There is no need for a trial to prove what is already known; that is, that MSHA cannot sustain its burden of proof in these cases.

I realize that Applicant is seeking something more; namely, an affirmative ruling on certain statements which it has presented as the "issues of fact and law." I do not propose to give such an affirmative ruling on these issues. That would be a far-reaching departure from the relatively precise and established issues presented in cases such as Southern and the Board's Eastern Associated matter. It would in my view be tantamount to an advisory opinion on matters, some of which are purely procedural issues. These should not be decided other than in a strict adversary context in my view.

Applicant finds fault with MSHA and distinguishes these proceedings from Reliable Coal in part because MSHA here is making no "concession of error." This is not exactly true. MSHA in this conference has in effect, if not explicitly, conceded that the citations were erroneously issued. The Applicant, however, wants a concession of error along the precise lines of the issues framed by itself. That is unacceptable as I view the matter.

MSHA disputes the issues as phrased by the Applicant, and there is no clear certainty that all of such statement of issues would necessarily be the issues in a fully litigated proceeding.

I believe the Applicant, because of the vacation of the citations, has obtained in these cases all the relief it can reasonably expect to obtain. It is true, of course, that the vacation of the citations unfortunately leaves undecided some issues which may well have been decided in a litigated case and would then have been available for precedent and guidance. Some of these issues, however, such as whether MSHA has the burden of proving dust concentrations in excess of the TLV and the feasibility and practicability of any dust control measure not in use and whether MSHA has the burden of proving any feasibility of any dust control measures at the Climax Mine and others, are apparently procedural in nature.

It would not be appropriate to address these issues outside of the contested proceeding. A ruling on such issues in the posture of this proceeding would be akin to dicta and be of little use in the final resolution in some possible future case.

I cannot conclude this decision without a summary of the efforts which led to the present posture of the proceedings. The issues presented originated nearly nine months ago. Climax, according to its statement, has undergone great expense, time, effort, and money in order to

properly prepare for an administrative resolution of the issues. It alleges that, up until a week ago, MSHA has consistently refused to vacate the citations. The Applicant asserts that this action raises a specter that will shadow the entire enforcement procedures under the Act and that to condone the agency's action is to grant it a license to effect its desires over the operator though it has no real right to do so.

I don't view the action of MSHA as being oppressive as Applicant has claimed. If I did that, some appropriate remedy would I think be in order. Nevertheless, the conduct of MSHA as shown on this record cannot be entirely condoned. ^{1/} It seems unusual, to say the least, that MSHA could not have determined much earlier in the investigation that it had no case. Yet it continued its investigation and discovery at what has been a considerable cost to the Applicant in money and time. Moreover, there is at least a suspicion that MSHA is retreating now only to appear another day when it has better proof.

Further, counsel for MSHA concedes that it has been a learning experience for MSHA though, of course, this has been in part at the operator's expense. Whether or not such tactics are permissible, the end result is to cause the operator a considerable amount of hassle and uncertainty. I understand, of course, that there are areas of enforcement here that are new to MSHA and thus, as was argued, some mistakes are to be expected. That, of course, is of little solace to the operator.

Counsel for MSHA has argued in effect, at least as I understand it, that the operator is not really deserving of too much sympathy here, that such actions that have occurred are normal and expected in the course of administrative enforcement. I cannot subscribe to that view. The regulations which all mines are subjected to call for considerable effort on the part of the operators. And in applying these regulations they should be treated as fairly and equitably as it is possible to do.

^{1/} This reference is not intended to be critical of particular counsel.

Also, no criticism is intended of MSHA's action in bringing these proceedings. Clearly, the Secretary must at times proceed even in doubtful areas if new technological breakthroughs in safety are to be achieved. The question is whether such experimentation should be all at the expense of the industry and, in particular, one member of the industry.

In this instance, a mistake or error apparently was made in issuing these citations, and the operator has been subjected, at least by its own account, to a great deal of expense and effort. It seems to me, at least in certain narrowly defined circumstances such as this where the operator has been so improperly 2/ cited and goes to a large expense to defend itself, that it is entitled to some kind of setoff. This will be in accordance with the Board rulings which have permitted setoffs where large expenses have resulted from mine closures. Applicant here is actually in a better position to claim a setoff since it has not been found to be in violation of the Act. 3/

I'm, of course, reasonably certain that MSHA will resist the implementation of any such setoff on the ground that it will interfere with the enforcement of the Act. I don't see that enforcement would be affected. It is a matter in my mind of a simple equity and fairness. Since no penalty is involved in these proceedings, I am in no position, of course, to implement any setoff. However, as part of this decision, I hereby recommend to the Commission, in connection with possible future penalties which may be incurred by this company in other cases, that it consider in the interest of fairness and in light of the particular circumstances of these proceedings a setoff to at least in part compensate the operator for its costs in this litigation.

I make this recommendation with the condition that within ten days the operator requests such a setoff and submit a statement of its direct costs for the record. MSHA will have ten days thereafter to comment on this statement submitted by the operator if it chooses to do so.

This concludes my decision on the motion to dismiss. Accordingly, the motion to dismiss is hereby granted. As I view and understand the situation since I have granted the motion to dismiss, that would mean that there is nothing further to be resolved. And these proceedings are dismissed, and there is no further need for action.

2/ The word "improperly" was used here in the sense of its meaning of "not appropriate" or "incorrect."

3/ The reference to Board cases was intended only to suggest that the concept of a "set off" has been sanctioned in the field of mine health and safety. It is obvious that the Board cases are not exact precedents for the action here recommended, except for the equitable principle involved. North American Coal Company 3 IBMA 93 (1974); Zeigler Coal Company 3 IBMA 366 (1974). It can hardly be contended, however, that the Commission must always follow these cases. It is clearly free to make its own determination.

Subsequent to this decision, the following additional documents were received: Applicant's statement of direct costs for set off showing costs totalling \$190,495.95, and its request that these costs be set off against future penalties; the Secretary of Labor's memorandum opposing the setoff claim and Applicant's supplement to its statement of costs for setoff. The Applicant's submissions have complied with the conditions set forth in the decision for a recommendation for a setoff to the Commission.

The decision from the bench granting the motion to dismiss the applications for review is hereby affirmed and these applications for review are dismissed.

Further, the preconditions having been met, I affirm my decision to recommend to the Commission, that in connection with possible future penalties which may be incurred by Applicant in other cases, the Commission consider, in the interest of fairness and in light of the particular circumstances of these proceedings, granting the Applicant a setoff to at least in part compensate it for its costs in these proceedings. I hereby so recommend.



Franklin P. Michels
Administrative Law Judge

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

AUG 1 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 79-35
Petitioner	:	A/O No. 46-01433-03024
v.	:	
	:	Loveridge Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

ORDER TO PAY

The Solicitor has filed a motion to approve a settlement in the above-captioned proceeding.

In his motion, the Solicitor advises the following:

1. The attorney for the Secretary and the respondent's attorney Karl T. Skrypak have discussed the alleged violation 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 \$114.00. The original assessment for the alleged violation was \$160.00.

3. A reduction from the original assessment is warranted because this violation was committed by an independent contractor, West Virginia Electric Company, performing operations at Respondent's mine. This citation was issued when an inspector observed an employee of this independent contractor not wearing safety shoes. Discussions with the Respondent's representative indicate that it maintained no direct control over the daily operations of this contractor or the conduct of its employees. Therefore, a reduction in negligence points is warranted, resulting in a reduction of the assessed penalty of \$160.00 to \$114.00.

This reduction more accurately reflects the circumstances surrounding this violation and the application of the six statutory penalty assessment criteria thereto and should therefore be approved.

In Secretary of Labor, Mine Safety and Health Administration v. Republic Steel Corporation (79-4-4) dated April 11, 1979, the Federal Mine Safety and Health Review Commission held that under the 1969 Act, the Secretary of Labor could issue citations against the owner of a coal mine for violations committed by independent contractors. Under the present Act, an operator is specifically defined to include an independent contractor as well as the operator. However, I believe the fact that the independent contractor now is specifically defined as an operator does not limit the Secretary's discretion with respect to whom to cite. Chief Judge Broderick reached the same conclusion in Secretary of Labor, Mine Safety and Health Administration v. Old Ben Coal Company (VINC 79-119-P) dated April 27, 1979. Accordingly, the citation against the operator here is proper. The Commission also held in Republic that where an enforcement action is undertaken against the operator, the independent contractor may also be proceeded against in a separate or consolidated proceeding. I believe the amount of the penalty sought against the operator properly can take into account the circumstances of the violation. Chief Judge Broderick also reached the same conclusion in the Old Ben case cited above. Accordingly, I accept the Solicitor's representations regarding negligence of the operator. I would state however, as I have on prior occasions, that enforcement of the Act would be better served if the Secretary proceeded against both the operator and the independent contractor.

ORDER

The operator is ORDERED to pay \$114 within 30 days from the date of this decision.



Paul Merlin
Assistant Chief Administrative Law Judge

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

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PIKE 78-410-P
Applicant	:	A.O. No. 15-02117-02036V
v.	:	
	:	Republic Mine
REPUBLIC STEEL CORPORATION,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

This proceeding involves seven charges of violations of mandatory safety and health standards initially assessed by MSHA for a total of \$44,500.

Order No. 6-0263 alleges one violation of 30 CFR 75.200 (failure to follow approved roof-control plan), initially assessed by MSHA for \$10,000. The parties have agreed to a reduction of the penalty to \$3,000.

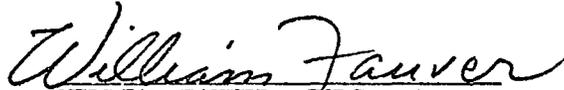
Order No. 6-0264 alleges one violation of 30 CFR 75.400 (failure to prevent accumulations of coal dust), initially assessed by MSHA for \$7,500. The parties have agreed to a reduction of the penalty to \$3,000.

The remaining five orders each allege one violation of 30 CFR 75.604 (failure to properly splice electrical cables). Each alleged violation of 30 CFR 75.604 was initially assessed by MSHA for \$5,500.

The parties have agreed to a reduction of the assessed penalties as follows: For Order No. 6-0265, the assessed penalty is reduced to \$2,600; for Order No. 6-0267, the assessed penalty is reduced to \$2,400; for Order No. 6-0268, the assessed penalty is reduced to \$2,500; for Order No. 6-0269, the assessed penalty is reduced to \$2,500; and for Order No. 6-0270, the assessed penalty is reduced to \$2,500.

I find the parties' motion for approval of settlement is consistent with the six statutory criteria set forth in section 110(i) of the Act and is supported by the record. On the basis thereof, the motion for approval of settlement is GRANTED.

WHEREFORE IT IS ORDERED that the Respondent shall pay the agreed civil penalties (\$18,500) within 40 days, and upon such payment, the proceeding is DISMISSED


WILLIAM FAUVER, JUDGE

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

AUG 17 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-218-P
Petitioner : A.C. No. 42-00082-03003
v. :
: Beehive Mine
AMERICAN COAL COMPANY, :
Respondent :

DECISION

Appearances: Thomas E. Korson, Esq., James Abrams, Esq., Office
of the Solicitor, U.S. Department of Labor, for
Petitioner;
Kent Winterholler, Esq., Patrick Garver, Esq.,
Parsons, Behle and Latimer, for Respondent.

Before: Administrative Law Judge-Michels

This matter is before me for decision upon the petition of
the Mine Safety and Health Administration for assessment of civil
penalty filed against the Respondent, American Coal Company, pursuant
to section 110(a) of the Federal Mine Safety and Health Act
of 1977, 30 U.S.C. § 820(a) (the Act).

A hearing was held in this matter on May 17, 1979, in Price,
Utah. Petitioner and Respondent appeared through counsel. The
parties have filed posthearing briefs and proposed findings
and conclusions. 1/ Such of the proposed findings not adopted
or specifically rejected herein are rejected as immaterial or
not supported by fact.

1/ Counsel for both parties have noted certain errors in the hearing
transcript and these have been corrected in the following manner:

- (a) On line 13 of page 3, the words "to eliminate" have been
stricken and the words "in limine" substituted;
- (b) On line 7 of page 16, the word "Respondent" has been stricken
and the words "of Respondent" substituted;
- (c) On lines 8 and 9 of page 34, the word "arching" has been
stricken and the word "arcing" substituted;
- (d) The same correction as (c) has been made on line 12 of
page 35;
- (e) On line 25 of page 77, the words "finger into the box to ener-
gize the terminal is there some" have been stricken and the words
"finger into the box to the energized terminal is there some"
substituted;
- (f) On line 19 of page 117, the words "at twenty-eight" have been
stricken and the words "Between eight" substituted.

I.

Findings and conclusions in this part are applicable to all the alleged violations.

(a) History of prior violations: The parties stipulated to the receipt in evidence of a printout showing prior violations (P-1). It was agreed that only the violations issued prior to the citations charged in this case would be considered (Tr. 22-23). The beginning date of the printout is July 27, 1976, and the ending date is July 27, 1978. This document shows a significant prior history of violations and I so find.

(b) Appropriateness of the penalty to the size of the operator: It was stipulated that the annual tonnage of the Beehive Mine is 498,042 tons. I find it to be medium to large in size.

(c) Effect on the operator's ability to continue in business: I find that the fines, if any, assessed will not affect the operator's ability to continue.

(d) Good faith: I find, with no evidence to the contrary, that the operator achieved rapid compliance in good faith.

II.

Findings and conclusions as to each of the separate violations charged are set forth below.

(1) Citation No. 245458, July 11, 1978

The inspector, Donald B. Hanna, on July 11, 1978, issued a citation to Respondent reading:

The main mine pump starter box, located in the No. 24 crosscut, between the intake and the 1st right entries was not properly maintained in that about 1-1/2 opening was present on the side of the 440 volt energized switch box allowing water to enter the box. Also, about 1 inch opening was present in the submersible pump box located about 20 feet inby the No. 24 crosscut on the intake entry.

This condition was charged to be a violation of 30 CFR 75.512. 2/ Later, on April 30, 1979, the citation was modified "to

2/ This mandatory standard reads in pertinent part:

"All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. "

show the correct section No. 75.520." Petitioner filed no motion to amend as to this charge and Respondent's motion in limine was granted so far as it involved the new charge of a violation of 30 CFR 75.520. The case therefor was tried as one charging only a violation of 30 CFR 75.512 (Tr. 20-21).

The evidence as to the alleged condition is not in serious dispute. The inspector testified he found "knockout" holes in two electrical boxes, and that in one such box, water was running down the side and into the disconnect switch (Tr. 32-33; R2, R3). Respondent's witnesses did not disagree with the inspector's description. The abatement consisted of placing folded tape in the hole and applying a clamp (Tr. 77).

The inspector claimed that the openings created a hazard by causing corrosion which could result in arcing, burning and a possibility of electrical shock (Tr. 34). The Respondent has generally denied the assertions that its electrical boxes were unsafe. Its safety director, Dixon Peacock, testified that all electrical parts are examined weekly and any violations would be recorded and, by inference, corrected (Tr. 76).

The regulation involved in this charge is general in nature. It requires in pertinent part that electrical equipment be "properly maintained by a qualified person to assure safe operating conditions." Although the regulation does not specify, the inspector asserts that proper maintenance includes the closing of holes in weather- or water-resistant boxes. The holes in this instance were caused by the removal of the knockouts. Knockouts are indentations in an electrical box which can be removed or knocked out for the purpose of inserting a cable or metal conduit (Tr. 43). If a cable is removed or if a hole once made is not used, an opening will remain in the box.

The question here is whether proper maintenance requires the closing of such openings in electrical boxes. The only evidence on the question is the testimony of the inspector and most of this is focused on the alleged hazard. The inspector asserted, based on his personal experience as an electrician, a weather-resistant box if not maintained will allow components to deteriorate causing arcing, burning and explosions (Tr. 34). He also contended that proper maintenance requires that one maintain an electrical component as good or better than when it was originally manufactured (Tr. 64). Neither Mr. Dixon Peacock, safety director, nor Mr. Stan Jensen, chief electrician for the operator, testified one way or the other whether proper maintenance requires the closing of open knockout holes in electrical boxes. Mr. Dixon appeared to admit the existence of the holes as charged, but asserted in effect that because of their location they did not cause a hazard. He further testified that he was not aware of any formal regulations nor had he received any written direction from MSHA on the proper maintenance of such boxes (Tr. 77). Mr. Jensen testified that the breaker arm on the

transformer would kick out if there was a short in the box (Tr. 85). He also testified that MSHA did not tell him the practice of leaving holes in boxes was either acceptable or unacceptable (Tr. 86-87).

The record contains no testimony or other evidence about the general practice in the trade with respect to closing the openings in electrical boxes. No witness other than the inspector expressed a view on that subject. Because there is no evidence other than the inspector's testimony, I accept his statement that proper maintenance requires the closing of a hole in an electrical box. As indicated above, the evidence on this citation generally concerns whether the condition was a hazard or not. That evidence relates to the gravity of a violation, if one is found, but it has no particular bearing on the fact of the violation.

I find therefore that the failure to close the openings in the electrical boxes was a violation by the operator of 30 CFR 75.512.

Findings on the specific criteria of gravity and negligence follow:

Gravity: The inspector did not look into the boxes. He speculated that arcing, fire and shock hazards were possible, but he did not know about the conditions inside the box. Mr. Peacock, on the other hand, testified that weekly examinations were made and in effect that any potential hazard would be found. Mr. Peacock had opened and examined the box and had determined that contact with wires through the holes would have been very difficult. It appears that the potential hazard in the particular circumstances was relatively remote especially since the transformer would kick out and deenergize the box instantaneously in the case of any short (Tr. 85). In the circumstances, I find that the violation was of moderate seriousness.

Negligence: The inspector testified that he had informed the operator's safety director on prior occasions to close these openings (Tr. 45, 55). He admitted, however, that this was probably a subject raised only generally in talking about boxes and maintenance problems. Mr. Peacock could not remember whether he had received any such warning. There is no clear evidence that electricians would routinely close such holes as a matter of normal maintenance. Under the circumstances, I find a small degree of ordinary negligence.

Assessment: Based on all the evidence, I find that the proper penalty should be \$25 for each improperly maintained electrical box or \$50 total for this violation.

(2) Citation No. 246521, July 11, 1978

This citation reads: "Air currents used to ventilate the air compressor installed at 29 crosscut between 1st right and return

entries were not coured directly into the return." A violation of 30 CFR 75.1103 was charged. Prior to the hearing, on May 1, 1979, Petitioner moved to amend the petition to charge a violation of section 75.1105. This motion was granted by order of the court of May 11, 1979, subject, however, to reconsideration at the hearing upon a proper showing by the Respondent. In the meantime, Respondent filed a motion in limine requesting the Judge to enter an order prohibiting Petitioner from introducing any evidence that seeks to establish a violation of any standard other than that cited in Citation No. 246521, that is, 30 CFR 75.1103 and to specifically prohibit evidence of an alleged violation of 30 CFR 75.1105.

At the hearing, arguments were made on the motion in limine and this motion was denied on the record (Tr, 95-96). Evidence was received on behalf of the Petitioner on the merits of the charge. Respondent presented no evidence at the hearing. The Respondent requested at the hearing that the Judge reconsider the issue of the amendment of the pleading and has filed a posthearing brief addressed to the subject.

In this brief, Respondent argues first that the Interim Rules do not allow the Judge to amend the citation immediately prior to the hearing. Although the rules do not specifically provide for the amendment of citations, it is clear that this authority is inferred in several of the specific powers granted to the Judge.

Secondly, Respondent argues that the amendment should not be allowed because it deprives it of proper notice of the violation charged. Respondent was advised of the intended change in the mandatory standard to be charged by Petitioner's response to a prehearing order filed May 1, 1979, approximately 2 weeks before the hearing. After allowing time for an answer, the motion was granted on May 11, 1979. Respondent thus had considerable advance notice that the hearing would proceed on the basis of a charge of 30 CFR 75.1105 rather than 30 CFR 75.1103.

Respondent has made no argument either at the hearing or in its posthearing brief that an alleged lack of notice deprived it of the opportunity to properly prepare for the hearing. There is no suggestion that it was unable to obtain witnesses or other evidence to defend itself against the charge of 30 CFR 75.1105. The original citation, apparently as an inadvertent error, listed 75.1103, whereas it is clear that the condition as narrated in the citation has nothing to do with that particular regulation. It is equally evident that the proper citation based on the narrated condition is 75.1105.

The case law does not support Respondent's contention that it failed to receive proper notice in the circumstances of this case. In one of its early decisions, the Board of Mine Operations Appeals held that it found no violation of due process where conditions or

practices described in the order of withdrawal do not specify a particular section of the act or mandatory standard violated. Eastern Associated Coal Corporation, 1 IBMA 233, 235 (1972). See also, Old Ben Coal Company 4 IBMA, 198, 206-210 (1975). In National Realty and Construction Co. Inc. v. OSHRC, 489 F.2d 1257, 1264 (D.C. Cir. 1973), the court held "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." (Footnotes omitted.) In L. G. Balfour Co. v. FTC, 442 F.2d 1 (7th Cir. 1971), the court held "[t]he complaint is adequate if the one proceeded against be reasonably appraised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was misled." In that case, the court held there was no claim that the petitioners were misled by the complaint nor evidence that they could have been so misled.

In summary, by apparent inadvertence, the Respondent was not immediately advised when receiving the citation of the correct number of the mandatory standard it was charged with violating, although the condition alleged is fully described in the narrative portion of the citation. The correct number was supplied several weeks before the trial and in time sufficient for the Respondent to prepare its defense. No representations have been made that such length of time was inadequate or that the Respondent was ever misled or deceived as to the exact nature or the charge. The charge, it is noted, was sufficiently clear to permit an abatement of the condition. Nor has Respondent made any showing of prejudice.

In the circumstances upon reconsideration, I affirm my decision to permit amendment of the citation.

The evidence presented on this citation, as previously noted, consists entirely of the testimony of the inspector, Donald B. Hanna. He testified that there was a violation because the air current in the mine intake air courses is directed to the working sections inside the mine, that it was passing over the energized compressor and not into the return and finally that this intake air is the main escapeway for the mine (Tr. 97). No evidence was submitted by the Respondent. Since this condition is prohibited by the regulation cited, it is found that Respondent was in violation of 30 CFR 75.1105.

The violation was serious because in case of a fire, the smoke gases, carbon monoxide, carbon dioxide and so on, passing over the energized compressor station could pass down the main escapeway into the intake air course and affect the workmen in the mine (Tr. 97). This was ordinary negligence because it should have been known to the operator that only one opening had been provided above this stopping where the compressor was permanently installed (Tr. 97).

Considering all the statutory criteria, I hereby assess the operator a penalty of \$150 for this violation.

(3) Citation No. 246523, July 12, 1978

In this citation, the inspector charged a violation of mandatory standard 30 CFR 75.326(a) for the following condition: "The air currents in the operating belt entry, 9th east working section, were used to ventilate the active working places."

The Beehive Mine having been opened in 1950, the portion of 30 CFR 75.326 relevant to the condition is as follows:

Whenever an authorized representative of the Secretary finds, in the case of any kind of coal mine opened on or prior to March 30, 1970, which has been developed with more than two entries, that the conditions in the entries, other than the belt haulage entries, are such as to permit adequately the coursing of intake or return air through such entries, (a) the belt haulage entries shall not be used to ventilate, unless such entries are necessary to ventilate, active working places * * *.

The Respondent argues (1) that the citation issued is fatally incomplete and therefore must be vacated, (2) that the standard allegedly violated is not applicable to the Beehive Mine, and (3) assuming, arguendo, the applicability of 30 CFR 75.326, no violation has been proven. The first argument is rejected.

Respondent's second argument specifically is that a finding by the Secretary must be made relative to the coursing of the air and the lack of a need for air off the belt haulage entry and presented in writing to the operator before a citation may issue under the second sentence in 75.326. Other administrative law judges have held to the effect that a finding by an inspector as to the adequacy of entries is a prerequisite for the issuance of a citation for an alleged violation. Knisley Coal Company, Docket Nos. PITT 76-66-P, etc. (October 22, 1974), by Judge Moore and Rushton Mining Company, Docket Nos. PITT 73-271-P, etc. (January 31, 1975), by Judge Cook. It is unnecessary to decide this issue in this case because of my finding below that no showing has been made sufficient to establish the existence of the alleged condition.

As noted above, Respondent argues that, assuming, arguendo, the applicability of 30 CFR 75.326, no violation has been proven. It contends first that there has been no showing of the use of air off the belt haulageway and that even if there was some movement of air off the belt it would exit through doors prior to reaching the working face.

MSHA's evidence on this point consists solely of the testimony of the inspector and his written statement which is identified as P-4. This evidence is insufficient in my view to establish that air was moving off the belt haulageway, at least in any quantity which would be deemed significant. The inspector could not get a valid reading of the movement of the air on his anemometer (Tr. 99-100). While he made a smoke tube test after the check curtain was installed, he conceded that there was no way that one could get an accurate measurement of how much air was being allowed into the section (Tr. 101). When the inspector was asked if he could feel the air moving at any time while investigating the condition he answered:

Just by sense. The dust in the air and by, it was so slight it would be hard to say by your actual feeling. You would probably imagine it because of the way the dust was traveling. It is possible if we detect the movement of the air all the time if there is high enough velocity you can certainly detect it (Tr. 101).

In my view, this is insufficient evidence to prove that the belt haulage entry was being used to ventilate. Even if the showing were sufficient to establish a slight movement of air, there is no further proof that it in fact reached the working face. Other evidence suggests that any small amount of air from the belt haulage entry, and it appears there will be always some, would be sucked into the return before reaching the working face (Tr. 116-117, 122, 128). Furthermore, the evidence establishes that the working section was adequately ventilated with 34,000 cubic feet per minute.

This case is similar to that decided by Administrative Law Judge Sweeney in D. R. Campbell & Son, Inc., BARB 72-156-P (November 27, 1973), in which he also held that the evidence was not enough to to prove a "use" of belt entry air within the context of section 75.326.

Accordingly, Citation No. 246523 is vacated and the petition dismissed as to this charge for failure of proof.

(4) Citation No. 246524, July 12, 1978

In this citation, the inspector charged a violation of mandatory standard 30 CFR 75.1704 and he described the condition or practice as follows: "Only one escapeway, (return air course) was properly marked from the 9th east working section out to the main drift, a distance of about 1,000 feet."

Standard 75.1704 provides for appropriate escapeways and that these "shall be maintained in safe condition and properly marked."

Respondent argues as to this citation that insufficient notice of the violation has been given to the company as to the degree and character of the marking required and by the lack of specificity in the citation. Specifically, it contends that the standard is void for vagueness and that the notice and the citation are fatally incomplete. Respondent also takes the position that the evidence shows the intake escapeway in the 9th East section was properly marked.

I reject the contention that insufficient notice has been given to the operator. Respondent's argument on vagueness is that there are no standards as to what constitutes proper marking and that because of the allegedly vague nature of the requirement, MSHA should have promulgated regulations or other written directions. I do not believe that the regulation is of such a nature that it would necessarily require additional guidelines. The escapeways clearly have to be marked. The only issue that might arise is whether a particular marking is proper. In some instances that may present a difficult question but, in this instance, the inspector testified that there were no markings whatsoever.

Respondent's second argument as to sufficiency of notice is that the citation was fatally incomplete because it allegedly does not describe at all the condition in question or even the escapeway in question. It is true that the citation on its face does not exactly describe the condition or the place but, in light of the abatement and also the testimony received at the hearing, it is apparent that the Respondent knew exactly the condition or practice with which it was charged.

On the issue of whether the intake escapeway in the 9th East section was in fact marked, there is contradictory evidence. The inspector accepted, for the purposes of abatement, the placement of reflector tape along the escapeway and so at least for the purposes of this proceeding such a marking will be considered a proper making.

The evidence received on the question of the presence of markings consists mainly of the testimony of the inspector, Mr. Hanna, and Respondent's witnesses, Dixon Peacock, safety director for American Coal and Stan Jensen, maintenance superintendent for the company. The inspector testified that the intake escapeway in the 9th East section was not properly marked because there was no indication that it was an escapeway and it was not marked as an escapeway (Tr. 136-137). Mr. Peacock testified that there is a sign at the junction of the 9th East section which is a reflective and states, "intake escapeway, this way out." He also claimed that the escapeway was marked because, inby to the section, every permanent stopping is identified by large numbers (Tr. 149). Mr. Peacock finally asserted that there was reflective tape and an identifying tag starting at the junction and proceeding inby to the section (Tr. 150). These were located, it was claimed, at stations where rock dust samples were taken (Tr. 158).

The inspector, in rebuttal, claimed that he had not taken rock dust samples in the 9th East section, but rather, had taken them in the 8th West section (Tr. 172). He testified that he observed no reflector tape of any kind on the 9th East section (Tr. 173). He also asserted that he was not aware of an escapeway sign at the junction and that he saw it for the first time the next day after the citation when Mr. Peacock pointed it out to him. He testified that it was pointing up into the section instead of out (Tr. 173-174).

It is not clear that the sign is particularly relevant to the charge contained in the citation. The inspector appeared to be concerned with the lack of markings along the escapeway and markings such as a reflector tape would have been satisfactory to him. He accepted the placement of reflector tape as an abatement measure and no mention was made of a sign at the junction at the time of abatement. The inspector did not testify whether the reflective tape placed at the rock dust stations would be sufficient markings. He testified only to the effect that there were no reflective tape markings. Finally, Mr. Peacock in further testimony referred to his notes which he asserted indicated the location of dust samples and that these show dust samples taken specifically in the 9th East section.

The testimony of the inspector and Mr. Peacock is virtually irreconcilable on the question that whether or not the dust sample reflector tapes were present. Mr. Hanna testified that he did not observe any tapes, but it may be that he was not particularly looking for such dust sampling tapes and thus may have failed to notice them. On the other hand, Mr. Peacock appeared to have contemporary information in the form of his own notes that samples were taken specifically in the intake entry in the 9th East section which would mean tapes were present. With the issue as close as this and in the circumstances mentioned, I will accept Mr. Peacock's testimony. This is not intended to reflect in any way upon the veracity of Mr. Hanna.

Accordingly, I find that the charge of a violation of 30 CFR 75.1704 has not been proved. Citation No. 246524 is vacated and the petition dismissed as to this charge.

ORDER

It is ORDERED that Respondent, American Coal Company, pay the penalties assessed herein in the sum of \$200 within 30 days of the date of service upon it of this decision.

Franklin P. Michels

Franklin P. Michels
Administrative Law Judge

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

AUG 27 1978

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. HOPE 78-644-P
Petitioner	:	A/O No. 46-05186-02009 V
v.	:	
	:	Docket No. HOPE 78-645-P
SWOPE COAL COMPANY,	:	A/O No. 46-05186-02010 V
Respondent	:	
	:	Docket No. HOPE 78-646-P
	:	A/O No. 46-05186-02011 V
	:	
	:	Docket No. HOPE 78-664-P
	:	A/O No. 46-05186-02012 S
	:	
	:	No. 1 Mine

DECISION

Appearances: David Barbour, Esq., Office of the Solicitor, MSHA, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Charles Tutwiler, Esq., Welch, West Virginia, for Respondent.

Before: Forrest E. Stewart, Administrative Law Judge

FACTUAL AND PROCEDURAL BACKGROUND

The above-captioned cases are civil penalty proceedings brought pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter, the Act), 30 U.S.C. § 819 (1970).

On July 28, 1978, MSHA filed three petitions to assess civil penalties for violations of mandatory safety standards. The fourth petition herein was filed on July 31, 1978. A total of seven violations of mandatory standards was alleged. Respondent filed answers to all four petitions on January 2, 1979.

The hearing in these matters was held on March 7, 1979, in Charleston, West Virginia. The Petitioner called five witnesses and

introduced 21 exhibits. The Respondent called one witness and introduced four exhibits. A posthearing brief was submitted by Petitioner on May 25, 1979. Respondent submitted its brief on June 20, 1979.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

LIABILITY OF SWOPE COAL COMPANY

The primary issues are whether Respondent violated the mandatory safety standards alleged and the penalty that should be assessed for violations under the criteria set forth in section 109(a)(1) of the Act. 1/ In addition, Respondent asserts that:

[I]t is not liable for the alleged violations in that it was not the "operator" of the No. 1 Mine at the time the assessments were made or at any other time, and has never been such operator, and as such does not come within the statutory definition of an operator as set out in Chapter 22, Title 30, § 802(d), which is as follows:

'Operator' means any owner, lessee, or other person who operates, controls or supervises a coal mine;

By a lease dated May 1, 1952, Bankers Pocahontas Coal Company, leased 300 acres of coal land, more or less, to W. B. Swope. W. B. Swope, in turn, on June 1, 1976, by written lease, subleased a portion thereof, being the No. 1 Mine, to Day Camp Coal Company. Petitioner argues that Swope Coal Company was the operator because it continued to exercise control over the mine and was named as the operator in the legal identity report for the No. 1 Mine signed by W. B. Swope after the sublease to Day Camp Coal Company.

It is undisputed that after the clearing away and removal of coal and topsoil in May 1976, the miners at the No. 1 Mine were not

1/ Section 109(a)(1) of the Act provides:

"The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than \$10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation."

in the employ of Swope Coal Company. 2/ Nevertheless, the record establishes that Swope Coal Company remained active in some aspects of the mining operation, including assistance to Day Camp Coal Company in the marketing of coal and procurement of equipment.

Prior to the date of the lease, Respondent had obtained a permit from the State of West Virginia to face up and remove coal from in front of the highwall. This permit, West Virginia Permit No. D9553, was issued in November or December 1975, in the name of Swope Coal Company, No. 1 Mine. In January 1976, W. B. Swope, Inc., received a charter from the State of West Virginia and on May 16, 1976, Respondent applied to MESA for a mine identification number which was received on June 15, 1976, being No. 46-05186.

Section 107(d) of the Act requires that each operator of a coal mine shall file with the Secretary the identity of the person who controls or operates the mine. 3/ Any revisions in such name or addresses are required to be promptly filed with the Secretary.

2/ Respondent has used different names. Counsel for Respondent stated that "there is no such entity as Swope Coal Company." W. B. Swope, Inc., was chartered by the State of West Virginia; in January 1976. However, the State mining permit and the MSHA identification number were issued in the Swope Company name and remained in that name at all times pertinent to these proceedings. Inspector James Bowman testified that "Swope Coal Company" was the only name he had ever heard used in reference to the mine. When inspector Herbert M. McKinney was at the mine in May 1977, he observed a sign on the main office building which read "Swope Coal Company No. 1 Mine Office." Although the charter name of the corporation was W. B. Swope, Inc., the corporation was known by and did business under the name of Swope Coal Company.

3/ 30 CFR 82.11 states in pertinent part:

"(a) Not later than 30 days after the effective date of this part, the operator of a coal mine shall, in writing, notify the Coal Mine Health and Safety District Manager * * * of the legal identity of the operator * * *."

30 CFR 82.12 states in pertinent part:

"Within 30 days after the occurrence of any change in the information required by section 82.11, the operator of a coal mine shall, in writing, notify * * * the District Manager * * * of such change."

30 CFR 82.13 sets forth the results of a failure to notify the District Manager:

"Failure of the operator to notify the Bureau of Mines [subsequents, MSHA] in writing of the legal identity of the operator or any changes thereof within the time required under the Act will be considered to be a violation of section 107(d) of the Act and shall be subject to penalties as provided in section 109 of the Act."

On June 14, 1976, Swope Coal Company, through its president, W. B. Swope, filed a legal identity report with MESA. ^{4/} This report, which was signed by W. B. Swope, named Swope Coal Company as the operator of the No. 1 Mine. It named W. B. Swope as president of Swope Coal Company and as agent for service of process. Significantly, it was filed with MESA 2 weeks after the effective date of the contract between Day Camp Coal Company and Swope Coal Company. This report remained in effect and unchanged through December 5, 1977. Each of the inspectors relied upon it when citing Swope Coal Company as operator.

Mr. Swope testified that he sent a letter to Mr. Krese, MESA's district manager, on July 15, 1976. The body of this letter reads as follows: "I wish to advise you that W. B. Swope Coal Co. has leased the Swope #1 Mine situated, Little Day Camp near Premier, to Day Camp Coal Company and they have been advised to contact your office for transfer of the ID number."

Mr. Swope received no answer to this letter and there is no indication that it was received by MESA. Moreover, the letter fails to indicate whether Respondent retained partial or total control over the mine and, consequently, whether it remained as an operator.

30 CFR 82.20 specifies how legal identity and changes thereof are to be filed: "Each operator of a coal mine shall file notification of the legal identity and every change thereof with the appropriate * * * District Manager by properly completing, mailing or otherwise delivering Form 6-357 'Legal Identity Report.'"

In the preamble to the regulations concerning legal identity reports published in the Federal Register, the Assistant Secretary of the Interior noted that the information required under Part 82 was "to be used daily by the enforcement personnel" and that the information required would "enable the Secretary to properly carry out his enforcement functions in the administration of the Act." F.R. Vol. 37, No. 238, December 9, 1972, pp. 26308-26309. The regulations became effective March 15, 1973, and were in force at the time the alleged violations occurred. Swope gave MSHA every outward indication it was the operator by filing a legal identity report as required under 30 CFR 82.11 after the Day Camp lease went into effect. If Respondent later had second thoughts and believed that Day Camp was the operator, it failed to follow the procedure set forth in section 82.20 for advising MSHA of the change. Its letter to District Manager Krese of July 16, 1976, did not meet the requirements of

^{4/} The functions of the Mining Enforcement and Safety Administration (MESA) have been transferred to the Mine Safety and Health Administration (MSHA) pursuant to the provisions of the Act and these names were used interchangeably in the record.

Section 82.20. Any letter stating that a lease has been entered into does not properly advise MSHA of anything substantive concerning the identity of an operator of a mine since it is possible for total or partial control of the mine to remain with the lessor and consequently for the lessor to remain the operator. Thus, Swope itself indicated to MSHA that it was the operator and continued to be so up to and through the period of the alleged violations.

The first change in the legal identity report was effected after the occurrence of the four violations at issue herein. On December 5, 1977, a revised report signed by "Lonnie Wood * * * Mine Foreman" was filed in MSHA's Pineville, West Virginia, office. Swope Coal Company was listed as operator, and W. B. Swope with the title of president, remained as agent for service of process. The only change from the earlier report was the listing of three different corporate officers.

The identity report was revised again on November 29, 1978. Swope Coal Company was again listed as operator. The report, signed by "Sammy R. Bell * * * Gen. Manager" listed a different agent for service of process and three new corporate officers.

Two letters which were introduced at the hearing provided additional evidence that the mine was operated under the name "Swope Coal Company." These letters dated June 7, 1979, were addressed to Mr. Krese under a Swope Coal Company letterhead. As noted above, the effective date of the lease between Swope Coal Company and Day Camp was June 1, 1976. The first letter was filed with MESA purportedly in compliance with section 107(d) of the Act. The letter was signed by Harold Burks as superintendent of the No. 1 Mine for Swope Coal Company. In the body of the letter, he referred to himself and to Henry Honosky "as the operating officials of Mine No. 1, Swope Coal Company." The second letter was written under a Swope Coal Company letterhead and was signed by W. B. Swope as operator of the Swope Coal Company No. 1 Mine. In the body of the letter, he referred to Mr. Henry Honosky as a "Partner."

Swope Coal Company represented itself as the operator of the No. 1 Mine to MESA and mining operations were carried out under the Swope Coal Company name. MSHA, for its part, relied upon these representations. Given this reliance, Respondent should not be allowed now to deny its status as an operator of the No. 1 Mine in the absence of clear evidence to the contrary.

In addition to holding itself out as operator, Swope Coal Company exercised enough control over the No. 1 Mine to be characterized as an "operator" within the meaning of the Act. The term "operator" is defined in section 3(d) of the Act to mean "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine * * *." The concept of "control" must be construed broadly in order to best effectuate the purposes of the Act. A person may be

considered an operator even though it does not supervise miners or direct the day-to-day operations of a coal mine.

Swope Coal Company, through its agent and president, W. B. Swope, entered into a contract with Day Camp Coal Company. In return for the payment of royalties, 5/ Day Camp was granted mining rights to the No. 1 Mine. Under the terms of the contract, Respondent retained substantial control over the No. 1 Mine.

Respondent retained the rights to enter the mine at all times to inspect any part thereof to ascertain the condition of the mine, the methods practiced, the amount of coal removed, or for any other lawful purpose. Day Camp was required by the terms of the contract to employ only the best and most improved methods of mining so as to maximize the amount of coal recovered. Day Camp could not remove pillars without Respondent's consent. Respondent's consent was also required before Day Camp could assign or sublet its interest in the mine. Finally, Respondent had the right to cancel the contract immediately if Day Camp violated any of the contract's clauses.

Swope's relationship with Day Camp Coal Company was not limited to that of lessor-lessee. Mr. Swope testified that he helped Day Camp Coal Company to market the coal it mined. He was also instrumental in providing some of the mining equipment used by Day Camp. Mr. Swope purchased the equipment and then immediately sold it to Day Camp. Day Camp purchased the equipment from Swope with money borrowed from a local bank. Mr. Swope endorsed the note in order to induce the bank to make the loan to Day Camp. After Day Camp folded, 6/ the machinery was repurchased by the bank at public auction. Mr. Swope then purchased the equipment from the bank.

Throughout this entire period of time, the State identification number, as well as the "Certificate for Approval of Mine Openings (for use of underground mines)," remained in the Swope Coal Company name. Day Camp Coal Company did not have a State operating certificate in its own name. Swope Coal Company was also responsible for State bonding and land restoration requirements.

Inspector Bowman testified that he observed Mr. Swope at the mine on two separate occasions--October 6 and 27, 1977. Mr. Swope testified that he went to the mine on October 27 because he was asked to help resolve the problems which had caused the mine to shut down. His presence at the mine on these occasions and his expressed purpose in

5/ Under the terms of the lease, Swope received a royalty of 10 percent of the gross sales price of the coal produced from the mine.

6/ After Day Camp Coal Company became defunct, Respondent leased the mine property to Abco Mining Development Company.

being there further supports the contention that Swope Coal Company exercised control over the No. 1 Mine.

Day Camp as lessee, and its miners, as employees, were at the No. 1 Mine to perform work which promoted the direct financial interests of Swope. Swope should not be allowed through its sublease arrangement to relieve itself from all responsibility for the miners who labored, in part, on its behalf. Such a release from responsibility would not promote health and safety of those miners or of others who now find themselves in a similar situation. ^{7/} Swope's apparent argument that actual supervision of miners or day-to-day direction of operations is a prerequisite to being an "operator" under the Coal Act is undermined by the recent case of Republic Steel Corporation, No. 79-4-4 (April 11, 1979), where the Commission found that a mine owner can be held responsible for violations of the 1969 Act created by its independent contractors even though none of the owner's employees were exposed to the violative conditions and it could not have prevented the conditions.

In addition to the legal issues, there are practical reasons why Respondent should be responsible for the safety of the miners in the No. 1 Mine. Republic also said that "A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted." While there is no direct evidence to indicate that in this case the lease and the use of different names was for the purpose of escaping responsibility, the possibility exists. There is even a greater possibility of the use of such a private contractual relationship to escape responsibility in cases such as this where the lessee merely hires miners and mines coal than in cases such as Republic where the independent contractor is hired to sink shafts, erect tipples, and perform tasks beyond the capabilities of the operator.

Swope Coal Company was the legal, as well as generally recognized operator, of the No. 1 Mine. The Respondent held itself out as the operator of the No. 1 Mine, did business as Swope Coal Company, and exercised sufficient control to be considered an operator. As such, Swope Coal Company may be assessed civil penalties under section 109 of the Act.

^{7/} MSHA argued that the concept of control need not require a finding of a singly responsible party, but that the exercise of any measure of control may make a party liable as an operator regardless of actual direction of day-to-day operations at the mine. Thus, in this instance, it was argued that Swope and Day Camp share joint and several liability and that, Day Camp being defunct, it was perfectly proper for MSHA to proceed solely against Swope.

VIOLATIONS AND STATUTORY CRITERIA

Each of the alleged violations contained herein occurred at the Swope Coal Company No. 1 Mine, located in Premier, West Virginia. At the time the alleged violations occurred, approximately 10 miners were employed at the No. 1 Mine and it produced coal at the rate of 100 tons per day. The parties stipulated that each of the violations herein was abated in good faith and that there was no applicable history of prior paid violations. The record contains no indication that the assessment of civil penalties in these proceedings will adversely affect the ability of the Respondent to remain in business.

Day Camp Coal Company failed to exercise reasonable care to prevent or to correct the conditions or practices which caused each of the violations herein, and they were known or should have been known to exist. Although Swope Coal Company exercised sufficient control to bring it within the definition of "operator" under the Act, the record does not establish that it was concerned with the day-to-day mining operations to the extent that the negligence of Day Camp Coal company or its personnel was imputed to Respondent.

Docket No. HOPE 78-644-P

Two separate violations of mandatory safety standards were alleged in Docket No. HOPE 78-644-P. They were observed by Federal coal mine inspector James Bowman in the course of a regular inspection of Respondent's No. 1 Mine on October 6, 1977. In both instances, the inspector issued a 104(c)(1) order of withdrawal.

Inspector Bowman issued Order No. 1 JFB after he observed three concurrent conditions or practices which he believed to be in violation of 30 CFR 75.200. First, the approved roof control plan was not being followed in the main 001 section in that miners had proceeded in by permanent roof supports. The roof bolting machine had been placed up against the face, 10 feet beyond support. There were no jacks on the roof bolting machine and no temporary supports had been set in the area.

Section 75.200 requires in pertinent part that "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." The roof control plan in effect that the No. 1 Mine permitted only those persons engaged in installing temporary supports to proceed beyond the last permanent roof support until such temporary supports were installed. In this instance, miners had been proceeding beyond permanent supports to make chalk marks on the roof for placement of roof bolts. This practice presented a clear violation of section 75.200.

The inspector also observed that cleanup had occurred under unsupported roof in the face area of the No. 4 entry and in the last open crosscut. The roof control plan requires that roof be supported during or immediately upon completion of the loading cycle. The cleanup under unsupported roof was in violation of section 75.200.

Finally, the inspector observed that mining continued in the No. 4 entry within 100 feet of an outcrop without the additional support called for in the roof control plan. An "outcrop" is that area where a seam of coal comes out to the surface. The roof control plan required that roof bolts shall not be used as the sole means of roof support when underground workings approach and when mining is being done within 150 feet of an outcropping. Supplemental supports were to consist of at least one row of posts limiting the roadway width to 16 feet. The failure to provide additional supports in this area as required by the roof control plan was a violation of section 75.200.

The section foreman was on the section constantly throughout the shift and should have known that miners were proceeding beyond permanent supports for other than proper purposes. The failure to install temporary supports at the conclusion of the mining cycle and to provide additional supports in the area near the outcrop were visually obvious. The inspector was told by Bill Burks, mine superintendent, that they did not have sufficient supplies on hand at the mine to permit either the temporary or permanent posting as required.

These conditions could have resulted in a fatality. It was probable that an accident would have occurred because of the conditions. The first condition threatened those miners in by the permanent supports. The latter two conditions endangered eight men, the entire crew on the section.

Inspector Bowman issued Order of Withdrawal No. 2 JFB after observing accumulations of coal in violation of 30 CFR 75.400. He observed these accumulations extending a distance of approximately 250 feet in four entries and part of the last open crosscut. Along the ribs, the coal ranged in depth from 6 to 20 inches. In the roadways the coal had accumulated from 1/4 to 4 inches. The coal was comprised mostly of coal dust. It was wet in the middle of the roadways, dry in by the last open crosscut and extremely dry along the ribs. The inspector approximated the extent of the accumulations using the mine map. He measured depth with a ruler.

The inspector believed that the area had never been cleaned after mining. The accumulations were too extensive to be the result of normal spillage during mining. No effort was made to clean up the coal when it was discovered by the inspector or while he was there. He estimated that the accumulations had been present for more than a month. The condition was visually obvious and existed for an extended period of time, yet management failed to take corrective action.

This was a serious violation. It was probable that an accident would occur because of the accumulations. There were ignition sources in the area of the accumulations. An energized cable with six poorly-made temporary splices was lying in loose coal in the outby areas. Battery-operated equipment presented additional ignition sources. The violation endangered all those working in the mine and particularly those working in the face areas. If a fire or explosion were to occur, the probable result would have been serious injury or a fatality.

Docket No. HOPE 78-645-P

Two separate violations of mandatory safety standards were alleged in Docket No. HOPE 78-645-P. The first of these was observed by Federal coal mine inspector Leighton Farley on May 24, 1977, in the course of an accident investigation. The inspector issued 104(c)(1) Notice of Violation No. 1 LCF, citing 30 CFR 75.1704. MSHA had received a complaint on May 23, 1977, which alleged that five men had been trapped in the mine because an escapeway was blocked.

The inspector's examination of the escapeway involved revealed that timbers had been broken, the top had deteriorated, and part of the roof had fallen. Mining had continued for one and a half shifts without two separate escapeways. The inspector discussed the condition with a mine foreman, Lacey Justice, who stated that he had discovered the rock fall during a preshift examination on May 17 or 18. He and Bill Burks, the manager of the mine, decided to continue mining in the area for 2 days and only thereafter to move the section back 200 feet where they could maintain two separate escapeways. This failure to maintain a second escapeway was in violation of section 75.1704 which requires that two separate and distinct travelable passageways be maintained in a safe condition to ensure passage at all times of any persons. The decision to operate without two separate escapeways was a conscious one on the part of mine management.

Because the second escapeway was blocked, five men were forced to use their self-rescuing devices and travel through smoke to reach the face. It is probable that the lack of a second escapeway could result in serious injury or a fatality.

The second alleged violation included under this docket number was observed by Inspector Bowman in the course of the regular inspection conducted on October 6, 1977. The inspector found six poorly-made temporary splices in a trailing cable which was conducting electricity to a loading machine operating in the main 001 section. He issued 104(c)(1) Notice of Violation No. 9 JFB, citing 30 CFR 75.603. This section reads in pertinent part as follows:

One temporary splice may be made in any trailing cable.
Such temporary splice may be used only for the next 24-hour

period * * *. Temporary splices in trailing cables shall be made in a workman-like manner and shall be mechanically strong and well insulated. Trailing cables or hand cables which have exposed wires or which have splices that heat or spark under load shall not be used.

It is clear that the condition in question was in violation of section 75.603. There were a total of six temporary splices in the cable. In addition, the outer jacket of some splices were worn and unraveled to the extent that bare wires were exposed. Some splices were also wet and filled with mud. The wires were joined with square knots. The condition and wear on the splices indicated that they had existed for at least several days.

The number of splices and the unworkmanlike manner in which they were made were visually obvious. The condition existed for at least several days. The section foreman and Curtis Kirk, the chief electrician, were in the section throughout their shift. Mr. Kirk had replaced a permanent splice on the cable on the day before the inspector arrived.

This was a hazardous condition. It is probable that the condition would cause an accident to occur. When the inspector first found the cable, it was energized. There was no short-circuit protection and the cable wires were exposed. The inspector testified that he knew of instances in which this type of cable burned from end to end. Because the cable was lying in dry coal dust in places and was an ignition source, it presented a fire or explosion hazard. The cable also presented a shock hazard because in some places it was lying in water. The roadway out by the last open crosscut was wet. At one time or another, it was likely that the splice would be in direct contact with this water. Frequent contact with the cable was necessary in this area in order to allow passage of vehicles. An individual might also suffer an electrical shock if he stood in water nearby. Every miner on the section was endangered by these hazards. If any of these accidents were to occur, the probable result would be serious injury or fatality.

Docket No. HOPE 78-646-P

The two violations included in this docket number were observed by Federal coal mine inspectors on October 27, 1977, in the course of a regular inspection.

Inspector Bowman issued 104(c)(2) Order of Withdrawal No. 1 JFB after he observed that the Respondent had mined within 30 feet of abandoned areas without first drilling test holes. He cited 30 CFR 75.1701 which, in pertinent part, requires the following:

Whenever any working place approaches within 30 feet of abandoned areas in the mine as shown by surveys made and

certified by a registered engineer or surveyor, or within 200 feet of any other abandoned areas of the mine which cannot be inspected and which may contain dangerous accumulations of water or gas, or within 200 feet of any workings or adjacent mine, a borehole or boreholes shall be drilled a distance of at least 20 feet in advance of the working face of such working place and shall be continuously maintained to a distance of at least 10 feet in advance of the

Before entering the mine, the inspector had examined an up-to-date mine map which indicated that mining was being done within 30 feet of an abandoned area. The abandoned area was comprised on one side of old works and on the other of mined-out areas. Neither area could be inspected because the old works had been sealed off and the roof in the mined-out area was falling in. The section foreman, Lacey Justice, admitted to the inspector that test bore holes had not been drilled. The operator did not have the equipment at the mine to drill as required. When using conventional equipment and taking a 10-foot cut, a test hole must be drilled 10 feet beyond the cut for a total of 20 feet. The Respondent had on hand a single auger which could be used to drill up to 10 feet only.

The requirement to drill bore holes was set out in the ventilation plan for the No. 1 Mine. The operator was aware of the close proximity of abandoned areas. When questioned by the inspector, Mr. Justice stated that the holes had not been drilled because they did not have the the necessary drill bits or augers.

This was a hazardous condition. The danger presented was the inundation of the area with water or gas. It was possible that water had accumulated in the abandoned areas against the coal seam which they were mining. Methane or black damp, oxygen-deficient air, might also have accumulated there. The probable result of inundation would be serious injury or fatality.

Inspector George Smith issued 104(c)(2) Order of Withdrawal No. 1 GLS (October 27, 1977), citing 30 CFR 77.502, after observing conditions which led him to believe that the required examination of electrical equipment was being carried out either inadequately or not at all. Section 75.502 provides the following:

Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept.

The inspector observed violations of sections 77.505, 77.506, 77.501, 77.507, and 77.521, all of which relate to surface electrical

equipment. The number of these violations indicated that the examination of electrical equipment was not being carried out. The inspector was also unable to find any record of electrical examinations. Curtis Kirk, Respondent's chief electrician, admitted that he had not been making or recording examinations.

Mine management should have known of the requirement to make and record examinations, yet it failed to do so. Given the number of violations present, it is probable that the failure to make and record examinations would cause an accident. Unless an examination of electrical equipment is carried out, the miner has no way of knowing whether a hazardous condition exists or not.

Docket No. HOPE 78-664-P

A single violation is alleged under this docket number. Inspector Herbert M. McKinney issued Order of Withdrawal No. 1 CDH-HM on May 23, 1977, citing 30 CFR 75.201. Section 75.201 reads as follows: "The method of mining followed in any coal mine shall not expose the miner to unusual dangers from roof falls caused by excessive widths of rooms and entries or faulty pillar recovery methods."

The inspector issued this order in the course of an accident investigation. Two miners had been injured by a roof fall while they were spot-bolting in the area of pillar Nos. 1 and 2 in the Day Camp Branch Portal. The method of pillar recovery being used posed a hazard to the miners working there in a number of respects. The block of coal in question had been partially split. Five places had been started off this split without setting the necessary turnposts and breaker posts. A six-way intersection was thereby created. The roof was supported with roof bolts and very few posts. In addition, the roadway exceeded 20 feet, the maximum width approved by MSHA. In places, it was as wide as 24 feet. These practices were clearly in violation of section 75.201.

Mine management should have known that the method which was used to remove the pillar was hazardous. The inspector was of the opinion that management was attempting to mine as much coal as possible without going to the expense of setting additional supports.

The method of extraction used created a hazardous condition and resulted in serious injury to a miner. That miner suffered a broken back.

ASSESSMENTS

In consideration of the findings of fact and conclusions of law in this decision based on stipulations and evidence of record, the following assessments are appropriate under the criteria of section 109(a) of the Act.

<u>Docket No. HOPE 78-644-P</u>	<u>Penalties</u>
Order of Withdrawal No. 1 JFB (October 6, 1977)	\$ 750
Order of Withdrawal No. 2 JFB (October 6, 1977)	\$ 750
<u>Docket No. HOPE 78-645-P</u>	
Notice of Violation No. 1 LCF (May 24, 1977)	\$ 375
Notice of Violation No. 9 JFB (October 6, 1977)	\$ 350
<u>Docket No. HOPE 78-646-P</u>	
Order of Withdrawal No. 1 JFB (October 27, 1977)	\$1,250
Order of Withdrawal No. 1 GLS (October 27, 1977)	\$1,250
<u>Docket No. HOPE 78-664-P</u>	
Order of Withdrawal No. 1 CDH-HM (May 23, 1977)	\$1,500
Proposed findings of fact and conclusions of law inconsistent with this decision are rejected.	

ORDER

The Respondent is ORDERED to pay the amount of \$6,225 within 30 days of this decision.

Forrest E. Stewart

Forrest E. Stewart
Administrative Law Judge

Issued:

Distribution:

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

AUG 26 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 79-257-PM
Petitioner : A.C. No. 39-00509-05002
v. :
: Virginia Mine
PACER CORPORATION, :
Respondent :

DECISION

Appearances: Robert S. Bass, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Robert L. Cullum, President and General Manager, and Mike Treloar, Safety Director for Pacer Corporation, for Respondent.

Before: Administrative Law Judge Michels

This matter is before me for hearing and decision on the petition for assessment of civil penalty filed by Petitioner MSHA on January 25, 1979. The Respondent, Pacer Corporation, answered the petition on February 2, 1979, and entered in effect a general denial. A hearing was held in Rapid City, South Dakota, on June 5, 1979, and thereafter the parties filed briefs and proposed findings. 1/

The only significant issue in this proceeding is whether a miner, Nerl Krueger, a rock sorter, was exposed to silica dust in excess of that permitted under the standard 30 CFR 55.5-1(a). 2/ MSHA contends that the threshold limit value for this miner under the regulation is 1.105 mg/m³ (milligrams per cubic meter), and that such employee was exposed to a concentration of 1.564 mg/m³ when sampled on April 20, 1978.

1/ The proposed findings not adopted or specifically rejected are hereby rejected, as immaterial or not supported by fact.

2/ The mandatory standard 55.5-1(a) reads in pertinent part as follows:

"(a) Except as provided in paragraph (b), the exposure to air-borne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1 through 54, which are hereby incorporated by reference and made a part hereof."

The Respondent has no disagreement with the mathematical calculations made by MSHA's laboratory technician (Tr. 73), but it does in effect argue that there was an error in the sampling procedure because it claims that the 3- to 14-percent variance in the percent of free silica shown by the evidence is entirely unlikely.

The charge here is focused on a condition which existed in a relatively small shed or room with dimensions of approximately 12 by 16 feet. On April 20, 1978, five miners were sampled and four of these worked inside the shed. One was designated den leader. Mr. Krueger was a rock sorter and the others were designated as pickers. The occupation of the fifth man apparently working outside the shed was that of loader and truck operator (R-1).

The record is not completely satisfactory as to the precise location of the four men who worked inside the sorting room, nor does it disclose whether or not they may have exchanged places. All that is known from the record is that the four men were working as sorters or pickers in the shed separating feldspar from the rock (Tr. 29-30). The record further shows that a belt went completely through the room and it would appear to be a reasonable inference that the men worked across from each other on either side of the belt. ^{3/} Of the men in the sorting room none were overexposed except Mr. Krueger (R-1, R-4).

The record gives us some details about the sorting room, but not all aspects of it are fully described. Mr. Treloar stated that it had one door, partial openings at each end through which the conveyor belt passed and windows on either side which apparently were boarded over (Tr. 69). The size of the room was given as approximately 12 by 16 feet. The witnesses disagreed as to the placement of a ventilation fan. Mr. Westphal, the inspector, asserted that Mr. Krueger, the exposed miner, was in the northwest corner of the shed and that there was a fan drawing air up by that location (Tr. 16). Mr. Treloar, on the other hand, testified that the fan was in the center (Tr. 73). ^{4/}

The evidence presented by MSHA shows the weight of the dust obtained in the samples as well as a percentage of the contaminant silica. The TLV or threshold limit value which establishes the maximum exposure is obtained by a formula contained in the document titled,

^{3/} In its posthearing brief, Respondent contends that the men were only a few feet from one another and were working at the same task only an arm's length apart.

^{4/} It is difficult to say who was right with respect to the fan. In its posthearing brief, in a statement which is not evidence, Respondent asserts that there are in fact two exhaust fans in the shed, one at each end of the building over the belt and shrouded to the belt.

"TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973." The initials stand for the "American Conference of Governmental and Industrial Hygienists." The document is incorporated by reference into the regulation.

The sampling processes are fully covered in the record from page 37 forward. The filters are first dessicated and the weight recorded. The inspector takes these and places filters which apparently are in cassettes into dust-pumps. The dust-pumps have previously been calibrated. The pumps are placed on the men for approximately 8 hours. They are checked during the 8-hour period. The measurements are all recorded (P-1, P-3). After use, the cassettes are returned to the laboratory where they are reweighed and a record is made of the dust weight (P-4).

After the weighing of the filters, they are sent via U.S. mail to the Denver Technical Center where they are analyzed for silica. The dust sample form (Tr. P-4) is partly filled out at the regional MSHA office and follows the samples to Denver. The laboratory in Denver fills in the amount of free silica detected by the laboratory tests. In the case of Mr. Krueger, the dust weight was found to be 1.177 milligrams and the free silica detected was 90 micrograms.

Upon obtaining the results from the samples, the laboratory technician at MSHA's regional office calculates the amount of the TLV or threshold limit value. In Mr. Krueger's case, it was 1.105. The percentage of quartz or free silica was found to be 7.047 percent. The technician first finds the TWA or time weighted average which in the case of Mr. Krueger was 1.564 milligrams per cubic meter. The amount of the TLV is determined pursuant to the formula found in the "TLV Book" (P-6). In Mr. Krueger's case, as noted, he was exposed to 1.564 milligrams per cubic meter, whereas the threshold limit value was 1.105. He was, in other words, .459 milligrams over the threshold limit according to the test, which is a significant amount (Tr. 61).

The evidence produced by MSHA shows that of the five miners sampled, only one, Mr. Krueger, was overexposed on the basis of the threshold limit value found. Respondent has made no showing that an error was made at any particular stage of the sampling procedure. It claims only in a general way that mistakes are often made. Mr. Treloar suggested the possibility that a pump could be turned upside down, but there was no evidence to suggest that this happened (Tr. 65). In its brief, Respondent claims that only a minute sample is taken, but there has been no showing that such a small sample would necessarily be invalid.

Nevertheless, Respondent takes the position that a variance of from 3-to 14-percent free silica is virtually impossible.

The net result is that MSHA has presented evidence showing that in a relatively confined space, one miner out of four was overexposed to silica dust. The logic of this result is troubling. It is possible perhaps that air currents for some reason unknown carried more dust toward and into the filtering pump of the one miner, Mr. Krueger, than into the pumps of the others. That seemed to be MSHA's explanation for the variation since it presented evidence about the placement of the fan. It is true that the sampling shows that Mr. Krueger received more dust than all the others (Exh. R-1).

It is possible perhaps to accept the fact that one miner received more dust than three others even though in a restricted space, because of the vagrancy of air currents. But, it is harder to rationalize on this record the further fact of the wide variances in silica received of the five sampled. Only three were relatively close in terms of the percent of contaminant received. The percentages for these three were 7.047, 8.974 and 7.246. The other two miners received widely varying amounts of silica, of 3.825 and 14.572 percent. If the silica is fairly constant in the rock feldspar being processed as Mr. Treloar testified, it is reasonable to question why the amount should vary so widely in the dust in the atmosphere. Possibly there is a good explanation for this but the record does not reveal it. Mr. Benson, MSHA's laboratory technician, testified that the results were not so far out of line as to suspect them of being invalid and that "[t]hese are pretty much in line with what we've been running at Pacer" (Tr. 54). Since Mr. Benson was not specific, it is unknown whether he was talking about the free silica content, the sample dust weight, or both. In another context, he testified that variances from 3.8 to 14.7 percent of silica did not cause him to question the analysis because he never knew where the men were working (Tr. 60). He was not asked, however, for his opinion based on the fact that four of the men were all working in the same 12 by 16 room, and he did not testify that such variances may be expected in these circumstances.

The inspector at the time of the inspection had not formed an opinion as to why only one employee was overexposed "because I didn't realize that I would have any over, or if there was, I could have supposed that all of them would have been over" (Tr. 16). [Emphasis supplied.] He later went on to express his opinion as formed after the results were received from Denver and this was that a fan drew the air right up by the affected miner. This opinion is at least questionable in light of other evidence about the fan's location, but in any event, his opinion would explain only the increase in sample weight it does not explain the percentage variation of free silica among the five miners sampled.

No witness directly addressed the question of the variance in the free silica, except Respondent's witness, Mr. Treloar, Pacer's safety director. He testified that he runs silica analyses in Respondent's

chemical laboratory in the ore mine, and that one would not expect to find more than one-hundredth of a percent of silica (Tr. 64). On the other hand, he did not run a test for free silica which apparently requires more sophisticated testing equipment. He claimed, however, that he estimated the free silica to be high (Tr. 70). In expressing his opinion that it would not be possible to have the variances shown on Exhibit P-4, Mr. Treloar stated:

Okay. My analysis of feldspar chemical. I base my opinion on this, on my chemical analysis of feldspar. It just does not vary that much. There is, what, almost an eight percent variance there, and even from different ore bodies its almost impossible. I've never run into it even in different ore bodies throughout the Hills, that it will have that great of variance.

(Tr. 71). He also testified that there should not be a difference in concentrations between the material itself and the dust that is air-borne (Tr. 73).

On the state of this record, I cannot conclude that MSHA has met its burden of proving a violation by the preponderance of the evidence. The fact of the wide variations in the percent of free silica in the samples has not been explained. On the basis of the limited evidence on the subject, it is at least as likely that the sample results demonstrate the inaccuracy of the methods as it is that they show that one miner was overexposed. When the evidence contains such an uncertainty, it is my conclusion that MSHA has not sustained its burden. On this record, I am not questioning MSHA's sampling procedures in general. All that this decision resolves is that the evidence in this proceeding is inadequate to support a finding that one of the five sampled miners was overexposed. Accordingly,

It is ORDERED that Citation No. 328213, issued May 15, 1978, be VACATED and this proceeding be DISMISSED.

Franklin P. Michels

Franklin P. Michels
Administrative Law Judge

Distribution:

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

7/5 1979

RANDY INMAN AND KENNY HINKLE, : Discrimination Complaint
Complainants :
v. : Docket No. VINC 79-184
: :
MID-OHIO MINING COMPANY, : Redfield No. 2 Strip Mine
Respondent :

DECISION

Appearances: William Safranek, Esquire, McConnelsville, Ohio, for the complainants;
Robert H. Albert, Esquire, Columbus, Ohio, for the respondent;
Thomas P. Piliero, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, amicus curiae.

Before: Judge Koutras

Statement of the Proceeding

This matter concerns a discrimination complaint filed by the complainants against the respondent pursuant to section 105(c)(3) of the Federal Mine Safety and health Act of 1977, 30 U.S.C. § 801 et seq. The complaint was filed with the Commission on February 12, 1979, and the respondent filed a timely answer denying any discrimination against the complainants. After a period of discovery in which interrogatories were served on and answered by the respondent, the matter was heard in Columbus, Ohio, on May 1, 1979, and the parties appeared by and through counsel and participated fully in the hearing. Post-hearing proposed findings, conclusions, and supporting briefs were filed by the parties and the arguments presented therein have been duly considered by me in the course of this decision.

The thrust of the complaint is the assertion by the complainants that they were laid off from their jobs with the respondent on November 25, 1978, because of a complaint made to State mine inspectors concerning unsafe equipment. A previous complaint filed by the complainants with the Labor Department resulted in a finding by that Department that the complainants were not discriminated against and their complaint was dismissed.

Issue Presented

The principal issue presented in this proceeding is whether the termination of Mr. Inman and Mr. Hinkle from their employment was, in fact, prompted by their reporting certain unsafe conditions at the mine to a State mine inspector.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3), which provide:

(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of a miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at a coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified to or is about to testify in any such proceeding, or because of the exercise of such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt

of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to

the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of the miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

Testimony and Evidence Adduced by the Parties

Complainants

Ronald K. Leigh, State of Ohio mining inspector, testified he was familiar with the Redfield No. 2 Mine operated by the respondent and that he has conducted inspections at that mine, and did so on November 24, 1978. The mine is a nonunion mine and employed approximately 10 people during that time. On November 24, one of his fellow State inspectors, a Mr. Jackson, came to his home and advised him that he had received complaints about equipment with no brakes being operated at the mine. He and Mr. Jackson went to the mine and met the mine foreman, Donald Vernon, who introduced himself and advised them that he had shut the pans down because they had no brakes. Mr. Vernon admitted that the pans were operated with no brakes because it was difficult to obtain parts. Mr. Vernon assured him that the machinery would be repaired and he (Leigh) put a danger sign on the machinery and instructed Mr. Vernon not to operate it until the brakes were repaired. During the course of the inspection, Mr. Leigh found some other violations, a dozer with a blown fuse, a loader with a defective windshield wiper, no first-aid equipment on the property, and a fuel truck with no brakes, defective turn signals, and a defective exhaust system (Tr. 9-19).

Mr. Leigh stated that after finding the violations, he discussed the matter with Mr. Vernon, and Mr. Vernon indicated he was having problems with the equipment and admitted that some of the pans had run together and one turned over. Prior to this time, Mr. Leigh had received no reports of such incidents at the mine. Mr. Leigh stated he "let it slip" to Mr. Vernon that he had learned about the pans, but did not mention any names. Mr. Vernon produced copies of equipment worksheets required to be filled out on the equipment when it is checked, and he mentioned that one of his employees was doing his job because he had noted some equipment defects on the worksheets. Mr. Vernon also asked about Mr. Jackson and indicated that he knew his father. The equipment that was tagged out was subsequently repaired and put back in operation in a matter of days (Tr. 19-26).

On cross-examination, Mr. Leigh testified that when he went to the mine on November 24, he did not know who had informed Mr. Jackson about the safety violations at the mine. He did not give Mr. Vernon the names of Mr. Inman or Mr. Hinkle as the parties who had informed State inspectors about the violations, and he would never tell a mine owner or foreman who had informed, and that is his practice. He could recall nothing in his conversation with Mr. Vernon that would lead Mr. Vernon to know who had informed, except for the conversation with Mr. Jackson that Mr. Hinkle and Mr. Inman lived in the area near Mr. Jackson. Mr. Leigh did not know Mr. Inman or Mr. Hinkle, nor did he know where any of the mine employees lived (Tr. 26-28).

The usual practice when the equipment is down, is to have mine employees help repair it, but he did not know the mechanical abilities of Mr. Inman or Mr. Hinkle (Tr. 29-31). Mr. Vernon did remark that "Randy" was the only person marking the equipment sheets as indicating that something had been wrong with the equipment (Tr. 33).

In response to bench questions, Mr. Leigh described a "pan" as a scraper used to take off topsoil (Tr. 34), and that during his prior inspection some 7 months earlier, he found no major violations or equipment defects (Tr. 36). Neither Mr. Hinkle nor Mr. Inman made any specific complaints to him, and Mr. Jackson was the person who notified him, and he (Leigh) did not know Mr. Inman or Mr. Hinkle prior to that time (Tr. 37-38).

Richard Jackson, State mining inspector, testified he was acquainted with Mr. Hinkle and Mr. Inman and indicated that they live approximately a mile and a half from him. He testified that Mr. Inman reported mine safety violations to him at a local school carnival on approximately November 10, 1978. Mr. Inman told him that the pans were running unsafe, running into each other, and that one had turned over, and he asked him if there were anything he could do about it. Mr. Jackson advised him that he would report it to the inspector who had jurisdiction in the mine district and that he did so by telling Mr. Leigh about it. Upon inspection at the mine on November 24, they found the pans operating without brakes, a defective exhaust system on a truck, and the fact that no first-aid equipment was available (Tr. 40-45, 57).

Mr. Jackson discussed the violations with Mr. Vernon and he produced the equipment worksheets. One particular individual who had filled out the sheets had noted items that needed to be fixed, while the other sheets simply noted that the equipment was "O.K." This individual was Mr. Inman and he pointed it out to Mr. Vernon and he knew who he was talking about because he looked at Mr. Inman's worksheets. Mr. Vernon then asked him about his father and asked whether he lived near him and he indicated that he did. Mr. Leigh "let it slip" that they had known about the equipment defects (Tr. 45-48).

On cross-examination, Mr. Jackson testified that Mr. Inman specifically mentioned the pans and the fact that the equipment was running into each other. The complaints were not in writing and he did not indicate to Mr. Vernon or to the respondent company as to who filed the complaint, nor did he make any specific statements to Mr. Vernon which would indicate to him who filed the complaint, and Mr. Vernon did not ask (Tr. 49-53). At the time of the complaint on November 10, Mr. Hinkle was present but merely asked him whether Mr. Inman had had spoken to him (Tr. 57).

In response to bench questions, Mr. Jackson stated that he said nothing to Mr. Vernon which would lead him to believe that Mr. Inman or Mr. Hinkle had filed any safety complaints. He could not recall the specific periods of time covered by the equipment worksheets which he reviewed, nor could he recall the specific equipment which was covered. He had no way of knowing whether the equipment marked "O.K." was, in fact, in good condition, and it was possible that it was. When he handed Mr. Vernon the worksheets filled out by Mr. Inman, Mr. Vernon remarked that "Randy does a good job," but he could conclude nothing from that remark, nor could he conclude that Mr. Vernon suspected him as being the person who had complained (Tr. 62-69).

Richard E. Cooper testified that he was formerly employed by the respondent as a mechanic from May to December of 1978 and quit because of a disagreement. He was aware of defective brakes on the scrapers and since they had so much work, as long as the equipment would run, it would be operated in that condition. Mr. Vernon instructed him to operate the equipment by "backing off the brakes," and they simply did not have the time to make brake repairs. He was not at the mine site on November 24, but he does know Mr. Inman and Mr. Hinkle and considers them to be good operators. He worked for Mine Foreman Vernon on a day-to-day basis and did not consider him to be a good foreman because he did not know how to move his dirt or work with his men. Company President Rybski had asked him to assist Mr. Vernon, but he would not take the foreman's job, although he took such a job at a different mining company. When the equipment was down, Mr. Inman and Mr. Hinkle would "help out a little bit" in assisting the mechanic in making repairs (Tr. 76-84).

On cross-examination, Mr. Cooper testified he was terminated by the respondent on December 7, 1978, and that Mr. Rybski stated, "[w]e had better part company." He recalled repairing a scraper shortly before he left the company, and indicated that it "blowed up" shortly after that, but insisted he was not at fault since he believed he had repaired the machine properly (Tr. 85-87).

William McCormick testified that he was employed by the respondent in November of 1978 and recalled the day the State inspectors came to the mine, but knows nothing about what they found. He

recalled mine foreman Don Vernon addressing the men as a group after the inspectors left and recalls him asking "[w]ho was the dirty son-of-a-bitch that called the inspectors in?" (Tr. 88-91).

On cross-examination, Mr. McCormick stated that Mr. Vernon met with the men the morning following the departure of the inspectors from the mine, and the whole crew was present. Nothing else was discussed and no one said anything else and Mr. Vernon mentioned no names as possible parties who may have filed the complaint. Mr. McCormick had no knowledge as to who may have made any safety complaints, and Mr. Vernon never made any further inquiries in this regard. Mr. Vernon did remark that Mr. Inman was "a damned good operator" (Tr. 91-96).

Wayne Baker is employed by the respondent and was so employed in November 1978. He recalls Mr. Vernon making a remark concerning "[w]ho was the dirty son-of-a-bitch" that turned him in to the inspectors, but the remark was not addressed to anyone in particular. He knows Mr. Inman and Mr. Hinkle and stated that they seemed to do their work as scraper operators. He recalled an accident when the engine on his pan quit and went backwards and ran into another one. The fact that the brakes were inoperative would not have made any difference since once the engine quits, all power is lost. The pan had no brakes that day and Mr. Vernon knew it (Tr. 99-102).

On cross-examination, Mr. Baker stated that Mr. Vernon received no information from his remark that would indicate to him that Mr. Inman or Mr. Hinkle were the ones that contacted the State inspectors (Tr. 102).

Mr. Baker had no idea who had contacted the State inspectors at the time Mr. Vernon made his remark, and when he learned that Mr. Inman and Mr. Hinkle were laid off, he did not know what to make of it. The remark made by Mr. Vernon was "off-the-cuff" at the end of the shift, the day the inspectors came and was not directed to anyone in particular (Tr. 103-105).

Robert Robinson was formerly employed by the respondent as a dozer operator and indicated that when problems arose with the equipment, he would help repair it. Problems were experienced with equipment brakes. He was working on a front-end loader the day the inspectors came to the mine, and they did not have time to fix the brakes. As far as he knew, mine management and the foreman were aware that the brakes were not working on some of the equipment. He recalled Mr. Vernon making the remark concerning who may have complained to the inspectors and believed that Mr. Inman and Mr. Hinkle did their job (Tr. 106-109).

Larry Jennings was employed by the respondent until the end of November 1978, but was not at the mine when the inspectors were

there. He was involved in an accident concerning Mr. Baker when his pan engine quit and his machine came down a hill, and he also rolled a pan. If the pan had good brakes, the accident may have been prevented (Tr. 111-112). He rolled his pan when he tried to cut a square corner and rolled over. That incident was not caused by bad brakes, but by a mistake in judgment on his part (Tr. 116-117).

Randy Inman testified that he is now employed as a pottery worker and ram press operator. He was previously employed in mining beginning in 1973, and has operated loaders, trucks, and bulldozers, and has had 7 years of mining experience. He worked at respondent's mine from August 11 to November 25, 1978, and he indicated that there had been accidents at the mine involving a highwall collapse and pans colliding. The pans did not have brakes and company management knew about it. As long as they would run, he was supposed to run them and he was concerned that someone would be injured. He spoke with Mr. Jackson about the situation and Mr. Hinkle was with him at the time, although he was not directly involved in making the report to Mr. Jackson. He was simply standing nearby. He was operating equipment at the mine when the inspectors appeared and he told John Hammond that he had spoken to Mr. Jackson about the situation and this was before they came to the mine. Mr. Vernon addressed the miners and wanted to know "[w]hich one of you dirty son-of-a-bitches called the inspectors?," but no one said anything (Tr. 120-132). When he and Mr. Inman reported to work later on a Saturday, Mr. Vernon instructed them to go to his office and told them that he wanted to speak to them. Mr. Vernon advised them that since the pans were shut down, they would have to be laid off, even though other miners were hired after they were (Tr. 135). Mr. Vernon told them he "did not like your act" (Tr. 136) and advised them that they were trying to "stir up trouble" (Tr. 136). Mr. Vernon advised them that he would indicate that they were let go for lack of work (Tr. 136).

Mr. Inman indicated that he had received recent pay increases, and about 3 weeks before he was laid off, he received a 50-cent per hour increase, which other older workers did not receive. He also indicated that Mr. Vernon made him a leadman over two other workers and that he never missed any work time. He also indicated that he averaged 20 to 25 hours of overtime each week and that he had assisted in the repair of equipment and he assumed that there was work of this type available after November 24. He identified several daily worksheets which he turned in and which indicated that equipment needed repairs (Tr. 136-144; Exhs. C-2 through C-2(h)).

On cross-examination, Mr. Inman testified that after he was laid off, he began work with Hall Pottery Company on January 27, 1979, at a daily pay of \$27, plus a weekly bonus ranging from \$30 to \$60. He indicated that he has made as much as \$208 in 1 week, and that he was on unemployment drawing \$51 a week from the time he was laid off until he went to work with Hall Pottery. He stated that he told no one

other than John Hammond that he had reported the unsafe working conditions. He told Mr. Hammond because they were co-workers and good friends. He did not tell Mr. Vernon that he reported the conditions. On the day he was laid off, he called Mr. Rybski to inform him that he and Mr. Hinkle had been laid off and Mr. Rybski indicated that he did not know about it, but would make an inquiry into the matter. He denied ever telling anyone that he "would get Don Vernon." No one other than Mr. Hinkle and Mr. Hammond knew that he had informed the the State inspectors about the equipment defects. He made no statements prior to November 24 to Mr. Vernon which would lead him to conclude that he had made any complaints (Tr. 144-154).

On redirect examination, Mr. Inman testified that when they were getting ready to leave work on the day the inspectors arrived, he observed Mr. Hammond and Mr. Vernon talking together in a truck, but he did not know what they were talking about. He indicated that several other employees were hired after he was, and this included Mr. Hammond, Mr. Hinkle, and Mr. Vernon.

On recross-examination, he could offer no reason as to why Mr. Hammond would have breached his confidence and informed Mr. Vernon of the fact that he had complained to the State inspectors (Tr. 155-159).

In response to questions from the bench, Mr. Inman stated that he knew of no reason why Mr. Hammond would inform Mr. Vernon about the fact that he had complained to the State inspectors, except possibly "to better himself in the company." Although the mine is inspected by Federal Mine inspectors, he never saw any on the property, and the reason he did not complain to them is that he did not know how to contact them. During the period of his employment at the mine, he did not see fit to bring the equipment conditions and roll-overs to the attention of mine management because they knew about them. He also believed that mine management should have known about the equipment defects because of the fact that they were reported on the daily work reports, and, even though mine management knew about them, they did nothing (Tr. 159-167).

Mr. Inman stated that he believed he was laid off because he had complained to the State mine inspectors. He and Mr. Vernon had been friends and Mr. Vernon simply told him he "didn't like his act" when he informed him that he was being laid off. He gave Mr. Vernon no reason to believe that he had informed the State inspectors (Tr. 167-169). On the day that he was laid off, he contacted State Inspector Jackson and asked him whether he had told anyone about the complaint and Mr. Jackson informed him that he had not. Mr. Jackson arranged for him to speak with the MSHA people in New Lexington the following Monday (Tr. 172-176).

On further recross-examination, Mr. Inman identified a signed statement he made to MSHA on November 27, 1978 (Exh. R-2). He conceded that his statement does not contain any indication that Mr. Vernon told him that he "didn't like his act" or that he was a "troublemaker," and he explained that he evidently forgot to mention it at the time his MSHA statement was made and that his statement was incomplete. He indicated that when Mr. Vernon first arrived at the office on the day of the lay-off, he did "hem-haw at first," poured himself a cup of coffee, and was leisurely talking to him and Mr. Hinkle (Tr. 178-181).

In response to bench questions, Mr. Inman indicated that he and Mr. Vernon had gotten along well in the past and Mr. Vernon had visited his home. He and Mr. Vernon never had any "run-ins" and as far as he knew, Mr. Vernon never "had it in for him" (Tr. 183, 184).

Kenny Hinkle testified that he was acquainted with State mine inspector Richard Jackson and that he lives about a mile from him. Mr. Hinkle is now employed in the oil fields, but previously worked at the Redfield No. 2 Mine from October 1 to November 25, 1978, and has had a year and a half experience in working with heavy equipment. He testified that he was aware of equipment defects at the mine, namely, two pans which had no brakes. He did not report the defects because mine management knew about it and Mr. Vernon would have him operate the equipment even though he knew the brakes were bad. Mr. Hinkle indicated that he was with Mr. Inman on November 10 at a carnival when he (Inman) complained to Mr. Jackson, and that he was also at the mine when the State inspectors arrived and tagged some equipment. On that day, Mr. Vernon made a statement "[w]ho is the dirty son-of-a-bitch that called them?," meaning the mine inspectors. The next day, he and Mr. Inman arrived at work as usual and Mr. Vernon made some work assignments but asked them to go to his office. Mr. Vernon arrived at the office and informed them that he would have to let them go because the mine inspectors shut the pans down. When Mr. Inman asked why he was being laid off, Mr. Vernon told him "I didn't like your act." When he (Hinkle) asked Mr. Vernon why he was being laid off, Mr. Vernon told him that he did not have enough experience (Tr. 186-194).

Mr. Hinkle testified that he believed he and Mr. Inman were laid off because Mr. Vernon somehow learned that they had informed the State mine inspectors. During the lunch hour on the day the inspectors arrived at the mine, he and Mr. Inman went to Mr. Hammond and he heard Mr. Inman tell Mr. Hammond what he had done. Mr. Hinkle then gave Mr. Inman a "dirty look" and left because he did not believe Mr. Inman should have told Mr. Hammond about the complaint. Later that day, he saw Mr. Hammond talking with Mr. Vernon. Mr. Hinkle indicated that he never missed a day of work, had worked overtime, and had also performed some maintenance work on his equipment (Tr. 194-197).

On cross-examination, Mr. Hinkle testified that he was currently employed with Altier Petroleum in oil and gas drilling and began work there in March at a weekly gross pay of \$165.70. Prior to this employment, he was unemployed and drawing \$167 unemployment compensation pay. He confirmed that he rolled a pan over on its side on November 14, and Mr. Vernon told him to be more careful. Mr. Hinkle stated he told no one that he and Mr. Inman had contacted State mine inspectors and he did not discuss it with Mr. Hammond, was not in on that discussion, and it was strictly between Mr. Hammond and Mr. Inman. Mr. Hinkle admitted that he did make a statement that he would "get Don Vernon." He made this statement to Mr. Vernon a week after he was laid off and he made it during the course of a conversation when he attempted to learn why he was laid off (Tr. 198-202).

On redirect examination, Mr. Hinkle stated that at the time he rolled over the pan, Mr. Vernon asked him whether he wanted to make out a report. Mr. Hinkle declined to make a report and Mr. Vernon asked him to keep quiet about it. Although he did not discuss the fact that he had made complaints to State inspectors with Mr. Hammond, he was present when Mr. Inman advised Mr. Hammond of this fact.

On recross-examination, Mr. Hinkle stated that during the carnival of November 10, he did not specifically complain to State Mine Inspector Jackson, but simply asked him whether Mr. Inman had told him everything. However, after he was terminated on November 25, he did discuss the bad pan brakes with Mr. Jackson (Tr. 205-206). After he was fired, he and Mr. Inman discussed the matter with Mr. Jackson and Mr. Hinkle believed he was fired because he thought that Mr. Hammond had told Mr. Vernon about the complaint to the State mine inspector (Tr. 207). Mr. Hinkle stated that he did not know whether Mr. Inman advised Mr. Hammond that he (Hinkle) had gone with Mr. Inman to make a complaint to Mr. Jackson. Mr. Hinkle stated that when he heard Mr. Inman getting ready to tell Mr. Hammond, he left the area (Tr. 208). Mr. Hinkle stated that prior to his termination, he was on good terms with Mr. Vernon (Tr. 210).

Respondent's Testimony

Mr. Donald Vernon testified that he was employed by the respondent from approximately August 14, 1978, until January 3, 1979, beginning as a bulldozer operator and ending as a mine foreman, a position to which he was appointed in October 1978. His responsibilities as a foreman included keeping all equipment running properly, assigning work, ordering parts, and generally running the entire mine. For a brief period of time before becoming mine foreman, he worked with Mr. Inman and Mr. Hinkle as an equipment operator, and after his appointment as mine foreman, they worked for him.

Mr. Vernon testified that in his capacity as mine foreman, he kept records pertaining to personnel evaluations concerning the work

performance and proficiency of his employees, including Mr. Inman and Mr. Hinkle (Exhs. R-3 and R-4). He testified as to certain entries made by him on Mr. Hinkle's personnel card, and those were as follows:

11/7/78, fair operator; tries to do the best he can.
11/14/78, he put a -- laid a pan up on its side. No damage or no report made and there was no time lost. 11/16/78, he gets excited and he's cowboying his machine.

11/18/78, he's not working out and he doesn't listen to instructions. 11/25/78, I laid him off: lack of work and poor performance. 11/30/78, come in to pick up his check. He threatened me with bodily harm. There was nobody around but myself.

Mr. Vernon testified as to certain entries that he made on Mr. Inman's personnel card, and they were as follows:

10/23/78, he operates good, but needs to improve. He will do anything he's told, but he complains. 11/2/78 -- came in and picked up his check and went home sick.
11/7/78, I talked to him about moving a little bit faster.
11/9/78, I raised him to \$6.50 on a previous week because he had cried or after he had cried. 11/13/78, run 400 and fed to 560; should have been the other way around; left a big pile of dirt in the pit. 11/13/78, switched him to the 560 because of poor work. 11/14/78, 560 went out of service so I laid him off for a few days. 11/25/78, I laid him off for poor performance and lack of work.

(Tr. 211-226).

Mr. Vernon testified that he believed Mr. Inman was "afraid of his machine" and did not know the "ins and outs of the machine." As for Mr. Hinkle, he believed that he operated his machine too fast, failed to listen to safety instructions, and was an unsafe operator. He would rate Mr. Hinkle as "bad" in following instructions, and Mr. Inman as "fair" in this regard. He terminated them on November 15, 1978, because of lack of work in that four of the machines were down, and the week following he was going to lose two additional rental machines. In these circumstances, he stated that he would have an overage of three people and someone had to be laid off. He evaluated all of his personnel and decided to retain those who he believed were the best, efficient, and safest machine operators, and seniority had nothing to do with his decision in this regard. There was a decrease in the number of personnel working for the respondent during the period November 24, 1978, and January 3, 1979, namely three, and on November 4, 1978, the company had approximately 17 employees (Tr. 226-229, 236).

Mr. Vernon stated that he first observed the two State mine inspectors in question at the mine on November 24, 1978, while giving Mr. Inman some instructions on how to operate the 355 bulldozer. Mr. Vernon confirmed that he was aware of the fact that two pieces of equipment were operating with bad brakes and since he saw the inspectors, he shut the machines down. The inspectors went directly to those machines and after some discussion, they "red tagged" them. He could recall nothing in his conversation with Inspectors Leigh or Jackson which would give him any indication as to who may have complained to them. He did not terminate Mr. Hinkle or Mr. Inman because of any knowledge or suspicion on his part that they may have complained to the inspectors, and the first time he learned about their complaint was the following Wednesday after they were terminated (Tr. 229-233).

Mr. Vernon confirmed that after the State inspectors left the mine site, he did remark to his work crew as to "[w]ho is the dirty S.O.B.'s that called the inspectors." However, he stated that he made the remark in a "joking manner" and everyone took it as such. At that time, since the State inspectors informed him that he would need a foreman for the night shift, and since the only two people available were John Hammond and assistant mine foreman Bob Rybski, he took Mr. Hammond aside and asked him whether he would be interested in the job. Mr. Hammond told him he had to check with his wife and that he would let him know later. Mr. Rybski was used as the night foreman for awhile and Mr. Hammond was later appointed to the job (Tr. 233-238).

On cross-examination, Mr. Vernon confirmed that he was aware of the bad brakes on the machines, was aware of it for a week, and had instructed the mechanic to take care of the matter. The mechanic informed him that he could not obtain parts and did not know what was wrong with the brakes. Rather than shut the machines down, which would have entailed laying people off, he decided on the "lesser of two evils" and permitted the machines to run. He believed they could be operated without brakes since the 12-foot blade could serve as a braking device, and the area where the machines were operating was flat and presented no grave danger. The incident involving the collision of two machines was caused by engine failure rather than bad brakes. He could recall making no remarks that he considered Mr. Inman to be a good operator, although he did appoint him as a "leadman" for a brief period of time over two loader operators on his shift, namely himself and Mr. Hinkle, and for a brief period of time, Mr. John Hammond. However, he took him off as lead operator over Mr. Hammond the day after he appointed him, because he did not know as much about the machine as did Mr. Hammond. Both Mr. Hinkle and Mr. Inman worked substantial overtime, and he believed that Mr. Hinkle was a steady worker, but that Mr. Inman was not because he missed several days of work, 2 pay days in a row, supposedly due to the illness of his father (Tr. 238-246).

Mr. Vernon testified that during his conversation with Mr. Hammond on November 24, he did not question him as to who may have complained to the State inspectors. Mr. Vernon confirmed that he told the MSHA investigator that he terminated Mr. Hinkle and Mr. Inman because of "lack of work and poor performance" (Tr. 249-253). Mr. Vernon denied that he had been offered reemployment with the respondent or that the respondent was going to assist him in obtaining employment (Tr. 254).

On redirect examination, Mr. Vernon identified Mr. Inman's and Mr. Hinkle's time cards and notations which he made on the cards as to their final pay checks, and the fact that they were terminated for lack of work (Exhs. R-5 and R-6, Tr. 263).

On recross-examination, Mr. Vernon confirmed that he asked State Inspector Jackson about his father and whether they were related and he did so because his father helped him in studying for his mine foreman's test. He did recall Mr. Jackson giving him work slips pertaining to Mr. Inman, or Mr. Jackson remarking that Mr. Inman was doing a good job (Tr. 266-268).

In response to bench questions, Mr. Vernon stated that he left his employment with the respondent on January 3, 1979, because he was not making enough money, that Mr. Hammond never indicated to him that Mr. Hinkle and Mr. Inman had made any complaints, and he was not aware that they made such complaints (Tr. 270).

John Hammond is employed as a night foreman bulldozer operator for the respondent. He testified that he has been employed by the respondent for 7 months. He confirmed that Mr. Inman told him that he had called Mr. Jackson about the pan brakes, and believed that the conversation took place "around November 22," but he was not sure. He did not recall discussing the subject with Mr. Hinkle. He recalled the day, November 24, 1978, when the State inspectors came to the mine to check the equipment, but was not involved in any discussions with them. He confirmed the comment made by Mr. Vernon to the men about "[w]hich S.O.B. turned us in to the State mine inspectors?," but he (Hammond) and the others took it as a joke and they laughed about it. He denied any conversations with Mr. Vernon after that with regard to the State inspectors, and indicated that Mr. Vernon talked to him about being a shift foreman (Tr. 272-276).

On cross-examination, Mr. Hammond confirmed that Mr. Inman contacted him the night before the instant hearing and asked to speak with him about the case. He also confirmed that he told Mr. Inman that he did not want to discuss it with him because he would have to give up his job, and that he had a family to support and "was not messing up for nobody" (Tr. 278). He told no one about Mr. Inman's advising him that he had called the inspectors (Tr. 279).

In response to bench questions, Mr. Hammond stated that he could recall no conversation with Mr. Inman concerning his complaining to

the State mine inspectors on the day the inspectors came to the mine. He was not surprised to see the inspectors because he knew that Mr. Inman had called them and he (Hammond) was looking for them. Mr. Hammond did not recall Mr. Inman telling him that he personally discussed the matter with Inspector Jackson, and his recollection was that he said he "called him" (Tr. 281).

Witnesses Recalled for Testimony by the Presiding Judge

William McCormick was recalled and testified as follows (Tr. 285-287):

JUDGE KOUTRAS: I don't want to leave you with the impression I'm picking on you, but you've been called as my witness, and you are still under oath. And I just picked you at random; you just happened to be the first one on the list here.

I just wanted to ask you one or two questions. With respect to the incident where Mr. Vernon went to the salamander and made some statements as to which of you S.O.B.'s -- and I'm quoting the testimony here -- blew the whistle so to speak, do you recall that incident? I believe you testified to that.

A. Yeah.

Q. How did you take that?

A. Well, I just -- It just was a figure of speech. I don't know; we all might have laughed or I don't -- I mean, I don't know. I -- of course I didn't know -- really know what it was all about.

Q. Did you laugh?

A. I might have at the time.

Q. Was that his only comment?

A. At that time, yes, sir, that I recall.

Wayne Baker was recalled and testified as follows (Tr. 287-289):

JUDGE KOUTRAS: Mr. Baker, have a seat please. I just want you to know that I have asked you to come back in because I've got a couple of questions I want to ask you so you are my witness now and you are still under oath.

Q. You testified earlier in the day with regard to the incident at the salamander where Mr. Vernon had made

a statement of some sort, which of you S.O.B.'s reported it to the inspector, or words to that effect. Do you recall that testimony?

A. Uh-huh.

Q. And do you recall that incident?

A. Right.

Q. How did you personally take his remark?

A. I don't think it was directed to anybody personally. I mean, I didn't take it personally directed to me.

Q. Well, I mean, what was your reaction. Was he serious when he said it?

A. No, I don't think he was. He had kind of a smile on his face and we all laughed at it when he said it.

Q. Did you laugh?

A. Yes.

Q. Was it an off-the-cuff-type situation or did he assemble everyone there and say, hey, listen, I want to -- to the best of your recollection?

A. No. We was already standing around there and I think it was just an off-the-cuff remark.

Q. I believe someone asked you earlier whether you knew for a fact or whether you have the information as to whether Mr. Inman and Mr. Hinkle had reported safety infractions to the State mining inspectors; and I believe your answer was no, you had no knowledge of it?

A. Right.

Q. Do you know whether there was anything in terms of any rumors or any stories floating around the mine that either of these two gentlemen may have made any complaints?

A. No. I never heard any. No.

Mr. Inman was called in rebuttal by his counsel, and testified as follows:

BY MR. SAFRANEK:

Q. This remark that he made, did you laugh?

A. No, I didn't laugh.

Q. Did anybody else laugh to your recollection?

A. I -- don't remember of anybody laughing. They could have; of course, you know, like Bill said, I -- you know, it's been a long time. You know, I don't --

Q. If they had, could it have possibly been nervous laughter of a sort?

A. It just struck me because, you know, I knew that I was the one that told them. And I was about half afraid to say anything or laugh or do anything. But I figured maybe he was throwing the remark right to me. I took it personally because I did call him. I didn't call him; I told him there at the Bingo thing. And I kind of took it kind of personal, myself.

Rebuttal Testimony

Mr. Inman was recalled and testified that he could recall no one laughing over Mr. Vernon's remark, but admitted that he could not remember because of the passage of time. He took it personally because he was the person who complained to the State inspectors (Tr. 209). Mr. Inman also clarified and confirmed the fact that he complained to Inspector Jackson personally at a local carnival where he was in attendance (Tr. 297). Mr. Hinkle was recalled and denied making any "smart remarks" to Mr. Vernon, and also stated that he followed work directions given him by Mr. Vernon (Tr. 300).

Arguments Presented by the Parties

Complainant

In their posthearing brief, complainants argue that prior to the November 24, 1978, State inspection of the mine, the mine had been inspected by State inspectors and found to be in good shape as far as safety violations were concerned. However, after November 24, major safety violations occurred, namely, much of the equipment was operating without brakes or with brakes which were inadequate, and that mine foreman Donald Vernon was aware of these brake conditions and, in fact, shut down two defective pans on November 24 before the State inspectors could get to them. The November 24 State inspection was prompted by complaints made by Mr. Inman and Mr. Hinkle to

State mining inspector Richard Jackson at a local school carnival on November 10, 1978, and when Mr. Jackson and his fellow inspector, Ronald Leigh, inspected the mine on that date, they found several major violations, in addition to the defective brakes, namely, the lack of first-aid equipment at the mine, and a fuel oil truck operating without brakes and a defective exhaust system.

With regard to Mr. Vernon's alleged motivation in terminating the complainants from their employment, it is argued that before the termination, Mr. Inman told fellow miner John Hammond that he and Mr. Hinkle had talked to Inspector Jackson, and that Mr. Vernon had a conversation with Mr. Hammond about the report the complainants had made to Mr. Jackson (Brief, p. 3). In view of this fact, complainants argue that there could not have been any other reason for their terminations since their attendance records were excellent, both had worked substantial overtime, and both were considered satisfactory employees, particularly, Mr. Inman, who in the past had been characterized by Mr. Vernon as a "damned good operator," had received a raise just 3 weeks before his termination, and had been designated by Mr. Vernon as a lead loader operator over other loader operators.

With respect to the respondent's defense concerning the terminations, complainants argue that respondent's purported excuse for the lay-offs, namely, that someone had to be laid off because two pieces of equipment were shut down and the complainants were selected because they were less than satisfactory employees is a ludicrous argument which does not square with the realities of mining practice, particularly in a situation where the two employees selected just happen to be the ones who complained about safety conditions. Complainants assert that the mathematical probabilities of two employees in such a situation being terminated is 1 chance in 272 (one-seventeenth x one-sixteenth) ($16 \times 17 = 272$). Further, in support of these assertions, complainants argue that there is substantial evidence in the record to the effect that the practice in the coal fields when equipment is down or out is to throw every available man onto the job of getting it back in working order, even if they are used only as runners and general laborers, and they cite the testimony of State Inspector Leigh (Tr. 25-26), and former Mine Mechanic Cooper (Tr. 83) as support for this contention.

Considering common experience, complainants argue that one can only conclude that they were terminated because of their report to Inspector Jackson and point to the fact that their perception of this motivation on the part of Mr. Vernon is indicated by the fact that they immediately contacted Mr. Jackson after they were terminated, who introduced them to Federal mine inspector Joe Zavora, who assisted them in the filing of their initial discrimination complaint on November 27, 1978. As for Mr. Vernon's knowledge that the complainants had made the complaint to Mr. Jackson, complainants assert that

the "evidence did show a channel from Inman to John Hammond from foreman Vernon through which the fact of complainants' report to the state mining inspector could have been communicated" (Brief, pp. 5-6). Further, complainants argue that the evidence establishes that Mr. Inman was substantially more diligent than other workers in reporting safety defects through certain daily maintenance sheets, which fact was brought to Foreman Vernon's attention by Inspector Jackson (Tr. 22, 46-47). A violation of section 110(b)(1) is established when discriminatory action is taken as a result of a report of a safety violation to the supervisory personnel. Munsey v. Morton, 507 F.2d 1202 (1974). And likewise, a violation is made out when discriminatory action is also taken against a fellow employee who is a close friend and companion as Inman and Hinkle were (Tr. 121, 186, 191).

Respondent's Arguments

Respondent argues that insofar as the alleged discrimination is concerned, the fact that the respondent was using defective equipment on the day of the State inspection is not an issue. However, by shutting the equipment down, respondent asserts that the natural consequence of this event was the fact that together with the loss of other equipment, the operators of the equipment had to be laid off. Regarding the assertion that the complainants could have been retained and used in making machinery repairs, respondent argues that complainants were not qualified or able to make equipment repairs and that even if they were, this was a judgment decision for mine management to make, and since the complainants were not mechanics, the respondent properly felt that they were not capable of making such repairs.

With regard to the termination of the complainants by the respondent, respondent argues that the complainants were terminated following the loss of certain equipment, namely, the equipment which was shut down and other rental equipment. In the judgment of the respondent, since the work performance of the complainants was less than satisfactory, and since someone had to be let go, the decision to terminate the complainants for "lack of work" was a management prerogative which is fully supported by the record, including the official work records concerning the complainants' period of employment with the respondent. Mr. Inman had been employed for a little over 3 months prior to his termination, and Mr. Hinkle for less than 2 months.

Regarding Mine Foreman Vernon's purported motive in terminating the complainants, respondent argues that there is no credible evidence that Mr. Vernon knew that the complainants had made any safety complaints to State Mine Inspector Jackson. Respondent dismisses as "trite guessing and conjecture," the attempts by the complainants to link Mr. Vernon's conversations with Mr. Jackson concerning the identity of Mr. Jackson's father and his place of residence with the

fact that the complainants may have been the individuals who complained to Mr. Jackson. As for Mr. Vernon's remarks concerning "[w]hich of you S.O.B.'s complained?," respondent asserts that this remark was made in jest and that the men accepted it as such. In summary, respondent asserts that the complainants have failed to establish by a preponderance of the evidence that they were discriminated against or that their terminations were prompted by any safety complaints made to State mining inspectors.

Findings and Conclusions

Based on a close and careful scrutiny of the entire record in this proceeding, it seems clear to me that the assertions made by the complainants concerning the alleged discrimination may be summarized as follows:

- Complainants were good workers, missed no time at work, worked substantial overtime, and were for all intents and purposes, good machine operators capable of performing maintenance on their equipment.
- Complainant Inman complained to State Mine Inspector Jackson about certain safety practices taking place at the mine and asked him to look into the matter. Since complainant Hinkle was with him at the time the complaint was lodged, complainant Hinkle must be deemed to be a complainant along with Inman.
- As a result of their complaints to the State inspector, Inspector Jackson and a fellow inspector came to the mine, discussed the matter with Mine Foreman Vernon, advised Vernon that Hinkle was a conscientious worker, and then proceeded to tag out certain equipment for safety violations.
- After inquiring about the residence of Mr. Jackson's father, and after attempting to learn who complained by making the "S.O.B." statement and discussing the matter with John Hammond, a friend and co-worker of Mr. Inman, Vernon learned or surmised that Inman and Hinkle had filed the complaints, and in retaliation, fired them for making the safety complaints.

Respondent's defense may be summarized as follows:

- Complainants were not the best employees, had worked only a short time with the respondent, and after the equipment was taken out of service, this resulted in a surplus of employees.

- Mine Foreman Vernon did not know that the complainants had complained to the State mine inspectors, his "S.O.B." remarks were in jest, and his conversation with John Hammond and Inspector Jackson had nothing to do with any complaints made to the State mine inspectors.
- Respondent exercised its management prerogative in terminating the complainants rather than keeping them on in some other capacity.

The record adduced in this proceeding establishes that there were, in fact, certain unsafe practices taking place at the mine at or about the time that the complainants were terminated from employment. These practices included the operation of several pieces of equipment with either marginal or no brakes, and the condition of the equipment was known to mine foreman Donald Vernon. The record also establishes that as a result of these unsafe conditions, Mr. Inman personally advised State Mine Inspector Jackson about them and asked him what he could do about the situation. Although the evidence reflects that Mr. Hinkle did not personally complain to Inspector Jackson, he was with Mr. Inman at the time the complaint was lodged, apparently overheard the complaint, and I conclude for purposes of this proceeding, Inspector Jackson could reasonably infer that both Mr. Inman and Mr. Hinkle were making the complaint. Subsequently, as a result of the complaint made to Inspector Jackson, the mine was inspected, and although the equipment had been taken out of service voluntarily by Mine Foreman Vernon when he saw the inspectors approaching, the inspectors tagged out two pieces of equipment and advised Mr. Vernon not to put them back into operation until they were repaired.

Aside from the fact that there is no direct evidence that Mr. Vernon knew that Mr. Inman and Mr. Hinkle had complained to Inspector Jackson, I cannot conclude that the testimony presented can even support an inference that he knew that they had complained and retaliated by firing them. While the inspectors did not tell Mr. Vernon at the time of the November 24 inspection that Mr. Hinkle and Mr. Inman had complained, Inspector Leigh let it be known that he "had heard" about the bad brakes on the equipment prior to the inspection, and Mr. Vernon purportedly acknowledged that he "kind of thought so" (Tr. 21). As for the worksheets alluded to by Inspector Leigh, Mr. Vernon produced them at Mr. Jackson's request, and Mr. Leigh overheard Mr. Jackson comment that one of the two (meaning Inman or Hinkle) "was doing their job" because the worksheets contained "marks on it that there had been something being reported of bad equipment," and Mr. Leigh believed that Mr. Jackson "mentioned the fellow's name on that sheet at that time" (Tr. 22). Mr. Jackson testified that he asked Mr. Vernon to produce the equipment worksheets and Mr. Vernon produced "a big stack of them."

Upon examining the worksheets in Mr. Vernon's presence, Mr. Jackson commented that most of them were marked "okay," meaning that the equipment was in good working order, but that one of the sheets filled out by Mr. Inman indicated that a particular piece of equipment was in need of attention, and he handed Mr. Vernon that particular worksheet.

The testimony establishes that when Mr. Vernon observed the State inspectors on November 24, he voluntarily took the equipment with defective brakes out of service and did so because he obviously believed that they would discover the defects. Mr. Vernon candidly admitted to the inspectors that the scrapers were operating without brakes and indicated he was experiencing difficulty in obtaining the necessary parts to keep them in repair (Tr. 15-16). And, while Mr. Jackson testified that upon inspection, the inspectors found "exactly what had been reported to us," in terms of equipment operating without brakes, the fact is that Mr. Vernon shut the equipment down when he saw the inspectors (Tr. 44).

Inspector Jackson stated that when he showed Mr. Vernon the sheet filled out by Mr. Inman, Mr. Vernon commented that Mr. Inman "does a good job," said nothing which would lead him to believe that he knew Mr. Inman had complained, did not attempt to single Mr. Inman out as the one who had complained, and said nothing derogatory about Mr. Inman (Tr. 65-66). As a matter of fact, Mr. Vernon made no inquiries of the inspectors as to who may have complained to them, and Mr. Jackson stated that Mr. Vernon said nothing which would lead Mr. Jackson to believe that Mr. Vernon suspected Mr. Inman as being the one who complained (Tr. 66).

With regard to the conversation between Mr. Vernon and Mr. Jackson concerning the identity of Mr. Jackson's father and his place of residence, I cannot conclude that Mr. Vernon had some devious motive in making the inquiry or that he was in some way attempting to learn who had complained. I find Mr. Vernon's explanation to be credible and plausible and find nothing in the record to support a conclusion or an inference that he was in any way attempting to learn the identity of the complainants. As for Mr. Vernon's "S.O.B." comments, when viewed in context, I believe and conclude from the testimony of the witnesses who testified on this comment that it was an "off-the-cuff" remark made by Mr. Vernon which the employees took as such. There is nothing to suggest that Mr. Vernon threatened anyone or made any searching inquiries of the employees in an attempt to learn who may have complained. It seems to me that if Mr. Vernon believed that Mr. Inman or Mr. Hinkle had complained, he would have confronted them and asked them about it. As for Mr. Vernon's conversation with Mr. Hammond, both denied under oath that they had any discussion about who may have complained, and since Mr. Hammond and the complainants were on friendly terms, I find nothing in the record to support any inferences or conclusions that Mr. Hammond had anything

to gain by telling Mr. Vernon who may have complained. Although Mr. Hammond refused to discuss the matter with Mr. Inman or his attorney before the hearing, and purportedly made a comment that he did not want to jeopardize his employment with the respondent, these events transpired after the fact, that is, after the termination of the complainants. Further, Mr. Hammond was cross-examined by complainants' counsel at the hearing, and I find his testimony to be consistent and credible.

Mr. Vernon was initially employed by the respondent on approximately August 14, 1978, as an equipment operator, and in October was appointed as a foreman. He terminated his employment with the respondent on January 3, 1979, and at that time was the assistant mine foreman. As foreman, his duties included assigning personnel to various job tasks, insuring that the employees were at work on time, and insuring that the equipment was in good working order (Tr. 213-214). For a brief period of time before he assumed a supervisory role, he and the complainants were fellow equipment operators, worked together, and apparently enjoyed a good working relationship. In his capacity of assistant mine foreman, his duties included the making of performance evaluations of the employees, and in this capacity he maintained certain company personnel records and documented the work performance of the employees, including the complainants which he produced (Exhs. R-3, R-4).

Mr. Vernon testified as to certain entries that he made on the company personnel records with regard to Mr. Hinkle during the period November 7, 1978, through November 30 1978 (Exh. R-3). On November 7, 1978, he noted that Mr. Hinkle was a "fair loader operator who tries to do the best he can." Subsequent entries made on November 14, 16, and 18, reflect that Mr. Hinkle "laid pan on its side," "gets too excited, cowboy's his machine," "not working out, does not listen to instructions." On August 25, the records reflect "laid him off due to lack of work and poor performance," and on November 30 there is a notation "came in to pick up his check. Threatened bodily harm. No witnesses."

Mr. Inman's personnel record for the period October 23, 1978, to November 25, 1978, contained entries made by Mr. Vernon indicating that he was a good loader operator, did anything he was told, but "complains and needs to improve." A notation for November 7, 1978, reflects that Mr. Vernon talked to him "about moving a little faster." On November 9, Mr. Inman was given a pay increase to \$6.50 an hour, and on November 13, he was reassigned to another piece of equipment because of "poor work," and on November 14, he was given a "few days off" because the "560 is out of service." The final entry for November 25, 1978, reflects that he was "laid off for lack of work and poor performance."

In addition to the personnel entries which he made, Mr. Vernon characterized Mr. Hinkle as an unsafe equipment operator, and stated

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that he operated his machine too fast and would not listen to instructions (Tr. 226). As for Mr. Inman, Mr. Vernon stated that he was "afraid of his machine" and that based on his performance in the operation of his machine, he believed that Mr. Inman did not know all of the "ins and outs of the machine" (Tr. 226).

In explaining his reasons for terminating the complainants, Mr. Vernon testified that after the defective equipment was taken out of service, a total of four pieces of equipment were out of service, since two additional rental machines would be lost the following week. Faced with a surplus of three employees, he contended that he made an evaluation of the performance of all of his workforce as to who could operate the equipment in the best, efficient, and safest manner and that seniority had nothing to do with his decision to terminate the complainants (Tr. 226-227). In these circumstances, while it may be true that the usual practice in the mines is to assign employees to other chores when equipment is down, I cannot conclude that the Act requires an operator to make such an accommodation for its employees, nor can I conclude from the evidence presented, that respondent discriminated against Mr. Inman or Mr. Hinkle by not assigning them to other tasks, while at the same time treating other employees similarly situated any differently. Absent any contractual obligations or agreements to the contrary, I believe that the assignment of personnel is a matter within the discretion and judgment of an employer and not the employee. Further, I cannot conclude that the complainants have established that they were qualified mechanics; and even if they were, I cannot conclude that respondent was under any obligation to retain them as mechanics for the purpose of repairing the equipment which had been taken out of service.

Shortly after their termination, the complainants filed a complaint with MSHA, and in connection therewith, executed a written statement (Exh. R-2). In that statement, no mention is made about Mr. Vernon's alleged comments that he considered Mr. Inman to be a "troublemaker" and that he "didn't like his act." At the hearing, Mr. Inman testified that Mr. Vernon had made these statements to him at the time he informed him of his termination, and Mr. Hinkle used the same phrases in testifying as to what Mr. Vernon purportedly said to Mr. Inman. When asked why he had not included these statements attributed to Mr. Vernon in his original written complaint, Mr. Inman answered as follows (Tr. 178):

Whether I had forgotten it at the time? I don't know. This has been so long ago.

I had been going over and over and trying to remember everything Don had said, about everything that was said in that office that morning. Whether it was in here or not, I don't know. Evidently, I had forgotten to put it in.

But there's a lot of things you remember after you think about it.

During his testimony at the hearing, Mr. Hinkle testified that at the time Mr. Vernon advised them that they were being terminated, he said "Well, I'm going to let you guys off because you know that the mine inspectors come in here and shut the pans down and you know they come in there, * * * (Tr. 193). Yet, Mr. Hinkle failed to include this in the written complaint. Thus, viewed in perspective, both of the complainants failed to include in their original written complaint, statements attributed to the mine foreman which go to the very heart of their present assertion that he was motivated to terminate them because they had complained to a State mine inspector.

With respect to the prior MSHA inquiry concerning the complaint, it was disclosed during the hearing that Mr. Vernon had made a previous statement to an MSHA investigator in which he indicated that he terminated the complainants for lack of work and poor performance (Tr. 249). Although a copy of his previous statement was produced and examined and used by complainants' counsel during cross-examination, counsel decided not to introduce it for the record (Tr. 253). And, although the MSHA inspector was present in the courtroom in response to a subpoena, complainants' counsel decided not to call him as a witness (Tr. 271). Thus, from the record adduced in this proceeding, I conclude that Mr. Vernon has been consistent in his testimony as to why he terminated the employees, and as for his own departure as an employee, he indicated that he quit because he was not making enough money (Tr. 269), and denied that he has been offered reemployment with the respondent or that the respondent was going to help him obtain other employment (Tr. 255). Thus, when viewed in perspective, I cannot conclude that Mr. Vernon had anything to gain by coloring his testimony or concealing the fact that he did, in fact, terminate the complainants because of their complaints to the State inspectors. Further, after viewing Mr. Vernon on the stand, I find him to be a credible witness and his testimony is consistent with the personnel evaluations and notations made by him with respect to the complainants' work performance. For example, one of the notations that he made was that Mr. Hinkle had threatened him on November 30 when he came to the mine to pick up his pay check. Mr. Hinkle candidly admitted that he "would get" Mr. Vernon (Tr. 201-202).

Having viewed the witnesses on the stand, and after careful evaluation of all of the testimony, I cannot conclude that the complainants have established through a preponderance of the evidence that respondent discriminated against them for exercising their rights under the Act to bring to the attention of State mine officials certain unsafe mine practices. It is clear that these rights are protected under the Act. However, the burden of proof lies with the complainants. I find and conclude that they have not carried their burdens and have not established that their termination was

prompted by their protected activities. To the contrary, I find and conclude that respondent has established through credible and probative evidence that the termination of the complainants was based on a lack of work and a management judgment that a reduction in personnel was necessary. In the exercise of that judgment, I am not convinced that the respondent acted out of any retaliation against the complainants for reasons connected with their protected activities. I believe that in the final analysis, and after their termination, complainants speculated that on the day of the inspection by the State mine inspectors, Mr. Hammond informed Mr. Vernon that they had complained, and that Mr. Vernon retaliated by firing them (Tr. 207). As a result of this speculation, they shortly thereafter again contacted Mr. Jackson, who, in turn, arranged for an interview with an MSHA investigator. Upon investigation, MSHA obviously believed that the discrimination complaint was not well-grounded since MSHA found no discrimination and dismissed the complaint after finding that the complainants' safety complaints were not a contributing factor to their termination by the respondent.

ORDER

In view of the foregoing findings and conclusions, I conclude and find that respondent's decision to terminate the complainants was not motivated by respondent's attempts to discriminate against them for protected mine safety activities. Accordingly, the complaints are DISMISSED, and the relief requested is DENIED.


George A. Koutras
Administrative Law Judge

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AUG 15 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. DENV 78-414-P
Petitioner : A/O No. 42-00098-02025V
v. :
: King Mine
U.S. FUEL COMPANY, :
Respondent :

DECISION APPROVING SETTLEMENT AND
ORDERING PAYMENT OF CIVIL PENALTY;
ORDER DENYING MOTION TO AMEND
CAPTION AND ORDER GRANTING MOTION
TO AMEND TITLE OF JOINT
MOTION AND STIPULATION

Appearances: James Abrams, Esq., Office of the Solicitor, U.S.
Department of Labor, for Petitioner;
Richard H. Nebeker, Esq., Callister, Greene & Nebeker,
Salt Lake City, Utah, for Respondent.

Before: Judge Cook

I. Procedural Background

On May 5, 1978, the Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalty against U.S. Fuel Company (Respondent) in the above-captioned proceeding. The petition, filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (Act), alleged violations of 30 CFR §§ 75.200 and 75.400. The Respondent filed its answer on June 7, 1978.

A notice of hearing was issued on July 10, 1978, setting a hearing date of September 12, 1978. Such date was later changed as a result of a motion for continuance. On November 6, 1978, an order was issued canceling the hearing and continuing the proceeding indefinitely in response to a communication indicating that a settlement had been reached.

On January 24, 1979, MSHA filed a "motion to approve settlement and to dismiss." This motion was denied by an order issued on January 31, 1979. Notices were issued setting May 10, 1979, as the hearing date.

On April 30, 1979, the Secretary of Labor moved to amend the caption, and the parties filed a "stipulation and joint motion to withdraw petition for assessment of civil penalty and for dismissal." On May 2, 1979, a telephone conference was held during which the undersigned Administrative Law Judge and counsel for the parties participated. The parties agreed to obtain certain further information to supplement the April 30, 1979, stipulation and motion to approve settlement. Accordingly, an order was issued on May 10, 1979, continuing the proceeding indefinitely.

The supplemental information was submitted in the form of a stipulation and joint motion on August 14, 1979, in conjunction with a "motion to amend title of joint motion and stipulation." Rulings on the three pending motions are contained herein.

II. Motion to Amend Caption

In support of his motion to amend the caption, the Secretary of Labor states the following: "Secretary of Labor moves to amend the caption of the pleadings in this case to reflect that Ray Marshall, Secretary of Labor, United States Department of Labor, is the petitioner, rather than Secretary of Labor, Mine Safety and Health Administration."

On April 18, 1978, it was determined by the Chief Administrative Law Judge of the Federal Mine Safety and Health Review Commission (Commission) that the captions in civil penalty proceedings before this Commission would be in the format as set forth in the present caption to this proceeding.

Accordingly, the motion to amend the caption will be denied.

III. Motion to Amend Title of Joint Motion and Stipulation

The motion states, in part, as follows:

Petitioner moves, by and through his attorney, pursuant to 29 C.F.R. 2700.13 to amend a pleading entitled "Stipulation and Joint Motion to Withdraw Petition For Assessment of Civil Penalty and for Dismissal" attached hereto as Exhibit A to "Stipulation of Settlement and Joint Motion to Approve Settlement Agreement."

In support of his motion, petitioner states this is necessary to properly describe: (1) the actions of the parties, and (2) the instrument upon which relief may be properly granted by the Commission.

Petitioner has been authorized by counsel for respondent to state this motion will not be opposed.

Accordingly, the motion will be granted, and the above-noted motion, filed on April 30, 1979, will be amended to read "Stipulation of Settlement and Joint Motion to Approve Settlement Agreement."

IV. Approval of Settlement

As relates to the proposed settlement, information as to the six statutory criteria contained in section 110 of the Act has been submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

The settlement figure for the alleged violations is \$1,500. The assessment for the alleged violations was \$3,600.

The alleged violations and the settlement are identified as follows:

<u>Order No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Assessment</u>	<u>Settlement</u>
7-0107 (1 LJC)	04/18/77	75.400	\$1,800	\$ 300
7-0108 (2 LJC)	04/18/77	75.200	1,800	1,200

As justifications for the proposed settlement, the parties state, in part, as follows:

1. Section 104(c)(1) Order No. 1 LJC (sic), 4/18/77, 30 CFR 75.400 originally assessed for \$1,800.00 to be settled for \$300.00.

Gravity, Negligence and Good Faith.

In this case float coal dust was allowed to accumulate on rock dusted surfaces in the 7 North Section for approximately 368 feet. Also, wet loose coal and coal dust were allowed to accumulate from the loading point in by the entries and crosscuts of the 7 North Section for a distance of approximately 2,650 feet and these accumulations ranged in depth from approximately 4 to 18 inches.

While loose coal could burn if ignited or float coal could propagate an explosion if one were to begin, moisture in the area decreased the likelihood of such an occurrence and so its gravity.

Roadways were wet and there were several areas where water had been pumped out the day prior to the citation, thereby significantly reducing probability of a mishap.

Additionally, methane gas has not been detected in the King Mine by the Secretary's duly authorized representative. There has not been an explosion or fire caused by methane gas in this mine. On April 18, 1977, the day the citation was issued, the section was not working. Marion Bingham, the construction foreman, had been sent to the 7 North Section with the large rock duster to rock dust the section.

Although the float coal dust and the accumulations behind the line curtain in the first left entry were dry (see Exhibit "A"), that entry constituted only 90 feet of the total accumulations. The rest of the accumulations of loose coal and fines contained moisture. This fact diminished the probability of a fire. Further, the probability of an explosion which could be propagated by the accumulations of float coal dust was diminished by the fact that no accumulation of methane was measured.

On April 18, 1977, the inspector did not cite any conditions and/or violations which could serve as a potential ignition source; similarly, no electrical defects were cited. Although the possible consequences of the violation could be serious, the probability of those consequences occurring (i.e., a fire and/or an explosion) was measurably reduced by the above conditions.

The accumulations had been observed, and the construction foreman was preparing the rock duster for operation in the section when the violation was cited. It is stated that the citation was the result of the operator's ordinary negligence.

The operator rapidly undertook the process of rock dusting the section and abated the violation by rock dusting the float coal dust and by loading out the loose coal and coal fines and then rock dusting the cleaned areas. It is stated that the operator exhibited good faith in attempting to rapidly correct the violation.

The original assessed penalty was amended to \$300.00 by the Office of Assessments as per Exhibit "D" attached hereto.

Previous History.

During the 24 months prior to the subject violation, 388 violations were assessed at the King Mine (see Exhibit "B"). From the inception of the Federal Coal Mine Health and Safety Act of 1969 to the date of the

subject violation, the operator's total history of previous paid violations was 872 (see Exhibit "C"). This is an average of approximately 116 violations per year up to the date of the subject violation. Of these violations 72 or approximately 8.3 % were violations of 30 CFR 75.400. This does not indicate an habitual disregard for the mandates of the standard on the operator's part.

2. Section 104(c)(1) Order No. 2 LJG (sic), 4/18/77, 30 CFR 75.200 originally assessed for \$1,800.00 to be settled for \$1,200.00.

Gravity, Negligence and Good Faith.

On April 18, 1977, an MSHA inspector found that the roof at four locations in 7 North Section was loose and it had not been taken down or supported. The areas involved were three crosscuts between actively used entries and a proposed intake entry. Miners could have accessed the area in question and been exposed to serious injury or death. The area was not being actively worked. However, a warning sign of the danger was posted. A fall had occurred in the proposed intake entry (Exhibit "A").

The poor roof condition had been entered in the preshift books on April 7, eleven days before the subject violation was cited evidencing operator negligence. The only corrective action which had been taken was to post signs warning of the "Bad Top" (see the Order and Exhibit "B").

The violation was abated through the installation of roof bolts in the four areas. It is stated that the operator exhibited good faith in attempting to rapidly correct the violation.

Previous History.

During the 24 months prior to the subject violation, 388 violations were assessed at the King Mine (see Exhibit "B"). From the inception of the Federal Coal Mine Health and Safety Act of 1969 to the date of the subject violation, the operator's total history of paid violations was 872 (see Exhibit "C"). This is an average of approximately 116 violations per year. Of these violations, 24 or approximately 2.7 % were violations of 30 CFR 75.200. This is not such an amount to indicate an habitual disregard for the mandates of the standard on the operator's part.

Size.

Unites States Fuel Company operates two mines: King Mine (I.D. No. 42-00098) and King No. 5 Mine (I.D. No. 42-01389). During 1976 and 1977, the King Mine produced approximately 614,941 and 882,455 tons of bituminous coal, respectively. During those same years, the King No. 5 Mine produced no coal and 5,000 tons (see (Exhibit "E")).

The King Mine has four active sections and employs approximately 227 miners. Three production shifts are worked during a 24-hour period (see Exhibit "F").

Settlement Amounts.

With reference to Order No. 1 LJJ, 4/18/77, 30 CFR 75.400, there was a low probability of an actual fire and/or explosion occurring as a result of the violation due to the lack of a probable ignition source, the wet nature of a majority of the coal and coal fines accumulations and the fact that no methane was determined by measurement.

The settlement of \$300.00 represents the second highest amount the operator will have paid for a violation of 30 CFR 75.400 cited prior to April 18, 1977, the highest being for a violation of 30 CFR 75.400 cited in conjunction with an imminent danger order (see Exhibit "C").

With reference to Order No. 2 LJJ, 4/18/77, 30 CFR 75.200, the proposed payment is almost five times as much as any payment made for a violation of 30 CFR 75.200. There was a lack of due diligence on the operator's part in correcting the poor roof conditions, and the chance of severe injury or death existed even though the area was posted with signs warning of the bad top. A deficiency inherent in the Order has also commenced a penalty reduction, namely the failure to describe with particularity the nature of the violative condition.

The above amounts will not affect the operator's ability to continue in business.

The Stipulation of Settlement and Joint Motion to approve Settlement Agreement was signed by the President of Local 6363, UMWA District 22 as representative of employees as well as the attorneys for both parties.

Exhibit "D" submitted on August 14, 1979, consists of a letter dated June 22, 1979, from Madison McCulloch, MSHA Director of Assessments, to James L. Abrams, Esq., counsel for MSHA. The letter states, in part, as follows:

This is to advise that on or about January 12, 1978, the captioned case was reviewed by the assessment office. Because it would have been difficult to establish a valid 104(c)(1) (now 104(d)(1)) notice to uphold the unwarrantable chain, a recommendation was made by this office to accept \$300 and \$1,200 respectively for violations in issue.

In view of the reasons given above by counsel for the parties for the proposed settlement, and in view of the disclosure as to the elements constituting the foundation for the statutory criteria, it appears that a disposition approving the settlement will adequately protect the public interest.

Of particular significance to the approval of the settlement, is the above-noted letter from the MSHA Director of Assessments.

ORDER

Accordingly, IT IS ORDERED that the Secretary of Labor's motion to amend the caption be, and hereby is, DENIED.

IT IS FURTHER ORDERED that the Petitioner's motion to amend the title of the joint motion and stipulation be, and hereby is, GRANTED. IT IS THEREFORE ORDERED that such joint motion be, and hereby is, AMENDED to read "Stipulation of Settlement and Joint Motion to Approve Settlement Agreement."

IT IS FURTHER ORDERED that the proposed settlement, as outlined above, be, and hereby is, APPROVED. IT IS THEREFORE ORDERED that Respondent, within 30 days of the date of this decision, pay the agreed-upon penalty of \$1,500 assessed in this proceeding.



John F. Cook
Administrative Law Judge

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AUG 29 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. BARB 78-655-P
Petitioner : A.C. No. 15-02709-02056 V
v. :
PEABODY COAL COMPANY, : Camp No. 1 Mine
Respondent :

DECISION

Appearances: Gregory E. Conrad, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
Thomas J. Frawley, Esq., Kohn, Shands, Elbert,
Gianoulakis & Giljum, St. Louis, Missouri, for
Respondent.

Before: Judge Cook

I. Procedural Background

On August 24, 1978, the Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalty pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1977), in the above-captioned proceeding. The petition alleged violations of 30 CFR 75.200 and 75.400. On October 2, 1978, Peabody filed an answer in conjunction with a motion to file a later answer, which motion was granted by an order dated October 13, 1978.

By order of October 16, 1978, the above-captioned case was consolidated with Docket Nos. BARB 78-6, 78-688-P, 78-690-P and 78-613-P and a notice of hearing was issued. However, Respondent filed a motion on October 25, 1978, wherein it requested that the above-captioned case be severed, requesting a separate hearing. This motion was granted by an order dated November 6, 1978.

The hearing commenced on December 12, 1978. Representatives of both parties were present and participated.

At the conclusion of the hearing, counsel for MSHA and counsel for the Respondent agreed that the hearing transcript could be mailed by the reporter by January 11, 1979. Counsel further agreed that the initial briefs would be filed simultaneously by February 19, 1979. On February 12, 1979, Respondent requested additional time until March 9, 1979, to file its initial brief. By an order dated February 13, 1979, the time for the filing of original posthearing briefs and any other proposals by way of findings of fact and conclusions of law was extended to March 9, 1979. The time for response was extended to March 23, 1979.

The Petitioner filed its posthearing brief on March 9, 1979. The Respondent filed its posthearing brief on March 12, 1979. The Petitioner and the Respondent filed reply briefs on March 23, 1979, and March 29, 1979, respectively.

II. Violations Charged

Order No. 7-0565 (1 MEM), November 21, 1977, 30 CFR 75.400.

Order No. 7-0563 (1 LWS), November 21, 1977, 30 CFR 75.400.

Order No. 7-0583 (1 LWS), December 1, 1977, 30 CFR 75.200.

III. Evidence Contained in the Record

A. Stipulations

At the commencement of the hearing, counsel for both parties entered into stipulations which are set forth in the findings of fact, infra.

B. Witnesses

MSHA called as its witnesses Mitchell E. Mills, an MSHA coal mine supervising inspector, and Louis W. Stanley, an MSHA inspector.

Respondent called as its witnesses Brent W. Roberts and Martin T. Lovell, safety managers at Respondent's Camp No. 1 Mine, and Jack Dan Matheson III, a belt foreman at Respondent's Camp No. 1 Mine.

C. Exhibits

1. MSHA introduced the following exhibits into evidence:

(a) M-1 is computer printout titled "Controller Information Report" compiled by the Office of Assessments containing information as to the size of the operator.

(b) M-2 is a computer printout compiled by the Office of Assessments containing the operator's history of violations for which assessments had been paid up to December 1, 1977.

(c) M-3 is a map of Respondent's Camp No. 1 Mine.

(d) M-4 is a copy of Order No. 7-0565 (1 MEM), November 21, 1977, 30 CFR 75.400.

(e) M-5 is a modification of M-4.

(f) M-6 is an abatement of M-4 and M-5.

(g) M-8 is the 104(c)(1) order underlying M-4, M-10 and M-13.

(h) M-9 is the 104(c)(1) notice underlying M-8.

(i) M-10 is a copy of Order No. 7-0563 (1 LWS), November 21, 1977, 30 CFR 75.400.

(j) M-11 is a termination of M-10.

(k) M-13 is a copy of Order No. 7-0583 (1 LWS), December 1, 1977, 30 CFR 75.200.

(l) M-14 is a termination of M-13.

(m) M-16 is a drawing produced by Inspector Louis W. Stanley depicting his recollection of the conditions cited in M-13.

(n) M-17 is a copy of the cleanup program for the Respondent's Camp No. 1 Mine.

(o) M-19 is an entry from the preshift examiner's report for the No. 3 Unit, dated November 25, 1977.

(p) M-20 is a preshift examiner's report for the No. 3 Unit, dated November 27, 1977, 10 to 11 p.m.

(q) M-21 is a preshift examiner's report for the No. 3 Unit, dated November 30, 1977.

(r) M-22 is a preshift examiner's report for the No. 3 Unit, dated December 1, 1977.

(s) M-23 is an entry from the belt examiner's book dated November 17, 1977.

(t) M-24 is an entry from the belt examiner's book dated November 18, 1977.

(u) M-25 is an entry from the belt examiner's book dated November 18, 1977.

(v) M-40 is a copy of the roof control plan for the Camp No. 1 Mine, dated August 5, 1977.

2. Peabody introduced the following exhibits into evidence:

(a) O-2 is the belt examiner's book for the Camp No. 1 Mine, beginning with entries for October 6, 1977.

(b) O-3 is the preshift examiner's book for the Respondent's Camp No. 1 Mine.

(c) O-4 is a copy of the roof control plan for the Camp No. 1 Mine, dated April 6, 1976.

(d) O-5 is a drawing produced at the hearing by Martin T. Lovell depicting his recollection of the conditions cited in M-13.

IV. Issues

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

V. Opinion and Findings of Fact

A. Stipulations

1. The Administrative Law Judge has jurisdiction over the subject matter in this proceeding (Tr. 7).

2. Peabody Coal Company and the Camp No. 1 Mine are subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969 (Tr. 7-8).

3. The subject orders of withdrawal were duly served on an agent of the operator (Tr. 8).

4. The assessment of any penalties in this proceeding will not affect the ability of Respondent to continue in business (Tr. 8).

5. With respect to each of the alleged violations in this proceeding, Respondent, at a minimum, demonstrated good faith in attempting to achieve normal compliance after notification of the violations (Tr. 8).

6. Inspectors Louis W. Stanley and Mitchell E. Mills were duly authorized representatives of the Secretary at all times relevant to this proceeding (Tr. 8).

7. Each of the proposed exhibits to be submitted by Petitioner and Respondent are authentic documents which were prepared in the ordinary course of business by the person or persons designated therein by their signature (Tr. 8).

8. For purposes of assessment of any penalties, Peabody is a large operator (Tr. 8).

9. The Federal Coal Mine Health and Safety Act of 1969 has been amended by the Federal Mine Safety and Health Act of 1977 (Tr. 9).

10. The Respondent is subject to the Federal Mine Safety and Health Act of 1977 (Tr. 9).

11. November 21, 1977, was a Monday (Tr. 77-78).

12. Inspector Stanley's order of November 21, 1977 (Exh. M-10), gives sufficient notice of the alleged accumulation cited therein (Tr. 175).

13. Peabody Holding Company, Inc., became the controller of Peabody Coal Company, effective June 30, 1977 (Tr. 510-511).

B. Occurrence, Gravity, Negligence, and Good Faith

1. Order No. 7-0565 (1 MEM), November 21, 1977, 30 CFR 75.400

(a) Occurrence of Violation

On Monday, November 21, 1977, MSHA supervisory inspector Mitchell E. Mills visited the Respondent's Camp No. 1 Mine. He arrived at 6:15 a.m. (Tr. 20-23). Inspector Mills noted that he was accompanying MSHA inspector Louis W. Stanley on a supervisory inspection and also because of information he had received regarding a problem with "dirty belts" at the Camp No. 1 Mine (Tr. 20-22, 115). While on the surface, Inspector Mills consulted with management personnel and persons from the United Mine Workers of America, while Inspector Stanley examined the preshift reports and the belt examiner's reports (Tr. 23, 50-51). Inspector Mills' knowledge of the information contained in those reports was acquired from Inspector Stanley (Tr. 50-51, 147-150).

Upon arriving underground, each inspector proceeded to a different area of the mine to begin his inspection. Inspector Mills inspected the area of the Third Main South belt, also called the Second South piggy-back belt (Tr. 239-240, 317). Ken Hazelwood and Brent Roberts accompanied him on the inspection tour (Tr. 29-30). He commenced his inspection at the tailpiece and ended his inspection at the header, walking the entire 3,500-foot length of the belt (Tr. 25, 73). The No. 7 Unit was moving, but the belt was not in operation and no coal production was occurring in by either the tailpiece or the header (Tr. 74-76, 98, 133-134, 240-243).

He observed readily noticeable accumulations of combustible material at two locations along the belt (Tr. 38, 44-45, 107). He measured the length and depth of the accumulations with a steel rule, with the assistance of either Mr. Hazelwood or Mr. Roberts (Tr. 45-46).

The first accumulation was observed at the old No. 7 Unit belt drive (Tr. 38, Exh. M-4, Point E on Exh. M-3). It consisted of loose coal and coal dust 16 to 24 inches in depth and 60 feet in length. He recalled from memory that it was 10 to 12 feet wide (Tr. 44, 74, 124). The depth of the accumulation indicated to the inspector that it had existed for approximately two shifts (Tr. 96).

The second accumulation was located in the middle of an intersection, one crosscut outby No. 3 Unit's intake overcast (Tr. 25-26, 89, Exh. M-4, Point C on Exh. M-3). The accumulation was 20 inches in depth and 20 feet in length. He recalled from memory that it was approximately 2 feet wide (Tr. 45, 74, 125, Exh. M-4). It consisted of approximately 80 percent coal, both fine and lump, and 20 percent rock (Tr. 45, 86-87, 114-115, 118). The inspector estimated that the accumulation had existed for approximately 2 weeks (Tr. 60, 96). The inspector's opinion as to both the cause of the accumulation and the duration of its existence was based upon a common set of observations. He testified that the belt had been running out of alignment as the result of a rock fall (Tr. 40-48). Thus, the top belt had been running to the right and the bottom belt had been running to the left. The top belt had been rubbing against the upright belt stand, while the bottom belt had been rubbing the rock and the coal (Tr. 87-88). The top belt was worn from rubbing against the stand, and, in fact, had rubbed halfway through a 2-inch pipe that was part of the belt stand. The bottom belt had rubbed through a piece of coal or rock. The belt was dragging the bottom and the bottom rollers were buried. It was the inspector's opinion that it would have required approximately 2 weeks for these conditions to develop (Tr. 57-60, 87-88, 99). Misalignment of the belt and slippage caused the spillage (Tr. 40-48, 62-63). This interpretation of inferences drawn from the facts was based on the inspector's experience in dealing with belts (Tr. 123).

Inspector Mills testified that he specifically asked Messrs. Hazelwood and Roberts if they thought the accumulations of coal were excessive, and that one or both of them responded in the affirmative (Tr. 43-44).

Inspector Mills identified Exhibit M-17 as containing the cleanup program in effect at the Respondent's Camp No. 1 Mine on November 21, 1977. The cleanup program, dated February 25, 1972, states:

The places are cleaned by 14BU10-11BE loading machine.

The ribs are hand shovelled.

The float dust and coal spillage is shovelled by hand on all belt haulage.

This work is being done by both coal run shifts.

Inspector Mills discussed the Respondent's cleanup program (Exh. M-17) at two points in his testimony. During direct examination, he testified that his observations caused him to conclude that the cleanup plan (Exh. M-17) was not being followed, especially with regard to the accumulation located one crosscut outby the No. 3 Unit overcast. He testified that the plan requires float dust and coal spillage to be shoveled by hand on all belt haulage during the coal run shifts (Tr. 61-62). The inspector set forth a more detailed interpretation of the cleanup plan during the course of examination by the Judge. He testified that the plan mandates daily inspection and reporting, in addition to systematic daily cleaning so that the belt remains clean at all times (Tr. 126-127).

The inspector had no actual knowledge of whether cleaning had occurred in the area of the No. 3 Unit intake overcast on November 17, 1977, or November 18, 1977 (Tr. 83-84). He never asked anyone whether any cleaning had been done in the area (Tr. 120). He did not recall discussing with either Mr. Roberts or Mr. Hazelwood their plans for cleaning the belt (Tr. 122). In addition, he did not ask anyone at the mine whether they intended to start the belt prior to cleanup (Tr. 122).

Inspector Mills issued the subject 104(c)(2) order of withdrawal at 10:30 a.m., November 21, 1977 (Exh. M-4), citing the Respondent for a violation of the mandatory safety standard set forth in 30 CFR 75.400. This section of the Code of Federal Regulations states the following: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or upon electric equipment therein."

30 CFR 75.2(g)(4) defines "active workings" as "any place in a coal mine where miners are normally required to work or travel."

In Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par. 22,088 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977), the Board of Mine Operations Appeals (Board) held that the presence of a deposit or accumulation of coal dust on other combustible materials in active workings of a coal mine is not, by itself, a violation. The Board held that MSHA's prima facie case consists of the following three elements:

1. that an accumulation of combustible material existed in the active workings, or on electrical equipment in active workings, of a coal mine;
2. that the coal mine operator was aware, or, by the exercise of due diligence and concern for the safety of the miners, should have been aware of the existence of such accumulation; and
3. that the operator failed to clean up such accumulation, or failed to undertake to clean it up, within a reasonable time after discovery, or, within a reasonable time after discovery should have been made.

8 IBMA at 114-115.

There can be no doubt that accumulations of combustible materials existed in the active workings of the Respondent's Camp No. 1 Mine at the two above-described locations along the Third Main South belt. Accordingly, it is found that MSHA has established the first element of its prima facie case. 1/

1/ Both with respect to order No. 1 MEM and order No. 1 LWS, Respondent asserts that Old Ben requires MSHA inspectors to "inquire of Respondent's employees concerning the accumulations and their cleanup efforts" (Respondent's Posthearing Brief, pp. 19-21, 27-28). Respondent argues that the finding of a violation of 30 CFR 75.400 is dependent upon the inspector determining, prior to issuing a withdrawal order, when an accumulation should have been discovered and the nature of the operator's cleanup efforts (Respondent's Posthearing Brief, p. 21). However, the Old Ben case does not require the inspector to direct specific inquiries to the operator's employees in all cases. The Board's Old Ben opinion merely requires the inspector to make a sound judgment as to how long the accumulation existed and whether the operator took an unreasonable amount of time in getting around to cleaning up the accumulation. This can be accomplished through "the use of logical conclusions drawn from circumstantial evidence." 8 IBMA at 113. As the record in the present case reveals sufficient evidence from which the inspectors could reach conclusions as to both the duration of the accumulations' existence and the reasonable time for cleanup, it was unnecessary to direct specific inquiries to the Respondent's employees.

The second element of MSHA's prima facie case, the requirement that the operator have actual or constructive knowledge of the existence of the combustible accumulations, has generated some controversy among the parties, as evidenced through their posthearing submissions. According to MSHA, the Old Ben decision addresses itself to two distinct types of accumulations: "usual" and "unusual." MSHA argues that depending upon the type of accumulation present in a given case, the operator's responsibilities and the legal prerequisites for MSHA's establishment of a prima facie case differ radically. MSHA takes the position that it must set forth affirmative evidence as to all three elements of its prima facie case only where the accumulations are "unusual" in nature. However, where "usual" accumulations of combustible materials have resulted from the ordinary course of the operator's mining activities, MSHA argues that "the Board appears to infer" that no knowledge requirement is present since it is "assumed" that the operator is aware of these inevitable accumulations. In such cases, MSHA argues that it satisfies its burden under Old Ben when it proves that the operator was not maintaining its regular cleanup program or that the cleanup program was deficient in that combustible materials were being permitted to accumulate without adequate attention to their cleanup (Petitioner's Posthearing Brief, pp. 3-4).

The Respondent takes vigorous issue with MSHA's assertions (Respondent's Reply Brief, pp. 1-2).

I disagree with MSHA's interpretation of Old Ben. The fact that an accumulation is "usual" or "unusual" does not alter MSHA's burden of going forward with the evidence. This is so because although the Board discussed both "usual" and "unusual" accumulations in its decision, it did not distinguish between them when it set forth the elements of MSHA's prima facie case. The fact that the three elements are described as "the precise elements of proof required under * * * 30 CFR 75.400 to make out a prima facie case * * *" further indicates that no such distinction was intended. 2/

In effect, MSHA argues that a presumption exists that the operator knew or should have known of the accumulation's existence once it has been established that the accumulation accrued during the ordinary course of the operator's mining activities, and that the operator's

2/ The question of whether an accumulation is "usual" or "unusual" has greatest significance with respect to the issue of whether the operator failed to clean up such accumulation, or failed to undertake to clean it up, within a reasonable time after discovery, or within a reasonable time after discovery should have been made, as set forth in both the Board's decision of August 17, 1977, and its subsequent memorandum opinion and order denying the Government's motion for reconsideration. 8 IBMA 109-111; 8 IBMA 198.

regular cleanup program was not being followed or was deficient in some respect. However, the Board in Old Ben did not specifically set forth such a presumption.

Although the Board did indicate that "[p]roof of the absence of [a regular cleanup] program, together with the presence of any accumulation might well alone support a citation for violation of Section 304(a)," Old Ben Coal Company, 8 IBMA 196, 198, 1977-1978 OSHD par. 22,328 (1977), Opinion and Order Denying Motion for Reconsideration of Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par. 22,088 (1977) (emphasis in original), this statement does not strengthen the Petitioner's position in the case at bar. The statement merely indicates that the operator might be held strictly liable if he fails to maintain a regular cleanup program. In the case at bar, the Respondent had a regular cleanup program (Exh. M-17). Although Inspector Mills stated that the plan was not being followed (Tr. 61), the Respondent took a position refuting this characterization by arguing that the Respondent was confronted with unusual circumstances in its efforts to clean the Third Main South belt (Respondent's Reply Brief, pp. 2-3). It cannot be found that the Board intended to impose a strict liability standard where the operator maintains a regular cleanup program, especially where the parties have raised a genuine issue of material fact with respect to whether the plan was being followed.

For the reasons set forth below, I find that the Respondent knew or should have known of the existence of the combustible accumulations at the two locations along the Third Main South belt.

A substantial dispute has arisen between the parties with respect to the knowledge issue, particularly as regards the accumulation located in the intersection one crosscut outby the No. 3 Unit intake overcast. The Petitioner relies most heavily on the inspector's estimate that the condition existed for approximately 2 weeks in arguing that the Respondent both knew of the existence of the accumulation and failed to undertake cleanup procedures within a reasonable time after he knew or should have known of their existence. The Respondent disagrees, relying upon its belt examiner's reports (Exh. 0-2) to argue that the accumulations observed in the area of the No. 3 Unit overcast were systematically removed promptly upon discovery.

I find the evidence adduced by the Respondent sufficient to rebut the inspector's estimate that the accumulation had existed for approximately 2 weeks.

The inspector testified that running the belt while it was out of alignment was a partial cause of the accumulation (Tr. 48, 62-63). The belt had been knocked out of alignment by a roof fall occurring one crosscut outby the No. 3 Unit's intake overcast, i.e., the roof fall had occurred in the same location where the inspector observed

the accumulation (Tr. 40-41, 45). The fall had pushed the belt approximately 18 inches out of alignment (Tr. 65) causing it to rub both the belt stand and the coal (Tr. 57-58, 60). According to the inspector, either the area had not been cleaned after the fall or another fall had occurred (Tr. 45). He estimated that the accumulation cited in the order of withdrawal had existed for approximately 2 weeks, noting that 2 weeks would have been required for the belt stand to develop the amount of wear observed, and also to "make all of the belt cut on the opposite side and to wear the rubber off" (Tr. 60) (see also, Tr. 57-58).

Mr. Brent Roberts, the safety manager of the mine, was aware that damage had been suffered by the Third Main South belt as the result of a rock fall somewhere in the area of the No. 3 intake overcast (Tr. 301). Although he had no idea as to when the roof fall had occurred, he indicated that it had to have been quite a while before November 21, 1977 (Tr. 301). He indicated that the area had been cleaned after the fall, but that apparently more rock had fallen in, either as the result of a second roof fall or as the result of rock sliding into the side of the belt (Tr. 301). However, he did not know the date of the second occurrence (Tr. 301-302).

Additionally, the inspector testified that the operator was aware of the existence of these accumulations because of entries in the pre-shift examiner's books (Tr. 50-51). At the Camp No. 1 Mine, the operator has both a pre-shift examiner who makes the active coal production units and a belt examiner who makes the belt on each coal production shift (Tr. 51). The belt examiner makes entries in a belt examiner's book located outside the mine (Tr. 51). According to the inspector, the accumulations were noticeable, and anyone making an adequate pre-shift examination in the area would have noticed them (Tr. 107-108). Although there are substantial indications that the information relayed to Inspector Mills by Inspector Stanley as to entries contained in the belt examiner's book pertained to the Second Main South belt, and not to the Third Main South belt (Respondent's Posthearing Brief, pp. 20-21), the error has no bearing on the operator's actual or constructive knowledge of the accumulations' presence. The belt examiner's book (Exh. 0-2) indicates that the Respondent was aware of spillages in the area of the No. 3 overcast. The belt examiner's reports for each of the following days and shifts indicate a problem with coal spillage in the area of the No. 3 overcast: second shift, November 17, 1977 (Exh. 0-2, Tr. 80, 252-253, 329); second shift, November 18, 1977 (Exh. 0-2, Tr. 84, 252, 327-328); second shift, November 19, 1977 (Exh. 0-2, Tr. 251-252). Although, as a result of the information contained in Exhibit 0-2, the Respondent assigned men to clean the area on the November 18, 1977, and November 19, 1977, day shifts (Tr. 328-329), there is no indication that cleanup personnel were assigned to the area on the November 19, 1977, second shift.

The foregoing evidence is sufficient to rebut the inspector's opinion that the accumulation in the area of the No. 3 overcast had existed for 2 weeks. There is no indication that he asked any of the operator's employees when the roof fall had occurred, even though his testimony reveals two possible reasons for the accumulation's presence, i.e., either the area had not been cleaned or another fall had occurred (Tr. 45). In fact, he never asked anyone whether any cleaning had been done by the Respondent prior to issuing the order (Tr. 120). The fact that Mr. Roberts stated that the area had been cleaned after the first roof fall and that another roof fall or rock slide had occurred in the area, coupled with the fact that the Respondent had cleaned in the area of the No. 3 overcast during the week prior to the issuance of the order, indicates that MSHA has failed to establish by a preponderance of the evidence that the accumulation had existed for 2 weeks. It is, however, sufficient to establish by a preponderance of the evidence that the belt had been running out of alignment for approximately 2 weeks.

However, this does not end the inquiry, because an entry made in the belt examiner's book for the November 19, 1977, second shift (Exh. 0-2, Tr. 251-252), is sufficient to charge the Respondent with knowledge of the presence of a combustible accumulation near the No. 3 overcast. In this instance, the accumulation was 20 inches deep for a distance of 20 feet, but the most serious part of the accumulation related to the belt dragging in coal and rock and the rollers so deeply buried that they could not be seen (Tr. 71, 87-88, 98-99). The extent and nature of the accumulations show that the serious portion had to exist for more than one shift and also that the belt examiner did not report in the book the extreme seriousness of the accumulation. Knowledge of the belt examiner should be chargeable to the Respondent under the principles set forth in Pocahontas Fuel Company, 8 IBMA 136, 84 I.D. 488, 1977-1978 OSHD par. 22,218 (1977), aff'd sub nom. Pocahontas Fuel Co. v. Andrus, 590 F.2d 95 (4th Cir. 1979). Furthermore, the Respondent, in its posthearing brief, acknowledges its awareness of this accumulation cited by the inspector (Respondent's Posthearing Brief, pp. 17-18).

The Respondent argues that it should not have been aware of the accumulation located at the old No. 7 Unit header. An individual was regularly assigned to clean this area (Tr. 319). According to Respondent, it should not have been aware of the accumulation because when the belt supervisor examined Exhibit 0-2 at the beginning of the day shift on November 21, 1977, he believed that the individual assigned to the No. 7 Unit was still stationed at the old No. 7 header location. Although the belt supervisor knew that the No. 7 Unit was moving, he understood that this individual would remain responsible for the old No. 7 header location even after the unit moved because of its proximity to the tailpiece of the Third Main South belt, at which point No. 7 Unit's new belt would empty and for which he was already responsible (Tr. 318, 323) (Respondent's Posthearing Brief, p. 17).

I disagree. The fact that the need for cleaning at the Old No. 7 Unit header had been noted on the day and second shift reports for November 19, 1977 (Exh. O-2, Tr. 316), is sufficient to charge the Respondent with knowledge of the accumulation's presence. The inspector's estimate that the accumulation had existed for approximately two shifts is thus confirmed by the entries in Exhibit O-2 (Tr. 96).

The final element of MSHA's prima facie case is whether the operator failed to clean up the accumulations, or failed to undertake to clean them up, within a reasonable time after discovery, or within a reasonable time after discovery should have been made.

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

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

8 IBMA at 115.

The Board further stated:

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

8 IBMA at 111.

A question is presented as to whether the two accumulations cited by Inspector Mills are the "small, but inevitable aggregations of combustible materials that accompany the ordinary, routine or normal mining operation," or whether they are "unusual occurrences of excessive accumulations." In the former case, the Respondent discharges its duty through the maintenance of and adherence to a regular cleanup program incorporating from one cleanup after two or three production shifts to several cleanups per production shift, depending upon the volume of production involved. In the latter case, the Respondent is required to undertake effective cleanup procedures promptly upon discovery of the accumulations.

For the reasons set forth below, I conclude that part of the accumulations cited by Inspector Mills in his order of withdrawal were excessive accumulations requiring a prompt cleanup response by the operator within the meaning of Old Ben. As such, the Respondent was required to implement cleanup procedures outside the requirements of its regular cleanup program. As relates to the other part of the accumulations, it is evident that the regular cleanup program was not followed.

The Respondent seeks to avoid a finding that a violation occurred by arguing that it was confronted with "unusual circumstances" in its efforts to clean the Third Main South belt (Respondent's Reply Brief, pp. 2-3). I disagree. The problems experienced by the Respondent could have been remedied by simply realigning the belt.

The inspector testified that the accumulations occurred as a result of both running the belt while it was out of alignment and because of slippage (Tr. 48, 62-63).

The alignment and slippage problems were directly attributable to the roof fall that occurred along the Third Main South belt line approximately 2 weeks prior to the issuance of the order. The available evidence, such as the excessive wear on the belt stand, indicates that the belt had not been realigned after the fall. In addition, the alignment problem was aggravated by events occurring on both the No. 3 and No. 6 Units on or around November 14, 1977, approximately 7 days prior to the issuance of the order. According to Jack Dan Matheson III, the belt foreman at the Camp No. 1 Mine, a fall occurred on the No. 6 Unit and the No. 3 Unit was loading rock (Tr. 338). The Third Main South belt was involved in transporting the material outside of the mine (Tr. 338, 344). As the transporting of large rocks on the belt is, in itself, sufficient to "knock" the rollers and cause an alignment problem (Tr. 339-340), it can be inferred that the activities on or around November 14, 1977, aggravated the existing alignment problem on the Third Main South belt. Although

it may be unusual for two units to be running rock onto the belt simultaneously (Tr. 376), this fact does not provide sufficient justification for failure to implement prompt cleanup, especially when such activities aggravate a preexisting alignment problem.

The fact that the roof falls which caused or aggravated the alignment problem had been cleaned up is of no assistance to the Respondent. Although those occurrences were removed in time or distance from accumulations observed on November 21, 1977, the accumulations still remained outside the scope of Respondent's regular cleanup program. Failure to correct the alignment and slippage problems resulted in the presence of such extensive accumulations of combustible materials in the mine's active workings that they cannot be deemed "the small, but inevitable aggregations of combustible materials that accompany the ordinary, routine or normal mining operation." 8 IBMA at 111. As long as the Respondent permitted the alignment and slippage problems to persist, it was bound to remove the voluminous accumulations promptly upon discovery, subject, of course, to the proviso that cleanup occur within a reasonable time.

Respondent submits that a violation of 30 CFR 75.400 cannot be found as regards the accumulation located in the intersection located one crosscut outby the No. 3 Unit's intake overcast because it was in the process of alleviating the allegedly violative condition at the time the withdrawal order was issued (Respondent's Posthearing Brief, p. 18; Respondent's Reply Brief, p. 5). The belt was not operating and there was no coal production. Jack Matheson testified that he had assigned two men to clean the area on November 21, 1977, because it had been cited in Exhibit O-2 on the second shift of November 19, 1977 (Tr. 333-334), and that he intended to keep the Third Main South belt shut off until the area had been cleaned (Tr. 331). In fact, Mr. Matheson went to the header of the Third Main South belt to insure that the belt was not in operation (Tr. 330-331, Respondent's Posthearing Brief, p. 18; Respondent's Reply Brief, p. 5).

However, the fact that the Respondent was in the process of removing the accumulations at the time the withdrawal order was issued is not dispositive of the question of whether it had permitted the accumulations to exist by failing to commence cleanup procedures within a reasonable time after discovery. The Respondent's theory, when carried to its logical conclusion, would preclude the finding of a violation where it could be established that a dangerous accumulation of combustibles had existed for a month, as long as the operator was in the process of removing them at the moment the order of withdrawal issued. Such a position is patently erroneous because it conveniently overlooks the clear mandate of Old Ben that "cleanup should be accomplished within a reasonable time after discovery." 8 IBMA at 110.

In support of its position, Respondent cites the Board's decision in Zeigler Coal Company, 3 IBMA 366, 81 I.D. 598, 1974-1975 OSHD par. 18,675 (1974). In Zeigler, a notice of violation was issued for oil and grease accumulations on a coal drill. The drill had been taken out of service and was being cleaned at the time the violation was cited. In holding that no violation was present since the equipment was out of service and being cleaned at the time of the inspection and prior to the issuance of the notice, the Board observed that such facts warranted the inference that the operator intended to clean the equipment before it reentered service.

The circumstances of that case do not apply to the facts in the instant case. The principles of the later Old Ben decision, reviewed above, must be applied to the instant case. There is no indication that the coal drill involved in Zeigler had been in use for an unreasonable period of time after the accumulation was or should have been discovered by the operator. In the instant case, the evidence is to the contrary as relates to the operation of the belt in question.

The Old Ben case is instructive as to the type of corrective action the Respondent should have taken. After setting forth the elements of MSHA's prima facie case, the Board proceeded to apply the test to the facts presented. According to the Board:

The operator's witnesses provided the only evidence explaining how and when the combustible materials had accumulated and what and when corrective action was taken. Mr. Steve Rowland, a graduate mining engineer, and a production foreman of Mine No. 24 for Old Ben, testified that the accumulations occurred during the shift preceding the morning shift of July 13, when the inspection took place, and that they were caused by a belt separation (Tr. 154); that there had been alignment and and tension problems with the belt (Tr. 157) and that the mine manager sent men to restore tension to the belt and realign it to prevent continued spillage, which was done (Tr. 158); that also, on the morning of the inspection, after checking the preshift examination reports, inspecting the beltline, and making the face areas, he immediately assigned the bobcat and shuttle car operators to shovel the side dumps along the belt (Tr. 156); and that the mine manager had told him that two belt shovelers had been sent to the 8th south belt in response to the preshift examination report which showed the belt dirty on the just-concluded shift (Tr. 156). Mr. Yattoni verified this by his testimony that he observed the two belt shovelers beginning their work at 185 station along the beltline as he walked in with the inspector (Tr. 114). [Emphasis added.]

8 IBMA at 117.

The pertinent language in the above-quoted passage reveals that the operator was not only in the process of removing the accumulations within a reasonable time after it knew or should have known of their existence, but also alleviating the cause of the spillage, i.e., the belt separation, tension and alignment problems. There is no indication in the present case that Mr. Matheson had instructed his men to correct the cause of the spillage through alleviating the slippage and alignment problems. Accordingly, there is no basis for an inference that Respondent would have implemented proper corrective action prior to starting the Third Main South belt.

The fact that the belt was not in operation on the morning of November 21, 1977, does not control the outcome of the case. Old Ben states that "reasonable time" must be determined by evaluating "urgency in terms of likelihood of the accumulation to contribute to a mine fire or to propagate an explosion." 8 IBMA at 115. Such factors as "mass, extent, combustibility, and volatility of the accumulation as well as its proximity to an ignition source" are relevant to this evaluation. 8 IBMA at 115. Accordingly, it is proper to look to the conditions that existed at the time the operator acquired knowledge of the accumulation's presence in determining whether it undertook cleanup procedures within a reasonable time.

The mass, extent and physical characteristics of the accumulation near the No. 3 Unit intake overcast are set forth above. It is unnecessary to repeat them. They are hereby found to be of sufficient mass, extent and combustibility to contribute to a mine fire or propagate an explosion. The remaining question is whether they were in sufficient proximity to an ignition source.

The accumulation either was observed or should have been observed by a belt examiner during the second shift on Saturday, November 19, 1977 (Exh. 0-2, Tr. 251-252). The shift started at 4 p.m. and ended at midnight (Tr. 245). The testimony of Mr. Brent Roberts is sufficient to establish that it is more probable than not that the belt examiner observed the condition between 4 and 8 p.m. (Tr. 252). In fact, the law requires the belt examination to be made as soon as the coal production shift starts (Tr. 150). 30 CFR 75.303. According to Mr. Roberts, it would be safe to assume that the belt was running on November 19, 1977, because entries in the belt examiner's book are made only during those time periods when the belt is running (Tr. 266). This is confirmed by Mr. Matheson's assertion that the belt examiner makes his examination of the belts during the coal production shift or during a shift on which the belts are running (Tr. 314).

Inspector Mills identified the potential hazard involved as a mine fire (Tr. 70), and stated that there was a good possibility that a fire could occur (Tr. 71). According to the inspector, heat-producing friction is caused both by the belt dragging in

coal and rock and by the belt rubbing the stand (Tr. 71). In fact, he made the point quite graphically by stating: "When a belt rubs a stand this long, its got to get hot. You'll find when they rub this long, sometimes they're so hot you can't touch them, even rollers that catch fire" (Tr. 71). The belt rollers were buried (Tr. 98-99). His opinion was based on 25 years' experience gained as a mine foreman (Tr. 19, 98).

The testimony of Respondent's witnesses confirms the inspector's assertions. According to Mr. Lovell, a belt running in coal is an ignition source (Tr. 425). Mr. Roberts' testimony on cross-examination reveals that a fire could have been caused by operating the belt before the accumulations were cleaned up (Tr. 279). Mr. Matheson's testimony on cross-examination reveals that if the accumulation had not been cleaned up, a belt fire could have occurred (Tr. 397).

The belt examiner is required to record his findings shortly after completion of his examination (Tr. 150-151). The Respondent's belt examiners recorded their entries toward the end of the shift (Tr. 316). The actual or constructive knowledge of an individual assigned by the operator to perform required examinations is imputed to the operator. Pocahontas Fuel Company, supra.

Accordingly, it is found that at the time the belt examiner observed the accumulation, it was in sufficient proximity to an ignition source to warrant prompt cleanup, and that this knowledge was imputed to the operator.

It is further found that the operator failed to implement cleanup procedures within a reasonable time in that it failed to implement cleanup until the next production shift, i.e., on the morning of November 21, 1977.

As relates to the accumulation at the old No. 7 Unit header (Point E on Exh. M-3), it is found that they were of sufficient mass, extent and combustibility to contribute to a mine fire. The accumulation was noted on the November 19, 1977, day and second shifts (Exh. O-2, Tr. 316). The testimony of Mr. Matheson establishes that an individual was assigned regular cleanup duties at the old No. 7 header, and that Mr. Matheson expected him to clean the area even though the No. 7 Unit was moving. However, Mr. Matheson had no actual knowledge as to whether this individual actually had cleaned the area during the time in question (Tr. 319-324, 386). According to Inspector Mills, assuming that the belt had been activated prior to cleanup, the buried coal and friction would have provided an ignition

source (Tr. 111-112). The accumulation should have been cleaned up during either the day or second shift on Saturday, November 19, 1977, to comply with the regular cleanup program. The Respondent's belt foreman stated that absenteeism on Saturday evenings (second shift) is about 30 percent. However this does not relieve the Respondent from its responsibility. In accordance with the rationale set forth above, it is found that the Respondent failed to undertake cleanup within a reasonable time after discovery of the accumulations.

Accordingly, it is found that MSHA has established a violation of 30 CFR 75.400 by a preponderance of the evidence.

(b) Gravity of the Violation

The potential hazard involved was a mine fire (Tr. 70). There was a good possibility of a fire occurring (Tr. 71). Although the belt was neither running nor hot at the time the order was issued (Tr. 74, 87), it had been in operation on November 19, 1977, i.e., prior to commencement of cleanup. The belt was made of fire-resistant material, water lines ran parallel to it, and a fire sensor was in the area (Tr. 102, 249-250). There was no methane in the area (Tr. 103). The length of the belt was pretty well rock dusted (Tr. 103, 248). There was some rock dust atop the accumulation on the return side near the No. 3 overcast, but there was no rock dust atop the accumulation under the belt (Tr. 118). There was an available escapeway (Tr. 104).

The inspector associated a severe degree of gravity with the violation (Tr. 107). He identified approximately 25 people on the No. 7 unit as being exposed to the hazard, in addition to some belt cleaners and ventilation men (Tr. 72). A belt fire could have trapped them (Tr. 72).

Accordingly, it is found that the violation was serious.

(c) Negligence of the Operator

As set forth above, the operator was aware of the alignment and slippage problems that caused the spillages. Respondent permitted the alignment problem to persist for 2 weeks, although it required only 2 hours to correct (Tr. 65). Exhibit O-2 establishes that Respondent acquired knowledge of the accumulations on November 19, 1977, and the inspector testified that the operator was aware of the accumulations' existence (Tr. 50). He indicated that a person making a proper preshift or onshift examination would have observed the

accumulations due to the following factors: The coal spillage in itself; the belt out of alignment; the dragging of the belt on the bottom without being on the bottom roller; and the rubbing of the stand (Tr. 58).

Accordingly, it is found that the Respondent demonstrated greater than ordinary, but somewhat less than gross negligence.

2. Order No. 7-0563 (1 LWS), November 21, 1977, 30 CFR 75.400

(a) Occurrence of Violation

MSHA inspector Louis W. Stanley conducted a spot inspection at the Respondent's Camp No. 1 Mine on November 21, 1977 (Tr. 160). While on the surface, he examined the fire boss' records and the belt examiner's records (Exhs. 0-2, 0-3, Tr. 161). Entries in the belt examiner's book (Exh. 0-2) made between November 17, 1977, and November 19, 1977, recorded accumulations along the Second Main South belt (Tr. 185-187). He was familiar with the system of reporting employed at the mine (Tr. 185). After relaying some of the information gleaned from the records to Inspector Mills (Tr. 188), he proceeded underground and inspected the Second Main South belt. The belt is approximately 4,500 feet long (Tr. 198). He was accompanied on the inspection by Mr. Martin T. Lovell, the safety manager at the Respondent's Camp No. 1 Mine (Tr. 161-162). Mr. Lovell accompanied him as far as the No. 31 crosscut (Tr. 412). Mr. Jack Dan Matheson III, the belt foreman, accompanied the inspector from the No. 31 crosscut inby for a distance of 15-20 crosscuts (Tr. 342-343).

An accumulation of loose coal was observed extending from the No. 7 crosscut inby to the No. 11 crosscut, a distance of approximately 280 feet (Tr. 177, Exh. M-10). It measured 4 to 8 inches in depth, and 3 feet in width (Tr. 177, Exh. M-10). Rock dust was observed atop the coal (Exh. M-10).

An accumulation of loose coal was observed extending from the No. 14 crosscut inby to the No. 19 crosscut for a distance of 300 feet (Tr. 178, Exh. M-10). It measured 16 inches in depth and 2 feet in width (Tr. 178, Exh. M-10). The belt was rubbing coal and stuck rollers were found at the No. 18 crosscut (Tr. 178). The accumulation was only on the backside of the belt (Tr. 198).

An accumulation of loose coal was observed extending from the No. 30 crosscut inby for approximately 220 feet (Tr. 179, Exh. M-10). It measured 20 inches in depth and 4 feet in width (Tr. 179, Exh. M-10). The belt was running in coal for 220 feet (Tr. 179). There were three stuck rollers, and two rollers were turning in coal from the No. 30 to the No. 34 crosscut (Tr. 179, Exh. M-10).

An accumulation of loose coal was observed extending from the No. 35 crosscut to the No. 44 crosscut, a distance of 540 feet. It measured 4 to 8 inches in depth and 3 feet in width (Tr. 179-180, Exh. M-10). The accumulation was found only on one side of the belt (Tr. 198).

An accumulation of loose coal was observed extending from the No. 44 crosscut inby for approximately 80 feet. It measured 18 to 24 inches in depth and 4 feet in width. The belt and four bottom rollers were running in coal. There was coal on both sides of the belt (Tr. 180, Exh. M-10).

An accumulation of loose coal was observed extending from the No. 46 crosscut to the No. 63 crosscut, a distance of approximately 1,020 feet. It measured 4 to 16 inches in depth and 2 to 4 feet in width. The belt was running in coal at the Nos. 56, 58 and 63 crosscuts (Tr. 180, Exh. M-10).

An accumulation of loose coal was observed extending from the No. 63 crosscut to the No. 68 crosscut, a distance approximately 300 feet. It measured 4 to 8 inches in depth and 3 feet in width (Tr. 180, Exh. M-10).

Float coal dust was deposited atop rock dusted surfaces from the No. 11 crosscut inby to the No. 63 crosscut, a distance of approximately 3,500 feet (Exh. M-10). Float dust was present the entire length of the belt from the drive to the tailpiece (Tr. 182, 222-223).

A ruler was used to measure the depth and width of the various accumulations (Tr. 181). The lengths were approximated by using the 60-foot centers as a guide (Tr. 181). The loose coal was defined by the inspector as ranging from 1 to 4 inches in diameter (Tr. 182).

Float coal dust was described by the inspector as possessing the property whereby it becomes suspended in the air when disturbed (Tr. 182). Although the inspector did not measure the float dust (Tr. 182), he did blow on it (Tr. 183). He stated that float coal dust is very difficult to measure unless an extreme depth is present (Tr. 183).

The belt was running during the course of the inspection (Tr. 183, 196, 436), which began at 7:30-7:35 a.m. (Tr. 412), until it was shut down at 8:20 a.m. (Tr. 196, 417). No coal production occurred during the course of the inspection. 3/

3/ At several points in his testimony, Inspector Stanley expressed his belief that coal production was taking place during the course of his inspection (Tr. 201, 212). He observed coal on the belt periodically (Tr. 196), and opined that it had resulted from mining activity, as opposed to having been deposited on the belt by belt

These accumulations resulted from belt spillage which occurred during the normal process of mining (Tr. 184). According to Mr. Matheson, on or around November 14, 1977, a fall occurred on the No. 6 belt line, and the No. 3 Unit was loading rock (Tr. 338). Both units were located inby the Second Main South belt, and the belt had to be employed to transport the rock out of those areas (Tr. 338). The transporting of large rocks on the belt causes a belt alignment problem (Tr. 339-340). Alignment problems cause spillage problems (Tr. 202).

The Respondent had a written cleanup plan in effect on November 21, 1977 (Exh. M-17), which states in pertinent part: "The float dust and coal spillage is shoveled by hand on all belt haulage. This work is being done on both coal run shifts" (Exh. M-17, Tr. 189-190). However, the interpretation of this plan set forth by Inspector Stanley varies materially from the interpretation urged by the Respondent's witnesses.

Footnote 3/ (continued) shovelers, based upon its length (Tr. 212). He observed that shoveling coal onto the belt produces "a spot here, another spot here * * *," whereas loading it from the face area produces a longer stream (Tr. 212). He believed that it had come from the working sections inby (Tr. 219). However, he admitted under cross-examination an absence of knowledge as to whether any miners had reached the faces by 8:20 a.m. (Tr. 201).

In light of the testimony of both Inspector Mills and the Respondent's witnesses, I conclude that Inspector Stanley was mistaken in his belief, and that the coal he observed on the belt had not been mined from a face. The testimony adduced with respect to Order No. 1 MEM, Part V(B)(1)(a), supra, indicates that no production was under way in the working sections adjacent to the Third Main South belt, and that the Third Main South belt was not in operation on the November 21, 1977, day shift. The Third Main South belt was inby and discharged onto the Second Main South belt (Tr. 344-345). It was impossible to transport material to the surface via the Third Main South belt without employing the Second Main South belt (Tr. 345). These facts weigh against Inspector Stanley's belief because he thought the coal was coming from working faces inby his location on the Second Main South belt (Tr. 219). In fact, he had no actual knowledge as to whether the inby belt had been running that day (Tr. 219-220).

Additionally, Mr. Lovell saw no coal on the belt, and he had walked with the inspector for a distance of 33 crosscuts (Tr. 413). When he left the inspector at 8:15 or 8:20 a.m., it was for the purpose of shutting down the belt (Tr. 417).

Additionally, although it would have been possible for the workmen to have commenced mining by 8:15 or 8:20, the testimony of Mr. Lovell reveals that it was highly improbable (Tr. 417-418).

According to Inspector Stanley, the cleanup plan was not being followed in that the spillage was not being shoveled onto the belts on both coal production shifts (Tr. 190). The inspector's interpretation of the plan was that the accumulations should have been cleaned up on each shift (Tr. 190). It should be recalled at this juncture that Inspector Mills, whose interpretation of the plan has been discussed previously in Part V(B)(1)(a), supra, interpreted the cleanup plan the same way.

The Respondent's witnesses disagreed with this interpretation. Mr. Brent Roberts, while agreeing that cleanup is required during the production shifts (Tr. 246, 274), stated that the plan refers to a continuous cleaning process which does not necessarily mandate one cleanup per shift (Tr. 274). According to Mr. Roberts, the fact that a spillage had existed for a couple of shifts would not necessarily make it an improper accumulation as long as work is being performed on it (Tr. 298). His interpretation of the plan was that it merely required work to be performed on the accumulation (Tr. 298).

Mr. Martin T. Lovell gave differing interpretations at various points in his testimony, one of which is in harmony with Inspector Stanley's interpretation and one of which is in harmony with Mr. Roberts' interpretation. According to Mr. Lovell, the cleanup plan requires work to be performed on both coal run shifts, but does not state that spillage has to be cleaned up within two coal run shifts (Tr. 455). However, during the course of examination by the Judge, he interpreted the cleanup program as requiring the cleanup of all accumulations by the end of each production shift in the absence of excessive amounts of spillage (Tr. 449-450). He defined an "excessive amount of spillage" as being "where the rollers or belt would be turning in coal" (Tr. 454). He thereupon stated, during cross-examination, that if a spillage or accumulation is caused by the normal process of mining, regardless of the extent of the accumulations, they are supposed to be cleaned up according to the cleanup plan (Tr. 455).

Based on the foregoing testimony as to the meaning of the cleanup plan in effect on November 21, 1977 (Exh. M-17), I conclude that the plan requires accumulations to be cleaned up by the end of each production shift, and that the plan encompasses those spillages caused by belt alignment problems resulting from the transportation of rock on the belt. This interpretation is buttressed by the fact that, to a certain extent, roof falls are normal at the Camp No. 1 Mine (Tr. 373, 376), thus requiring frequent use of the belts to transport the material produced by the falls.

The subject order of withdrawal (Exh. M-10) alleges a violation of 30 CFR 75.400. The text of this section of the Code of Federal Regulations and the elements of MSHA's prima facie case as set forth in Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par.

22,087 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977), have been set forth in Part V(B)(1)(a), supra. Briefly, MSHA's prima facie case consists of three elements: (1) The existence of an accumulation of combustible materials in the active workings of a coal mine, or on electrical equipment therein; (2) that the operator knew or should have known of their existence; and, (3) that the operator failed to clean up, or failed to undertake to clean up, the accumulations within a reasonable time after he knew or should have known of their existence.

There can be no doubt that accumulations of combustible materials existed in the active workings of the mine as described above.

The extent of the accumulations was sufficient to give the operator knowledge of their presence (Tr. 188). According to Inspector Stanley, the condition had existed for at least 1 week prior to November 21, 1977 (Tr. 189). His opinion was based upon two sets of facts (Tr. 189). First, he had examined the examiner's reports on the surface (Tr. 186). The condition had been reported by the examiner in a series of entries made between November 17, 1977 and November 19, 1977 (Exh. 0-2, Tr. 186-187). Second, the presence and color of the float coal dust deposited atop the spilled coal indicated that it had been present for at least 1 week (Tr. 189). According to the inspector, a period of time is required for float coal dust to move down the belt line and settle on the coal (Tr. 213). A recent spillage would be shiny black, whereas one present for a longer period of time would have a brownish cast (Tr. 213-214). The float coal dust observed by the inspector had a brownish cast (Tr. 214). Additionally, the depths of the accumulations, and, in some instances, the presence of rock dust deposits atop the coal, also influenced his time estimate (Tr. 213). The accumulations should have been discovered during a proper preshift or onshift examination (Tr. 188-189).

The testimony of Respondent's witnesses is sufficient to corroborate the inspector's time estimate. First, a close examination of the entries in Exhibit 0-2, mentioned by Inspector Stanley in his testimony (Tr. 186-187), shows that they are not identical. Some are very specific, while some are very general in their descriptions. Mr. Matheson indicated that, in response to the entries in Exhibit 0-2, he had assigned from six to 10 belt cleaners daily to the subject belt (Tr. 336-337) between November 18 and November 21, 1977. As a permissible inference, one could infer that these men removed all of the accumulations along the belt on each day they were assigned to the area, a fact that would explain the differing descriptions contained in the belt examiner's book (Exh. 0-2). Under this interpretation, no two descriptions would be alike because they would not be referring to the same accumulation(s) on successive days. This appears to be the interpretation advanced by Respondent, as evidenced by Mr. Matheson's testimony regarding "fines." "Fines" were defined by Mr. Matheson as small particles that fall through the belt splices (Tr. 327).

He testified that he did not see any accumulation of fines along the 15 to 20 crosscut distance that he walked with Inspector Stanley (Tr. 346-347). According to Mr. Matheson, the absence of fines denoted that the belt had been shoveled previously because: "[t]he more fines you have, the longer its been since the belt has been shoveled" (Tr. 347). Unfortunately, the absence of fines has little probative value when viewed in light of the extensive accumulations observed by the inspector. Even assuming that the accumulations were intended to be removed at the end of two shifts, Mr. Matheson could not state that all accumulations were always removed within two shifts (Tr. 385).

The testimony of both Mr. Matheson and Mr. Lovell reveals that the belt examiner's reports do not always contain a complete record of the belt examiner's observations. Mr. Lovell had reached the conclusion that the belt needed to be shut down prior to the issuance of the order because, while walking the belt with the inspector, Mr. Lovell's observations caused him to conclude that the accumulations were "too much" (Tr. 443). Mr. Matheson had apparently reached the same conclusion. After walking 15 to 20 crosscuts, he went inby to the No. 3 overcast region of the Third Main South belt to reassign his men to the Second Main South belt. He did so because his personal observations revealed that the spillage problem was more extensive than what he had read in the belt examiner's book, and he therefore deemed it necessary to reassign his men to the area (Tr. 342-346). In light of the foregoing, Mr. Matheson's statements that belt examiners consistently record those things that need shoveling, and that such examiners always indicate when cleaning is necessary (Tr. 364-365), stand discredited to the extent they infer that the entries in the belt examiner's book accurately recorded the extensiveness of the accumulations along the Second Main South belt.

The presence of two additional factors serves to corroborate the inspector's time estimate. First, the above-mentioned activities that occurred on or around November 14, 1977, resulted in the loading of the rock that adversely affected the belt alignment, resulting in the spillage. The fact that the alignment problem can be traced to at least 1 week prior to November 21, 1977, corroborates the inspector's 1-week time estimate. Second, Mr. Matheson recalled assigning six to 10 belt cleaners per day to the Second Main South belt on the 14th, 15th, 16th, and 17th days of November 1977 (Tr. 337). Since cleanup personnel were assigned to an area based upon both the entries in the belt examiner's book and conversations with the belt walkers (Tr. 310), it can be inferred that the condition had been reported to Mr. Matheson on those days.

Accordingly, it is found that a large portion of the conditions cited in the subject order of withdrawal had existed for approximately 1 week prior to November 21, 1977, and that, based on the foregoing, the Respondent knew or should have known of their existence.

In light of the foregoing conclusion that most of the accumulations had existed for approximately 1 week, and in view of the requirement of the cleanup plan that accumulations be removed by the end of each production shift, it is found that the Respondent failed to clean up or undertake to clean up the accumulations within a reasonable time after it knew or should have known of their existence in that it failed to follow its written cleanup program. For the reasons previously set forth in this decision, the fact that the transportation of large rocks on the belt had caused an alignment problem that resulted in the subject spillages, does not excuse the Respondent's failure to adhere to the cleanup plan. The fact that the spillage occurred during the normal process of mining (Tr. 184) further places them within the scope of the plan.

This finding is bolstered by the testimony of Mr. Matheson. Instead of affirmatively stating that he always complied with the cleanup plan, he testified that he endeavored to comply with the cleanup plan to the "best of my ability" (Tr. 308). The inferences drawn from this guarded statement, coupled with the fact that the mine faced problems with dirty belts (Tr. 194, 282), further supports the conclusion that the cleanup plan was not followed during the periods of time pertinent to this proceeding.

The presence of cleanup men working on the belt at the time the inspection was underway does not aid the Respondent on the facts as presented herein. The inspector observed only two persons cleaning the belt, and they were observed at the No. 34 crosscut (Tr. 199, 214). Mr. Matheson had reviewed the belt examiner's book (Exh. 0-2) on November 21, 1977 (Tr. 314). Although he later concluded that the entries contained therein understated the spillage problem (Tr. 342-345), the information contained in the book caused him to assign, to the best of his recollection, eight to 10 belt cleaners to the Second Main South belt (Tr. 336). The fact that the information contained in the book caused Mr. Matheson to conclude that eight to 10 men were needed to alleviate the spillage, coupled with the presence of only two belt cleaners on the belt, prevents a finding that the Respondent was in the process of implementing effective cleanup procedures at the time of the order's issuance.

(b) Gravity of the Violation

The description of the extent, composition and location of the accumulations is set forth in Part V(B)(2)(a).

The Second Main South belt was running from the time the inspector started at 7:30-7:35 a.m. until it was shut down at 8:15-8:20 a.m. (see Tr. 183, 196, 206-207, 411-412, 417). Inspector Stanley testified as to the presence of stuck rollers, as set forth in Part V(B)(2)(a), supra. He felt the rollers, and some of them were warm to the touch (Tr. 195).

Mr. Matheson indicated that the belt had been in operation during the week prior to the order's issuance (Tr. 393). He also stated that, given the proper conditions, a belt fire can be started by one stuck roller or by the belt dragging in coal (Tr. 394, 396). Mr. Lovell stated that a belt running in coal presents an ignition source (Tr. 425).

The inspector stated that the area was rock dusted (Tr. 189), but indicated that the belt was not well rock dusted (Tr. 203). There was float coal dust atop the rock dust (Tr. 189). He identified the potential hazard as a mine fire (Tr. 195), and classified an occurrence as "probable" because friction could cause a fire (Tr. 195). The possible injury was death by smoke inhalation (Tr. 196). Approximately 50 miners were exposed to the hazard (Tr. 196). He stated that with respect to methane, in "this area it would be academic as far as being any sufficient amount" (Tr. 195). There were firesensing lines and a water line in the area (Tr. 203). The water line adjacent to the belt ran the entire length of the belt (Tr. 415). There were both primary and secondary escapeways (Tr. 204).

Accordingly, on the facts as set forth above, it is found that the violation was extremely serious.

(c) Negligence of the Operator

As set forth in Part V(B)(2)(a), supra, the Respondent knew or should have known of the presence of the combustible accumulations in the mine's active workings. This is based upon the entries in the belt examiner's book, the duration of the accumulations' existence, the extent of the accumulations as sufficient to give notice to the operator, and the fact that they should have been observed during a proper preshift or onshift examination. Also, the Respondent failed to undertake effective cleanup procedures within a reasonable time after it knew or should have known of the accumulations' presence.

Accordingly, it is found that the Respondent demonstrated more than ordinary but somewhat less than gross negligence.

3. Good Faith in Securing Rapid Abatement: Order Nos. 7-0565 1 (MEM), November 21, 1977, and 7-0563 (1 LWS)

The Second Main South and Third Main South belts had a combined length of approximately 7,000-8,000 feet (Tr. 209, 350). After regrouping his men, Mr. Matheson had approximately 35 people cleaning the Second Main South belt (Tr. 352, 420). By the end of the first shift, a major portion of the Second Main South belt, in Mr. Matheson's estimation approximately 95 percent, had been cleaned (Tr. 352). The Second Main South belt was rock dusted after it was cleaned (Tr. 352-353). The mine has only one rock dusting tanker, and it is possible to rock dust eight to 10 crosscuts with one tanker and do a good job (Tr. 353). There are approximately 70 crosscuts on the Second Main South belt (Tr. 353).

The Second Main South belt had been cleaned and portions of it had been rock dusted by 7 a.m. on November 22, 1977 (Tr. 194-195, 207, 209). The rock dusting was still under way when the inspector arrived (Tr. 209-210).

As regards the Third Main South belt, the accumulation near the No. 3 unit overcast had not been cleaned up by 6:30 a.m. on November 22, 1977 (Tr. 63). However, it was abated by 8:30 a.m. (Tr. 64-65).

Accordingly, it is found that the operator demonstrated good faith in securing rapid abatement of the violations.

4. Order No. 7-0583 (1 LWS), December 1, 1977, 30 CFR 75.200

(a) Occurrence of Violation

MSHA inspector Louis W. Stanley arrived at the Respondent's Camp No. 1 Mine at 6:20 a.m. on December 1, 1977 (Tr. 460). He went underground between 7:00 and 7:15 a.m. (Tr. 460). He was accompanied during the inspection by Mr. Martin T. Lovell, the safety manager at the Respondent's Camp No. 1 Mine (Tr. 519).

According to the inspector, the roof was inadequately supported at a point in the No. 1 entry in the Fourth East Panel off 2 Main South located 60 feet outby spad 4+20 (Exh. M-13, Tr. 464). The Fourth East Panel is also called the No. 3 Unit (Tr. 461). The No. 1 entry was being used as a supply road at the time, and people were observed riding under the inadequately supported roof (Tr. 464, 468, 485-486), even though a danger sign was located at the mouth of the cavity (Tr. 471). The road was 18 feet wide (Tr. 490-491). There were rocks hanging from the ceiling of the cavity, most of which were to the side (Tr. 478).

He thereupon issued the subject order of withdrawal (Exh. M-13), citing the Respondent for a violation of the mandatory safety standard embodied in 30 CFR 75.200, which states, in pertinent part: "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 cavity existed in the roof of the No. 1 entry, a cavity caused by a previous roof fall (Tr. 464-465). Mr. Lovell confirmed the existence of the cavity (Tr. 520). It was approximately 35-40 feet in length (Tr. 465) and approximately 10 feet high (Tr. 487). Width estimates were made with reference to those roof bolts which had been installed in the cavity.

According to the inspector, only a portion of the cavity was completely lacking support. Two rows of bolts had been installed for a distance of 16 lineal feet and three rows of bolts had been installed for a distance of 20 lineal feet (Tr. 465, Exh. M-16). In the inspector's opinion, there should have been at least four rows of bolts for the entire length of the cavity (Tr. 466).

The blue lines on Exhibit M-16 represent the estimated widths of areas totally lacking supports, figures estimated with reference to the previously installed supports. Exhibit M-16 is not drawn-to-scale (Tr. 465-466). The previously installed supports were located toward the center of the cavity (dark circles on Exhibit M-16). On the lefthand side of the cavity, supports were lacking in an area approximately 4 feet in width and 16 feet in length (Exh. M-16, Tr. 484-485). On the righthand side of the cavity, supports were lacking in an area measuring 36-40 feet in length, and varying in width between 8 and 10 to 12 feet (Exh. M-16, Tr. 485).

The inspector measured the length of the cavity (Tr. 482). He estimated all widths visually, both as to the spacing between the roof bolts and as to the unsupported area, because the 10-foot height of the cavity, coupled with the presence of rock from the previous roof fall on either side of the entry, prevented his taking measurements (Tr. 465, 483-484, 487-488). At one point in his testimony, Mr. Lovell, who was present when the order was issued, stated both that the inspector's estimate of the distance of the cavity was reasonably accurate and that all of the inspector's dimensions seemed reasonably accurate (Tr. 520). Mr. Lovell further stated that Exhibit M-16 accurately reflects the roof bolts present at the time (Tr. 520). Furthermore, he did not dispute the fact that there was an area of unsupported roof (Tr. 534).

In light of the corroborating testimony of Mr. Lovell, coupled with the absence of any objections to the measurement procedure in either the testimony or in the Respondent's posthearing brief, it is found that the inspector's width and distance estimates are sufficiently accurate for purposes of resolving the issues presented herein.

The inspector testified that he did not cite a violation of the roof control plan because the plan does not specifically cover rebolting in the situation presented herein (Tr. 494-495). He stated that the roof control plan in effect on the date of the order addressed the rebolting of roof cavities only as follows: "Header boards shall be installed between the roof bearing plate and the roof where cavities are rebolted. Conventional roof bolts may be used in these areas" (Tr. 498; Exh. M-40, p. 9, No. 32). However, he observed that the roof control plan normally requires bolts to be on 5-foot centers, and that normally four rows of bolts would be across an entry (Tr. 491-492).

Mr. Lovell indicated that the roof control plan covered the area. He thought it required conventional bolts to be set on 5-foot centers, but admitted that the plan was vague (Tr. 539).

It is unnecessary to address the ambiguities in the roof control plan, if it is indeed ambiguous, because the plan is not the basis for the violation presented herein. In Zeigler Coal Company, 2 IBMA 216, 80 I.D. 626, 1973-1974 OSHD par. 16,608 (1973), the Board of Mine Operations Appeals held "that an operator is under a duty to maintain a safe roof irrespective of any roof control plan and that the failure to do so constitutes a violation of the mandatory safety standard of [30 CFR 75.200]." 2 IBMA at 222.

Accordingly, where the evidence presented is sufficient to establish that the mine's roof was not adequately supported to protect persons from falls, it is not necessary to prove a violation of the roof control plan in order to sustain a violation of 30 CFR 75.200.

Mr. Lovell did not dispute the fact that an area of unsupported roof existed (Tr. 534, 542). However, for reasons set forth in the section of this decision discussing the gravity of the violation, he disagreed that the individuals riding in the mantrip would be required to travel directly under unsupported roof (Tr. 542). Yet, he did not dispute the fact that either the supported or the unsupported section of roof could fall (Tr. 540).

The question presented is whether the above-mentioned facts establish a violation of 30 CFR 75.200 by a preponderance of the evidence. Both witnesses agreed that unsupported roof existed in the area cited in the subject order of withdrawal. Inspector Stanley testified as an expert that the number of supports present was inadequate, stating that four rows of supports should have been installed. Rocks were observed hanging from the roof of the cavity, most of which were to the side. During the abatement process, some of the unbolted roof fell (Tr. 474). Miners were observed passing beneath the cavity, even though a danger sign was conspicuously located at its mouth. Even Mr. Lovell admitted that an area of unsupported roof was present, and he did not dispute the fact that the unsupported section of roof could fall.

Accordingly, it is found that a violation of 30 CFR 75.200 has been established by a preponderance of the evidence.

(b) Gravity of the Violation

The inspector identified the potential danger as fatal roof falls (Tr. 472). Possible injuries ranged from smashed fingers to death (Tr. 473). Ten miners were directly exposed to the hazard (Tr. 473). The inspector stated that an occurrence was probable, and, indeed, during the abatement process, some of the unsupported roof fell (Tr. 474).

There were fractures in the roof (Tr. 478, 541). According to the inspector, they were present in both the bolted and unbolted portions of the cavity (Tr. 479). The inspector stated that fractures are very dangerous in unbolted sections of roof (Tr. 479). Mr. Lovell indicated that cracks can add to the extent of a roof fall as relates to unsupported roof, depending upon the depth of the fracture (Tr. 541). The inspector stated that the danger sign indicated that the Respondent thought the condition was bad because it was unsupported (Tr. 490).

The 10-foot height of the cavity prevented the inspector from testing the roof for drumminess (Tr. 486).

The roof was not working (Tr. 478, 528). The term "working" refers to cracking and popping (Tr. 478).

According to Mr. Lovell, a mantrip, which is approximately 6 to 8 feet wide, could travel under the bolted portion of the cavity and still remain under supported roof (Tr. 529-530). During the course of the hearing, he produced a drawing to assist in illustrating his opinion (Exh. 0-5). His testimony referred to that portion of the cavity where two rows of bolts were present (Tr. 529).

According to Mr. Lovell, the roof control plan requires conventional bolts to be installed on 5-foot centers (Tr. 529), thus leading to the conclusion that each conventional roof bolt provides roof support within a 2-1/2-foot radius (Tr. 529-530, 542). Conventional bolts had been installed in the cavity (Tr. 529), with 5 feet between each bolt (Tr. 529). He therefore concluded that the two bolts provided support for a distance of 10 feet, as measured between the ribs. This figure was reached by adding the 5 feet between the two bolts to the 2-1/2 feet on the opposite side of each bolt (Tr. 529, 530). In his opinion, this was sufficient to allow the 6- to 8-foot wide mantrip to pass under supported roof (Tr. 530, 542).

A review of Mr. Lovell's background (Tr. 409) reveals that he does not possess the credentials necessary to accord great probative value to his theory. Indeed, he could not state that the presence of the bolts in the cavity would either impede a roof fall or lessen its severity (Tr. 540-541). Accordingly, his testimony on this point does not materially affect the gravity of the violation. The fact that the inspector testified that a person walking down the center of the travelway would be under the bolted portion of the roof (Tr. 482) cannot be interpreted as lending support to Mr. Lovell's theory of the facts presented herein. Indeed, the inspector saw people pass beneath the unsupported roof (Tr. 468).

On the facts as set forth above, it is found that the violation was extremely serious.

(c) Negligence of the Operator

The condition was readily visible (Tr. 471). The condition was listed on the preshift examiner's reports commencing November 25, 1977 (Exh. M-19, Tr. 469) and running through November 30, 1977 (Exhs. M-20, M-21, Tr. 469-470). The entry in Exhibit M-22 for December 1, 1977 (Tr. 470), was made after the issuance of the order (Tr. 546-550, 553-554). There was a danger sign immediately outby the cavity across the supply road (Tr. 471). It had been placed there between 12 midnight and 8 a.m. on November 30, 1977 (Tr. 532). The fact that more rock had to be removed from the area before the remaining bolts could be installed (Tr. 533) does not lessen the degree of negligence demonstrated by the Respondent.

Accordingly, it is found that the Respondent demonstrated a high degree of gross negligence.

(d) Good Faith in Securing Rapid Abatement

The order of withdrawal was issued at 7:50 a.m. on December 1, 1977 (Tr. 463, Exh. M-13), and was terminated at 11:00 am. on December 2, 1977 (Exh. M-14). The condition was abated by installing additional roof bolts (Tr. 474).

Accordingly, it is found that the Respondent demonstrated good faith in securing rapid abatement of the violation.

5. History of Previous Violations

The Respondent's history of previous violations, relating to the Camp No. 1 Mine, as contained in Exhibit M-2, during the 24 months prior to November 21, 1977, is summarized as follows:

<u>30 CFR Standard</u>	<u>Year 1 11/22/75 - 11/21/76</u>	<u>Year 2 11/22/76 - 11/21/77</u>	<u>Totals</u>
All sections	334	520	854
75.200	28	49	77
75.400	43	50	93

(Note: All figures are approximations).

The Respondent paid assessments for approximately 854 violations of all sections of Title 30 of the Code of Federal Regulations during the 24 months prior to November 21, 1977. Approximately 334 are shown during year 1, and approximately 520 are shown during year 2.

The Respondent paid assessments for approximately 77 violations of 30 CFR 75.200 during the 24 months prior to November 21, 1977, with approximately 28 during year 1 and approximately 49 during year 2.

The Respondent paid assessments for approximately 93 violations of 30 CFR 75.400 during the 24 months prior to November 21, 1977, with approximately 43 during year 1 and approximately 50 during year 2.

On June 30, 1977, Peabody Coal Company was transferred by Kennecott Copper Company to Peabody Holding Company (Tr. 510-511). Respondent contends that the change in ownership prevents including the violations prior to June 30, 1977, in the history of violations (Tr. 10-15, Respondent's Posthearing Brief, p. 25). Counsel for the Respondent was informed during the hearing that for the position to be considered, appropriate evidence would have to be placed in the record (Tr. 15). No evidence has been presented as to the structure of Kennecott Copper Company, Peabody Holding Company, and Peabody Coal Company, and their relationships with the subject mine. There is no evidence establishing that the change in ownership marks any change in company policy as to mine safety. The fact remains that Peabody Coal Company has been the operator of the Camp No. 1 Mine at all times relevant to this proceeding (Exh. M-2).

Accordingly, violations which occurred prior to June 30, 1977, will be considered in evaluating the Respondent's history of violations.

6. Appropriateness of Penalty to Size of Operator's Business

The Camp No.1 Mine produced approximately 559,509 tons of coal in 1978 (Exh. M-1). Peabody Coal Company produced approximately 47,650,569 tons of coal in 1978 (Exh. M-1). Furthermore, the parties stipulated that the Respondent is a large operator for purposes of assessment of any civil penalties (Tr. 8).

7. Effect on Operator's Ability to Continue in Business

The parties stipulated that the assessment of any penalties in this proceeding will not affect the Respondent's ability to continue in business (Tr. 8). Furthermore, the Interior Board of Mine Operations Appeals has held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

1. Peabody Coal Company and its Camp No. 1 Mine have been subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969 and the 1977 Mine Act during the respective periods involved in this proceeding.

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

3. The violations charged in the subject orders of withdrawal are found to have occurred.

4. All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

Both parties submitted posthearing briefs: Both parties submitted reply briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

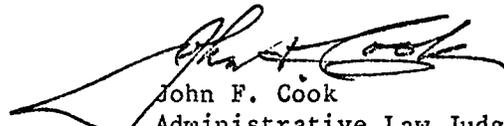
VIII. Penalties Assessed

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

<u>Order No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Penalty</u>
7-0565 (1 MEM)	11/21/77	75.400	\$3,000
7-0563 (1 LWS)	11/21/77	75.400	6,000
7-0583 (1 LWS)	12/01/77	75.200	8,000

ORDER

Respondent is ORDERED to pay the penalties assessed in the amount of \$17,000 within 30 days of the date of this decision.


John F. Cook
Administrative Law Judge

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

MAY 29 1978

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. BARB 78-474-P
Petitioner : A.O. No. 15-02079-02021V
v. :
: Ken No. 4 Underground Mine
PEABODY COAL COMPANY, :
Respondent :

DECISION

Appearances: Leo J. McGinn, Trial Attorney, Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for the
petitioner;
Thomas Gallagher, Esquire, St. Louis, Missouri, for the
respondent.

Before: Judge Koutras

Statement of the Proceeding

This is a civil penalty proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, initiated by the petitioner against the respondent on June 19, 1978, through the filing of a petition for assessment of civil penalty, seeking a civil penalty assessment for five alleged violations of the provisions of certain mandatory safety standards. Respondent filed an answer and notice of contest on July 3, 1978, denying the allegations and requesting a hearing. A hearing was held in Louisville, Kentucky, on May 15, 1979, and the parties submitted posthearing proposed findings, conclusions, and briefs, and the arguments set forth therein have been considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil 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 this decision.

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

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 CFR 2700.1 et seq.

Stipulations

The parties stipulated to jurisdiction, and that the respondent is a large mine operator. The mine in question produces 5,500 tons of coal per day and employs a total of 320 men.

DISCUSSION

Section 104(c)(2) Order No. 1 TML, December 20, 1976, citing 30 CFR 75.402, states:

Rock dust was not being applied up to and within forty feet of the working places (faces) in the Nos. 1 thru 6 entries on the roof, ribs and floors and connecting crosscuts beginning at the unit ratio feeder and extending inby for approximately 150 feet on the No. 3 unit 8 H.W. (I.D. 023) responsibility of the 1st and 2nd shift foreman. Samples were taken.

Petitioner's Testimony and Evidence

MSHA inspector Thomas M. Lyle, testified that he conducted a routine spot inspection of respondent's mine for a period of 15 actual inspection days, from December 20, 1976, to March 4, 1977. The mine is located in the Kentucky No. 9 seam, has a coal height of approximately 56 inches, and conventional mining is conducted on six active units operating on two production shifts and a maintenance shift. Conventional mining equipment is used for the noncontinuous miner-type activities such as cutting, drilling, shooting and loading.

Inspector Lyle issued his order upon observing that the floors of all six entries were black. The ribs and roof were spotty, and wet dust had been sprayed on in streaks. The area involved consisted of the No. 1 through No. 6 entries and the crosscuts beginning at the unit ratio feeder and extended for approximately 150 feet. The unit ratio feeder was approximately 170 feet away from the face, was located at the belt dumping on the belt, and for some 150 feet in by from this point no rock dust had been applied. He walked up and down and examined each of the entries, and walked by the 8 or 10 crosscuts and looked at them. Coal was being run at the time he walked the entries and crosscuts, and he saw no evidence of any dry rock dust being applied, but the roofs and ribs appeared spotty and had been sprayed with a slurry solution of rock dust and water, which does not take the place of regular rock dust, and it will dry out (Tr. 8-21).

Inspector Lyle testified that the mine is usually dry rock dusted and he had never previously found it in such a condition. The lack of rock dust was readily observable and obvious, and anyone could see it visually. He took band samples in the usual prescribed manner and the laboratory results are reflected in Exhibit G-6. The three band sample results indicated 31, 30.7, and 32.4 percent incombustible rock dust content at the places sampled. The law requires 65 percent in intake air and 80 percent in the return. He took samples to substantiate the violation, although he is not required to do so since the area cited was obviously black through visual observation. He was accompanied during his inspection by assistant mine manager Ken Large who admitted that the condition of the section with regard to rock dusting was the worst he had ever seen (Tr. 21-26). The possible results of allowing the condition to go on, is that if a cutting machine had been at the face of coal and hit a pocket of methane gas and ignited, an explosion could occur since there was no dry rock dust on the roof, ribs and floor of the mine.

With respect to the spots of wet dust that had been applied, the inspector stated that this would not have any effect on the seriousness of an explosion or an ignition, and indicated that it would not in any way suppress an explosion if there had been an ignition at the face. Once there is an ignition, the float coal dust will not stick because the area becomes very slick, thus the explosion is enhanced. In the event an ignition or explosion were to occur in the area during the production shift, approximately 12 men could have been involved in such an explosion. The condition was such that the operator either knew or should have known that it existed since the men advanced approximately 50 to 60 feet per shift during the normal mining cycle and there were approximately two or three shifts involved. He examined the preshift books, but could see no indication that the conditions had been reported and noted. The foreman on the shift was responsible for examining the area on preshift and onshift examinations to see whether or not rock dust had been applied. The lack

of rock dusting is visibly obvious since an area which has been rock dusted is less black than an area which has not been rock dusted. The mine floor was entirely black, and the roof and ribs were spotted where they had been sprayed with the wet dust (Tr. 26-34).

On cross-examination, Inspector Lyle confirmed that his notes stated that:

[R]ock dust was not being applied up to and within 40 feet of the working faces in Nos. 1 through 6 entries on the roof, ribs, floors and connecting crosscuts beginning at the unit ratio feeder and extending inby for approximately 150 feet on the No. 3 unit, I.D. 0288 Northwest. Samples were taken to substantiate this.

He explained the procedures he followed in taking his band samples, and reiterated the hazards presented when inadequate rock dust is applied. He also described the areas where he took his samples (Tr. 38-53).

Inspector Lyle testified that he found several other violations on the section on the No. 3 unit, which he told Mr. Large and the section foreman about. He wrote a citation for a violation of 75.301-1 for insufficient air at the working face where it is either being cut, mined or loaded; 75.301 for insufficient air in the last open crosscut on the return side; 75.304 for inadequate onshift examination; and a section 75.401 float dust violation. He is not sure exactly how long he was on the unit, but he was there for a few hours (Tr. 53-54).

In response to questions from the bench, Inspector Lyle testified that the previous four citations he issued on December 20, including a fifth one for an inadequate line curtain, 75.302-1, were all section 104(b) notices. One was issued at 6:15 p.m. and was abated at 6:25 a.m.; the second issued at 6:20 p.m., and was abated at 6:30; the third issued at 6:31 p.m. and was abated at 6:45; and the fourth was issued at 6:40 p.m. and abated at 7 p.m. The order in issue here was issued at 7 p.m., therefore, all of the previously-mentioned conditions and citations had been abated prior to the issuance of the order (Tr. 54-57). He further testified that wet rock dust is normally used to comply with section 75.401 in areas of less than 40 feet of face in order to keep the dust down. Assuming that an operator used wet dust to totally rock dust an area such as the roof, ribs, and floor, and after doing that it appeared white, Mr. Lyle testified that he would not accept that as being in compliance with 75.402, even though the incombustible content may be high and even though it completely whitens the area (Tr. 57-58).

Respondent's Testimony and Evidence

Myron D. Stewart, employed by respondent as a face foreman, testified that on the day in question while he was at the face of the mine, Mr. Large accompanied Inspector Lyle to the face where he met them and the inspector took an air reading. He does not know what the air reading was since Inspector Lyle did not tell him, and he confirmed that the inspector issued a 104(c)(2) order that day for lack of rock dusting. According to Mr. Stewart, rock dusting had been done that day, but it did not meet the inspector's approval since the inspector had stated that wet dusting is not permissible (Tr. 68-71).

Mr. Stewart identified a sketch he made of the rooms in question, and in describing the procedure for using a wet duster, he indicated that a wet duster is used because it covers evenly, men do not have to breathe the dust that is accumulated by throwing it in by hand, and that such dusting can be done during the production shift. In Mr. Stewart's experience of using a wet duster, it covers evenly rather than spotting since it is liquid in form and it adheres to the roof and ribs. In his opinion, one of the advantages of a wet duster in terms of safety to miners is that they do not have to breathe in the air as when it is being applied by hand. With regard to the ability of dry dust as opposed to wet dust to cover an area, in his opinion, wet dust covers better. Mr. Stewart also stated that Exhibit R-2, which is an onshift production report for the period of December 17 to 20, indicates that rock dusting was permissible on the unit, and if it were not, the report would have so indicated (Tr. 73-80).

In order to abate the order, the area was rock dusted by hand, and then wet dusted. He was with Mr. Lyle the entire time that he was on the section, and he never heard Mr. Large make any remarks with regard to the condition of the rock dusting on the section, either in his presence or in Mr. Lyle's presence (Tr. 80-83).

On cross-examination, Mr. Stewart testified that he first saw Mr. Lyle at the face, and that coal was being produced at that time. Mr. Stewart did not learn that an order had been issued for a violation of 75.402 until he arrived outside of the mine that night. He stopped production in order to comply with the inspector's request to apply more rock dust, and although he did not know that an order had actually been issued, he ordered that the area be re-rock dusted since he had been instructed to comply with the requests of MSHA inspectors in order to make the section a better or more safe place to work. He believes that the samples that were allegedly taken by the inspector are a fabrication because no samples were taken while he was on duty that night (Tr. 84-92).

Mr. Stewart further testified that the distinction between wet dusting and dry rock dusting is that the former adheres and covers a wide area and it can be applied during the production shift, while approximately 50 percent or more of dry rock dust falls off as it is applied by hand. The wet-dusting apparatus is located on the coal drill, and after the drilling is done, the slurry pump sprays the ribs and roof. According to Mr. Stewart, rock dust is required to be maintained through the active areas within 40 feet of the face in order to comply with section 75.402 (Tr. 89-95).

Mr. Stewart stated that the color of the roof, ribs and floor within 20 feet of the working face was white. With respect to the inspector's testimony that from 150 feet out to the face, it was dark in color, Mr. Stewart stated that it could not have been since the three entries had been driven approximately a week before and they had been rock dusted a long time ago; thus it was all white throughout the six entries and all the crosscuts 150 feet out to the face. However, the feeder location would not be completely white because when the cars dump coal, they spill a small amount, thus making the area a little dirty; however, that is shoveled and cleaned up. Mr. Stewart vividly recalled the condition at the time, although he did not take any notes. Although he did not see a red tag being put up at 7 o'clock when the order issued, he knew where rock dusting had to be done in order to abate the order since the inspector stated that they would have to go back to the feeder and rock dust over what had been done before since it did not meet his approval (Tr. 98-101).

Mr. Stewart indicated that the ribs, roof and floor had been rock dusted before the order issued because that is the normal procedure as the mining cycle advances. Wet rock dust was used on the ribs and roof, and dry rock dust was used on the floor, and that is the procedure that was followed in the mine at the time the order issued. Dry rock dust is not applied to the roof or ribs any place in the mine unless a shuttle car hits a rib and knocks it off, and if they had to use dry rock dust, production would have to stop (Tr. 101-111). He had never previously been cited for using wet rock dust (Tr. 112).

In response to bench questions, Mr. Stewart testified that he was with the inspector the entire time only after he reached the face. Since the inspector had to walk through the areas cited to reach the face, it is possible that he stopped and took samples. It was possible that Mr. Large and Inspector Lyle had some conversations while they were walking to the face area, and Mr. Stewart would not have been aware of this (Tr. 113-115).

Kenneth R. Large, mine accounting engineer, testified that on December 20, 1976, he was acting mine manager on the second shift

and that he and Mr. Lyle met in the office after which they went to the 8 Northeast unit where they first encountered Section Foreman Stewart at the face. They then went across the room and the inspector pointed out several things that needed to be done, all of which were taken care of immediately and then they went down to the last set of rooms that had been worked out. Inspector Lyle stated that he would not accept the wet dusting because it was inadequate, and he indicated that it was unacceptable from the "rosco" to the face, and from the feeder, which was three breaks, but, he did not indicate the reasons why he would not accept wet dusting. He then indicated that he was going to issue an order, which he did when he went outside the mine. Rock dusting had been done to about 20 feet to the face, and Mr. Large did tell Inspector Lyle that the area could have been dusted better, but he did not state to Inspector Lyle that it was in the worst condition that he had ever seen the section in, although the inspector had indicated such in his notes (Exh. G-7). There were several black places, some of which resulted from dust that had been applied over loose coal and then had fallen off, probably because some cars had hit the ribs and knocked it off. He and Mr. Lyle were on the section for approximately 1-1/2 to 2 hours; he was with Inspector Lyle the entire time, and Inspector Lyle never left his presence. He did not see Inspector Lyle take any band samples, and while he carried a plastic brief case with him which was approximately 3 to 4 inches by 1 to 2 feet, in his estimation, Inspector Lyle did not have on his person the equipment necessary to take a band sample (Tr. 117-127).

On cross-examination, Mr. Large testified that from the first open break outby the face to the "rosco," the six entries were adequately dusted; however, the first open break had just gone through and it had not been dusted. At the face, the area was black, but outby from the ratio feeder inby, it was all white. The two entries closest to the "rosco" would have been dry dusted because the break had been opened only since they moved in the set of rooms. Two of the breaks were already there and had been dry rock dusted. The floor had been rock dusted but one probably could not tell whether the roof and ribs were wet dusted because frequently when dry dust has been applied, it will sweat and one cannot tell if it is dry dusted or wet dusted. Wet dust is usually applied at the face, and one of its characteristics after it is applied is that it becomes hard and then caked. When the men pull out a set of rooms, the third shift will come in and move everything out and dry dust it. Wet dust suppresses the dust, and Mr. Large did not know why it would not serve the same purpose as rock dust in relation to suppression of fire or explosion. In his opinion, the purpose of 75.401 is to abate dust at the working face and the purpose of 75.402 is to prevent propagating an explosion. Although wet dusting is used at the face to suppress dust for the health and convenience of the workers, it is necessary to add dry rock dust afterwards because after it gets older, it will deteriorate (Tr. 127-137).

Mr. Large testified that he did not see the inspector red tag the area, although that is the normal procedure when production is shut down. Although he was involved in the abatement of other violations at the time, he told someone else to take care of abating them (Tr. 138).

Inspector Lyle was recalled in rebuttal, and testified that wet dusting is routinely done in the mine at the face area to suppress dust and that after the wet dust is applied, it is routine practice at the mine to dry rock dust the areas. In his opinion, the distinction between the purpose of wet dusting and dry rock dusting is that when wet rock dust is applied to the roof and ribs; it will dry and become a caked surface, and if an ignition should occur in the mine, it will not disperse into the atmosphere to suppress the ignition. The application of a wetting agent or wet dust does not satisfy the requirements under 75.402. The difference between the definitions of "rock dust" and "wet dust" is that rock dust would go through a 20-mesh per linear-inch sieve since it is dry, while wet dust will not, and wet dust will always become dry and adhere and form into a cake, while dry dust will not form into a cake. He referred to the appropriate Inspector's Manual references with respect to the acceptable uses of wet rock dust (Tr. 141-146).

Inspector Lyle further testified that he took the samples indicated in the normal manner in which he was trained to do so and that no one observed him taking them. Although Mr. Large accompanied him in the mine on the section, they were not together all of the time since Mr. Large was involved with abating other violations that he had issued, and during the time he was not with Mr. Large, he took the samples. He had the necessary equipment for taking the samples in his brief case which is approximately 24 inches long and 18 inches wide and a small plastic bag. The equipment that he uses to take the samples is about 8 inches by 8 inches and folds up. The handle to the brush is cut off and the screen part drops down inside the tray and the little scoop also fits inside the tray so that the equipment contains itself. He also had other equipment with him on that day such as anemometers or smoke tubes (Tr. 147-149).

In response to bench questions, Inspector Lyle stated that it was customary in the mine to use the wet rock duster in the face area at less than 40 feet, but that in all areas up to 40 feet, dry rock dust is used with it with a Bantam duster. Respondent had been shortcutting and using the wet rock-dust solution to rock dust areas that are supposed to be dry rock dusted. The total weight of the samples taken was approximately 1 pound, and he followed the standard procedure and did red tag the section when he issued the order before going to the surface. Mr. Large and the section foreman were on the section, and he informed them that he was issuing a 104(c)(2) order for inadequate rock dusting, 30 CFR 75.402, and he was told that the cited condition would be remedied. He then hung his closure tag, returned to the surface, and went back the next day and abated the order (Tr. 154-157).

Section 104(c)(2) Order No. 1 TML, February 16, 1977, citing 30 CFR 75.200, states:

There has been a violation of the approved roof control plan dated October 1976, No. 4 unit 11 N.W. (I.D. 027) in that the connecting crosscut between the Nos. 4 and 5 entries had been holed through (cleaned up and rock dusted) creating an intersection and had not been bolted (pinned) on the right side facing the No. 4 entry face and had been advanced, cut, drilled, shot and preshift examined, permitting workmen to advance inby the unpinned intersection to the working face. Responsibility of Jim Greer and E. A. Conn, foremen.

Petitioner's Testimony

Inspector Lyle confirmed that he issued the order during a production shift after coming to a point between the Nos. 4 and 5 entries, where the connecting crosscut had been opened up creating an intersection. The No. 4 entry had roof bolts installed just off the rib, but the rest of the crosscut in the area on the open end was not bolted, nor was it timbered or supported with any other means of permanent supports. The crosscut had a total of three bolts, and he examined the roof outby the bolted area and saw no evidence at all of pinning. The roof control plan had been violated, namely, page 6, item 13. The face was at the top of entry No. 4, and based on the markings of the preshift examiner and the location of the face, he realized that a cut of coal had been taken, advanced from the adjacent entry, and then holed through into the No. 4 entry. The precise violation of the roof-control plan was the fact that persons had gone inby into an unpinned section. Under the roof-control plan, the crosscuts are approximately 20 feet in width, and roof bolts are to be installed 3 feet from the rib line on 5-foot centers across; thus, approximately 15 or 16 feet of roofing was left without support. In his opinion, this would be a serious violation because roof falls constitute "the number one killer in coal mines." Most of the falls in the No. 9 top in the Western Kentucky area occur in the crosscuts across the intersection, except when crosscuts are completely staggered. Unstable roof conditions are characteristic of mines in the Kentucky No. 9 area, which is the area in which the Ken No. 4 Underground Mine operates. The main roof at Ken No. 4 is composed of gray shale with rock bands, and the immediate roof is dark shale slate which tends to crack and break up, and it will slough and fall off. If a roof fall did occur, it would fall in the crosscut and out into the No. 4 entry, and would most likely directly fall on one person, although all workers on a section would be exposed to the hazard (Tr. 158-171).

With respect to the question of negligence, Inspector Lyle stated that the operator either knew or should have been aware of the condition since roof bolting is done during the normal mining cycle, and

the preshift examiner and the person who made the onshift examination should have noted the condition. Knowing that it was unbolted, men should not have gone in by unless they were going in to install temporary supports or to make a gas check. Given the physical distances involved, and the physical setup, he would estimate that the condition existed from the previous shift. He arrived at this conclusion from reviewing the condition and from the statements that Mr. Greer made to him that he had informed the foreman on the previous shift about it the day before (Tr. 171-174).

On cross-examination, Inspector Lyle testified that as he was crossing the unit, accompanied by Mr. Conrad Bowen, he observed the unpinned intersection, which was approximately 16 feet by 9 feet. The entry itself was pinned, but the area that was unpinned was at the edge of the crosscut. He did not observe any workmen in the area cutting, drilling, shooting, or preshift examining. Assuming the mining cycle had holed through the previous day, Mr. Lyle did not know whether the area would have been supported and then advanced beyond the place where the coal allegedly had fallen since there could have been a breakdown (Tr. 174-181).

In response to questions from the bench, Inspector Lyle stated that he did not see any coal being cut in the entry, but coal was being run on the section, and there was no cutting machine in the Nos. 4 or 5 entries. Bolting had been accomplished beyond the area which involved the citation, and he received no explanation as to why the particular location cited was not bolted, but he ventured a guess that "they just forgot to bolt it" (Tr. 181-183).

Respondent's Testimony

James Greer, assistant mine manager, testified that he was the section foreman on February 16, 1977, and he confirmed the existence of an unpinned roof area, but stated that it was on the left rib by the break between Nos. 3 and 4, and not between Nos. 4 and 5. There were approximately three bolts missing, but the rest of the intersection was pinned. He testified that Mine Manager Bowen had just discovered the unpinned roof area and he was just ahead of the inspector looking for possible violations. Mr. Bowen instructed him to bring in the roof bolter when Inspector Lyle arrived on the scene. The preshift report and a fire boss report of the 17 Northwest section for February 15 and 16 showed no indications of any unpinned areas.

Mr. Greer denied telling Mr. Lyle that he had informed the previous shift foreman about the unpinned intersection. In explaining the fall of coal in the entry and the three missing roof bolts, Mr. Greer stated that could have been an overhang that the cutting machine or the drillman had either cut or shot off. In his opinion, it is possible for an overhang to have been present and left up and still advance the entry, and this could explain why Mr. Lyle thought

that the entry had been advanced. The fall of coal was directly across from the crosscut at the face of No. 3 (Tr. 181-194).

On cross-examination, Mr. Greer stated that he did not see any "No bolt" signs in the area. He considers a drummy top to be stable, especially when one takes tests holes with a roof bolter and no cracks are shown. However, there is a difference between a drummy top and sound top; the sound is heavier on a sound top than on a drummy top and a drummy top is more likely to fall than a sound top (Tr. 194-208).

In response to questions from the bench, Mr. Greer testified that production was not stopped at the mine at the time the inspector cited the condition, nor was any closure sign put up. With respect to the inspector's testimony that he believed that the alleged violation occurred between the Nos. 4 and 5 entries, Mr. Greer stated that no one supplied such information to the inspector, that he confused the entries, and this was very easy to do. Thus, he and the inspector are actually talking about the same alleged condition and the same area of unsupported roof (Tr. 210-211).

Conrad Bowen, assistant mine superintendent, testified that he accompanied Inspector Lyle while he was on the section; however, he did not stay in Inspector Lyle's presence all the time. Mr. Bowen found three bolts missing on the left rib going in the No. 3 entry and he instructed Mr. Greer to install them. Although he first testified that he did not see any "No bolt" signs, he later stated that there was such a sign. When he discovered the bolts were missing, Mr. Greer was approximately in the next intersection behind him, together with Mr. Lyle. With respect to the condition of the mine top, Mr. Bowen stated that he has "seen a lot worse" and that the subject mine has the best No. 9 coal that he has ever seen. It was he, rather than Inspector Lyle, who discovered the unpinned area.

Mr. Bowen stated that according to the roof-control plan, it is not permissible to advance 10 feet inby a crosscut until it is opened for ventilation, and in his opinion, the fall was left there until the crosscuts went through and the unpinned area resulted when a sump machine was cutting a breakthrough. Once the breakthrough is made, and the feeder is in the next entry, the inby corner is cut off when one comes back through with a shuttle car. Sometimes, an outby corner is cut off in the next entry in order to allow the shuttle car to turn the curve easier. Since the intersection was pinned all the way through except for three bolts, he believes that it must have been cut from both sides (Tr. 213-220).

On cross-examination, Mr. Bowen testified he tries to proceed ahead of an inspector so that if he sees any violations, he can have them abated before the inspector sees the conditions. He did not conceal the condition from Inspector Lyle, but rather, gave instructions

for the bolter to be brought in since they had an area with unsupported roof, and this was done in the inspector's presence. He did not believe that the condition was a violation since the "No bolt" signs were posted. If it had been a violation, the fire boss would have, in all likelihood, written it up in the preshift book. Since the signs were posted, Mr. Bowen did not write up the condition. Although the inspector described the unpinned dimensions as 16 feet by 9 feet, Mr. Bowen believed the area was 5 feet 5 inches by 8 feet, and if there were three bolts missing, approximately 15 feet of roof area was unsupported (Tr. 220-226).

In response to questions from the bench, Mr. Bowen testified that he did not feel that the unsupported roof was a violation because it was marked so that miners could see that it was unsupported, and, in the regular mining cycle, when the pinner comes in, he can pin it. No one is to work in an area past a sign or marker designating an unsupported roof, with the exception of pinnermen. The signs used to designate nonbolted areas are approximately 10 to 12 inches long and approximately 4 inches wide, and they are not red-tagged, dangered-off signs, but rather simply state "No bolts." Mr. Greer stated that he is familiar with provision 13(a) of the roof-control plan which requires that a conspicuous sign be suspended from the roof, but that the provision did not come into effect until after the order was written. (The term "conspicuous sign" means a stick with fluorescent tape on it.) According to Mr. Bowen, however, on the day the citation issued, there was present a sign to warn people that this was an unbolted area, but he did not point the sign out to Inspector Lyle nor does he know whether Mr. Lyle saw the sign (Tr. 226-230).

Petitioner's Rebuttal Testimony

Inspector Lyle stated that approximately eight or nine roof bolts were missing from an area approximately 16 by 9 square feet. He did not see any conspicuous signs displayed, although such were required. If three roof bolts along one rib were missing in an entry or crosscut which otherwise was adequately pinned according to the roof-control plan, he would most likely have issued a 104(b) notice for a violation of the roof-control plan rather than the 104(c) notice that he issued. He informed the mine manager and face foreman of the order, and prior to the time he examined the roof, he had not been informed by anyone from management of the condition. If Mr. Bowen had seen the condition prior to his observation of it, he did not realize it, and he confirmed he did not shut production down in the entire area and that he remained on the site until it was abated (Tr. 231-236).

On cross-examination, Inspector Lyle confirmed the dimensions of approximately 16 feet by 9 feet, and stated that the 16-foot dimension would be from one rib of the crosscut in the direction of the other and the 9 feet would be in the same direction as the crosscut. The ribs in a crosscut are approximately 20 feet across. He observed the

unpinned area from under the bolted area in the entry, and there were approximately eight bolts missing (Tr. 237-242).

In response to questions from the bench, Inspector Lyle stated that a sign previously referred to by one of the witnesses should have been at the edge of the unpinned area, rather than out in the area, but that he did not see such a sign. It is acceptable mine practice to put up a white sign with red lettering on it that says "No bolts" whenever there is unsupported roof. The presence of a sign would not mean that there was no violation or that there was no hazard because the Ken No. 4 Underground Mine had a roof-bolting plan which required that all areas in the mine be bolted. If subnormal conditions exist in a mine, then it is necessary to take steps other than the normal precautionary measures, e.g., install longer bolts, cribs, crossbars, etc. The discrepancy in the entry numbers can be attributed to how the crosscuts are numbered from left to right or right to left, and when he asked about the entry, he was told that it was the No. 4 entry, and the area he circled in his notes was intended as an approximation. He does not know how many bolts it took to abate the citation, since he did not count, but including the time it took to move the equipment over, it took about an hour to correct the condition (Tr. 244).

Section 104(c)(2) Order No. 1 TML, February 28, 1977, citing 30 CFR 75.301, states:

The quantity of air reaching the last open crosscut between the intake and return pillars in the developing entries of the No. 5 unit, 2 nd S.W. was only 7,900 cfm during the production of coal when measured with an approved anemometer and smoke tube. Responsibility of Don Ramsey, foreman.

Inspector Lyle testified he was accompanied on his inspection by Mine Manager Bowen and Section Foreman Ramsey. He issued the order at 9:50 a.m. after he had observed and written up other violations, then proceeded to the track entry, and then to the No. 1 intake entry where he measured the air. According to his measurements, the air in the intake in the connecting crosscut between the Nos. 5 and 6 entries on the return pillar sides was 11,780 cubic feet per minute. When he took the readings described in the order, he was in the connecting crosscut between the Nos. 5 and 6 entries on the return pillar side. When he reached the crosscut, he took three air readings with his anemometer and found the air to be below 9,000 cubic feet of air. The first reading, which was taken along the center of the crosscut, measured 6,840 cubic feet per minute, the second reading was 5,700 cubic feet per minute, and the third reading was 7,125 cubic feet per minute. The variations in the anemometer readings are explainable by the fact that coal production was going on at the time and curtains were being fanned and moved around so that air was moving up and down. At

the time he took the readings, there was measurable dust in the air in the crosscut, but he did not know how much. He was particularly interested in the air at the mine because there was a continuing problem with maintaining sufficient minimum air requirements, and he had previously written several violations at the mine regarding the sufficiency of air. Further, an inspection team from Arlington had visited the Ken No. 4 Underground Mine and had stated in their report that the mine was operating on marginal air.

In addition to taking readings with the anemometer, Inspector Lyle testified that he took three smoke tube readings of the area. He obtained a reading of 7,600 cubic feet of air on the first smoke tube reading, 7,410 cubic feet of air on the second, and 7,885 cubic feet of air on the third which he cited as 7,900 cubic feet (and which was the highest air reading). No one assisted him in taking either the smoke tube readings or the anemometer readings. Section 75.301 requires that the minimum quantity of air reaching the last open crosscut in any pair or set of developing entries in the last open crosscut and any pair or set of rooms shall be 9,000 cubic feet of air per minute (Tr. 249-260).

Inspector Lyle considered the violation to be serious because the low air readings had to affect the air at the working face. He cited a violation at the No. 5 face for low air readings some 20 minutes earlier. Methane could build up and not be swept away, and the mine was under a section 103(i) inspection requirement. He believed the operator was aware or should have been aware of the condition because of the continuing ventilation problems and mine management had discussed the possibility of putting in additional raise holes to improve ventilation. The unit was subsequently abandoned after abatement was achieved because of ventilation problems (Tr. 260-269).

On cross-examination, Inspector Lyle confirmed that the air reading on the intake side was 11,780 cfms (Exh. G-19). He also confirmed that he took three air readings in all, and when he took the first reading, he informed respondent that according to his anemometer, the amount of air present was low. The first reading was taken in a traverse fashion, i.e., he went from one rib to the other rib in a back and forth manner. With respect to the second reading, which was taken approximately a quarter of the way in between the crosscut, he took it in the traverse style. When he took the third reading, he backed up to past half of the entry, to the center part of the area. After he took the three readings and calculated that he did not have sufficient air, he then took three smoke tube readings. He performed the calculations on paper (Exh. G-20), the same day that he took the readings, rather than at a later date. The correction factor that he used on his anemometer was 20 percent, and he calculated the area of the intersection with a tape line (Tr. 274-288).

In response to questions from the bench, Inspector Lyle testified that he had indicated on Exhibit G-19 that there were 11,780 cfms of air coming in the intake. After the line curtain was installed, the highest reading that he came up with was 7,885 cubic feet. He does not know what was causing the low air reading at that point because at the time he was taking air readings in the last open crosscut, the operator was working on the problem. When the air came up to above 9,000 cfms, he abated the notice. He did not find any significant amounts of methane; and had he found such, he would have issued an imminent danger order (Tr. 289-293).

Respondent's Testimony

Donald Ramsey testified that he was working as the foreman on the 2 Southwest, No. 5 unit, on the day shift on February 28, 1977, and first met with Inspector Lyle at the transformer where the inspector was checking for violations, after which they then went to the face area where coal was being loaded, and the loader operator appeared and told him that he had torn down part of the check curtain and that he needed a hammer to repair it. His helper was coming across from behind him with a hammer and he helped him repair the curtain. During this time, Inspector Lyle was in a stationary position taking an air reading in the last open crosscut, approximately 80 feet away on the other side of the loader, but he was not taking a traverse reading. The curtain was down, but was repaired within 2 or 3 minutes, after which time Inspector Lyle advised him that he did not have enough air, and in Mr. Ramsey's opinion, the air reading that Inspector Lyle based that statement on was taken when the curtain was down (Tr. 294-300).

At the time Mr. Lyle ordered the unit closed, there were 8 to 12 men working in by the last open crosscut, and the check curtain was down for approximately 5 minutes. Some of the common causes of check curtains being torn down are blasting or shooting coal down, which, in turn, tears them down, and people walking under them. The general rule is that if someone tears down a check curtain, he puts it back up, and the loader operator that he encountered was looking for a hammer (Tr. 302-308).

On cross-examination, Mr. Ramsey stated that although he does not remember going to the intake with Inspector Lyle, he remembers walking across crosscut Nos. 4, 5 and 6, but he does not remember whether any violations were cited at the time. He confirmed that a 104(b) notice was issued the same day, citing a violation of 75.302-1 for failure to provide a line brattice on the face of the No. 5 entry where coal was being loaded, but he remembers it being the No. 6 unit rather than the No. 5, and recalls that the line curtain was down several times that morning. He accompanied Inspector Lyle across face Nos. 4, 5 and 6 and although the inspector states in his order that he took both anemometer and smoke tube readings at the face, he does not recall any

smoke tube readings having been made by the inspector at unit No. 5, although he remembers that the inspector took two anemometer readings at the face (Tr. 308-315).

Mr. Ramsey indicated that after Inspector Lyle informed him that the air content was low, he went to the intake entry and took his own air reading, after which he returned to the No. 5 unit, where the inspector was. Mr. Ramsey did not take an anemometer reading in the No. 5 crosscut because he did not think it was necessary since he knew he did not have sufficient air because the loader had torn the curtain down. Although it took 2 to 3 minutes to rehang the line curtain, and the inspector told him that he then had sufficient air, Mine Manager Brown decided to close the unit down because it was slowing production to keep 3,000 cubic feet of air at the face and putting 9,000 cfms out in the other area. He did not question Mr. Brown's decision to shut down the unit, and he does not recall how long the unit was abandoned (Tr. 316-329).

Inspector Lyle was recalled in rebuttal and testified that after he issued the order, he continued to take air readings in the last open crosscut. He then walked around to the return side in order to check to see if they had their stoppings up as required by the ventilation plan which calls for permanent stoppings up to and including the third open crosscut outby the face. He walked back up to the No. 5 entry and checked to see if they had a block curtain up in the back part of the entry. He continued to take air readings and when the air increased to 9,600 cfms, he abated the order at 10:30 a.m., after which time the unit was abandoned. The line curtain had been replaced when he started taking his first air readings. In his opinion, the cause of the low air was not the check curtain, but resulted by the operator trying to course the air through the mine around falls because the mine was in dire need of an air shaft or the boring of a hole of some kind to provide better ventilation (Tr. 336-338).

In response to questions from the bench, Inspector Lyle stated that the other two citations that he issued (Exhs. G-21 and G-23) were both abated prior to the subject order. Although Mr. Ramsey testified that they were loading coal in both entry Nos. 5 and 6, Inspector Lyle testified that this was not true since it was not permissible to have two loaders on a section loading in the same entries or adjacent entries. It was actually the No. 3 entry that was being loaded and the No. 5 entry is the one he cited. Inspector Lyle also stated that he asked Mr. Ramsey what the number was of that particular entry and Mr. Ramsey told him that it was No. 5. He further stated that he took his air readings between Nos. 5 and 6 on the return side and that there are no other entries past the No. 6 entry (Tr. 339-340).

Section 104(c)(2) Order No. 1 TML, March 1, 1977, 30 CFR 75.301-1

The quantity of air reaching the No. 5 entry (cross-cut to the left) working face where coal was being loaded by T. C. Williams with a Joy loading machine was insufficient enough to measure with an approved anemometer or smoke tube during the loading cycle on No. 6 unit (ID 029) 3rd S.S. Responsibility of Pat Sturgill, foreman.

Petitioner's Testimony

Inspector Lyle testified that in addition to the subject order, he issued other notices of violation that day. He issued the subject 104(c)(2) order for failure to maintain sufficient ventilation while loading coal, and there was no curtain present while the loading was being done. He started to take air readings, but could not get his anemometer to work on either one of the rib lines or out in the entry, despite the fact that the anemometer was functioning. He then tried four or five times to take a reading with a smoke tube but could not get any measurement of smoke traveling and he then concluded that there was not sufficient ventilation or perceptible air movement to be measured with an anemometer or a smoke tube. While he was taking the tests, the men had stopped loading (Tr. 343-348).

Inspector Lyle considered the violation to be serious, and he had previously written a notice for failure to use water to keep the dust down to minimum and allowable limits. Since there was no curtain to course the ventilation into the working face and there was no perceptible air movement, if methane had been encountered, along with excessive dust, a serious methane ignition and dust explosion could have resulted. In his opinion, the operator should have been aware of the condition because a foreman is present on the section at all times and it is his duty to operate the unit and to insure that a minimum of 3,000 cubic feet of air is maintained at the face whenever coal is being cut, mined or loaded. It was visibly obvious that there was not a sufficient amount of air (Tr. 350-352). When he first walked into the entry, the loader operator was there with the loading machine, and no wing curtain was installed. Had a face ignition occurred, he estimates that at least 12 men would have been exposed, since there are approximately 12 men on a section (Tr. 353).

Respondent's Testimony

Mr. Pat Sturgill, day shift section foreman, 3 Northeast section, testified that the wing curtain was taken down in order to clean the ribs approximately 4 or 5 minutes before Inspector Lyle walked past the area. He does not know specifically whether Inspector Lyle saw Mr. King tear down the curtain, but he does not know how Inspector Lyle could not help but see it. To the best of his recollection, Inspector Lyle did not tell him that he was issuing a citation

because a loader was loading without a wing curtain being installed until the curtain was torn down for the loader to back up and clean the roadways and the ribs. The purpose of tearing the wing curtain down that day was to clean the ribs, which is a normal practice. If the wing curtain is left up while a man is shoveling behind it, he cannot be seen, and he has to throw the debris far out so that the loader can pick it up on its next cycle. The curtain was down for 5 or 6 minutes, and Mr. Lyle took an air reading while the curtain was down. When the loader finished cleaning up the rib area, the curtain was hung and another air reading was taken by the inspector (Tr. 358-366).

On cross-examination, Mr. Sturgill stated that Inspector Lyle never informed him that he was issuing the violation, and Mr. Sturgill believes that since the curtain is normally supposed to be up, except when the ribs are being cleaned, that the inspector happened to see the curtain down and then cited the condition, not realizing that they were in the process of cleaning the ribs. He does not believe that the requirement in 75.301-1 of maintaining 3,000 cfms is unreasonable, but in his opinion, it is not a hazard if an operator is loading coal at the face and is unable to measure any perceptible air movement because the ribs would probably have been cleaned by shovel if he had found methane on his section (Tr. 367-378).

Inspector Lyle was called in rebuttal and stated that he never saw a wing curtain being taken down, and he disagreed that it is necessary to take down curtains in order to clean faces or ribs. It is permissible to move a curtain to the other side so long as the requisite amount of air is maintained according to the law, and he is unaware of any permitted exceptions. In order to abate the cited condition, a curtain was obtained and extended into the area up to within 10 feet of the face, after which he took air readings (Tr. 379-384).

In response to questions from the bench, Inspector Lyle testified that the notice he issued at 11:25 for lack of a line brattice, and the notice he wrote at 11:30, pertained to the No. 5 entry crosscut to the left where coal was being loaded. There is a relationship between the two notices, since without the line brattice or wing curtain, the required 3,000 cubic feet of air could not be coursed in where coal was being loaded. In effect, the failure to have the line brattice generated two citations, i.e., the notice and the order, both of which stemmed from the same condition. He confirmed Mr. Sturgill's testimony that wing curtains are frequently taken down to facilitate the cleaning of the ribs, rather than taking the risk of having the curtain torn down. However, he does not know of any inspector in the District 10 Office that would allow this practice (Tr. 385-389).

Section 104(c)(2) Notice No. 2 TML, March 1, 1977, 30 CFR 75.301-1

The quantity of air reaching the end of the line brattice where coal was being cut with a Joy cutting machine by Mike Foster was measured to be only 1,748 cfms with an approved anemometer and smoke tube in the No. 2 entry working face crosscut to the left on the No. 6 Unit (ID 029) 3rd S.E. Responsibility of Pat Sturgill, foreman.

Petitioner's Testimony

Inspector Lyle testified that some time after he had issued the 104(c)(2) order for the inadequacy of air with the loading machine, he proceeded back across the run and observed the Joy cutting machine being operated in the face, cutting coal while the line curtain was 20 feet out by the face area where the machine operator was cutting. He then issued a 104(b) notice to the operator for having an inadequately-installed line brattice which did not reach up to and within 10 feet of the working face where coal was being cut, mined or loaded. After taking air readings, he then issued the 104(c)(2) order for a violation of section 75.301-1, since the air measurement was only 1,748 cfms. He took three anemometer readings and two smoke tube readings which he recorded. The anemometer readings were 1,260 cfms, 1,300 cfms and 1,380 cfms. The smoke tube readings were 1,764 cubic feet per minute and 1,731 cubic feet per minute. He put the figures together and averaged them out to be 1,748 cubic feet per minute, while the statutory requirement is 3,000 cubic feet per minute (Tr. 410-412).

With respect to the seriousness of the violation, Inspector Lyle testified that he would classify it on the same level as the other violations previously dealt with. If there was a pocket of methane gas, without the proper amount of air, there could be an ignition or a mine explosion. He reiterated his previous statement that the mine was somewhat lacking in air and was in dire need of much better ventilation. The inspector took methane readings, but he did not find any methane. As far as negligence is concerned, he believed that the operator should have known of the condition since he had issued an order for another similar violation 30 to 40 minutes earlier. Mr. Sturgill, the section foreman, was accompanying him when he issued the subject order and took the measurements (Tr. 413-415).

On cross-examination, Inspector Lyle stated that there was confusion in the mine when he issued the order, since the operator and his employees were not very happy about the order and they were arguing, but he is not certain whether Chester Waters was with him. The cutting machine operator had probably taken his second cut out, but he does not know how far down the entry had been advanced (Tr. 417-421).

Respondent's Testimony

Mr. Sturgill testified that he and Inspector Lyle were leaving the area of the previous violation and were heading towards No. 1. There was a coal drill in No. 4, drilling coal and Inspector Lyle took a reading in that area and got a measurement at the coal drill of 8,000 cubic feet. The machine stopped at the face and Inspector Lyle measured and got a reading of 1,700 cfms, and advised him that he would have to hang a wing curtain across the machine in front of a particular roof bolt and he told the inspector "that is in front of the cutterman right here and I've stopped the face" (Tr. 428). After the curtain had been hung over the cutter, the inspector took another air reading which proved to be sufficient and then told him to proceed. They held the curtain up and the cutter proceeded to cut coal. According to Mr. Sturgill, it was foolish and dangerous to hold the curtain up since the cutter bar could have pulled the men holding the curtain into the cutting machine by catching the curtain, and he feels that he should have pulled the cutter out and gone to another place (Tr. 422-431).

Mr. Sturgill further testified that on the day the notice issued, the wing curtain was positioned in the correct position, i.e., in back of the cutting machine and that the air was sufficient because he was not working at the face of the entry, but at the face of the crosscut. The regulation requires that there be 3,000 cubic feet of air at the back of the equipment, 10 feet from the working face. After Inspector Lyle told Mr. Waters to hang a wing curtain across the cutter bar, Mr. Waters and the inspector had a few words about the inspector's order, and Mr. Waters told the inspector that he was just nitpicking. In his 30 to 31 years' experience in mining, he has never before hung a wing curtain over a cutting machine that was running. After Inspector Lyle left, he did not return the wing curtain over the cutting machine, but rather tore it down and continued on with the cutting (Tr. 431-434).

On cross-examination, Mr. Sturgill testified that despite the depiction of the cutter in Exhibit R-10 as occupying approximately 80 feet of the entry, the cutter was not in the middle of the entry. No crosscut at all had been driven at the time since the cutter was in the process of taking its first cut. He agrees that 3,000 cfms are required at the working face, however, he maintains that he had 8,000 cfms in the crosscut where he was working and stated that the reason the inspector got a measurement of 1,700 cfms is because he did not measure where the cutting was actually being done, i.e., at the working face, but rather, he measured above where the cutting was being done inby (Tr. 434-440).

Mr. Chester Waters, mine manager at the Ken No. 4 Underground Mine, testified that on March 1, 1977, he was the assistant mine foreman on the day shift, that he was present on the section during Inspector Lyle's entire inspection, and that he went ahead of

Mr. Sturgill and Mr. Lyle. The wing curtain was up within 10 feet of the working face. He took an air measurement in excess of 5,000 cfms, and since he believed he was in compliance with the law, he gave the cutter operator the go-ahead to commence operation with the first cut. Inspector Lyle and Mr. Sturgill then approached the cutting machine, and Inspector Lyle informed him that he did not have the wing curtain to within 10 feet of the face, and he then went around the cutting machine and marked the roof bolt where he wanted the wing curtain advanced. At the time, the inspector was referring to the face of the entry, but the actual working face was the crosscut. Mr. Waters testified that he told Inspector Lyle that he was nitpicking and that they were not in violation of the law. In order to abate the condition, the wing curtain was advanced to the location indicated by Mr. Lyle so that the proper amount of air was achieved. However, in Mr. Waters' opinion, the abatement was done in a dangerous way since holding the curtain up restricted the visibility of the cutter operator. In his more than 20 years in the mining industry, he has never before or since that time, seen a curtain held up while the cutter operator cuts coal. In his opinion, this practice is not safe since no men should be around the cutter except the operator, because of the possibility of being crushed and injured by the cutter. He believes that there was a sufficient amount of air and the correct position of the wing curtain that day was where it was located when Inspector Lyle first observed it, i.e., within 10 feet of the working face or the crosscut which they were working (Tr. 441-448).

On cross-examination,

Mr. Waters testified that he took one air reading with an anemometer that he had borrowed from Mr. Sturgill, and using a tape line he calculated the measurement in his head. After Inspector Lyle verbally issued his order, he remained on the scene until it had been abated, after which time, he left with Inspector Lyle (Tr. 451-452).

Inspector Lyle was recalled in rebuttal and stated that although he has no reason to doubt that Mr. Waters did take an air reading, his notes indicate that Mr. Waters did not have an anemometer. The working face is wherever coal is being cut, mined or loaded. He took his air reading at the end of the line curtain, just in by the end of the line curtain. He arrived at the calculation of 1,700 cfms based on the location of the line curtain as being 3 feet from the rib and the approximate distance of the roof as being 5 feet high. He does not think that it is possible that he took his air reading on the other side of the cutter up in the corner of the entry since had he gone around and taken a reading where there was no curtain to direct the air, he would not have been able to record any reading because the air would have to have come out the end of the curtain which was 3 feet wide, 3 feet out from the rib, and 5 feet high, and then dispersing with a 20-foot-wide area. In addition, the air would have to get by

the cutting machine itself as well as go over the top of the cutting machine. According to the inspector, the only place that it would have been possible for him to have come up with a correct air reading would have been at the line curtain where he distinctly recalls having taken the reading (Tr. 452-460).

With respect to whether or not he directed management to have a line curtain over the cutting machine, Inspector Lyle testified that, as a policy, he does not direct management to do anything. He simply, writes a notice of violation that requires that management abate a violation of the law. In order to abate the violation, the line curtain was extended up to within 10 feet of the crosscut to the left, and to his knowledge, it was never extended over the cutting machine (Tr. 460-461).

The original notice citing the line curtain as being more than 10 feet from the face concerns the same line curtain as in the subject order which was issued for lack of air at the same working face. When the first 104(b) notice was abated and the line curtain was extended up to within 10 feet of the face, the air came up. Had the curtain been extended over the cutting machine up to the problem area, it would have been in by the working face (Tr. 461-463).

Findings and Conclusions

Order No. 1 TML, December 20, 1976, 30 CFR 75.402

Fact of Violation

Respondent argues that the inspector issued this citation because of his dissatisfaction and dislike for the method of wet rock dusting utilized by the respondent in its mine. Respondent asserts that it had rock dusted the roof and ribs to within a few feet of the working face and had dry rock dusted the floors to approximately within 20 feet of the working face (Tr. 19-20, 71-72, 121, 150-151).

With regard to the samples taken by the inspector, respondent asserts that since the inspector took only three band samples over an area described as being inadequately rock dusted and which encompassed six entries in width and a length or distance of 150 feet, their reliability as true indications of the rock-dusting condition on the section is open to serious question. Further, respondent argues that the inspector's judgment was colored by the fact that he did not believe that wet rock dusting met the requirements of section 75.402, and that he therefore did not take true representative rock-dust band samples in the section. Finally, respondent asserts that although the inspector testified that he was not accompanied by a company representative the entire time he was on the section, one of respondent's witnesses (Large) testified he accompanied the inspector the entire time that he was on the section and did not observe him take a rock-dust band sample, and a second witness (Stewart) testified that the

inspector was in his presence continuously from the time he came to the face until he left the section and that he never observed him take a rock-dust band sample.

In support of the citation, petitioner relies on the testimony of the inspector, including his description of the procedures used to take the band samples, the laboratory results of the sampling, and the detailed notes and sketch of the scene made by the inspector at the time the citation was issued. As for the use of wet rock dust, petitioner argues that the definition of "rock dust" set forth in 30 CFR 75.2(d) differs both in composition and in usage from the wet dust which the respondent believed was adequate to comply with section 75.402.

With regard to the inspector's sampling, petitioner asserts that no witness offered by the respondent could testify to more than the fact that they did not personally see the inspector take the samples, and that the inspector repeatedly testified, as was admitted by the respondent's witnesses, that they did not accompany him at all times while he was inspecting the section.

Respondent is charged with a violation of section 75.402, which states that:

All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion, shall be rock dusted to within 40 feet of all working faces, unless such areas are inaccessible or unsafe to enter or unless the Secretary or his authorized representative permits an exception upon his finding that such exception will not pose a hazard to the miners. All crosscuts that are less than 40 feet from a working face shall also be rock dusted.

The statutory definition of the term "rock dust" is found at 30 CFR 75.2(d), and it is defined as follows:

"Rock dust" means pulverized limestone, dolomite, gypsum, anhydrite, shale, adobe, or other inert material preferably light colored, 100 per centum of which will pass through a sieve having 20 meshes per linear inch and 70 per centum or more of which will pass through a sieve having 200 meshes per linear inch; the particles of which when wetted and dried will not cohere to form a cake which will not be dispersed into separate particles by a light blast of air; and which does not contain more than 5 per centum of combustible matter or more than a total of 4 per centum of free and combined silica (SiO_2), or, where the Secretary finds that such silica concentrations are not available, which does not

contain more than 5 per centum of free and combined silica; * * *.

The June 1974 edition of the Inspector's Manual, published by MSHA's predecessor MESA, and which contains guidelines for inspectors and the coal mining industry, contains the following information pertaining to the use of wet rock dust in a mine:

Application of rock wet dust. So long as the percentages of incombustible content specified in 75.403 are maintained, rock dust may be applied wet in the following manner: Wet rock dust shall be limited to rib and roof surfaces in face areas; It shall not be used for redusting mine surfaces; in such applications, only limestone or marble dust which meets the specifications contained in Section 75.1(d) shall be used; the application shall be at the rate of not less than 3 ounces (weight) of dust per square foot of surface, and shall be by a mixture of not more than 6 to 8 gallons of water with 100 pounds of dust, whether by premixed slurry or by mixing at the nozzle of a hose to assure that the mixing is not too fluid and that sufficient dust adheres to the surfaces. After the wet rock dust dries, additional dry rock dust shall be applied to all surfaces to meet applicable standards. Wet rock-dusting of ribs and roof does not eliminate the necessity for dry rock-dusting the floor.

In one of the earlier cases litigated under the 1969 Act, Valley Camp Coal Company, 1 IBMA 243, 246 (1972), the former Interior Board of Mine Operations Appeals observed as follows when commenting on the intent of the statutory rock dust requirements found in sections 304(c) and (d) of the Act:

The above sections should be construed as a whole. Their purpose is to provide an incombustible atmosphere in most underground areas of the mine so that, if ignition occurs, the dust will not propagate an explosion. When read with this community of purpose and subject matter, sections 304(c) and 304(d) require operators to rock dust every crosscut as well as other areas of the mine beyond 40 feet of working faces, unless such areas are naturally too high in incombustible dust content to propagate explosions, too wet to propagate an explosion, inaccessible, unsafe to enter, or have been excepted from the requirements by the Secretary or his authorized representative in accordance with section 304(c). Section 304(d) does not define the level of incombustibility that is "too high to propagate an explosion," but, when read as a whole, this level is defined by section 304(d).

It seems obvious from the evidence presented that the wet rock dust applied by the respondent did not meet the definition set forth in section 75.2(d), which states that such rock-dust particles be of such a consistency "which when wetted and dried will not cohere to form a cake which will not be dispersed into separate particles by a light blast of air." As a matter of fact, respondent's own witness, Face Foreman Stewart, when testifying that it is impossible to take a rib or roof sample with a brush in an area which had been wet dusted, indicated that one would have to chip off some of the rock dust with a hammer.

On the evidence adduced here, I find that the inspector's interpretation with respect to the use of wet rock dust as a means of compliance with section 75.402 is correct. The wet rock dust apparently being used by the respondent obviously did not meet the statutory definition, and respondent has presented no credible evidence to the contrary, nor has respondent offered any statutory or regulatory authority which authorizes the use of wet rock dust to gain compliance with section 75.402. Although I recognize the fact that section 75.402, on its face, does not prohibit the use of wet rock dust, when read together with the statutory definition of the term "rock dust," I cannot conclude that the petitioner's interpretation and application of section 75.402 on the facts and circumstances presented here was unreasonable or incorrect, and respondent's posthearing arguments do not persuade me to the contrary.

The next question presented is whether the petitioner has established by a preponderance of the evidence that the area cited by the inspector had not been rock dusted to within 40 feet of the working faces as required by section 75.402. Simply stated, respondent takes the position that it met the requirements of section 75.402 by applying wet rock dust to the area cited. Petitioner's position seems to be that the use of wet rock dust not meeting the statutory definition is akin to not using rock dust at all. I conclude and find that the petitioner has the better part of the argument and that the testimony and documentation of the condition as articulated by the inspector supports the order which he issued.

With respect to the inspector's sampling procedures, and particularly respondent's attack on his credibility, I reject respondent's assertion that the inspector somehow misinterpreted the fact that he took samples. A careful review of respondent's testimony reflects that Face Foreman Stewart and Mine Manager Large did not see the inspector take samples, and while respondent's posthearing arguments suggest that the inspector was never out of the sight of Mr. Stewart and Mr. Large, that is not the case. The inspector had ample opportunities to take his samples, and I find his testimony and notes made at the time of the inspection to be credible. Further, respondent was free to take its own samples, but apparently did not do so.

In denying that the 150 feet described by the inspector was white in color, Face Foreman Stewart stated that this was not so because the three entries had been driven a week before the inspector and had been rock dusted "a long time ago." Thus, Mr. Stewart's testimony lends credence and support to the inspector's testimony. If the entries had been previously driven and rock dusted even earlier, the subsequent mining activity which took place after those events obviously affected the condition of the section on the day of the inspection. Further support for this conclusion may be found in Mr. Stewart's candid admission that dry rock dust was not used because production would have to stop. Placing coal production ahead of adequate rock dusting simply should not be permitted.

I conclude and find that petitioner has established a violation of section 75.402 as charged in the order and it is AFFIRMED.

Negligence

Although respondent may have believed that wet rock dusting met the requirements of section 75.402, I am not convinced that mine management was completely oblivious to what was required to meet the rock-dusting requirements of that section. Mr. Large's testimony reflects his concession that certain areas were not rock dusted, that the area could have been dusted better, and he apparently was aware of the differences between the rock-dusting requirements of section 75.402, and the provisions of section 75.401 which permit the use of wetting agents at the face. Further, the extent of the area involved, some 150 feet, convinces me that the respondent failed to take reasonable care to insure that the area cited was properly rock dusted. I find that the condition cited resulted from the respondent's ordinary negligence.

Gravity

Failure to rock dust in an area where coal is being mined presents a hazard of fire or explosion. Considering the extent of the area which was not rock dusted, and the results of the inspector's sampling for incombustible content, I conclude and find that the violation was serious.

Good Faith Compliance

Exhibit G-3 reflects that the order was terminated at 9:30 a.m., the day after it issued, after the area was adequately rock dusted. Further, respondent's testimony reflects that rock dusting was accomplished at the beginning of the next production shift after the order issued at 7 p.m. on December 20. In these circumstances, I find that the respondent demonstrated good faith compliance in correcting and abating the conditions cited.

Fact of Violation

Respondent does not dispute the fact that there was an area of unsupported roof as described by the inspector in the order citing a violation of section 75.200. As a matter of fact, during the course of the hearing, respondent's counsel did not dispute the existence of some unsupported roof area, and conceded that the fact that the inspector may have been mistaken as to the numbering of the entries was not unusual since someone may have honestly and mistakenly given him the wrong entry numbers (Tr. 199).

The thrust of the respondent's defense to the violation is the assertion that the unsupported roof condition was first discovered by the mine manager, that the size of the unsupported area was approximately 15 square feet, that only three bolts were missing, and that the area had been posted with a "No bolts" sign. Since the area was posted and no one was working there, respondent argues that no violation occurred since the area would have been supported in the regular work cycle.

Petitioner argues that respondent admitted the roof was unsupported and the fact that a danger sign was put up is no defense.

I find that the evidence adduced with respect to the violation supports the action taken by the inspector and establishes a violation of section 75.200 as stated in the order. The applicable roof-control plan (Exh. G-9 at p. 6, item 13), provides in pertinent part that "[B]efore side cuts are started, the roof in the area from which it is turned shall be supported with permanent supports according to the approved plan; * * *." It is clear here that one side of the intersection at the connecting crosscut in question had not been bolted as charged in the order. And, the fact that mine management may have discovered the condition before the inspector did and began abatement is not material to the fact that the condition cited did in fact exist and that it constituted a violation of the roof-control plan, and consequently, a violation of section 75.200. The order is AFFIRMED.

Gravity

Although the inspector saw no coal being cut in the entry or a cutting machine in the entries, coal was being run on the section and the roof had been bolted in the area beyond the cited unsupported roof area. The inspector believed the condition existed for at least one shift and men were working in the section. Although there was a dispute as to the extent of the unsupported roof area and the number of roof bolts which were missing, the fact is that the area cited was unsupported and posed a roof-fall hazard. I conclude and find that the violation was serious.

Negligence

Although Assistant Mine Superintendent Bowen testified he found the missing bolts just before the inspector arrived at the intersection, I believe that a proper preshift inspection by the section foreman or his crew should have discovered the condition sooner, particularly on the facts presented here where the inspector indicated that the area beyond had been bolted and that the condition existed for at least one shift. Further, since the respondent maintains that the area was posted with a "No bolts" sign, which was not observed by the inspector, leads me to conclude that someone might have been aware of the missing bolts before Mr. Bowen arrived at the scene. In the circumstances presented, I conclude and find that the respondent failed to exercise reasonable care to prevent the condition cited and that this constitutes ordinary negligence.

Good Faith Compliance

The abatement notice reflects that the condition cited was immediately corrected and that the order was abated in approximately an hour after it was issued (Exh. G-11). I find that the respondent exercised good faith in abating the condition which was cited in the order in question.

Order No. 1 TML, February 28, 1977, 30 CFR 75.301

Fact of Violation

Respondent does not dispute the inspector's low air reading of 7,900 cfms in the last open crosscut at the location described in his order. In defense of the condition cited, respondent asserts that a technical violation occurred only after the loader operator inadvertently knocked down a check curtain, and that the loader operator and a helper were in the process of obtaining a hammer to replace the curtain when the inspector entered the last open crosscut and took his air reading. Since the only thing done to abate the violation was the rehangng of the check curtain which had been knocked down and the checking of another curtain that was loose, respondent asserts that it would have had the required amount of air were it not for the knocked down curtain.

With regard to the inspector's air readings and measurements, respondent, both during the hearing and in its posthearing brief, suggested that the inspector's air reading computations and calculations as set forth in Exhibits G-20 and G-33 were fabricated.

Petitioner argues that the inspector's testimony, notes, air readings, and calculations concerning the lack of a sufficient quantity of air at the location cited all support the order. Further, petitioner points to the fact that respondent's own witness admitted that the air

was insufficient, that securing adequate ventilation was a continuing problem on the section, and that the section was shut down the day after the order issued by the mine manager due to the inability to maintain sufficient air at the working faces (Tr. 265, 266, 321-328).

As for the respondent's attack on the inspector's credibility surrounding the preparation of Exhibits G-20 and G-33, petitioner states that the exhibits were not produced for the respondent in advance of the hearing and in response to discovery requests because of a "clerical error" in the reproduction of the inspector's notes (Brief, pp. 4-5).

I find that the petitioner has established a violation of section 75.301 by a preponderance of the evidence. It is clear to me that 9,000 cubic feet of air per minute was not being maintained in the last open crosscut in the area described by the inspector and that the condition constituted a violation of the cited mandatory standard. Further, it is clear to me that respondent presented no credible evidence to dispute the inspector's findings which were supported by notes and air measurements taken by him at the time of his inspection.

Respondent's suggestion that the violation was "technical" is rejected. None of the air readings taken by the inspector reached the required levels and based on all of the evidence adduced with respect to this violation, it seems clear to me that the respondent was experiencing serious problems in maintaining the proper quantity of air in the section and I am not convinced that the ventilation problems could have been readily cured by simply finding a hammer and hanging up a check curtain, as suggested by the respondent.

With respect to respondent's suggestion that the inspector may have fabricated the air measurement computations which are reflected in his notes (Exhs. G-20, G-33), I find this to be a most serious accusation which should not be taken lightly. However, respondent has produced no credible evidence to support its assertion and it is rejected. I accept the explanation given by the petitioner in its brief with respect to the notes in question and find the explanation plausible. In the future, I would think that the respondent would have a more solid basis for such an accusation and should avoid speculative, groundless, and unfounded assertions of this kind. The order is AFFIRMED.

Gravity

The inspector detected no methane and the air readings which he obtained for the area cited indicated air quantity ranging from 5,700 to 7,125 cfms when measured with an anemometer, and 7,410 to 7,885 cfms when measured with a smoke tube. Further, the air in the intake measured 11,780 cfms and the inspector cited no permissibility

violations. Further, respondent's evidence establishes that the curtain which was down was apparently rehung in about 5 minutes and that the required quantity of air was achieved.

Although I recognize the fact that the respondent was experiencing problems with mine ventilation which apparently required additional raises and which prompted the section to be subsequently abandoned and shut down, the gravity of the particular condition cited in the order must be determined on all of the prevailing conditions which existed as to that order. The facts presented here show that there was sufficient air in the intake, no methane, and no permissibility violations. Although the inspector believed that the low air readings may have affected the air at the face, he apparently took no air readings there and there is no evidence to support his conclusion that the air at the face was affected at the time the order issued.

The potential adverse effects of the violation must be determined within the context of the conditions or practices existing in the mine at the time the violation is detected, Lawson Coal Company, 1 IBMA 115, 120 (1972). In view of the totality of the conditions which prevailed, including the fact that the required quantity of air was apparently restored within a short time, I cannot conclude the violation was serious, and I conclude and find that it was not.

Negligence

The fact that the section had experienced problems with ventilation was known both to the respondent and the inspector. As a matter of fact, the inspector indicated that an MSHA ventilation team had previously visited the mine for the purpose of checking the ventilation and the respondent was apparently attempting to solve the problem. Viewed in this context, I cannot conclude that the ventilation problems being encountered in the mine can serve to establish negligence on the respondent's part with respect to the condition cited which served as the basis for the order. The order must stand on its own footing, and any negligence must be established by petitioner on the basis of the then prevailing conditions.

Respondent maintains that the low air readings resulted from a check curtain being down. However, the inspector testified that he took air readings after the curtain had been replaced and he did not believe the check curtain was the cause of the low air readings. Since the section was subsequently shut down because of the ventilation problems and consistently low air readings, I cannot conclude that his evaluation of the situation was wrong.

In view of the foregoing, I conclude that the respondent knew or should have known about the conditions cited and failed to exercise reasonable care to prevent the conditions. I find that the violation resulted from respondent's ordinary negligence.

Good Faith Compliance

The evidence establishes that the order was terminated some 40 minutes after it was issued after the quantity of air was increased to 9,600 cfms. Further, respondent's testimony reflects that the curtain which was torn down was rehung in short order. In the circumstances, I conclude that the respondent exercised rapid abatement in achieving good faith compliance after the order issued.

Order No. 1 TML, March 1, 1977, 30 CFR 75.301-1

Fact of Violation

Respondent asserts that it is clear from the testimony of its face foreman, Pat Sturgill, that there was a technical violation of the cited safety standard in that respondent was only using a normal and acceptable mining practice to clean the ribs and that the inspector himself acknowledged that this practice is done to facilitate the cleaning of the ribs (Tr. 359-360, 365, 377-378, 388-389).

Petitioner argues that coal was being loaded in a working face although the air movement was so insufficient as to be incapable of measurement. The loading machine was actually loading coal along the ribs to the working face where the coal had not yet been loaded out (Tr. 353, 374).

I find that the petitioner has established a violation of section 75.301-1 by a preponderance of the evidence. Respondent has offered no defense other than the assertion that taking down the curtain is a normal mining practice when cleaning ribs. I reject that defense. I conclude from the inspector's testimony that coal was being loaded out of the section at the time of the order and respondent has not established that it is permitted to take down ventilation curtains while loading out coal. Further, while respondent presented testimony from its shift foreman that the curtain was taken down to facilitate the cleaning of the ribs, I find the inspector's testimony that coal was being loaded out to be the more credible. Even if the ribs were being cleaned, respondent has cited no standard or mine cleanup plan provision which would permit ventilation curtains to be taken down to facilitate the cleanup of ribs. Respondent's assertion that the inspector acknowledged this practice is taken out of context and does not excuse the violation. The inspector confirmed the section foreman's testimony in this regard, but he indicated that no inspector in his district would permit the practice and he obviously does not since he issued the citation. The order is AFFIRMED.

Negligence

I find that the respondent deliberately took down the ventilation curtain in question in order to facilitate the loading out of coal and in so doing caused the quantity of air at the working face to be reduced to a point where it could not be measured. In the circumstances, I conclude that the respondent exercised a reckless disregard of the requirements of section 75.301-1, and in so doing, caused the condition cited through gross negligence.

Gravity

The quantity of air at the working face was so low as to make it impossible for the inspector to take an air reading with his anemometer. Coal was being loaded, the area was dusty, and if methane were liberated, the lack of air would present an explosion hazard exposing the 12 men on the section to danger. I find that the violation was very serious.

Good Faith Compliance

The abatement notice concerning Order No. 1 TML, for a violation of section 75.301-1, reflects that the order was terminated at 11:55 a.m. on March 1, 1977, 25 minutes after it was issued by increasing the quantity of air to 3,000 cfms at the location in the No. 5 entry where coal was being cut (Exh. G-26). I conclude that respondent exercised good faith in correcting the violation.

Order No. 2 TML, March 1, 1977, 30 CFR 75.301-1

Fact of Violation

Respondent argues that the testimony of the face foreman and assistant mine foreman clearly shows that there was more than enough air at the working face in question at the time the violation was written, that the inspector erred in his assessment of the correct position of the wing curtain, and that respondent's personnel were required to perform a very unsafe and highly dangerous act to abate the condition. Respondent asserts that it is highly unlikely that an experienced mine foreman, knowing that an inspector was on the section, would take an air reading at the incorrect wing curtain position and then advise the cutter to begin cutting. Respondent also points out that although the inspector alluded to a 104(b) notice which he said he issued at the same working face moments before he issued the order, when MSHA attempted to introduce the notice at the hearing, it was discovered that it did not deal with the alleged situation described by the inspector and the exhibit was withdrawn. Respondent asserts that this is an indication of the inspector's confusion as to what actually occurred.

Petitioner argues that the inspector described in detail the results of three anemometer readings and two smoke tube readings which he took to support his order, and that they averaged 1,748 cfms as stated on the face of the order. Although both the inspector and Foreman Sturgill testified that the cutter was cutting the crosscut to the left as alleged, petitioner asserts that Exhibit R-11 and other testimony by respondent's witness attempted to indicate that the working was actually the face of the entry and not the face of the crosscut to the left. Petitioner submits that Exhibit R-11 was obviously not prepared by eyewitnesses underground at the time the violation was cited and is clearly a self-serving product of prehearing preparation.

Petitioner points to the fact that the violation was issued some 26 months prior to the date the hearing was held and that because of the passage of time, the critical and specific details surrounding the violation are difficult to recall from memory. Since the inspector was able to consistently refresh his memory from notes made at the time of the violation, and since he was the only one to take air measurements and tests, petitioner suggests that his testimony should be given more weight.

After careful review and consideration of all of the testimony adduced in this proceeding, I conclude and find that the petitioner has established a violation by a preponderance of the evidence. I find that the inspector's testimony, as supported by his notes which were taken at or near the issuance of the order, supports his findings of a violation and support the order which he issued. I further find and conclude that the testimony presented by the respondent in defense of the citation does not rebut the findings made by the inspector, both as to the existence of the conditions cited or the fact of violation.

With regard to the location of the working face, the inspector's testimony is consistent with the description noted on the face of his order, as well as the notes taken by him on the day the violation issued. He defined the term "working face" as "wherever coal is being cut, mined, or loaded" and specifically testified that coal was being cut in the crosscut to the left. The inspector's testimony that coal was being cut and that the cutting machine was "sumped up and cutting" (Tr. 412) has not been rebutted by the respondent. As a matter of fact, Mr. Sturgill admitted that the cutting machine was in the entry cutting coal and that the crosscut had been advanced or began one cut when he and the inspector reached the entry (Tr. 424). Thus, I cannot conclude from the testimony presented that the inspector was wrong in his assessment of the situation, nor can I conclude that he erroneously located the working face.

Respondent's assertions that the inspector admitted confusion as to what actually occurred is taken out of context. A close review of the inspector's testimony makes it clear that while he alluded to some confusion based on the fact that mine management was not happy with the issuance of the order and accused him of "nitpicking," when asked whether that confusion may have spilled over to his notes, he specifically and directly stated "No." I put in my notes what I observed and what I had seen and what I came out with" (Tr. 417). Further, based on the somewhat limited cross-examination of the inspector, I cannot conclude that he was confused or unsure of the conditions which he observed on the day in question which led him to issue the violation.

Regarding the respondent's assertion that the inspector required its personnel to perform an unsafe and dangerous act to abate the conditions, although the face foreman testified on direct examination that the inspector "told me that I would have to hang a wing curtain across this machine" (Tr. 428), on cross-examination, he stated that the inspector did not instruct him to hold the line curtain and that the inspector did not care "how I cut the place" (Tr. 438). And, in testifying that the inspector "made me hang this curtain across this cutter bar" (Tr. 439), he confirmed that inspectors do not order or instruct him how to abate a violation but simply indicate that the air is insufficient and leave it to him to bring it up to requirements. In this case, he admitted that the inspector did not order him to hang the curtain, but that he told him to hang it to a roof bolt (Tr. 440). Under the circumstances, I cannot conclude that the respondent's assertion that the inspector required its personnel to perform a dangerous act has been established. Even if it were, I fail to understand how the method of abatement detracts from the condition which the inspector believed was a violation of the cited standard. The citation is AFFIRMED.

Negligence

The evidence adduced that the respondent was in the process of cutting coal at the face of the entry cited by the inspector. In such circumstances, it is reasonable to expect that the section foreman would insure that the proper amount of air was maintained at the face where such cutting was taking place. I find and conclude that the condition cited by the inspector should have been discovered and corrected and that respondent's failure to do so prior to the time that the violation was cited, constituted ordinary negligence.

Gravity

The inspector testified that he believed the gravity presented with respect to the violation "was the same as the others," meaning the previous violations which he testified about in this proceeding. Although he alluded to certain hazards if a pocket of methane were

encountered, he also stated that he took methane tests and found none (Tr. 413). As for the existence of other prevailing conditions which may have amounted to violations, while he confirmed the issuance of other notices, he specifically stated that those conditions had been abated prior to the issuance of the subject order (Tr. 413). Notwithstanding the fact that the respondent was experiencing difficulties with its mine ventilation at the time the order issued, I cannot conclude from the evidence presented by the petitioner that it has established that this violation was serious. Taking into account all of the conditions established by the credible evidence adduced, I conclude that it was nonserious.

Good Faith Abatement

The abatement notice concerning Order No. 2 TML, for the violation of section 75.301-1, reflects that the order was terminated at 12:55 p.m., 15 minutes after the order was issued on March 1, 1977, by increasing the quantity of air to 3,400 cfms (Exh. G-30). Absent any evidence to the contrary, I conclude that the respondent exercised good faith in abating the conditions cited.

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

The parties stipulated that respondent is a large mine operator. Respondent presented no evidence or arguments that any civil penalties assessed by me in this proceeding will adversely affect its ability to remain in business, and I conclude that they will not.

History of Prior Violations

As evidence of respondent's history of prior violations, respondent produced a computer printout (Exh. G-1) for the period January 1, 1970, to December 19, 1976, for the Ken No. 4 Underground Mine, indicating that respondent has paid a total of \$132,270 in civil penalty assessments for 1,127 violations. Seventy nine violations were for infractions of section 75.200, 89 were violations of section 75.301, 21 were violations of 75.301-1, and 11 were violations of 75.402. Twelve of these violations were orders of withdrawal, and the remaining 188 were notices of violation. The individual civil penalties paid for all of the violations on the printout range from a low of \$9. to a high of \$6,300.

For the 6-year period covering respondent's prior history of violations, the violations issued at the mine in question averaged 185 a year. For an operation of its size, I cannot conclude that respondent's overall track record during this period of time is indicative of any total disregard for the safety and health of its workforce. I conclude that respondent has a moderate history of prior violations, but I do take note of the fact that approximately

20 percent of the prior violations were for violations of the very same safety standards which are the subject of this proceeding, and this is reflected in the civil penalties assessed by me in this proceeding.

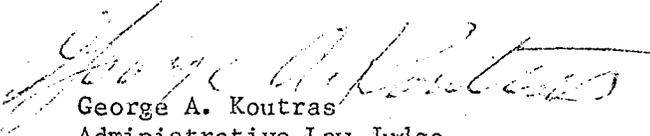
Penalty Assessments

In view of the aforesaid findings and conclusions, and after due consideration of the six statutory criteria for assessment of civil penalties, and in particular, respondent's size, prior history of paid violations, and the negligence and gravity issues previously discussed, I conclude and find that the following civil penalty assessments are appropriate for each of the violations which have been affirmed:

<u>Order No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
1 TML	12/20/76	75.402	\$ 1,500
1 TML	02/16/77	75.200	2,000
1 TML	02/28/77	75.301	1,000
1 TML	03/01/77	75.301-1	4,000
2 TML	03/01/77	75.301-1	1,600
		Total	<u>\$10,100</u>

ORDER

Respondent is ORDERED to pay civil penalties in the total amount of \$10,100 within thirty (30) days of the date of this decision.


George A. Koutras
Administrative Law Judge

Distribution:

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

AUG 29 1978

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. BARB 79-108-PM
Petitioner : A.O. No. 38-00138-05001
v. :
: Columbia Mine
PENNSYLVANIA GLASS SAND CORP., :
Respondent :

DECISION

Appearances: Leo McGinn, Trial Attorney, Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
the petitioner;
Jeffrey J. Yost, Esq., Berkeley Springs, West Virginia,
for the respondent.

Before: Judge Koutras

Statement of the Proceeding

This is a civil penalty proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, initiated by the petitioner against the respondent on November 16, 1978, through the filing of a petition for assessment of civil penalty, seeking a civil penalty assessment for nine alleged violations of the provisions of certain mandatory safety standards. Respondent filed an answer and notice of contest denying the allegations and requesting a hearing. A hearing was held in Columbia, South Carolina, on April 17, 1979, and the parties were afforded an opportunity to file posthearing proposed findings, conclusions, and briefs. Respondent filed a brief and proposed findings and conclusions and the arguments set forth therein have been considered by me in the course of this decision. Petitioner submitted no posthearing arguments.

Issues

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

violations, based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

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

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 CFR 2700.1 et seq.

DISCUSSION

The section 104(a) citations at issue in this proceeding were issued on March 13 and 14, 1978, during an inspection of the mine, and they allege violations of the following safety standards:

Citation No. 103201, 30 CFR 56.12-34:

An unshielded light bulb was being used in the trailer at the bag house. Three men were loading bagged flour in the trailer for shipment. The bulb was 5 feet from the floor at the trailer hanging from a nail. This was a 110-volt circuit.

30 CFR 56.12-34 states: "Portable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded."

Testimony and Evidence Adduced by the Petitioner

MSHA inspector Merle Slaton, testified that in March of 1978, he made frequent inspections at respondent's Columbia Mine and that on approximately 15 other occasions he visited the mine. The mining operation consists of sand, which is mined in open-pit fashion with a front-end loader, and approximately 43 to 45 men are employed at the mine which operates three shifts 7 days a week. On March 14, 1978, he wrote and served upon plant manager John Michner, Citation No. 103201 (Exh. G-1), for a violation of 30 CFR 56.12-34, for using

an unshielded light bulb. Material was being bagged, put on a belt conveyor from the bagger, and the bags were then carried into a tractor trailer that had been backed into the loading dock, and employees were stacking the bags on pallets. The light bulb in question was hanging on nails and strung along the wall inside the closed trailer approximately 5 feet from the floor and 8 to 10 feet back from where the employees were working and was being used for illumination. Normally, a grounded wire cage enclosing the light bulb is provided. However, in this case he saw no evidence of any guard or shield in the area. This was primarily a nonserious type of violation, although it could possibly result in a fatality. If someone were to contact a lighted bulb, a burn could result. If the bulb were broken by someone bumping into it or hitting it with an object, he could be cut. The 110 watts could emit enough of a shock to kill someone. The light bulb had been unshielded for approximately an hour and a half to 2 hours, and the foreman would normally be responsible for seeing that the bulb is shielded (Tr. 14-23).

On cross-examination, Inspector Slaton testified that the foreman was not present at the time the violation occurred, but that he was present at the bagging area, and for part of the time while he was there. It is not necessary for an employee to come into contact with both sides of the bulb filament simultaneously in order to become shocked, and he believed it is possible for someone to grab the energized side of the bulb that was exposed plus a ground wire.

Three men were loading the truck using a retractable conveyor which extended itself up to where they were loading and retracted as they loaded the truck and moved back in the truck. During the time he was observing the men, the light was always 8 to 10 feet behind them. After he observed the violation, he asked the men to correct it and 30 minutes later after he came back to check on it, they had already taken the light out and replaced it with a grounded circuit, and it would not have been possible for them to correct it any sooner (Tr. 23-32). The trailer was an "18-wheeler," approximately 40 feet long and 8 feet wide (Tr. 32-36).

Respondent's Testimony

John Michner, plant manager, testified that guarded extension lights are available at the plant and are normally obtained by employees by asking a foreman or supervisor for a storage requisition slip for the trouble light and then taking the slip to the storage room and exchanging it for such a light. Trouble lights are used throughout the plant as required on maintenance jobs, and each maintenance man has one in his locker, or will obtain one if he feels it is required on the job. From July 24, 1978, to April 2, 1979, 14 trouble lights were used at the plant, and some were damaged and had to be replaced, but the majority disappear on the job, i.e., they are probably stolen (Tr. 36-38).

On cross-examination, Mr. Michner stated that the light in question was stored in a locker in the bagger building along with other valuable equipment, and the leadman and bagging crew normally install the trouble lights. With regard to checking the installation of the light for safety, the shift foreman will normally go underground when a bagging crew is starting, but he is usually there a few minutes to make sure that the right material is being bagged in the proper blocks and on the proper pallets. Although the shift foreman's duties include checking for safety violations, he will normally attend to other duties and will not return unless there is a problem.

Mr. Michner stated that the plant did not specifically have a safety director nor a safety manager at the time of the alleged violation, nor was there a formal safety training program. Safety meetings, however, are held four times a year for all employees (Tr. 39-41).

Citation No. 103202, 30 CFR 56.12-8:

The electrical wiring for the start-stop switches and the wind-up reel were not bushed with insulated bushings. These were all on the power curve conveyor. No energized circuits were exposed. This was a 480-volt circuit.

30 CFR 56.12-8 states:

Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Petitioner's Testimony

Inspector Slaton confirmed that he issued Citation No. 103202 because the wiring for the start-stop switch and the wind-up reel on the power curve conveyor were not bushed with insulated bushings. The power curve conveyor is the conveyor that is used to load trucks and rail cars with bagged sand, and it is the same conveyor that was being used in the previous citation concerning the unshielded light bulb. The wire from the wind-up reel leading into the receptacle holding the start-stop switches had possibly been spliced and the outside insulation had been cut away leaving the circuits going into the receptacle without a bushing. These circuits were not energized. The purpose of the bushing is to keep the wires going into the receptacle hole from vibrating and moving, and it serves as insulation. Mr. Slaton was concerned that the 6 inches of wire going into the receptacle box had not being bushed.

Inspector Slaton indicated that since the conveyor belt was running at the time and was on a 480-volt circuit with the wires laying loose in the hole, there was a possibility that they would vibrate through the smaller amount of insulation, which would cause them to short out into the metal conveyor, thereby causing the conveyor to become energized with the voltage. There was the possibility of electrical shock and fatality resulting from men coming in contact with the conveyor and being grounded at the same time, and in his opinion, the voltage was sufficient to produce a lethal affect. Men would normally be in contact with the conveyor while loading and unloading and he had no idea how long the condition existed. He assumed that maintenance personnel would be responsible for inspecting the wiring and bushings (Tr. 41-47).

On cross-examination, Mr. Slaton identified a picture of the receptacle box in question. The individual wires coming out of the cable entering the box were individually insulated and he assumed that the part of the cable which had been stripped back resulted from some repairs made inside the box. The individual "nut-type" bolts which hold the cables entering and exiting the junction box were intact and in place, but three of the wires inside one of the cables entering the box were stripped back approximately 6 inches. He did not know what was inside the box behind and at the ends of the "nut-type" bolts. From his experience, however, they are the devices which contain the insulated bushings. The individual wires appeared to be well-insulated and no energized circuits were exposed (Tr. 47-51).

On redirect examination, Mr. Slaton stated that the three wires which had been stripped back were not fitted inside and down through the bushing into the junction box. However, the wires did go through the bushing into the box, but the outside insulation was taken away although they were individually insulated (Tr. 51-58).

When asked whether the circuits inside the junction boxes are required to be approved by MSHA, Inspector Slaton responded that they are supposed to be; however, the only way that inspectors would have any way of knowing whether it was properly wired or installed, is to shut down the equipment, energize the circuit and open the boxes, which inspectors do not do except on electrical inspections. To his knowledge, at the time of the inspection, there was nothing wrong with the particular junction box at issue (Tr. 59-62).

Respondent's Testimony

Mr. Michner stated that the piece of equipment involved in the citation is a telescoping conveyor, and since the start-stop buttons are on the end of the conveyor, the buttons move as the conveyor moves. The wire or cable running to the button is stored on a wind-up reel on the stationary part of the conveyor, and as the conveyor is extended the wire is pulled from the reel. The conveyor

was supplied with an inadequate or marginally adequate storage capability on the reel, and it causes problems. If the conveyor is extended beyond its design length, it pulls the cable from the buttons since the cable is not as long as the length to which the conveyor could be extended. Although the cable itself was properly installed, since the cable itself went through the bushing on the box, when the conveyor was overextended, it would pull the cable out of the bushing and the slack that was used in the box to make up the start-stop button was then pulled out through the bushing. Mine management did not initially know how to correct this situation since more cable could not be added due to the lack of room on the storage reel. However, the conveyor buttons have since been moved farther down the conveyor to correct the situation permanently. On the day the citation issued, the same procedures were followed, that is, the buttons were moved and the cable was pulled back through the bushing. The bushings around the hole in the switch box were still intact. Although there is no regular electrician on the payroll at the plant, a contract electrician has been working at the plant for the most part on a fulltime basis for a number of years (Tr. 64-66).

On redirect examination, Mr. Michner stated that the mine has an ungrounded delta system, and if one of the three phases touches the ground anywhere in the plant for one reason or another, it will energize the ground and it will register on one of the ground detection meters in the control room. By turning off the equipment around the plant, an electrician can isolate the grounded equipment and locate it. Normally, the equipment will continue to function and there is no shock hazard because in order for there to be a shock hazard, a person has to get his body or some part of his body between areas of two different voltages.

On recross-examination, Mr. Michner stated that if the insulation on two of the individual conductors had broken during the telescoping and the two wires touched each other, there would be a short circuit, which would trip the circuit breaker and deenergize the equipment. If one conductor broke down, the equipment would continue to run, but one phase would be touching the ground and the conveyor and ground would be energized to 480 volts. In such a circumstance, he did not believe there would be any potential for anyone to get hurt, but he would not go as far as to say that the system is entirely fail safe (Tr. 70-72).

Inspector Slaton was recalled as the court's witness and drew a sketch of the condition which he cited (Exh. ALJ-1). He stated that the individual wires remained intact and the outer insulation of the main cable came loose. The bushing was inadequate because it allowed the main cable cover to slip back, thereby exposing the individually insulated wires (Tr. 72-76).

Citation No. 103204, 30 CFR 56.16-9:

A track and rolling dolly was needed for changing the No. 2 scrubber liners. There was no way for men to stay clear of suspended loads. One man would need to work under the load. This is a periodic job done by maintenance.

30 CFR 56.16-9 states: "Men shall stay clear of suspended loads."

Petitioner's Testimony

Inspector Slaton described the scrubber operation and identified a picture of the unit in question after the condition was abated (Exh. R-2). The scrubber liners are cleaned periodically and in order to facilitate the cleaning process, the scrubber motors and other scrubber parts, such as guards, are lifted out by means of a chain attached to an overhead steel beam. Once lifted out, the parts would remain suspended above the scrubbers with no means of pushing them out of the way, and men would have to work under the suspended loads while working on the scrubbers. A track-and-roll dolly was installed to abate the citation and this allowed the machinery to be hoisted up and moved out of the way of the men working under the suspended loads. The equipment lifted out might weigh 1,500 pounds, and if it fell on someone it would be fatal (Tr. 79-88).

On cross-examination, Inspector Slaton testified that he did not personally see any men working under any suspended load while changing out the liner. The condition which he believed constituted a health and safety violation was pointed out to him by the miners' representative who accompanied him during his inspection, and his testimony has been a reiteration of what the miners' representative told him (Tr. 88-89).

On redirect examination, Inspector Slaton testified that he was accompanied on his inspection by Robert Bowles, the miners' representative and MSHA inspector Earl Diggs. Upon arriving at the scene of the alleged violation, Mr. Bowles remarked that a way was needed to keep men out from underneath the scrubbers. Although there was a rolling dolly installed at another plant location which provided a means for moving a suspended load away from the area where the men were working, no such equipment had been provided at the area where the alleged violation occurred. Mr. Bowles pointed out to him the need for providing a way for moving a load away so that the men would not be working directly under it. Plant Manager Michner agreed that men had to stay under the load while they were changing the liners, and according to Inspector Slaton, Mr. Bowles contended that men were forced to remain under the suspended load while they were changing the liners. Mr. Slaton questioned him about this in the presence of Mr. Michner, and he discussed with Mr. Michner the procedures that

were involved in changing the liners. During the conversation, there was no denial of the fact that the liners had to be changed in the scrubber nor the fact that the men were working under suspended loads while this was being done (Tr. 100-104).

On recross-examination, Inspector Slaton stated that the guards are located over the top of the four scrubber motors and that when the scrubber lining is changed, the miners manually lift out the scrubber screen or guard and set it aside since there is no hoist for the guard. The motors are lifted out individually one at a time rather than lifting all four motors out at any one time. A hoist was fastened to an overhead beam and a chain was lowered down and hooked to the motor so that it could be lifted up with the hoist. According to Inspector Slaton, Mr. Bowles stated that the motor was left suspended while the men worked on replacing the liner, but that it was tied off with a safety chain while suspended. Under the "Gravity" section on his inspector's statement, Inspector Slaton testified that he had indicated "improbable" with respect to "the occurrence of the event against which the cited standard was directed" since the safety chain was always used to support the load in case the suspension failed (Tr. 104-107). Mine management has always been cooperative in making any changes he has recommended, including the installation of the track and dolly installed to abate the citation (Tr. 109). The installation of the dolly at the first location was done voluntarily by the operator rather than as the result of a citation or a notice, but Mr. Slaton had no idea as to why a similar apparatus was not installed at the location in question at the same time. The operator freely acknowledged that the men worked under the load when they changed the liners (Tr. 113-114).

Citation No. 103205, 30 CFR 56.11-1:

A working platform was not provided for maintenance on the flour-loading dust collector air slide. Two men would be involved in this work. This work is only done periodically.

30 CFR 56.11-1 states: "Safe means of access shall be provided and maintained to all working places."

Petitioner's Testimony

Inspector Slaton confirmed that he issued Citation No. 103205 because there was no work platform installed adjacent to the air slides which are approximately 12 to 18 feet above the ground and under the flour-loading dust collector. Periodic maintenance is performed on the air slides and a platform is required due to the fact that the air slides are suspended above ground. Work was performed by means of safety belts and lines used by workmen who would climb out on a beam to work on the slides. He has never seen any employees performing maintenance on the particular air slides which

he cited, although he has observed such work performed on other air slides which had been provided with working platforms. He does not consider the use of safety belts and lines to be safe since safety belts may not always be used by the men. Although safety belts were generally available at the operation, they were not readily available to the men at the particular location cited at that particular time (Tr. 125-128). With respect to the risk of injury, Inspector Slaton stated that he is of the opinion that serious injury could result if men did not wear their safety belts, but that if a man was wearing his safety belt, and everything was held intact, any injuries incurred would be bruises or possibly broken ribs. He made no attempt to ascertain why a walkway was not provided, although they were provided on other air chutes (Tr. 129-130).

On cross-examination, Inspector Slaton testified that he did not see anyone working on the air slides, and he acknowledged that his testimony is based on what the miners' representative told him during his inspection when he pointed out the area to him and described the condition. He does not know how often the air slides need to be replaced, but believed it was "periodic," but he did not know how often. In order to get into the area to repair the slides, the men used steps and walkways, which were safe at the time. They would then have to line themselves off to reach the slide (Tr. 130-131).

Citation No. 105601, 30 CFR 56.14-1:

The flat belt drive on the sand floatation tanks was not guarded. The pinch point was approximately 4 feet from the floor.

30 CFR 56.14-1 states: "Gears; sprockets; chains; drive; head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

Petitioner's Testimony

MSHA inspector Earl W. Diggs testified that he issued Citation No. 105601 (Exh. G-6), for a violation of 30 CFR 56.14-1, because upon observing the skimmer paddle wheels turning on the flotation tanks inside the mill building, he noticed that the flat drive at one end of the skimmer was not guarded. The flat belt drive is an electric motor driven paddle wheel that skims floating waste materials off the sand-cleaning tanks. The paddles are driven by a flat belt which has a pinch point at the motor drive pulley and at the paddle wheel pulley. He required a guard to be put over the drive pulley, at the electric motor, and it covered the complete belt. The danger of someone getting caught in the upper pinch point was not serious, but the motor end pinch point was serious because that is a drive. After the situation was corrected, the guard served to protect persons from the

pinch point at the drive. The danger of a guard not being in place is that a man, when performing adjustments such as opening valves to let the water in, could possibly slip and fall, or he could reach to grab something to keep him from falling and get caught in the pinch point. However, it is customary not to change the paddles without first locking out the circuit. Inspector Diggs indicated he would consider the violation to be nonserious because if a man's clothing got caught in the pinch point, his arm could possibly become twisted. He did not know why the drive was not guarded, and did not know how long it had been unguarded since this is the first time he had noticed it. He did not know whether a maintenance man was regularly assigned to perform maintenance on the belt (Tr. 148-154).

On cross-examination, Inspector Diggs stated that after he issued the citation, it took a few hours to install the cover, and that it was done promptly. The drive belt was a flat belt and not a V-shaped pulley so there was not a groove that somebody could get caught in. The paddles turn fairly slow and it was possible for someone to grab one of the paddles, as well as the belt itself, and stop it from turning. The pinch point was located at the end of the tank itself, within approximately 3 feet of a couple of water valves that appeared to be well-used. He recalls filling out an inspector's statement after the inspection and he remembers checking the box under "Gravity" and stating that "[t]he pinch point was in an out of the way position." He also indicated on the statement that it was "improbable" that someone could be severely injured on it (Tr. 154-156).

Inspector Diggs acknowledged that he had inspected the plant before and he had never previously noticed a guard. The belt was fairly loose on the drive and there was no heavy tension. A person could reach up and hold the paddles and this would stop the belt from turning, but it would not stop the drive pulley from turning and grinding away in one's hand. The pulley sheave is located approximately 4 feet from the floor, while the drive pulley is higher up in the air, approximately 5 or 6 feet. Once the paddle is stopped by hand, the pulley is also stopped from turning.

Since the tension was not enough to turn the paddle wheel, there is a possibility that if someone got his sleeve caught, he could pick it out by slowly turning the belt. However, there is also the possibility of someone getting caught in the keyways, locks, or fastening nuts of the flat belt, that is, inside the pulley. The keyways are located in retainers and hold or lock the pulley onto the shaft, but he does not recall whether or not the keyways were exposed (Tr. 156-161).

In response to questioning by the bench, Inspector Diggs stated that the area involved was a passable, but remote area where someone would seldom pass through. The pinch point was located away from travelways. Any maintenance needed to be performed on the pulley

device would likely consist of regular belt maintenance or the repair of a broken belt. Removal of the guard could be accomplished by removing two bolts on each side of the guard. The condition was abated on the same date as the citation issued--at 10:10 p.m. that night (Tr. 162-163).

Respondent's Testimony

Mr. Michner testified that the guard that was obtained to abate the condition came from a local fabrication shop, since there are no facilities at the mine to do the type of fabrication required. He acknowledged that the belt could be stopped from turning by grabbing it in one's hand. Although he has never measured it, he estimated that the upper drive pulley is 7 to 8 feet from the floor and that the lower pulley is approximately chest-high. There had never previously been a guard on this particular pulley before, and no inspector previously suggested that the pulley or belt be guarded. If such a suggestion had been made, then it would have been done. No one had ever been injured while the belt was unguarded, and the reason that the belt had not been guarded is that it never occurred to anyone that there was a hazard there. The machine was manufactured by Denver Equipment Company, which has made a million such machines, and over the years, he has never seen one of these machines guarded. The machine in question has been running unguarded at the plant since 1961. Before he came to work at the Columbia Mine, Mr. Michner worked at respondent's plant in New Jersey, where there are six identical machines that have been running since 1962 without guards; however, such machines are probably now guarded. He is certain that inspectors who visited the mine had previously observed the condition since the machine was located outside his office window and anyone who walks on the main walkway through the wet process, walks past the machine (Tr. 165-169).

Citation No. 105603, 30 CFR 56.12-8:

The electric wiring entering the acid pump drive motor did not enter through proper fittings. The wet process building. The meter is fed by a 110-volt system.

Petitioner's Testimony

MSHA Inspector Diggs testified that he issued Citation No. 105603 after he observed insulated wires going into the junction box on the acid pump motor through a hole in the junction box. He identified Exhibit R-4 as a photograph of the equipment which was cited. The conduit leading into the junction box at the bottom of the photograph was broken loose and the wires were sticking out. The wires came out of the conduit and went into the motor and he could not recall whether the box shown in the photograph was there at the time of the citation. The wires were insulated and taped. However, someone could have

stepped in or tripped on the wires, thereby pulling them out and shorting the motor. The citation does not involve improper fittings, but rather, unprotected insulated wiring. The wires were hooked to the motor, and while they were taped, they were still left exposed and inadequately protected from someone walking on them or tripping over them (Tr. 170-176).

Inspector Diggs stated that the condition he observed could possibly affect the men operating in the plant area, i.e., the maintenance personnel who go in to check the acid pump for the acid flow into the system. Since the area involved is a wet process area, it is possible that a person performing maintenance duties there could step on the wires often enough so as to wear the insulation down, thereby possibly being fatally electrocuted. The likely result of the condition which he observed is possible shock, burns, or acid inhalation from a fire that could result from shorting out the 110-volt motor (Tr. 176-177). He believed that the operator was not aware of the condition until it was pointed out to him, and there was no required electrical inspection to be performed that would make the operator aware of the condition (Tr. 177-178).

On cross-examination, Inspector Diggs testified that the motor was small, approximately between three-quarters to one horsepower. His purpose in issuing the citation was to insure that a proper junction box was installed on the electrical motor. He confirmed his previous testimony that wires were coming out of a conduit rather than out of a cable, and indicated that the distinction between cable and wires is that insulated wiring has less protective insulation around it than insulated cable since insulated cable has two types of insulation--one type of insulation around the wire and then another type completely around the cable. Mr. Diggs conceded that on the citation he stated that the wires did not enter through proper fittings, and then acknowledged admitting that what is involved is not a cable, but rather a wire. Section 56.12-8 does not require wires to have proper fittings and it only applies to cables.

On redirect examination, Inspector Diggs verified his previous statement concerning the conduit, but indicated it was not connected to the motor at the junction box. The conduit, according to the inspector, is similar to wires and the cable because there is a double protection, i.e., the conduit protects the wiring and the outer insulation protects the cable (Tr. 181-182).

On recross-examination, Inspector Diggs testified that if a cable were involved, it would be connected to the motor and that either the cable or the conduit would terminate in or at the junction box at the connection to the motor. He was not aware of any standard that requires power wires to be inside a conduit or in a cable. Thus, the operator has a choice whether to use wires or cables (Tr. 182-183).

Respondent's Testimony

Mr. Michner testified that the power wiring to the acid pump drive motor came through a rigid conduit fastened on a column and the last 12 to 18 inches between the rigid conduit and the motor had no protection for the wires. The wires came out of the conduit, were fastened to the wires pigtailed out of the motor with wire nuts and tape, and were all exposed without a flexible conduit or junction box. The inspector wanted the wires to be guarded, that is, he wanted them protected in some fashion. However, he could not recall whether the inspector specified the manner in which he wanted such to be accomplished, but the installation of a junction box would be the logical approach for protecting the wires. The pump in question was located on a small steel platform, approximately 12 inches off the floor. Although it was near a normal work area, there was no traffic through the area, and it was very unlikely that someone would step on it. The only person who would probably be in the vicinity adjacent to the motor would be an electrician, and the size of the electric motor is one-twentieth horsepower (Tr. 184-186).

In response to a question from the bench, Mr. Michner stated that the wires were insulated and that there was a bushing on the motor itself. In abating the condition, a cover was put over everything in order to protect the wires, and the existing wire nuts and bushing are still in the box. In his opinion, the use of a box is the more professional way of protecting the wires, etc. Assuming the citation was to be vacated, Mr. Michner stated that he would not undo what was done and put things back in their original condition (Tr. 186-188).

Citation No. 105604, 30 CFR 56.12-30:

The electrical junction box on the drive motor for the power tank dust collector at the top of the flour tanks was torn loose. The motor is fed by a 480-volt three-phase system.

30 CFR 56.12-30 states: "When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized."

Inspector Diggs testified he issued the citation in question after climbing to the top of the dust collector drive motor and observing that the junction box had vibrated loose and was hanging down. It was physically separated from the motor, but it had not been torn loose. The wires were still leading from the motor to the junction box, the motor was located approximately 3 to 6 inches from the junction box, and the equipment was energized. He considered this to be a potentially dangerous condition because with continued vibration, it is possible that the insulation could have worn off the wires, and if there was a breakdown in the grounding system, the mill building

could have been energized. Anyone walking from the ground to a ladderway and then reaching up to grab the handrails to climb up could have been injured by electrical shock. The amount of voltage being carried though the wires depended upon how many phases could break through the insulation, and one phase is approximately 177 volts. Since the conditions outside at that time were dry, any shock would be nonserious. The condition was corrected immediately by reattaching the junction box to the motor (Tr. 190-195).

On cross-examination, Mr. Diggs testified that the electric motor was located at the top of the flour tanks at a height of approximately 50 to 60 feet. Since there was nothing located above this area, it was probably one of the most remote areas in the plant. He recalls indicating on his inspector's statement that "it is improbable that someone would get hurt because the circuits were locked out when someone was up in that area working on the equipment." In his estimation, the possibility of someone being injured by the condition would be improbable but not impossible. There was no indication that the operator had prior knowledge that the junction box had become dislodged. With respect to the requirements of the safety standard regarding the finding of a potentially dangerous condition, the inspector believed that the standard means that when such a condition is found, it should be deenergized and corrected before it is reenergized (Tr. 195-198).

Apart from the fact that the junction box was dislodged from its normal place, the only other defect that Mr. Diggs could detect was a screw missing from the cover, but the cover itself was still in place. His concern was that if the dislodged junction box was allowed to remain, it could possibly get worse. The first citation covered the situation which he found, and although he wrote "junction box cover" on the first citation out of haste, what he actually meant was "junction box." He did not personally amend the citation because he was out of the area (Tr. 199-201).

Citation No. 103206, 30 CFR 56.12-32:

A junction box cover for the sending generator on the No. 1 separator in the mill was not kept in place. This was about 4-1/2 feet from the walkway with no energized circuits exposed. About four men would pass within 5 feet of the violation per shift. This was a 110-volt circuit.

30 CFR 56.12-32 states: "Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

Inspector Slaton testified he issued the citation after finding that the junction box cover was not in place on the box located on the sending generator in the upper floors of the mill building. The circuits passing through the junction box were exposed, but were well-insulated. Although the cover is normally kept in place with screws,

there was no cover on the junction box, and it was not under testing or in maintenance. The violation occurred on the production shift when the equipment was running, and in the inspector's opinion, the violation was nonserious since the exposed circuits were well-insulated. In his opinion, any hazard would result from continued vibration wearing on the insulation, and someone possibly getting into it from the cover not being in place. The condition occurred in an area where mill and maintenance people passed by, and approximately four men per shift would pass within approximately 5 feet of the location in question. If the insulation were to become frayed to the extent it would expose the electrical circuits and people come close enough to it, they could be fatally shocked by the 110-volt circuit. In his opinion, if a person touching the circuit were standing on a metal floor, the circuit would pass through him. He was unable to determine how long the cover had been missing, and he did not see a cover anywhere in the area (Tr. 202-207).

On cross-examination, Mr. Slaton stated that the junction box cover would be facing down toward the floor when in place, and he identified a photograph of the box in question (Exh. R-5, Tr. 207-209).

Respondent's Testimony

Mr. Michner confirmed that the junction box faced toward the floor. He also stated that the wires were properly insulated, and because they were hanging out of the junction box with wire nuts on them (as in the citation including the acid pump), they were highly visible. In his opinion, there was no justification for the missing cover, and an electrician had obviously made some connection or reconnection and had not replaced it. Although he admitted to having experienced problems with respect to employees removing junction box covers and forgetting to put them back on, he had no reason to believe they were stolen, and he was not present when the citation was issued or abated (Tr. 211-214).

Citation No. 103207, 30 CFR 56.12-32:

The junction box on the pump house sump pump was not kept in place. This motor was in a remote area in the corner of the pump house. It was 8 inches from the floor. The only time anyone was exposed to this violation was during maintenance on the sump pump. No energized circuits were exposed. This was a 110-volt circuit.

Inspector Slaton testified that he issued the citation in question after observing a pump in the sump pump room with the junction box cover missing and a wire exposed. He observed no cover in the area and the exposed wire was well-insulated. The violation was not serious since there was adequate insulation on the wires. However, if the circuits become exposed where the energized wiring is exposed

and someone comes in contact with it, the situation becomes more serious because the location involved was a wet area. The pump was portable, and when in use, it rested approximately 8 inches from the floor. In order for someone to be injured if the wires were exposed, all that would be necessary would be for someone to come into contact with it while walking past it. The frequency of movement of the pump would vary depending upon how often it was needed, and he was not able to determine how long the cover plate had been missing (Tr. 214-218).

On cross-examination, Inspector Slaton indicated that the pump in question was located in the back corner of the sump room in an out-of-the-way and remote location and was not operating when he observed it (Tr. 218-219).

In response to bench questions, Mr. Slaton stated that the only time anyone would be exposed to the condition cited would be during maintenance or adjustments to the pump. The pump motor was a small 110-volt motor and the junction box was missing from the motor pump. The pump was a portable type which he believed was being stored in the area and he assumed that it was used in the sump area when needed. In order to ascertain whether the pump was down for maintenance, he asked the person who accompanied him, and since no one said anything about the pump being down for testing or maintenance, he assumed that it was not (Tr. 219-222).

Findings and Conclusions

Citation No. 103201, 30 CFR 56.12-34

Fact of Violation

This citation was issued because the inspector found an unshielded portable "trouble-light" bulb being used as lighting in a tractor trailer which was being loaded with bags of sand. The citation states that the light bulb was hanging 5 feet from the floor of the trailer. The inspector testified that the light bulb was out of the reach of the three workers who were stocking sand bags on pallets in the truck, and that the exposed bulb was hanging from a nail on the side of the truck some 8 to 10 feet back from where the men were loading. During the time the inspector was observing the loading operation, the light bulb was always 8 to 10 feet behind the men and he could recall no one passing close by the bulb while he was there. Even upon his return a half hour after issuing the citation when the condition had been abated, the men were still located some 4 to 6 feet from the bulb.

Section 56.12-34 requires that portable extension lights be guarded only if the location of the light is such that a shock or burn hazard is present. In this case, it seems clear to me that the petitioner has not established that the location of the light bulb was

such as to present a shock or burn hazard. The light was being used for illumination and the testimony of the inspector establishes that it was always located some 8 to 10 feet behind the men working in the trailer and that it was out of their reach. Even after abatement, the light bulb was still 4 to 6 feet behind the men, and the inspector conceded that the usual procedure was to move the location of the light bulb back away from the men as the loading process advanced from the front to the rear of the truck and as the conveyor was retracted. Further, the inspector also indicated that during the loading process the men would usually stay in one stationary location at the end of the conveyor while off loading and stocking the material on the pallets (Tr. 34).

I find that the petitioner has failed to establish that the location of the light bulb in question was such as to constitute a shock or burn hazard and that a violation of section 56.12-34 has not been established by a preponderance of the evidence. The citation is vacated.

Citation No. 103202, 30 CFR 56.12-8

Fact of Violation

I find that the petitioner has established a violation as charged in this citation. Although the start-stop switch wiring passed through bushings, it is obvious that the bushings were inadequate since they permitted the wires to be stripped back approximately 6 inches. This condition was apparently caused by the telescoping conveyor windup reel which had an inadequate takeup capacity which in turn caused the cables to be pulled away from the stop-start switch. Although the inspector's testimony is somewhat confusing as to the conditions which he observed, I conclude and find that it does establish a violation of section 56.12-8, which requires insulated wiring passing through metal frames to be substantially bushed with insulated bushings. Since the wires in question were pulled or stripped back when the takeup reel was activated, it seems obvious that the bushings were inadequate since they did not prevent this from occurring. Plant Manager Michner's testimony confirmed the condition found by the inspector and it also confirmed the cause of the cited condition.

Negligence

Respondent's testimony confirms that it was aware of the fact that the design capability of the conveyor was such as to permit the cable to be pulled out of the start-stop switch when the conveyor was extended. This being the case, respondent should have known that the wiring in question would likely be stripped back and not held in place by the bushings. In the circumstances, I find that the respondent failed to exercise reasonable care to prevent the condition cited and that this constitutes ordinary negligence.

Gravity

Although the wires in question appeared to the inspector to be well-insulated and no energized circuits were exposed, the conveyor belt was in operation when the inspector observed the condition and he believed that a potential electrical shock hazard was present since men would come in contact with the conveyor while loading and unloading material. Although respondent's testimony indicated that the equipment would deenergize in the event a short circuit occurred because of the wiring becoming separated, the fact is that there was a potential for the conveyor to become energized and the grounding system was not entirely a failsafe system. Under the circumstances presented, I find that this violation presented a shock hazard and was serious.

Good Faith Compliance

The respondent demonstrated good faith in achieving rapid compliance. When the citation was issued at 9:45 a.m., the respondent was given until 9 a.m. the following day to correct the condition. However, compliance was achieved and the citation was terminated at 4 p.m. on the same day of its issuance (Exh. G-2).

Citation No. 103204, 30 CFR 56.16-9

Fact of Violation

The safety standard cited requires that men stay clear of suspended loads. The standard in question is one of several standards listed under a general section 56.16, which is headed by the terms "materials storage and handling." Thus, the initial question presented is whether this standard has any application to a suspended heavy load such as a scrubber motor, guard, and other such scrubber parts which must be lifted out and suspended in order to facilitate the changing of the scrubber liners or to perform other maintenance on the scrubbers.

Although I fail to see the logic in including the cited standard under a "materials storage and handling" general regulatory section, I conclude that it may be applied to a situation where it is established that men are working under any suspended loads, whether it be "materials," as that term is commonly understood, or motors or other equipment.

A second question presented is whether the condition or practice described by the inspector on the face of the citation sufficiently described a condition or practice which is in violation of the cited mandatory safety standard as required by section 104(a) of the Act, which states in pertinent part as follows: "Each citation shall be

in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated."

In this case, although the citation was dated and issued on March 14, 1978, some 5 days after the effective date of the 1977 Act, it is obvious that the alleged condition or practice occurred prior to March 14th. However, since the inspector failed to indicate on the face of the citation when the alleged condition occurred, and failed to furnish any details as to the alleged condition or practice, I conclude that he failed to describe the alleged violation with any particularity. For all I know, the alleged condition may have occurred prior to the effective date of the Act.

Aside from the anemic evidentiary presentation by the petitioner in support of the alleged violation, I find that the "condition or practice" on the face of the citation fails to describe any condition or practice which amounts to a violation. The "condition" cited simply recites that there was a need for a track and rolling dolly to change scrubber liners, that there was no way for men to stay clear of suspended loads, that one man would need to work under the load, and that the job was periodically performed by maintenance. As pointed out by the respondent in its brief, section 56.16-9 does not mention tracks and rolling dollies, and the condition described does not state that miners had in fact ever worked under a suspended load. And, as testified to by the inspector, the scrubber motor was supported by a safety chain and could be tied off and swung to the side or possibly set down on the floor so that men would not have to work under it (Tr. 107).

Finally, I come to what I believe to be the most crucial issue presented with respect to the citation, namely, whether the fact that the inspector did not personally observe anyone working under a suspended load is sufficient to support a violation. In this case, it is clear that the inspector did not observe anyone working under a suspended load during his inspection. In issuing the citation, he relied on the information furnished to him by the employees' representative who accompanied him during the inspection.

Although MSHA did not file any posthearing brief or proposed findings and conclusions, counsel at the hearing took the position that it was not necessary for an inspector to personally observe a condition in order to support a violation. Citing the language of section 104(a) of the Act, which states in pertinent part "if, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, * * * he shall, * * * issue a citation to the operator," MSHA apparently takes the position that any belief by an inspector that a violation has occurred, authorizes the inspector to issue a

citation, notwithstanding the fact that such a belief is based, not on the inspector's personal observations, but on the observations or statements of a third party who may or may not have personally observed a condition or practice constituting a violation.

The testimony of the inspector reflects that during the course of his inspection, and while accompanied by the employee representative and the plant manager, the employee representative remarked that during the course of replacing the scrubber liners, the scrubber motors were lifted up by a chain hoist, tied off with a safety chain, and while suspended in such a position, the persons performing the work were required to work under the suspended motors. According to the inspector, Plant Manager Michner confirmed that this was the case and did not deny it. The employee representative did not testify, and Mr. Michner was not called to testify, although he was present in the courtroom.

Since MSHA did not file any posthearing briefs or arguments in support of any of the citations in these proceedings, its position and theory on which it believes a citation may be supported on facts outside the inspector's own personal knowledge or observations remains a mystery. Apparently, MSHA is of the view that the statutory language of section 104(a) authorizing an inspector to issue a citation if he believes that a mandatory safety standard has been violated is sufficient on its face to support a citation, irrespective of how the inspector arrives at that belief, or irrespective of the evidence produced by the petitioner in support of the alleged violation. Thus, MSHA's position appears to be that any time anyone advises an inspector of some past condition or practice outside the inspector's own personal knowledge or observations, the inspector must issue a citation. In my view, such a broad interpretation of section 104(a) raises serious due process questions, and on the facts and circumstances presented here, is rejected.

Section 103(a) authorizes frequent mine inspections and investigations, and one of the purposes of such inspections and investigations is to determine whether there is compliance with the mandatory health or safety standards. Subsection (f) authorizes a representative of the mine operator and the miner's representative to accompany an inspector during the physical inspection of the mine made pursuant to subsection (a), for the purpose of aiding such inspection. Subsection (g)(1) provides in pertinent part that:

Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the

Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, * * *. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists * * *. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination. [Emphasis added.]

Subsection (g)(2) of section 103 provides in pertinent part that:

Prior to or during any inspection of a coal or other mine, any representative of miners or a miner in the case of a coal or other mine where there is no such representative, may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act or of any imminent danger which he has reason to believe exists in such mine. [Emphasis added.]

It seems clear that sections 103(g)(1) and (2) authorizes a representative of miners to obtain an inspection when he believes there is an existing condition which may be a violation, and to bring to the attention of the inspector an existing condition which he believes constitutes a violation. However, I find nothing in section 103 which authorizes an inspector to base a citation on some past condition or practice brought to his attention orally by a representative of miners during the course of an inspection.

Section 104(b) of the 1969 Coal Act, provided in pertinent part that: "[I]f, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard * * *, he shall issue a notice to the operator or his agent * * *.

The January 1975 edition of the Inspector's Manual dealing with the issuance of notices under section 104(b) of the 1969 Act, states that apart from imminent danger situations, the issuance of notices pursuant to section 104(b) is "the primary tool for obtaining compliance with the mandatory health and safety standards" (section 1.0). The manual guidelines and instructions for an inspector to follow in issuing section 104(b) notices state in pertinent part as follows as sections 1.0 and 1.4:

When the inspector is satisfied upon inspection that a condition or practice exists which violates a

mandatory standard his responsibility is to issue a 104(b) Notice and fix a reasonable time for the operator to abate the condition or practice. Notices of Violation shall be written promptly after a violation of the Act is observed, * * *. [Emphasis added.]

It seems clear that under the 1969 Act, an inspector was required to personally observe an existing condition in a mine which he believed constituted a violation before issuing a notice of violation pursuant to section 104(b). The "finding" that he was required to make concerning such a condition was obviously intended to be based on his personal observations of an existing condition. However, under the 1977 Amendments to the Act, the language presently used in section 104(a) with respect to the issuance of citations is "believes." Thus, the question presented is whether the term "believes" means the same as, or something different from, the term "finds" as previously used in the comparable section of the statute authorizing inspectors to issue citations.

Section 104(a) of the 1977 Act provides in pertinent part that:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, * * * he shall, * * * issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, * * *.

The connotation of the word "believe" is entirely subjective, 10 C.J.S. 238. In the common and ordinary use of the English language, and in all the general acceptance of the term, the word refers primarily and explicitly to the mental state of the believer without any necessary regard to the reasons, conditions, and circumstances which may have caused or influenced the existence of such mental state; and hence it does not imply, require or mean a reasonable belief. As pointed out in the cases cited in 10 C.J.S. 238, 239, the verb "believe" is susceptible of interpretation in varying degrees. In its most definite and strongest sense, it has been defined as meaning to accept as true on the testimony or authority of others; to be persuaded of the truth of anything; to be persuaded upon evidence, arguments, and deductions, or by circumstances other than personal knowledge, and the term has been held equivalent to, and interchangeable or synonymous with "find."

Words and Phrases, Volume 5, Permanent Edition, pp. 409-412, indicates that the word "believe" has been construed to mean:

--- nearly synonymous with rely and means to accept as true on the confidence of others.

--- to be convinced or to feel that something is true or at least probable.

--- in the sense of "averred" or "alleged".

--- to credit upon authority of testimony of another, to be persuaded of truth of, to regard, accept, or hold as true.

The March 9, 1978, edition of the Labor Department's Inspector's Manual for the issuance of citations and orders contains the current guidelines for an inspector to follow when he issues citations for violations of any mandatory health or safety standards, and I take official notice of such publication notwithstanding the fact that the parties did not see fit to bring it to my attention. Section 1.1 of the manual lays out guidelines for an inspector to follow when describing an alleged violation, and it states in pertinent part as follows:

Elements of a violation description include: An adequate description of the condition(s) and/or practice(s), which must set out the fact(s) that cause and constitute the violation of the Act or a specific regulation. The description should be written to show how and why the regulation is violated. The location in the mine where the violation and/or hazard exists must be identified for several reasons: (1) to prevent problems of timely abatement and to inform the operator as to the area of the mine so affected by the citation or order; (2) to inform the miners and their representative where the violation and hazard exist; and (3) to inform other inspectors who may be required to make the follow up inspection. Any equipment involved should be properly identified as well as located and the inspector should include in his description of the violation, any facts relevant to exposure hazards to the miners and negligence on the part of the operator. In a few words it must describe with particularity the nature of each violation.

Section 2.1, which deals with MSHA policy concerning the issuance of section 104(a) citations, states in pertinent part as follows:

When an inspector finds, or believes, upon an inspection or investigation, that a condition or practice exists which violates a mandatory standard but does not create an imminent danger he is required to issue a Section 104(a) or 104(d) Citation (except where a Section 104(d) order is issued) and fix a reasonable time for the operator to abate the condition or practice. (Emphasis added.)

Section 2.6 of the manual provides guidance for the inspector in the issuance of citations for violations of Title I of the Act, and states in pertinent part as follows:

Where violations of any provisions of Title I of the Act are observed at a mine, or an investigation reveals that a Title I violation exists, the authorized representative shall issue the citations on Form 1. On the Form 1, check the box for citation, and enter type of action as 104(a). In citing the violation, identify the proper section of the Act.

The citation should state specifically when, where, and how the violation occurred, if relevant, and a detailed description of the conditions or practices.

A violation of Title I of the Act shall be processed the same as any violation of Title II and Title III of the Act (mandatory health and safety standards). The citations should be entered in the proper inspection or investigation report, if appropriate, and such citations are subject to civil penalties. [Emphasis added.]

Section 5.0 of the manual deals with the inspector's preparation of an "Inspector's Statement," which is a form filled out by the inspector at or near the time that he issues a citation, and which contains his comments and observations concerning the six statutory criteria contained in section 110(i) of the Act. The instructions and guidelines state in pertinent part as follows:

Inspector's Statement Report. See Form No. 7000-4.

The Statement Report shall be a description of the conditions, actions of the operator, and circumstances surrounding the violation which the inspector has observed or determined by investigation, inquiry, or discussions with the operator, supervisors, mine foremen, section foremen, miners or others which lead him to make the statements contained in the report. The description should be concise and brief but at the same time convey a sufficient description upon which a determination or recommendations can be made as to the amount of penalty. The inspector should realize that his analysis and report will influence and be given weight by others. The inspector should therefore be able to substantiate the opinions stated and such statements must be in agreement with the information contained in the citation or order issued.

The citation or order issued under the provisions of sections 104(a), 104(b), 104(d)(1) or (d)(2), 104(c)(1) or (c)(2), 104(f), 104(g)(1), and 107(a) will best describe by section number the mandatory health or safety standard which has been violated and will contain a description of the conditions or practices as observed by the inspector upon which he made his determination as to what caused and constituted the particular violation. [Emphasis added.]

A review of the legislative history of the 1977 Amendments to the 1969 Coal Act gives little guidance as to what Congress intended when it changed the statutory language from "finds" to "believes." The Senate bill permitted the issuance of a citation based upon the inspector's belief that a violation occurs. The House amendment required that a citation be based on the inspector's finding that there was a violation. The conference substitute adopted the provisions of the Senate bill. MSHA's current Inspector's Manual, which serves as the "handbook" for the guidance of inspectors in the field while conducting inspections and issuing citations, uses the terms interchangeably. Curiously, however, the terms are used in tandem with the terms "inspections" or "investigations," and in several places where it instructs the inspector to detail the circumstances surrounding the asserted violation on which the citation is based, the terms "observed" and "exists" are consistently used in relationship with the condition or practice found by the inspector. This leads me to the conclusion that when an inspector is conducting a routine inspection of the mine, any condition which he finds during that inspection which prompts him to issue a citation must be based on his personal observations during that inspection and it must relate to an existing condition or practice which is in violation of the cited mandatory standard.

As noted earlier, sections 103(g)(1) and (2) of the Act, authorize a miner or miner representative to bring to the attention of an inspector any condition or practice in a mine which the miner or representative reasonably believes constitutes a violation of a mandatory standard. As a matter of fact, Senate Committee Report No. 95-181, reflects that both of these provisions are based on the Committee's belief that mine safety and health will generally improve to the extent that miners themselves are aware of mining hazards and play an integral part in the enforcement of the mine safety and health hazards. However, in bringing these matters to the attention of the Secretary, they must be in writing, and once received by the Secretary, serve as a starting point for initiating an immediate inspection of the mine by means of a special inspection, with notice of same served on the operator no later than at the time of the inspection. If the Secretary fails to issue a citation prior to or during an inspection of a mine in the case of a condition which has been brought to his attention based on such a written "reasonable belief," he is

required by subsection (g)(2) to establish informal review procedures for the purpose of determining why a citation was not issued and to communicate the reasons for his final disposition of the matter to the miner or his representative. Thus, it seems clear to me that while the statute permits miners and their representatives to bring to the attention of an inspector conditions which they believe constitute violations of any mandatory standard, two conditions precedent must be met before an inspector may issue a citation. First, the complaint must be in writing and served on the operator. Second, MSHA must initiate an immediate special investigation to ascertain all of the facts surrounding the conditions which the complainants believe constitute a violation. In such a circumstance, any conditions or practices found during the special inspection may conceivably result in the issuance of citations based on the results of that investigation, and, the citations conceivably could be based on information developed during the course of that investigation, including statements and testimony furnished by third parties outside of the personal observations and knowledge of the inspector.

In the instant case, it is clear that the inspector was not conducting a special inspection or investigation (Tr. 91). As a matter of fact, petitioner's counsel touched on and alluded to the requirements of section 103 during the following colloquy on the record (Tr. 96-97):

MR. MCGINN: * * * I do not know what else the inspector could do, Your Honor. If he did not cite a violation here, he could be reprimanded by the Union or by the miners' representative or other people over him.

ADMINISTRATIVE LAW JUDGE: I cannot conceive of any Union or any Management representative reprimanding an inspector.

MR. MCGINN: I mean for a Union for failure to-- an inspector, by his authority, is to cite the violation where he thinks one exists.

And, at page 117:

ADMINISTRATIVE LAW JUDGE: That is what I am trying to find out. Was it specifically brought to the attention of the inspector or MSHA before the day of the inspection, or was it brought out during the course of the inspection casually?

MR. MCGINN: It was not brought up prior to the time of the inspection. This was the first inspection under the new law. The inspector said that it was specifically pointed out to him during the inspection.

In view of the foregoing discussion, I conclude that the statutory and regulatory inspection scheme distinguishes between regular mine inspections where the inspection discloses conditions and practices personally observed by an inspector during the course of his inspection, and conditions or practices developed during the course of a special inspection or investigation where the conditions or practices are developed by means of observations and evidence outside of the issuing inspector's personal knowledge and observations. In these circumstances, I find that a condition or practice cited by an inspector as the basis for a citation in the course of a routine regular mine inspection must be based on his personal observations made during the course of that inspection. On the facts presented here, it is clear that the inspector did not personally observe any condition or practice which may serve as the basis for a citation. And, by failing to include in his citation any information as to when the violation purportedly occurred, it has not been established that the alleged violation occurred subsequent to the effective date of the 1977 Act. Since the standard cited is based on the now repealed Metal and Nonmetallic Mine Safety Act, the timing of the citation becomes critical since a proven violation would subject the operator to a civil penalty up to \$10,000, a remedy not previously available to MSHA under the now-repealed Metal and Nonmetal Act.

In addition to my interpretation of the application of section 104(a), it should be emphasized that the burden of proof in a civil penalty proceeding lies with the petitioner, and the petitioner must establish by a preponderance of the evidence that the respondent violated the cited mandatory safety standard. Hearings pursuant to the 1977 Act are conducted pursuant to the Commission's Rules published at 29 CFR, Part 2700, and they are subject to the requirements of the Administrative Procedure Act, 5 U.S.C. § 553. Section 1006(d) of that Act, 5 U.S.C. § 556(d), permits the admission of hearsay evidence, provided it is not irrelevant, immaterial, or unduly repetitious, and the courts have recognized the admissibility of such evidence in administrative proceedings, Montana Power Co. v. FPC, 185 F.2d 491, 497 (D.C. Cir. 1950), cert. denied, 340 U.S. 947 (1951); Vitarelli v. Seaton, 359 U.S. 535, 540 (1959); Willapoint Oysters, Inc., v. Ewing, 174 F.2d 676 (9th Cir. 1949), cert. denied, 338 U.S. 860 (1949). However, 5 U.S.C. § 556(d) also provides that: "A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence."

According to Black's Law Dictionary (4th ed. 1951), the following terms are defined as follows:

Reliable: Trustworthy, worthy of confidence.

Probative: In the law of evidence. Having the effect of proof; tending to prove, or actually proving.

Testimony carrying quality of proof and having fitness to induce conviction of truth, consisting of fact and reason co-operating as co-ordinate factors.

Substantial: Of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable. Something worth while as distinguished from something without value or merely nominal.

It is well settled that mere uncorroborated hearsay or rumor does not constitute substantial evidence, Camero v. United States, 345 F.2d 798, 800 (D.C. Cir. 1965); Universal Camera Corporation v. NLRB, 340 U.S. 474, 477 (1951); Consolidation Edison Co. v. NLRB, 305 U.S. 197, 230 (1938).

I have serious reservations about an enforcement policy that authorizes an inspector to issue section 104(a) citation (which could subject an operator to civil penalties up to \$10,000), based solely on oral statements made to him by a third party concerning an alleged past condition or practice which purportedly occurred outside the inspector's personal observations and knowledge at some unspecified time prior to his inspection. Such uncorroborated hearsay is in the nature of rumor and I reject MSHA's attempts to use such "evidence" as proof and support for the citation and petition for assessment of civil penalty. On the facts and circumstances presented in this proceeding, I conclude and find that the evidence presented by the petitioner to support the alleged violation is of little or no probative or credible value. It is clear that the inspector saw no one working under any suspended load on the day the citation issued, and his testimony in support of the citation is based on conversations he had with the miners' representative and plant manager who accompanied him during the inspection. Further, the inspector admitted that he never observed the procedure used for changing scrubber liners anywhere in the plant (Tr. 90), he was not conducting any special inspection based on a miner complaint (Tr. 91), and the scrubber liners were not being changed on the day of his inspection (Tr. 92). As a matter of fact, there is no testimony from anyone who observed the liners being changed in the fashion described, and there is no testimony that there were in fact any suspended loads in the plant on the day the citation issued or that men were not staying clear of such loads (Tr. 93-94). The sole basis of the petitioner's case is based on the inspector's inference that, based on the scrubber liner change-out procedure, as described to him by a third party, "there had to be a violation" (Tr. 95).

Arguably, the existence of the violation may be the fact that the procedures for changing out the scrubber liners necessarily require that a miner position himself under a suspended load, thereby exposing

himself to possible danger. That seems to be the petitioner's view of the violation in this case. However, there is no credible testimony as to when the scrubbers in question were lifted out and worked on, who worked on them, or what procedures were followed in accomplishing this task. Here, the inspector conceded that when the liners are changed out, the scrubber guards are lifted out one at a time and placed down next to where the work is being performed, thereby eliminating the possibility of anyone working under a suspended guard. As for the scrubber motors, the inspector conceded that all of the motors are not lifted out all at once. Each motor is apparently lifted out individually and one at a time by a chain hoist and then secured or "tied off" to the side with a safety chain. In such circumstances, I fail to understand how it can be said that one is working under a suspended load, since the motor is tied off and secured in a manner which apparently meets MSHA's requirements. However, without the critical testimony of those individuals directly involved in this procedure, any rational and intelligent findings or conclusions are impossible.

Although the record indicates that the inspector was accompanied during his inspection by the miner representative and the plant manager, the miner representative was not produced as a witness. Further, although the plant manager was present in the courtroom, he was not called as an adverse witness. The explanation given for failing to call the employee representative is as follows, at page 119 of the transcript:

ADMINISTRATIVE LAW JUDGE: Was there any particular reason why this employee that was walking around was not produced today for testimony?

MR. MCGINN: It came to my attention late yesterday afternoon, Your Honor. I did not see time to do this. If you wish, we could continue it.

ADMINISTRATIVE LAW JUDGE: No, I am not going to continue it. The citation was, you know, issued March 14th of 1978. You mean, for the first time yesterday, you learned of this?

MR. MCGINN: Both. I knew that -- Mr. Michner, who was a witness here, also participated in the conversation.

ADMINISTRATIVE LAW JUDGE: He did what?

MR. MCGINN: Participated in the conversation at that time.

I believe that in a civil penalty proceeding where the petitioner is seeking to impose the sanction of a fine up to \$10,000 for a violation of a mandatory safety standard, the petitioner has an affirmative

responsibility to produce that kind of evidence which would be admissible and held to be substantial in a United States District Court civil proceeding, particularly in the circumstances surrounding this citation, where the evidence needed to support the petitioner's position concerning its interpretation of section 104(a) was so readily available. Here, not only did the inspector fail to include in his citation the critical elements of the conditions purporting to be in violation of the cited standard, but the petitioner at trial failed to call critical witnesses who possibly could have supplied testimony critical to its burden of proof.

On the basis of the foregoing findings and conclusions, Citation No. 103204, alleging a violation of section 30 CFR 56.16-9, is VACATED, and a summary of the basis for this action on my part is as follows:

1. Failure of the petitioner to establish a prima facie case by a preponderance of any credible or probative evidence.

2. Failure of the inspector who issued the citation to describe with any particularity, particularly with respect to the date of the alleged infraction, a condition or practice constituting a violation.

3. In a civil penalty proceeding where the petitioner is seeking a civil penalty assessment based on a citation issued by an inspector pursuant to section 104(a) of the Act during the course of a regular inspection, petitioner must establish that the inspector's action in issuing the citation was based on his personal observations or knowledge of the conditions during the inspection.

Citation No. 103205, 30 CFR 56.11-1

Fact of Violation

This citation charges that the respondent failed to provide a working platform for the dust collector air slide where two men would be involved in periodic maintenance work. The cited standard requires that "safe means of access shall be provided and maintained to all working places."

An initial question presented is whether the listing of section 56.11-1 under the general heading entitled "56.11 Travelways," renders the cited standard inapplicable to the location described in the citation.

The term "travelways" is defined in section 56.2, the definitions section of Part 56, as "a passage, walk or way regularly used and

designated for persons to go from one place to another." The evidence establishes that the air slide in question was located and suspended approximately 12 to 18 feet above ground beneath a dust collector and no walkway was provided. Under these circumstances, there is no way that the air slide can be considered to be a travelway as defined by section 56.2, and I conclude that it was not. However, while one can argue the logic of including section 56.11-1 under the general category of "travelways," the crucial question is whether the cited air slide location qualifies as a "working place."

Section 56.2 defines "working place" as "any place in or about a mine where work is being performed." Thus, assuming it is established that work is performed on the air slide, a safe means of access must be provided and maintained while that work is in progress at that location, and I conclude that the cited standard would be applicable, notwithstanding the possible ambiguity created by including it under the general regulatory category of "travelway."

The next question presented is whether the term "safe access" requires that a work platform be installed every time work is performed on the air slide. Respondent apparently did not believe so because work was allegedly performed from an adjacent beam with the use of safety belts and lines. In addition, it would appear that at other similar air slide locations, either a walkway or work platforms were provided. Thus, on the facts presented here, there were three potential ways in which "safe access" could have been provided, namely, a work platform, a walkway, or safety belts and lines. Since the standard, on its face, does not specify what would suffice as a "safe means of access," I can only conclude that this would depend on the circumstances presented on a case-by-case basis. Since the burden of proof as to the condition cited lies with the petitioner, it is incumbent on MSHA to establish that the method used to perform work on the air slide in question did not include providing and maintaining a safe means of access to the air slide. While the inspector indicated that safe steps and walkways were used to gain access to the air slide area, he obviously believed that the precise location at which the work was allegedly being performed on the air slide did not include a work platform. Thus, the crucial question presented is whether the inspector had sufficient evidence to support his citation.

This citation is similar to Citation No. 103204, dealing with the track and rolling dolly, in that the inspector did not personally observe the alleged condition or practice on March 14, 1978, the date the citation issued. He observed no work being performed on the air slide on March 14, nor did he at any time observe anyone performing any work on the air slide in question. His belief that a violation occurred was again based solely on information provided to him by the employees' representative who accompanied him during the inspection. That information consisted solely of the representative telling him that at some unspecified time in the past, periodic maintenance was

performed on the air slide by certain unidentified men without the use of a work platform. The inspector did not know how often maintenance was required or performed on the air slide, nor did he make any attempts to ascertain why a walkway was not provided at that particular location as was the case at other air slide locations. Further, there is nothing in the record to indicate any effort on his part to ascertain who performed the maintenance work or when it was performed, and surprisingly, MSHA did not see fit to call any of these men or the representative as witnesses. MSHA's sole proof in support of the citation rests on the representative pointing to the air slide location and advising the inspector that work had been performed there in the past without the use of a work platform.

In view of the facts and circumstances surrounding the issuance of Citation No. 103205, citing a violation of 30 CFR 56.11-1, I find that the citation should be VACATED, and my reasons for this are the same as those previously discussed with respect to Citation No. 103204, dealing with the track and dolly condition and my findings and conclusions as to that citation are herein incorporated by reference as the basis for my vacating this citation.

Citation No. 105601, 30 CFR 56.14-1

Fact of Violation

I find that the petitioner has established a violation of the guarding requirements of section 56.14-1, and respondent's testimony and evidence does not rebut this fact. The exposed pinch point at the drive was some 4 feet from the floor in a location where it was possible for someone to come into contact with it, and the photograph, Exhibit R-3, and the inspector's testimony confirms this fact. The citation is affirmed.

Negligence

Respondent's testimony reflects that the machine in question had been operating in an unguarded condition since 1961, it never occurred to anyone that it should be guarded, and no MSHA inspector ever suggested that it should be guarded. I conclude that the respondent could not reasonably have known that a guard was required and was not negligent in permitting the condition cited to exist.

Gravity

The inspector believed the condition cited to be nonserious and I adopted his finding of nonserious as my finding in this regard.

Good Faith Compliance

The condition was abated on the same day the citation issued, and a day before the time fixed for abatement. Thus, the respondent exercised good faith compliance by rapidly abating the condition.

Citation No. 105603, 30 CFR 56.12-8

Fact of Violation

In this case, the citation asserted that the electric wiring entering the acid pump drive motor did not enter through proper fittings. Section 56.12-8 has three requirements, and the second one relied on by the inspector requires that cables shall enter metal frames of motors, only through proper fittings. However, the inspector's testimony is that there is no cable involved in the condition cited, and insofar as the cited wires are concerned, the standard does not require that they enter motor frames through proper fittings (Tr. 180-181). Here, there is no evidence that the hole in the motor frame was not properly bushed, and the inspector confirmed that the wires were adequately insulated. Under the circumstances, I find that the petitioner has failed to establish a violation, and Citation No. 105603 is vacated.

Citation No. 105604, 30 CFR 56.12-30

Fact of Violation

The evidence adduced by the petitioner supports the fact that the junction box in question had separated from the dust collector drive motor and was hanging down from the motor. The inspector admitted that the box had not been torn loose as stated in his citation, and he indicated that the separation resulted from vibration. He considered the condition to be potentially dangerous and that is why he cited section 56.12-30.

I find that the petitioner has established a violation of the cited section. The fact that the inspector's citation states that the box had been torn loose, when in fact it had not, does not prejudice the respondent, nor does it affect the described condition. The fact is that the junction box had separated from its usual location, and in that condition could be considered as "torn loose," and respondent presented no evidence to the contrary. Further, the fact that the equipment was energized when the inspector found the condition cannot serve as a basis for vacating the citation simply because the standard requires that the condition be corrected before equipment is energized. In my view, that fact may bear on the gravity of the condition but may not serve as a defense to the citation. The citation is affirmed.

Negligence

The inspector testified that the junction box was located some 50 to 60 feet high in one of the most remote areas of the mine. He did not believe that the respondent had any prior knowledge that the junction box had become dislodged. Under the circumstances, I find that the respondent could not have reasonably known of the condition and consequently was not negligent.

Gravity

The inspector was concerned with the fact that the junction box was dislodged and that if it were allowed to remain in that condition, it could wear down the insulation. If this happened and there was a breakdown in the ground system, the storage tank area could become energized, thus exposing the men to a shock hazard. However, he indicated that the outside conditions were dry and that the threat of shock was diminished because lock-out procedures would be followed if someone were working on the equipment.

Notwithstanding the lock-out procedures and the remote location of the box, the loose junction box posed a potential shock hazard if it were to remain undetected. Continued vibration would have probably caused it to separate completely from the motor and this would have posed a possible shock hazard. In these circumstances, I find the violation was serious.

Good Faith Compliance

The condition was corrected immediately by the reattaching of the junction box to the motor. I find that the respondent abated the condition cited rapidly and in good faith.

Citation No. 103206, 30 CFR 56.12-32

Fact of Violation

I find that petitioner has established a violation concerning the missing junction box cover for the sending generator, and respondent conceded as much by Mr. Michner's testimony that there was no justification for the missing cover and that an electrician apparently neglected to replace it after performing some work on the wiring. The citation is affirmed.

Negligence

Although the junction box was facing down toward the floor and may not have been visible if the cover were kept in place, the fact is that respondent conceded the wires were hanging out and were visible. Coupled with the fact that an electrician had apparently

performed some work on the box and neglected to replace the cover plate; and the inspector's un rebutted testimony that men would readily pass by the area, I find that the respondent should have known about the condition cited and failed to exercise reasonable care to prevent the condition cited. In these circumstances, I conclude that respondent is guilty of ordinary negligence.

Good Faith Compliance

The condition was abated one-half hour before the time fixed by the inspector, and I find that respondent exercised good faith compliance in this regard (Exh. P-8).

Gravity

The evidence established that the wires located in the uncovered junction box were well-insulated and the inspector believed the condition, as he found it, and which served as the basis for his citation, was nonserious. Respondent's testimony confirmed that the wires were well-insulated and were fastened with wire nuts. Under the circumstances, I adopt the inspector's nonserious finding as my finding for this citation.

Citation No. 103207, 30 CFR 56.12-32

Fact of Violation

I find that the petitioner has established that the junction box cover for the pump house sump pump was not kept in place as charged in the citation, and respondent presented no evidence to the contrary. Failure to keep the junction box cover in place constitutes a violation of the cited standard, and respondent presented no evidence that repairs or testing was taking place. The citation is affirmed.

Negligence

The inspector testified that the sump pump in question was located in the back corner of the sump room in an out-of-the-way and remote location, was not being used, and he could not determine how long the cover plate had been missing. In addition, he did not indicate whether or not anyone passed through the area in question or whether anyone normally would be in a position to observe the condition cited. In these circumstances, I cannot conclude that respondent was negligent or that petitioner has established any negligence with respect to this citation. Accordingly, my finding is that there was no negligence with respect to the condition cited.

Gravity

The evidence establishes that the junction box wires were well-insulated, that the sump pump was located in a remote area, and that

it was not in use. The inspector believed the violation was non-serious, and I adopt this conclusion on his part as my finding in this regard.

Good Faith Compliance

The condition was abated on the same day the citation issued and prior to the time fixed by the inspector. I find that the respondent exercised good faith compliance by taking immediate corrective action (Exh. P-9).

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

The parties stipulated that the size of the respondent's mining operation is medium-to-small, but that respondent is a subsidiary of ITT (Tr. 9). Respondent presented no evidence that any civil penalties assessed by me in this proceeding will adversely affect its ability to remain in business, and I conclude that they will not.

History of Prior Violations

The inspection in question was the initial inspection under the 1977 Act, and the parties stipulated that respondent has no prior history of violations (Tr. 9).

ORDER

In view of the foregoing findings and conclusions, it is ORDERED that the following citations be vacated and the petition for assessment of civil penalties, insofar as it seeks penalty assessments for these citations, is DISMISSED:

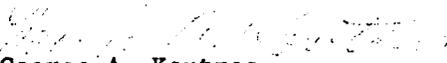
<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>
103201	03/14/78	56.12-34
103204	03/14/78	56.16-9
103205	03/14/78	56.11-1
105603	03/14/78	56.12-8

In view of the foregoing findings and conclusions affirming the following citations, and taking into account the six statutory criteria set for in section 110(i) of the Act, civil penalties are assessed as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>
103202	03/14/78	56.12-8	\$150
105601	03/14/78	56.14-1	35

105604	03/14/78	56.12-30	75
103206	03/15/78	56.12-32	25
103207	03/15/78	56.12-32	25

Respondent is ORDERED to pay civil penalties totaling \$310 within thirty (30) days of the date of this decision.


George A. Koutras
Administrative Law Judge

Distribution:

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

AUG 30 1979

EUGENE GREY, : Application for Review of
Applicant : Discrimination Complaint
v. :
: Docket No. HOPE 79-77
RIVERTON COAL COMPANY, :
Respondent : Eagle No. 1 Mine

DECISION

This proceeding was brought by Eugene Grey, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for review of an alleged act of discrimination.

The case was heard at Charleston, West Virginia, on April 13, 1979. Counsel for the parties have submitted their proposed findings and conclusions and supporting briefs following receipt of the transcript.

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

FINDINGS OF FACT

1. Applicant was employed by Respondent as a coal mine section foreman from about October 1, 1976, to April 7, 1978. Applicant worked at Respondent's No. 35 Mine until his transfer to the Eagle No. 1 Mine in November, 1977.

2. Respondent was, at all pertinent times, the operator of the No. 35 and Eagle No. 1 Mines in Fayette County, West Virginia.

3. Applicant was hired as a section foreman by William Sublett on October 1, 1976, at the No. 35 Mine. At that time, Mr. Sublett was mine superintendent for the No. 35 Mine. Applicant continued as a section foreman at the No. 35 Mine until early November 1977, when he was transferred to Riverton's Eagle No. 1 Mine. The transfer was made because of a reduction in the work force due to Respondent's decision to close the No. 35 Mine.

4. Mr. Sublett and Bob Samuels, then the general mine foreman for the Eagle Nos. 1 and 2 Mines, chose Applicant for the transfer over two other section foreman from the No. 35 Mine because he had more mining experience, they found him better qualified as a foreman, and he had more time with the company than the other men. The use of seniority in determining job reassignment was the normal practice at Riverton.

5. Applicant worked in the new section foreman position, on the day shift, at the Eagle No. 1 Mine until Friday, April 7, 1978. At the end of his shift on that date, Applicant entered the office trailer and met Mr. Samuels, who had recently been promoted to mine superintendent for the Eagle Nos. 1 and 2 Mines. Mr. Samuels informed Applicant that he wanted him to start working on the evening shift the following Monday, April 10, 1978, until management could open a new section. Applicant refused this assignment, and said that he would quit before working on the evening shift. Applicant had never expressed any resistance to working on the night shift before this time.

6. Mr. Samuels determined that the transfer of a day shift foreman to the evening shift was necessary because the general mine foreman on the evening shift, who had more seniority than any of the section foremen on the day shift, was transferring to the day shift. Mr. Samuels chose to transfer Applicant to the evening shift because he had the least seniority of the day shift section foremen at the Eagle Mine. It was Mr. Samuels' normal practice to base this type of transfer on seniority, as was the case when Applicant had transferred to the Eagle No. 1 Mine in November, 1977, over men junior to him in seniority.

7. When Applicant told Mr. Samuels that he would quit before going on the evening shift, Mr. Samuels reminded Applicant that a new section was being prepared and promised Applicant that he would be brought back to the day shift as soon as the new section was ready to begin production. Applicant refused to consider a transfer to the evening shift and as he left the office he stated "I quit." He then went to see Mr. Sublett, who at that time was general manager of Riverton Coal Company and was over Mr. Samuels.

8. Before Applicant arrived at Mr. Sublett's office, Mr. Samuels called Mr. Sublett and told him that Applicant had quit and that they would need a section foreman to replace him. Mr. Sublett responded that he would begin searching for a replacement.

9. Applicant arrived at Mr. Sublett's office shortly after Mr. Samuel's telephone conversation with Mr. Samuels. Applicant went to Mr. Sublett's office to try to convince him to allow Applicant to remain on the day shift or if that was not possible, to promote him to the general mine foreman's position on the evening shift.

Mr. Sublett rejected these suggestions, as another man had been hired to be the general mine foreman on the night shift. He also stated to Applicant that he did not think that Applicant was qualified to be the general mine foreman because "he did not have the company's interest at heart." At that point in their conversation, Mr. Sublett's telephone rang and he motioned for Applicant to leave the office in order to conduct his conversation in private. He did not intend this as a signal that Applicant could not come right back to resume their discussion. Applicant left the mine site before Mr. Sublett got off the telephone. Applicant did not return for work on Monday and did not indicate at any time to either Mr. Samuels or to Mr. Sublett that he would accept a transfer from the day shift to the night shift as a section foreman. He never returned to talk to Mr. Samuels or Mr. Sublett.

10. Mr. Sublett testified that although Applicant was a good section foreman, he had not displayed a willingness to put in the extra time that would be required of a general mine foreman, and that he had found that Applicant tended to arrive at work at the last minute and would leave immediately at the end of his shift.

11. On July 18, 1978, Applicant filed a discrimination complaint. In that complaint, he alleged that the termination of his employment with Respondent was due to three previous complaints he had made concerning mine safety. MSHA investigated the complaint and informed Applicant by letter dated September 25, 1978, of its determination that he had not been discriminated against in violation of section 105(c) of the Act. Although this initial complaint was filed after the 60 day period provided in the Act, MSHA did assert jurisdiction. On October 19, 1978, Applicant filed a complaint with the Commission alleging that he had been discharged on April 7, 1978, for making three safety complaints during the course of his employment with Riverton. This complaint was filed within the time prescribed in the Act for filing a complaint after the Secretary's decision, and is basically the same as the one filed with MSHA.

12. The first safety complaint alleged by Applicant occurred in early 1977. It concerned water accumulations in the No. 35 Mine and the alleged failure of Respondent to provide an up-to-date mine map. Many of the miners in the No. 35 Mine had been concerned that the accumulations of water were coming from the abandoned Hickory Camp Mine that was adjacent to the No. 35 Mine. The situation had first been brought to Mr. Sublett's attention in 1974. At that time, Mr. Sublett hired a surveying company to determine the location of the abandoned mine and plot its location on Riverton's map of the No. 35 Mine. The survey showed that active mining in the No. 35 Mine was more than 2,000 feet away from the old works, this report was announced to the miners, and concern among the miners about water accumulations diminished. Mining in that section ceased, and was later resumed in December 1975.

13. After mining resumed in that section, water again began to accumulate. Almost every employee voiced concern to Mr. Sublett about the water. As mining continued, concern about the water accumulations and the accuracy of the survey grew. In early 1977, Applicant expressed his concern to a Federal mine inspector regarding the faintness of the drawing of the Hickory Camp Mine on Riverton's No. 35 Mine map. The inspector asked Mr. Sublett to prepare a new edition of the map that would show more clearly the location of the abandoned works. Mr. Sublett immediately complied with this request and no citations were issued by MSHA on the basis on Applicant's complaint.

14. The employees remained concerned about the accumulations of water and Mr. Sublett authorized the drilling of bore holes in the direction of the abandoned works in May 1977. These test bore holes were not required by MSHA because the map showed that mining was about 1,400 feet from the old works and section 317(b) of the Act required drilling bore holes only if the active workings were within 200 feet of abandoned areas. Once the drilling was begun, all comment concerning the water ceased.

15. The second incident alleged by Applicant as the basis for his discrimination complaint occurred on August 4, 1977, when the No. 35 Mine was not operating due to a strike. Applicant and another employee, Mr. John Westfall, were instructed to conduct a preshift examination and to bring a roof bolter to the mouth of the mine. After making the preshift examination, Applicant attempted to call the portal and report that the mine was clear, but no one answered his call. In the meantime, Mr. Sublett and general mine foreman John Bickford had entered the mine and proceeded to a portal on the other side of the mountain.

16. On their return through the mine, they met Applicant and Mr. Westfall and told them that two State mine inspectors were at the portal issuing notices of violation to the men for entering the mine without filling out the fireboss book. Applicant complained to the State inspector that there was no one on the surface to answer his call.

17. No one was cited for this alleged violation involving the communications section of the Act (Applicant's complaint). The State inspectors cited the men for entering the mine without completing the fireboss book. These notices of violation were subsequently withdrawn by the West Virginia Department of Mines.

18. The third incident relied on by Applicant in his complaint occurred at the Eagle No. 1 Mine in late November or early December of 1977. On this occasion, Mine Superintendent Samuels and a Federal mine inspector were in Applicant's section. The inspector remarked that loose coal needed to be cleared away from the ribs and

Mr. Samuels instructed the Applicant to get the scoop and clean the area. When the inspector and Mr. Samuels returned, they found that Applicant had instructed his men to clean the ribs with shovels rather than with the scoop.

19. Mr. Samuels asked Applicant why he had not gotten the scoop. Applicant replied that he felt that the scoop was dangerous because it lacked a canopy. Mr. Samuels stated that the use of the scoop was less dangerous because the operator would be about 8 feet from the rib when he was using a scoop, while miners using a shovel to clean the coal around the rib would be directly under the rib.

20. The inspector agreed with Mr. Samuels' assessment and Applicant finally agreed to use the scoop. The operator had not been required to install a canopy on this scoop by MSHA because it was used outby the last open break. The scoop was used daily on every shift. Applicant made no further mention of this incident and Mr. Sublett was not informed that it had occurred.

21. The first two incidents occurred at the No. 35 Mine prior to Applicant's transfer to the Eagle No. 1 Mine. Applicant admitted that these incidents were "water under the bridge" at the time of his transfer in November 1977. The third incident occurred shortly after his transfer. There was no proof that Mr. Samuels' decision to transfer Applicant to the evening shift as a section foreman was related in any way to these three incidents. I find the decision to transfer Applicant was based on the fact that he had the least seniority of the day shift section foreman. This was the normal practice for job reassignment of foreman at Respondent's mines.

22. The preponderance of the evidence shows that Applicant refused to accept the decision by the mine superintendent to transfer to the evening shift and informed him that he would quit rather than accept the transfer, and he did quit. He then went to Mr. Sublett to see if he could get a promotion to general mine foreman or to be allowed to remain on the day shift.

23. Mr. Sublett would not agree to overrule Mr. Samuels' decision and Applicant gave no indication that he was willing to work on the night shift as a section foreman.

24. I find that Applicant's charge that he was discharged because of prior safety complaints is without merit. There was no evidence in the record to show any relationship between the three above-mentioned incidents allegedly involving Applicant's safety complaints and either the decision by management to transfer him to the night shift or management's decision to accept his resignation when he refused to accept the transfer.

DISCUSSION

Section 105(c)(1) of the Act protects miners from discrimination in retaliation of their exercise of safety complaint rights. Applicant has failed to show that he was discriminated against in any manner. Respondent's decision to transfer him to the night shift was based upon an established, non-discriminatory seniority practice. Applicant gave his employer an ultimatum that either he be allowed to stay on the day shift or he would quit. The employer accepted the resignation.

There is no evidence that either Respondent's decision to transfer Respondent or its decision to accept this resignation was in any way related to his prior safety and health complaints. The evidence instead supports the finding that the transfer was based on Applicant's mine seniority, as was his earlier transfer to the Eagle No. 1 Mine over other section foremen at the No. 35 Mine who were laid off when production was curtailed.

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and the subject matter of the above proceeding.
2. Respondent's Eagle No. 1 Mine and No. 35 Mine, at all pertinent times, were subject to the provisions of the Act.
3. Applicant has failed to meet his burden of proving that Respondent violated the Act as alleged.
4. The application for review should therefore be DENIED.

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

ORDER

WHEREFORE IT IS ORDERED that the application for review is DENIED and the proceeding is DISMISSED.


WILLIAM FAUVER, JUDGE

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

AUG 30 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VINC 78-395-P
Petitioner	:	A/O No. 11-00599-02026V
v.	:	
	:	Orient No. 6 Mine
FREEMAN UNITED COAL MINING	:	
COMPANY,	:	
Respondent	:	

DECISION

Appearances: Leo J. McGinn, Esq., and Sidney Salkin, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Harry M. Coven, Esq., Gould & Ratner, Chicago, Illinois, for Respondent.

Before: Judge Cook

I. Procedural Background

On June 7, 1978, a petition was filed by the Mine Safety and Health Administration (MSHA), for the assessment of civil penalties against Freeman United Coal Mining Company for alleged violations of 30 CFR 75.301-4 and 30 CFR 75.400. This petition was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1977 Mine Act). An answer to the petition was filed on June 19, 1978.

On June 27, 1978, MSHA filed a motion for production of documents, and the motion was granted by an order dated July 19, 1978.

Notice of hearing was given on July 14, 1978. The hearing was held between September 26 and September 29, 1978, in Chicago, Illinois. Representatives of both parties were present and participated.

At the hearing on September 26, 1978, stipulations were entered into as to both the history of violations and the annual tonnage produced at the Orient No. 6 Mine and the annual tonnage produced by the Freeman United Coal Mining Company.

When the hearing opened on September 26, 1978, settlement proposals were submitted in the following cases involving the same parties: Docket Nos. VINC 78-392-P, 78-393-P, 78-394-P, 78-396-P, 78-397-P. Settlement proposals were not submitted in either VINC 78-49-P or the present case. It was proposed that the record be consolidated as to all cases, but the Respondent preferred to maintain separate transcripts of the proceedings in Docket Nos. VINC 78-49-P and the present case. The record of the September 26, 1978, settlement negotiations was consolidated with the separate records of the remaining companion cases.

The hearing on the alleged violations in the present case was held between September 27 and September 29, 1978. A schedule for the submission of post-hearing briefs was agreed upon at the conclusion of the hearing, but a delay in the receipt of transcripts and other problems experienced by counsel forced a revision of the briefing schedules. Freeman filed its posthearing brief on March 21, 1979. MSHA filed no post hearing brief. No reply briefs were filed.

II. Violations Charged

<u>Order No.</u>	<u>Date</u>	<u>30 CFR Standard</u>
1 KLW	01/26/77	75.301-4
1 LDC	01/03/77	75.301-4
1 LDC	01/19/77	75.301-4
1 LDC	01/12/77	75.400

III. Evidence Contained in the Record

A. Stipulations

Stipulations were entered into by the parties on September 26, 1978, and are set forth in the findings of fact, infra.

B. Witnesses

MSHA called as its witnesses Kirby L. Webb and Lonnie D. Conner, MSHA inspectors.

Freeman called as its witnesses Peter Helmer, the mine superintendent at the Orient No. 6 Mine; Loren Boner, a foreman at the Orient No. 6 Mine; Wesley Helm, an underground supervisor at the Orient No. 6 Mine on the date of the hearing, and a face boss at the Orient No. 6 Mine on January 3, 1977; Ray E. Williams, a foreman at the Orient No. 6 Mine; and Paul Budzak, Freeman's safety director.

C. Exhibits

1. MSHA introduced the following exhibits into evidence:

(a) M-1 is a copy of Order No. 1 LDC, January 12, 1977, 30 CFR 75.400.

(b) M-2 is a termination of M-1.

(c) M-3 is a copy of Order No. 1 KLW, January 26, 1977, 30 CFR 75.301-4.

(d) M-4 is a termination of M-3.

(e) M-5 is a copy of Order No. 1 LDC, January 3, 1977, 30 CFR 75.301-4.

(f) M-6 is a termination of M-5.

(g) M-7 is a copy of Order No. 1 LDC, January 19, 1977, 30 CFR 75.301-4.

(h) M-8 is a termination of M-7.

2. Freeman introduced the following exhibits into evidence:

(a) 0-1 is a diagram of a Lee Norse miner.

(b) 0-2 contains calculations made by Inspector Webb representing the method used by him to compute mean air velocity.

(c) 0-3 is a drawing.

(d) 0-4 is a copy of a production sheet for January 3, 1977.

(e) 0-5 contains background information pertaining to Paul M. Budzak.

(f) 0-6 is a copy of a preshift examiner's report dated January 12, 1977.

(g) 0-7 is a copy of a preshift examiner's report dated January 11, 1977 (afternoon shift).

(h) 0-8 is a copy of another preshift examiner's report dated January 11, 1977 (day shift).

3. Exhibit 1 is a diagram pertaining to an air velocity measurement experiment described by Paul M. Budzak during the course of his testimony.

4. Exhibit 3 is a computer printout listing the history of paid penalty assessments at the Orient No. 6 Mine. (This exhibit was received into evidence during the September 26, 1978, settlement proceedings, and is filed in Docket No. VINC 78-49-P).

IV. Issues

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

V. Opinion and Findings of Fact

A. Stipulations

During the settlement proceedings on September 26, 1978, the parties entered into the following stipulations:

(1) The Orient No. 6 Mine produces approximately 1,159,797 tons of coal per year (Tr. 5, 11-September 26, 1978).

(2) The Freeman United Coal Mining Company produces approximately 6,221,752 tons of coal per year (Tr. 5, 11-September 26, 1978).

B. Order No. 1 KLW, January 26, 1977, 30 CFR 75.301-4; Order No. 1 LDC, January 3, 1977, 30 CFR 75.301-4; Order No. 1 LDC, January 19, 1977, 30 CFR 75.301-4

(1) General Findings

Between January 3, 1977 and January 26, 1977, MSHA inspectors Kirby L. Webb and Lonnie D. Conner issued the three subject orders of withdrawal for three separate violations of 30 CFR 75.301-4. Mr. Paul Budzak, the Respondent's safety director, appeared as an expert witness on the subject of air velocity measurement. His testimony refers to all three air violations. The Respondent's post-hearing brief presents questions of law and fact common to all three violations. To prevent undue repetition in the portions of this decision which separately address each order of withdrawal, the common questions of law and fact will be addressed herein.

30 CFR 75.301-4, the applicable mandatory safety standard, states:

Velocity of air; minimum requirements. (a) On and after March 30, 1971, except in working places using a blowing system as the primary means of face ventilation or in working places where a lower mean entry air velocity has been determined to be adequate to render harmless and carry away methane and to reduce the level of respirable dust to the lowest attainable level by the Coal Mine Safety District Manager, the minimum mean entry air velocity shall be 60 feet a minute in (1) all working places where coal is being cut, mined, or loaded from the working face with mechanical mining equipment, and (2) in any other working place designated by the Coal Mine Safety District Manager for the district in which the mine is located in which excessive amounts of respirable dust are being generated by any type of mechanical mining equipment.

(b)(1) Except as provided in subparagraph (2) of this paragraph, and except in working places where combination face ventilation systems are employed, the mean entry air velocity of air passing through any room, entry, crosscut, pillar cut, or other working place shall be established as follows:

(i) The quantity of air, when measured at the inby end of the line brattice or other approved device, shall be determined;

(ii) The cross sectional area of the room, entry, crosscut, pillar cut, or other working place, when measured at or near the inby end of the line brattice system or other approved device, less the cross sectional area of the line brattice system or other approved device, shall be determined;

(iii) The air quantity measured in subdivision (i) of this subparagraph shall then be divided by the remaining cross sectional area as determined in subdivision (ii) of this subparagraph and the resulting quotient shall constitute the mean entry air velocity; thus:
 $[i/ii]=V.$

(2) When longwall mining is used the mean entry air velocity at the longwall face shall be determined by establishing the total intake air quantity delivered to

the longwall face and dividing this quantity by the cross sectional area of the longwall place at the entrance to the longwall face.

(c) The determination of mean entry air velocity may be made either immediately before mining equipment enters a working place or during its presence in such working place and the person making such determination shall use an anemometer or other device approved by the Secretary.

The method of face ventilation employed at the Orient No. 6 Mine consists of 16 inch diameter exhaust tubing installed to within 10 feet of the working face. The tubes are hung from the left side of the roof. They are connected to an exhaust fan which pulls air through the tubing (Tr. 47, 128-29, 170).

30 CFR 75.301-4(b)(1) sets forth the prescribed formula to be used in establishing the mean velocity of air passing through the working place, except where combination face ventilation systems are employed. Combination face ventilation systems were not employed in the subject areas of the Orient No. 6 Mine at the time the three orders were issued. 30 CFR 75.301-4(b)(1)(i) requires a measurement to be taken at the inby end of the line brattice or other approved device to determine air quantity. 30 CFR 75.301-4(b)(i)(ii) requires the cross sectional area of the working place to be determined by taking measurements at or near the inby end of the line brattice system or other approved device, and deducting therefrom the cross sectional area of the line brattice system or other approved device. Under the formula in 30 CFR 75.301-4(b)(1)(iii) mean air velocity is computed by dividing the figure obtained under 30 CFR 75.301-4(b)(1)(i) by the figure obtained under 30 CFR 75.301-4(b)(1)(ii).

The Respondent argues that the inspectors failed to take measurements of the cross sectional area at or near the inby end of the exhaust tubing. (Respondent's Post-Hearing Brief, pp. 23-24, 28). According to the Respondent, the inspectors testified that in each instance the cross sectional measurements were taken behind the mining machine located in the working place at the time. The mining machines used at the Orient No. 6 Mine are 33 feet long (Tr. 115). In each instance, the end of the exhaust tubing was within 10 feet of the face. The Respondent thereupon argues that in each instance the inspector could not have been closer than 20 feet from the inby end of the exhaust tubing when he measured the cross sectional area of the room. "It is apparent," argues the Respondent, "that 20 feet outby the inby end of the exhaust tubing is not the location designated by section 75.301-4(b)(1)(ii) to take the measurement for cross sectional area of the room." (Respondent's Post-Hearing Brief, pp. 23-24). I disagree with the premise that such a measurement point could not be construed to comply with the regulations.

The Interior Board of Mine Operations Appeals (Board) was faced with an analogous set of facts in Zeigler Coal Company, 3 IBMA 78, 81 I.D. 173, 1973-1974 OSHD par. 17,615 (1974). The Board was confronted with an alleged violation of 30 CFR 75.301-3, with the Respondent contending that the required measurements were taken in the wrong location in the mine. The pertinent language of 30 CFR 75.301-3(a) and (b) interpreted by the Board was similar to the pertinent language of 30 CFR 75.301-4(b)(1)(ii) in that it specified only a general location for taking the measurement. The Board concluded that the government could adopt its own interpretation as to the location at which to make the air volume measurement. The Board also noted that no rebutting evidence was present to indicate that moving the point of measurement made any difference in the readings obtained.

Mr. Budzak was present in the hearing room when the inspectors testified as to the method they employed to compute the air velocity (Tr. 202-03). He testified that, in his opinion, the method used by the inspectors was inadequate to the extent that they were not taking into consideration with any degrees of consistency, the areas that should have been deducted in computing the cross sectional area of the working place (Tr. 205-06, 222). He did not indicate either that the measurements were taken too far from the inby end of the tube or that the location at which the measurements were taken affected the accuracy of the results.

Accordingly, it is found that the inspectors took the measurements employed in computing the cross sectional area of the working place at or near the inby end of the approved device within the meaning of 30 CFR 75.301-4(b)(ii).

The Respondent's second position asserts that the cross sectional area of the exhaust tube must be deducted in computing the cross sectional area of the working place. (Respondent's Post Hearing Brief, p. 24). I agree. 30 CFR 75.301-4(b)(1)(ii) specifically states that the cross sectional area of the line brattice system or other approved device shall be deducted in computing the cross sectional area of the working place. According to Mr. Budzak, the 16 inch exhaust tubing has a cross sectional area of 1.39 square feet (Tr. 208, 235).

The Respondent's third position asserts that the cross sectional area of the mining machine located in the working place should have been deducted in computing the cross sectional area of the working place. (Respondent's Post Hearing Brief, pp. 24-25). Mr. Budzak testified that such an adjustment would increase the mean air velocity reading (Tr. 205), and indicated that the failure to make the adjustment resulted in an incorrect mean air velocity computation (Tr. 206).

I disagree with the Respondent's position. The regulation clearly states that the mean air velocity can be determined either

with or without mining equipment in the working place. 30 CFR 75.301-4(c). It is equally clear that only the cross sectional area of the approved ventilation device can be deducted in computing the cross sectional area of the working place. 30 CFR 75.301-4(b)(1)(ii).

The core of Mr. Budzak's disagreement with the measurement procedure used by the inspectors is not that the inspectors failed to follow the regulations by not deducting the cross sectional area of the mining machine. Rather, he disagrees with the formula set forth in the regulations (Tr. 237-38). In effect, the Respondent is requesting the Judge to invalidate the regulation by adopting Mr. Budzak's computation scheme.

Without considering the question as to the power of the Commission to pass upon the validity of such a regulation, it appears that there is no basis for holding that one part of the regulation, relating to the alternative procedures for taking measurements, should be held void since it is part of the overall regulation which sets the minimum velocity requirement. There is no claim that the overall regulation as to velocity is void. Apparently the drafters of the regulation had in mind a need for a maintenance of a minimum velocity of air whether the machinery was in or out of the working place at a given moment during the mining cycle (Tr. 149).

Accordingly, it is found that the inspectors were correct in not deducting the cross sectional area of the mining machine in computing the cross-sectional area of the working place.

The Respondent's fourth argument asserts that the Petitioner failed to establish that the pitot tube and magnehelic gauge are approved air measurement devices within the meaning of 30 CFR 75.301-4(c). (Respondent's Post Hearing Brief, p. 25). I disagree. Both Exhibits M-5 and M-7 indicate that the magnehelic gauge and pitot tube are approved air measurement devices. During the course of direct examination respecting Order No. 1 LDC, January 19, 1977, Inspector Conner indicated that the devices are approved (Tr. 171). Additionally, both inspectors had been instructed by the government as to the correct means of using the tube prior to the issuance of the orders (Tr. 53, 63, 133). The pitot tube and magnehelic gauge, on the one hand, and the anemometer, on the other, are alternative methods for determining air velocity at the face (Tr. 50). In fact, Inspector Webb testified that the pitot tube and the magnehelic gauge are more accurate than an anemometer (Tr. 51).

Accordingly, it is found that with this evidence the Petitioner has established at least a prima facie showing that the pitot tube used in conjunction with the magnehelic gauge is a device approved by the Secretary. In view of that evidence it would be up to the Respondent to prove otherwise if it were possible.

The Respondent's fifth position asserts that, by failing to introduce into evidence the conversion chart used by the inspectors in interpreting the readings from the pitot tube and magnehelic gauge, the Petitioner has failed to meet its burden of proof by omitting an essential evidentiary link. (Respondent's Post-Hearing Brief, p. 25). I disagree.

Zeigler Coal Company, 3 IBMA 78, 81 I.D. 173, 1973-1974 OSHD par. 17,615 (1974), was similar to the present case in that it addressed the government's burden of proof with respect to air violations. In Zeigler, the Board indicated that a notice of violation is sufficient to prove an air velocity violation in the absence of rebutting evidence tending to negate the grounds for the notice's issuance. In Zeigler, the Board noted that there was no indication that the notices were deficient.

In Eastern Associated Coal Corporation, 7 IBMA 14, 83 I.D. 425, 1976-1977 OSHD par. 21,195 (1976), aff'd on reconsideration en banc 7 IBMA 133, 83 I.D. 695, 1976-1977 OSHD par. 21,373 (1976), an operator challenged a sampling system employed by MSHA's predecessor, the Mining Enforcement and Safety Administration (MESA), in computing the average concentrations of alleged respirable dust in the mine atmosphere.

Eastern was a civil penalty proceeding involving 22 notices of violation issued under section 104(i) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 814(i) (1970), for alleged noncompliance with the Secretary of the Interior's respirable dust standards. The Board, citing Castle Valley Mining Company, 3 IBMA 10, 81 I.D. 34, 1973-1974 OSHD par. 17,233 (1974), observed that MESA had established its prima facie case by authenticating the subject notices and introducing them into evidence.

In this decision the Board indicated that an operator can challenge a sampling system used by the government agency charged with securing compliance with the mandatory standards by establishing that the sampling system does not conform with the requirements of the statute or the regulations promulgated thereunder. After addressing the various arguments raised by the parties on appeal, the Board summarized the record as follows:

* * * (1) by placing the subject notices in evidence, MSHA established a prima facie case for its charges that Eastern had exceeded the applicable limit on average concentrations of "respirable dust;" (2) Eastern established by a preponderance of the evidence an affirmative defense--to wit, that each of the subject notices was based upon alleged concentrations of "respirable dust" that in fact included particulates of dust which are not "respirable" as a matter of law under section 318(k) of

the Act and 30 CFR 70.2(i); and (3) MESA's sole rebuttal, namely, that the provisions of section 318(k) were properly ignored as a matter of law, is without merit.

7 IBMA at 46.

The three subject orders of withdrawal (Exhs. M-3, M-5, M-7) were properly identified and authenticated by the issuing inspectors (Tr. 45, 127, 168), and admitted into evidence without objection (Tr. 123, 156, 168-69). Each order of withdrawal sets forth the mean air velocity as computed by each inspector. By properly placing these orders into evidence, the Petitioner established a prima facie case for the respective violations of 30 CFR 75.301-4. Therefore, it was unnecessary for the Petitioner to introduce the conversion charts into evidence in order to sustain its burden of proof. The burden was thereupon placed on the Respondent to produce evidence tending to establish either that the inspectors failed to adhere to established procedures in interpreting the readings acquired through the use of the pitot tube and the magnehelic gauge or that the use of the tube and gauge or the use of the chart violated the statute or the regulations. Although the record indicates that Inspector Conner failed to properly determine the cross sectional area of the working place by failing to deduct the cross sectional area of the exhaust tubing, there is no indication that either Inspector Webb or Inspector Conner incorrectly used the chart in interpreting the readings taken with the pitot tube and magnehelic gauge. Additionally, no probative evidence was introduced to establish that the use of the tube and gauge or the use of the chart was not authorized by the statute or the regulations.

The sole evidence adduced by the Respondent with respect to the chart was through Mr. Budzak's testimony. According to Mr. Budzak, experts in the field of air velocity measurement agree that in order to obtain an air quantity reading, through the use of a pitot tube in an air duct, that is 100 percent accurate, 20 readings must be taken and averaged (Tr. 220-21, 229-35, Exh. 1). The method employed by the inspectors was to take one reading from the center of the exhaust tube (Tr. 67, 101, 235). According to Mr. Budzak, the federal authorities use an 85 percent correction factor to equate this one reading back to a result that is 100 percent accurate (Tr. 235-36). The 85 percent correction factor is reflected in the conversion chart used by the inspectors (Tr. 236). Mr. Budzak then indicated that laboratory testing indicates that a correction factor of approximately 90 percent is needed to equate one reading back to a result that is 100 percent accurate (Tr. 220-21, 224, 236).

However, he stated under cross-examination that it would be correct to say that the foremen testified that the method they used to reach their air velocity figures was essentially the same as the method used by the inspectors (Tr. 223). In fact, he testified that

he would not be the least bit surprised by the fact that Inspector Conner's 44 feet per minute calculation was approximately the same as the 45 or 47 feet per minute calculation computed by the section foreman approximately 5 minutes earlier (Tr. 225). He further stated that he was satisfied with the manner in which his section foremen were taking the readings. The only point he was attempting to make was that the .85 correction factor is disputed by the authorities in the Bureau of Mines who are contending that a .90 correction factor should be used (Tr. 224).

This testimony tends to establish that a dispute exists amongst the authorities in the field of air velocity measurement as to whether the .85 correction factor embodied in the chart is appropriate, but it does not tend to establish that the inspector's used the chart incorrectly. Additionally, the Respondent introduced no calculations using the 90 percent correction factor to establish that its use would materially affect the air velocity measurements.

An additional factor common to all 3 orders of withdrawal is the mathematical formula used to compute mean air velocity. This procedure is set forth as follows:

Step 1:

Cross sectional area of the working place when measured at or near the inby end of the approved ventilation device minus the cross sectional area of the approved ventilation device equals the adjusted cross sectional area of the working place.

Step 2:

The reading taken from the magnehelic gauge is applied to the conversion chart to obtain the corresponding CFM reading for 16 inch tubing.

Step 3:

Divide the CFM reading by the adjusted cross sectional area of the working place to determine the mean air velocity in feet per minute.

(Exh. 0-2, Tr. 52, 55, 87-89, 105-06, 215-16).

2. Order No. 1 KLW, January 26, 1977, 30 CFR 75.301-4

(a) Occurrence of Violation

MSHA inspector Kirby L. Webb visited the Respondent's Orient No. 6 Mine on January 26, 1977 (Tr. 45). At approximately 10:30 a.m.,

he traveled to the 2nd northwest working section and proceeded to the working face of the No. 5 room (Tr. 46). Coal was being cut at the time (Tr. 46, 64). He thereupon took measurements in the 16 inch exhaust tubing used for face ventilation to determine the mean air velocity (Tr. 47, 50, 52, 55).

He used a small drill bit to bore a small hole into the second or third tube outby the working face (Tr. 50, 66). The tubing comes in 10 foot sections (Tr. 48). He inserted the L shaped pitot tube into the opening, and positioned the hole in the end of the pitot tube toward the air flow (Tr. 51-52). He thereupon checked the reading on the manometric gauge, which recorded .5 inches of water (Tr. 52). The manometric gauge was attached to the pitot tube by means of two hoses (Tr. 51). The gauge registers air pressure in inches of water which is then converted to CFM by means of a conversion chart (Tr. 51-52). He then consulted the conversion chart for 16 inch tubing and .5 inches of water and got a reading of 3,357 CFM (Tr. 52, 104). The entry was measured with a steel tape (Tr. 75), and measured approximately 7-1/2 by 14-1/2 feet (Tr. 77). The inspector testified that the cross sectional area of the working place was approximately 107 or 108 square feet after deducting 2 or 3 square feet for the cross sectional area of the exhaust tubing (Tr. 52, 55, 105-06). He thereupon calculated the mean air velocity as 33 feet per minute, (Tr. 55, 96, 97, Exh. M-3). He thereupon issued the subject order of withdrawal (Exh. M-3) citing the Respondent for a violation of the mandatory safety standard embodied in 30 CFR 75.301-4 which requires a minimum mean air velocity of 60 feet per minute in all working places where coal is being cut, mined or loaded from the working face with mechanical mining equipment.

A recomputation, using the precise adjusted cross sectional area of the working place, reveals the following: The working place measured 14-1/2 feet by 7-1/2 feet, yielding a cross sectional area of 108.75 square feet. The 16 inch exhaust tubing has a cross sectional area of 1.39 square feet (Tr. 208, 235). Therefore, the adjusted cross sectional area of the working place was 107.36 square feet. (108.75 square feet minus 1.39 square feet equals 107.36 square feet). 3357 CFM divided by 107.36 square feet yields a mean air velocity of approximately 31.27 feet per minute.

Mr. Loren Boner, a foreman employed by the Respondent, testified that the mining machine in the No. 5 room was broken when he arrived on the section at approximately 8:35 a.m. (Tr. 113, 116). The machine was repaired and returned to service shortly before the order was issued (Tr. 116). Although the miner could not have been operating for more than five minutes prior to the order's issuance (Tr. 117), Mr. Boner confirmed that the miner had cut coal during the 5 minute time period (Tr. 119). The machine was returned to service before Mr. Boner conducted air velocity tests (Tr. 117, 119).

Accordingly, it is found that a violation of 30 CFR 75.301-4 has been established by a preponderance of the evidence in that the mean air velocity was 31.27 feet per minute in a working place where coal was being cut, mined or loaded from the working face with mechanical mining equipment.

(b) Gravity of the Violation

The purpose of adequate face ventilation is to render harmless and remove methane, respirable dust, and other contaminants (Tr. 57).

The explosive range of methane is 5 to 15 percent (Tr. 210). The inspector recorded two-tenths of one percent methane in the subject area (Tr. 56), and opined that he did not consider the reading as indicating a hazardous methane level (Tr. 80). However, both Inspector Webb and Mr. Budzak agreed that it is impossible to predict the level of methane liberation in the face area when coal is being extracted with a continuous miner (Tr. 55-56, 227). The largest quantities of methane are released from a face when coal is being extracted (Tr. 98). The section does not have a history of sudden methane releases (Tr. 114).

According to Inspector Webb, the miners were taking approximately 6 inches of rock from the top with the continuous miner (Tr. 56), conduct which can cause a frictional ignition at the face (Tr. 56-57). Although the inspector stated that an ignition at the face can result in injuries to miners working or operating machinery in the working place (Tr. 57), he classified an occurrence as improbable (Tr. 57).

It should be recalled that the inspector computed the mean air velocity as 33 feet per minute. He considered this reading low because it represented just over half the amount of air required by 30 CFR 75.301-4 (Tr. 96-97). Although he expressed the opinion that the velocity was insufficient to carry away methane and respirable dust (Tr. 57), he admitted a lack of knowledge as to what relationship 33 feet per minute mean air velocity has to exposing a miner to respirable dust (Tr. 97). Although the mean air velocity has been recomputed as 31.27 feet per minute, the inspector's observations are still material to the gravity issue because both mean air velocity figures are approximately the same.

Mr. Budzak, an expert in the field of air velocity measurement and face ventilation, who testified for Freeman, opined that a miner operator was not endangered by respirable dust because he would have been 20 to 22 feet from the dust area (Tr. 212). He stated that the air velocity figure cited by the inspector would not represent a dangerous or hazardous condition to a coal miner (Tr. 213-14).

After consideration of all of the evidence, it is found that the violation was accompanied by a moderately serious degree of gravity.

(c) Negligence of the Operator

The low air velocity was caused by leakage in the exhaust tubing (Tr. 93-94).

Although the preshift reports contained no reference to inadequate air in the subject area of the mine (Tr. 81), the inspector opined that the operator should have been aware of the condition (Tr. 60). The machine was cutting coal when the order was issued (Tr. 60), although coal production could not have been underway for more than five minutes prior to the order's issuance (Tr. 117, 119). Mr. Lorne Boner, the foreman, had not taken air velocity readings prior to commencing coal production (Tr. 116-17).

The inspector testified that when proper air velocity is maintained, a person standing within 30 feet of the inby end of the exhaust tube can often hear a rush of air entering the tube (Tr. 58). The inspector could not hear air rushing into the tube, which indicated to him that either a leakage in the tube or some other problem was present (Tr. 59).

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

(d) Good Faith in Securing Rapid Abatement

The order was issued at 10:40 a.m. on January 26, 1977, and was terminated 20 minutes later (Exhs. M-3, M-4, Tr. 92). The tubing was sealed to ameliorate the leakage problem, and the ends of tubing installed in other working places were moved outby to further reduce the leakage (Tr. 93-94). After abatement, the mean air velocity was computed as 63 feet per minute (Tr. 93). Accordingly, it is found that the Respondent demonstrated good faith in securing rapid abatement of the violation.

3. Order No. 1 LDC, January 3, 1977, 30 CFR 75.301-4

(a) Occurrence of Violation

At 5:25 p.m. on January 3, 1977, MSHA inspector Lonnie D. Conner issued the subject order of withdrawal for a violation of 30 CFR 75.301-4 at the Respondent's Orient No. 6 Mine (Exh. M-5, Tr. 127). The subject order of withdrawal (Exh. M-5) describes the observed "condition or practice" as follows:

The continuous mining machine in the 2nd North-West section, I.D. 067, was loading coal at the face of the No. 8 room, and the face was being ventilated with a mean air velocity of only 28 feet per minute.

The air was measured with an approved magnehelic and pitot tube 20 feet out by the intake end of the exhaust tubing.

The end of the exhaust tubing was approximately 10 feet from the face (Tr. 130).

The inspector drilled a small hole in the rigid exhaust tubing, inserted the pitot tube, read the magnehelic gauge and applied the reading to the conversion chart (Tr. 132). He determined that 3,002 cubic feet of air per minute was passing through the exhaust tubing (Tr. 132). He made measurements to determine the area of the working place (Tr. 132). It measured 14.5 feet by 7.5 feet (Tr. 132), yielding an area of 108.75 square feet. He rounded off this figure to 109 square feet. He divided 3,002 CFM by 109 square feet, and reached a rounded off mean air velocity of 28 feet per minute (Tr. 132). He did not deduct the cross sectional area of the approved ventilation device as required by 30 CFR 75.301-4(b)(1)(ii) (Tr. 139).

A recomputation, using the correct adjusted cross-sectional area of the working place, reveals the following: The working place measured 14.5 feet by 7.5 feet, yielding a cross sectional area of 108.75 square feet. The 16 inch exhaust tubing has a cross-sectional area of 1.39 square feet (Tr. 208, 235). Therefore, the adjusted cross sectional area of the working place was 107.36 square feet. (108.75 square feet minus 1.39 square feet equals 107.36 square feet). 3,002 CFM divided by 107.36 square feet yields a mean air velocity of approximately 27.96 feet per minute.

A question is presented as to whether coal was being "cut, mined or loaded from the working face with mechanical mining equipment" within the meaning of 30 CFR 75.301-4(a). The Respondent contends that the Petitioner failed to overcome the Respondent's evidence that it was not cutting, loading or mining coal at the face when the inspector made his air velocity measurements (Respondent's Post-Hearing Brief, pp. 27, 28, 36). I disagree.

The inspector testified that when he entered the room the continuous miner was at the face and that through asking somebody he determined that five or six shuttle cars of coal had been loaded prior to the issuance of the order (Tr. 129, 135-36, 144). He did not see the actual subject matter that was loaded out (Tr. 144). Although the inspector had no present recollection as to whether he observed coal being loaded out, he concluded that he had observed such activity because an entry in his notes recorded that the miner was loading coal at the face of the No. 8 room (Tr. 144).

Mr. Wesley Helm, a face boss at the Orient No. 6 Mine on January 3, 1977, testified that when he arrived on the section at approximately 4:45 p.m. (Tr. 160), he observed rock from a rock fall,

measuring approximately 1-1/2 to 2 feet in depth, on the floor of the No. 8 room almost the entire distance of the cut (Tr. 161). The roof was not completely bolted (Tr. 162). The extent of Mr. Helm's knowledge as to the activities occurring in the No. 8 room prior to the issuance of the order was revealed on direct examination as follows:

Q. Would you have bolted that roof before you mined any coal?

A. I had to clean up the rocks first. Then it is possible it wasn't completely cut up. There might have been room for a little bit of cutting yet without going out from under the bolts. I am not sure about that.

Q. Well, did you proceed to load out the rock.

A. I had the miner loading the rock in Room 8. I was finishing the bolting in Room 9.

Q. Do you recall Mr. Conner taking his reading for which he issued the order?

A. I didn't see him take the reading. I was over with the bolter crew in Room 9.

Q. Until what time were you loading out rock in Room 8?

A. Until what time?

Q. Yes, sir.

A. I would say until 5:25 when Mr. Conner came in. He says they were loading coal. If so, it had to be they had finished the rock, and they had just hit the face for as much as I could tell. I wasn't there. Like I say, I was with the bolter crew.

(Tr. 162-63).

The foregoing testimony reveals that Mr. Helm was not present in the No. 8 room when the inspector conducted his air velocity measurements. He was uncertain as to precisely when the loading of rock ceased, and his testimony implies that some coal could have been loaded in the inspector's presence.

Exhibit O-4 reveals that the Respondent started loading coal at 8:35 p.m., and that 25 buggies of coal were loaded out (Tr. 165).

Normally, approximately 75 to 80 buggies of coal would be loaded out on a shift, absent cleanup difficulties or mechanical problems (Tr. 165).

However, Exhibit O-4 cannot be read for the proposition that absolutely no coal was loaded prior to the 5:25 p.m. issuance of the order because Mr. Helm's testimony reveals that a small amount of coal could have been loaded a few moments before 5:25 p.m.

Accordingly, it cannot be found that the Respondent has rebutted the evidence adduced by the Petitioner on the question of coal production.

Accordingly, it is found that a violation of 30 CFR 75.301-4 has been established by a preponderance of the evidence in that the mean air velocity was 27.96 feet per minute in a working place where coal was being cut, mined or loaded from the working face with mechanical mining equipment.

(b) Gravity of the Violation

The explosive range for methane is 5 to 15 percent (Tr. 210). Methane is normally liberated in greatest quantity at the face when coal is being cut and loaded (Tr. 135). It is not possible to predict when a large amount of methane will be liberated (Tr. 227). The inspector classified the mine as gassy, but his methane readings revealed no accumulations of methane at the face (Tr. 135). The miner was not cutting coal when the methane readings were taken (Tr. 135).

The inspector classified the violation as serious because the ventilation was not adequate to deal with the liberation of a sizable amount of methane (Tr. 134). According to the inspector, 28 feet per minute mean air velocity is not sufficient to carry coal dust from the face areas without contaminating the mining machine operator's breathing air (Tr. 134).

Mr. Budzak disagreed, stating that the air velocity was sufficient to alleviate respirable dust problems for the miner operator (Tr. 212-14).

After consideration of all of the evidence, it is found that the violation was accompanied by a moderately serious degree of gravity.

(c) Negligence of the Operator

According to Mr. Helm, the preshift reports indicated low air on the return (Tr. 159-60).

The exhaust tubing contained several flexible ribbed, canvas-type couplings that increased the air resistance in the tube (Tr. 130-137). The flexible couplings were being employed to negotiate

corners in lieu of rigid couplings (Tr. 137). The use of the flexible couplings caused the Respondent to experience considerable difficulty in maintaining 60 feet per minute mean air velocity (Tr. 138). Additionally, the Respondent was not sealing the joints between the sections of rigid tubing, thus contributing further to the air velocity problem (Tr. 138).

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

(d) Good Faith in Securing Rapid Abatement

The order was issued at 5:25 p.m. and terminated at 7:45 p.m. (Exh. M-5, M-6, Tr. 127).

The ribbed joints were removed. The ventilation tubing was taken down and reinstalled. The joints were sealed to prevent air leakage (Tr. 138). After abatement, the mean air velocity exceeded 60 feet per minute (Tr. 138).

Accordingly, it is found that the Respondent demonstrated good faith in securing rapid abatement of the violation.

4. Order No. 1 LDC, January 19, 1977, 30 CFR 75.301-4

(a) Occurrence of Violation

At 9:50 a.m. on January 19, 1977, MSHA inspector Lonnie D. Conner issued the subject order of withdrawal at the Orient No. 6 Mine citing the Respondent for a violation of 30 CFR 75.301-4 (Exh. M-7, Tr. 168). The subject order of withdrawal (Exh. M-7) describes the observed "condition or practice" as follows:

Coal was being loaded at the face of No. 22 room of the 15th North-East Section, I.D. 068, and the face was being ventilated with a mean air velocity of only 44 feet per minute. The air was measured with an approved magnehelic gage and pitot tube 20 feet outby the intake end of the exhaust tubing.

The testimony of Mr. Ray E. Williams confirms that two loads of coal were mined prior to the issuance of the order (Tr. 197).

The inspector computed the quantity of the air passing through the exhaust tube as 4,747 cubic feet per minute (Tr. 172). The working place measured 16.5 feet by 6.5 feet (Tr. 170, 173), yielding an area of 107.25 square feet (Tr. 173). He rounded off the area to 107 square feet (Tr. 173), divided 4,747 by 107 and thereby computed the mean air velocity as 44 feet per minute (Tr. 173). In computing the cross sectional area of the working place, he did not make an adjustment for the area of the exhaust tubing (Tr. 181).

A recomputation, using the correct adjusted cross sectional area of the working place, reveals the following: The working place measured 16.5 feet by 6.5 feet, yielding a cross sectional area of 107.25 square feet. The 16 inch exhaust tubing has a cross sectional area of 1.39 square feet (Tr. 208, 235). Therefore, the adjusted cross sectional area of the working place was 105.86 square feet. (107.25 square feet minus 1.39 square feet equals 105.86 square feet). 4,747 CFM divided by 105.86 square feet yields a mean air velocity of approximately 44.84 feet per minute.

Accordingly, it is found that a violation of 30 CFR 75.301-4 has been established by a preponderance of the evidence in that the mean air velocity was approximately 44.84 feet per minute in a working place where coal was being cut, mined or loaded from the working face with mechanical mining equipment.

(b) Gravity of the Violation

The inspector classified the violation as serious because the mean air velocity was insufficient to carry away either a large accumulation of methane or the coal dust suspended in the air (Tr. 173). A face ignition can occur in the presence of a buildup of methane (Tr. 173). The inhalation of coal dust can eventually develop into black lung disease (Tr. 173-174).

It is not possible to predict when sudden releases of methane from the face will occur during the mining operation (Tr. 174, 227). Methane is explosive in the 5 to 15 percent range (Tr. 210). The inspector took methane readings and detected no methane accumulation at the face (Tr. 171). Serious injury or death could result from an ignition (Tr. 174). The number of persons affected would depend upon the magnitude of the ignition (Tr. 174). The crew usually consists of 8 or 9 workmen (Tr. 174).

According to the inspector, the seriousness of the violation would not be diminished by the presence of water sprays on the cutting head of the miner because the spray does not precipitate out all respirable dust (Tr. 182-83).

Mr. Budzak testified that the air velocity as described by the inspector, was sufficient to prevent a coal miner from being exposed to a dangerous or hazardous condition (Tr. 212-14).

After consideration of all of the evidence, it is found that the violation was accompanied by a moderate degree of gravity.

(c) Negligence of the Operator

Mr. Ray E. Williams, the Respondent's foreman, permitted coal production to begin prior to conducting air velocity tests in the

exhaust tube (Tr. 195-97). When he took his readings, he discovered that the air velocity was 45 or 46 cubic feet per minute (Tr. 195). He testified that immediately upon discovering the low air velocity, but immediately before the inspector's arrival, he ordered the machine shut down (Tr. 196). Two loads of coal were mined during the course of approximately 4 minutes (Tr. 197).

According to the inspector, the last 10 joints in the tubing had not been sealed and there was one flexible ribbed, canvas type connecting joint in the line of tubing (Tr. 170). He testified that these characteristics indicated operator negligence because a previous discussion with mine personnel had resulted in a consensus that the tubing joints had to be sealed and the flexible-type couplings removed to assure adequate face ventilation (Tr. 174-75).

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

(d) Good Faith in Securing Rapid Abatement

The order was issued at 9:50 a.m. and terminated at 11 a.m. (Exhs. M-7, M-8, Tr. 168, 175). Abatement was achieved by sealing the joints in the exhaust tubing (Tr. 175). The corrective action increased the mean air velocity to greater than 60 feet per minute (Tr. 175).

Accordingly, it is found that the Respondent demonstrated good faith through securing rapid abatement of the violation.

C. Order No. 1 LDC, January 12, 1977, 30 CFR 75.400

(1) Occurrence of Violation

MSHA inspector Lonnie Conner conducted a regular health and safety inspection at the Respondent's Orient No. 6 Mine on January 12, 1977 (Tr. 7). He walked the Main West North conveyor belt, arriving in the area at approximately 9:30 a.m. (Tr. 7). He issued the subject order of withdrawal at 11 a.m. (Tr. 6, Exh. M-1), citing the Respondent for violating the mandatory safety standard embodied in 30 CFR 75.400 in that accumulations of combustible materials were observed along the Main West North conveyor belt (Tr. 8, Exh. M-1).

Two airlocks were located across the belt travel entry approximately 5 or 6 crosscuts from the point where the subject belt dumped onto the Main North belt (Tr. 8). The two airlocks were approximately 70 to 80 feet apart (Tr. 8). Along that 70 to 80 foot distance, the inspector observed float coal dust, coal dust and loose coal (Tr. 8). Immediately inby the first airlock, he observed large accumulations of coal dust and float coal dust (Tr. 8). The coal dust was 5 to

6 inches in depth where the air going through the airlock was blowing it off the belt (Tr. 9). The float coal dust was not only in the belt entry, but also in the intersecting crosscuts and in the entry immediately north of the belt line (Tr. 8). The inspector testified that the instability of float coal dust renders it difficult to measure (Tr. 10).

The inspector proceeded from the inby airlock, traveling west on the south side of the belt (Tr. 10). He observed accumulations of coal and coal dust 2 to 6 inches deep all along the south side of the belt and underneath the belt up to a point 70 feet outby the tail-piece, a distance of approximately 2,300 feet (Exh. M-1, Tr. 10). The 2,300 feet was determined by taking a measurement off the mine map (Tr. 11).

Float coal dust was observed on rock dusted surfaces along the belt entry and intersecting crosscuts from the inby airlock to the 1,150 foot mark (Tr. 12, Exh. M-1).

All depths were measured with a steel tape (Tr. 10, 11). All areas cited were dry, including the float coal dust (Tr. 12). The inspector testified that the belt was in operation and that the conditions were observed during a production shift (Tr. 7), but he did not recall whether coal was being loaded (Tr. 7).

The witnesses disagreed as to the extent of the combustible accumulations. The inspector described them as deep and continuous (Tr. 250), while the testimony of Mr. Peter Helmer, the mine superintendent, portrays a different picture. Mr. Helmer inspected the area cited in the subject order of withdrawal immediately after its issuance (Tr. 267). He testified that he observed intermittent piles containing loose coal, rock and coal dust along the south side of the belt. According to Mr. Helmer, it was not a continuous spillage (Tr. 267). He indicated that a problem existed in that area of the mine with rock falling from the roof and ribs, a condition that makes any accumulation appear more extensive than if it consists only of coal (Tr. 267). However, he did not mention specifically either the presence or the absence of float coal dust in the subject area, while the inspector indicated that the float coal dust was present for a length of 1,150 feet (Tr. 10, 12).

In Old Ben Coal Company, 8 IBMA 98, 84 I.D. 459, 1977-1978 OSHD par. 22,088 (1977), motion for reconsideration denied, 8 IBMA 196, 1977-1978 OSHD par. 22,328 (1977), the Board of Mine Operations Appeals (Board) held that the presence of a deposit or accumulation of coal dust or other combustible materials in the active workings of a coal mine is not, by itself, a violation.

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

(1) that an accumulation of combustible material existed in the active workings, or on electrical equipment in active workings of a coal mine;

(2) that the coal mine operator was aware, or, by the exercise of due diligence and concern for the safety of the miners, should have been aware of the existence of such accumulation; and

(3) that the operator failed to clean up such accumulation, or failed to undertake to clean it up, within a reasonable time after discovery, or, within a reasonable time after discovery should have been made.

8 IBMA at 114-115.

The Respondent in its post-hearing brief, argues that MSHA has failed to prove that an accumulation of combustible materials existed in the mine's active workings as described in the order of withdrawal (Exh. M-1) (Respondent's Post-Hearing Brief, pp. 52). In support of its position, the Respondent points to the testimony of Mr. Helmer, which indicates that some rock was intermixed with the accumulations, and argues that samples were not taken and analyzed to determine the combustibility of the accumulation. I disagree with the Respondent's theory for two reasons: First, visual observations are sufficient to prove a violation of 30 CFR 75.400. Coal Processing Corporation, 2 IBMA 336, 345-46, 80 I.D. 748, 1973-1974 OSHD par. 16,978 (1973). Second, the rebutting evidence adduced by the Respondent is insufficient to establish that rock was present in sufficient quantities to render the accumulations inert. Accordingly, it is found that accumulations of combustible materials were present in the mine's active workings as described in the order of withdrawal (Exh. M-1).

The second question presented is whether the operator knew or should have known of the accumulation's presence. The preshift report for the examination conducted between 4 a.m. and 8 a.m. on January 12, 1977 (Exh. O-6) states: "The 4th main west belt dirty, 800 to 850" (Tr. 259). This entry refers to the belt cited by the inspector (Tr. 258, 259). According to Mr. Helmer, the entry refers to a 50 foot section of belt located at the second north belt transfer point (Tr. 259). The preshift reports for the 2 previous shifts, (Exh. O-7, O-8) described the subject belt as "safe" (Tr. 260-61). Accordingly, it is found that the Respondent first gained knowledge of an accumulations problem along the subject belt through the entry in Exhibit O-6.

It should be pointed out that the 50 foot area described in Exhibit O-6 is considerably less than the area cited in the subject order of withdrawal (Exh. M-1). However, the evidence is insufficient

to conclude that the Respondent knew or should have known of the more extensive accumulation problem for the following reasons: First, there is no credible evidence in the record to establish that the preshift examination was less than thorough. Second, the inspector's estimate that the condition had existed for more than 16 hours was based on his observations of the extent of the accumulations which he interpreted in conjunction with his belief that the area had been reported dirty on two successive shifts (Tr. 13, 14, 250). Since this misaken belief as to the entries in the preshift reports for the three preshift examinations immediately preceding the order of withdrawal figured conspicuously in his time estimate, his opinion that the accumulations had existed for two shifts cannot be accepted.

The remaining question presented is whether the Respondent failed to cleanup, or failed to undertake to cleanup, the accumulations within a reasonable time after discovery. As to the issue of "reasonable time," the Board stated:

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

8 IBMA at 115.

The Board further stated:

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

8 IBMA at 111.

Only meager evidence is contained in the record as to the Respondent's cleanup plan. The extent of the inspector's knowledge on this subject is revealed in the following question-and-answer dialogue with counsel for the Petitioner:

Q. Do you know if there was a plan in effect for the cleaning up of the spillage along these belt lines?

A. No, sir; not at that time, I didn't.

Q. Had you ever seen a plan?

A. I had never seen a plan.

Q. Have you any idea that there was a plan in effect for cleanup at the mine?

A. No, sir; not as far as belt lines go. I am unaware of any cleanup plan for belt lines. The only thing that I know is that men were assigned to some belts, some belts they weren't, and men were assigned as needed, as determined by the mine manager, to certain belts.

Q. Do you know if men were regularly assigned to this belt?

A. No, I don't.

(Tr. 15).

Furthermore, at the time the order was written, the inspector made no attempt to determine whether a cleanup program existed for the belt (Tr. 36). The sole evidence adduced by the Respondent as to cleanup procedures at the mine was Mr. Helmer's statement that belt cleaners are regularly assigned to clean belt transfer points at the start of every shift (Tr. 265).

Proof of the inadequacy or nonexistence of a cleanup plan is central to the question of whether the operator failed to cleanup, or failed to undertake to cleanup, the accumulations of combustible materials within a reasonable time after the operator knew or should have known of their existence. Therefore, such proof must be adduced by MSHA as part of its prima facie case if the inadequacy or nonexistence of the cleanup plan is to provide the corner stone for a finding on the question of reasonable time. This conclusion is reinforced by the Board's statement that proof of the absence of a regular cleanup program, coupled with the presence of any accumulation, might be sufficient to support a violation of 30 CFR 75.400. Old Ben Coal Company, 8 IBMA 196, 198, 1977-1978 OSHD par, 22,328 (1977). (denying

the government's motion for reconsideration of the decision in Old Ben Coal Co., 8 IBMA 98). The Board's statement indicates that the burden of going forward with the evidence is borne by MSHA.

Both the inspector's uncertainty as to the existence of regular cleanup procedures for belts and the limited extent of his knowledge as to the assignment to cleanup men to the belts, cannot be deemed sufficient proof of the absence or inadequacy of a regular cleanup program.

However, this conclusion does not end the inquiry, because the crux of a violation is the failure to cleanup, or undertake to cleanup, the accumulations within a reasonable time after discovery. The above-mentioned proof as to the cleanup plan, although an effective gauge of the reasonable time factor, is by no means the exclusive method of proof. All that Old Ben requires of an inspector before issuing a citation is that he make a sound judgment as to when the operator acquired knowledge of the accumulation's presence and whether cleanup commenced within a reasonable time.

Although the inspector's background and training qualified him as an expert, he gave no affirmative opinion on the reasonable time issue. However, sufficient inferences can be drawn from his testimony to assess his thoughts thereon.

The inspector testified that he checked the preshift books, and that the belt had been recorded "dirty" for two shifts prior to his inspection (Tr. 13). The only notations that he took from the books were the approximate footage marks for the recorded accumulations (Tr. 13). According to the inspector, the belt was recorded dirty from the 790 foot mark to the 818 foot mark and, to the best of his recollection, from the 800 foot mark to the 880 foot mark, (Tr. 13), which totaled approximately 107 feet (Tr. 14).

The inspector testified that, in his opinion, the coal and coal dust accumulated "over a period of time" (Tr. 13). Although he never expressed a firm opinion as to the approximate duration of the accumulations existence, he did state on direct examination that the preshift books indicated that the condition had existed on two previous shifts (Tr. 14). He interpreted this as meaning in excess of 16 hours (Tr. 14). On redirect examination, the inspector testified as follows:

Q. Mr. Conner, did visual observations which you had before you have any bearing on your determination on how long the accumulations had been there?

A. Yes, sir, they did.

Q. Could you explain how?

A. The accumulations were deep and continuous. In one particular spot, there was more than three ton of coal in one particular spot along the belt that had got there from some kind of dumping. So, I assume, going along with the pre-shift examiners' books, it is my opinion that the accumulations had been there for some time.

(Tr. 249-50).

The inferences drawn from the above-quoted passage, coupled with the inspector's recollection as to the time periods covered in the relevant preshift reports, lead to the conclusion that the depth and extent of the accumulations were interpreted in conjunction with the preshift reports in reaching the conclusion that the coal and coal dust had been present for "some time." These factors evidently led to the conclusion that the accumulations had been present for 2 shifts; i.e., more than 16 hours.

However, the preshift reports do not support the inspector's time estimate. The report for the preshift examination conducted between 4 a.m. and 8 a.m. on January 12, 1977 (Exh. 0-6) recorded a spillage problem on the subject belt between "800" and "850," a distance of 50 feet (Tr. 259). The reports for the preshift examinations conducted between 8 p.m. and 12 midnight on January 11, 1977 (Exh. 0-7) and between 12 noon and 4 p.m. on January 11, 1977 (Exh. 0-8) reveal no accumulations problems along the subject belt (Tr. 260-61). Thus, a key factor in the inspector's equation has been proven in error.

The second factor involves the presence of cleanup personnel along the subject belt. The inspector testified that he saw three workmen and one boss performing cleanup operations at the tailpiece of the subject belt (Tr. 37). He assumed that they had started at the beginning of the shift, an assumption confirmed by the testimony of Mr. Helmer (Tr. 266). The inspector opined that more than 25-manshifts would have been required to remove the accumulations and rock dust along the belt (Tr. 15).

It can be inferred from the above-mentioned factors that they provide the basis for whatever conclusion the inspector reached as to whether the operator failed to undertake cleanup procedures within a reasonable time after the operator acquired knowledge of the accumulations' presence. Since the time element, a key factor in this equation, was in error, and since the inspector failed to make a determination as to the cleanup procedures at the mine, it cannot be found that he made a sound judgment as required by Old Ben as to how long the accumulations had existed and whether the operator failed to cleanup, or undertake to cleanup, the accumulations within a reasonable time.

In fact, the evidence reveals that the Respondent first became aware of an accumulations problem along the subject belt through the preshift report recording the findings of the preshift examination conducted between 4 a.m. and 8 a.m. on January 12, 1977 (Exh. 0-6). The Respondent assigned men to the belt at the beginning of the 8 a.m. to 4 p.m. shift on January 12, 1977, in response to the entry in Exhibit 0-6 (Tr. 265-66), and these men were in the process of cleaning the belt during the inspector's inspection tour (Tr. 37, 279).

As the Board observed in Old Ben: "When a coal mine operator undertakes, or is engaged in, cleaning up accumulations of combustible materials, he is then certainly not permitting such accumulations." 8 IBMA at 112.

Since the Respondent commenced cleanup procedures immediately upon learning of the problem, it cannot be found that it was permitting them to accumulate. Furthermore, this interpretation of the facts is also set forth in the Respondent's post-hearing brief (Respondent's Post-Hearing Brief, pp. 53-54). It is interesting to note, although it is not a controlling factor, that the Petitioner did not submit a reply brief indicating any disagreement with this interpretation.

Accordingly, it is found that the Petitioner has failed to establish a violation of 30 CFR 75.400 by a preponderance of the evidence.

D. History of Previous Violations

Exhibit 3 is a computer printout of Office of Assessment records containing the history of paid penalty assessments for the Orient No. 6 Mine, beginning January 1, 1970 and ending October 28, 1976.

The history of previous violations during the 21 months prior to January 19, 1977, as reported in Exhibit 3, is contained in the following chart:

30 CFR Standard	Year 1	Year 2	Totals
	(12 Months) 1/20/75-1/19/76	(9 Months) 1/20/76-10/28/76	
All sections	181	133	314
75.301-4	0	2	2

(Note: All figures are approximations)

E. Appropriateness of Penalty to Operator's Size

The Freeman United Coal Mining Company produces approximately 6,221,752 tons of coal per year. (Stipulations embodied in transcript

of the September 26, 1978, proceedings, pp. 5, 11). The Orient No. 6 Mine produces approximately 1,159,797 tons of coal per year. (Stipulation embodied in transcript of the September 26, 1978, proceedings, pp. 5, 11).

F. Effect on Operator's Ability to Continue in Business

Counsel for the Respondent concedes in his post-hearing brief that assessment of the maximum penalty will have no effect on the Respondent's ability to continue in business (Respondent's Post-Hearing Brief, pp. 33, 38, 42, 56). Furthermore, the Interior Board of Mine Operations Appeals has held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

(1) Freeman United Coal Mining Company and its Orient No. 6 Mine have been subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969 and the 1977 Mine Act during the respective periods involved in this proceeding.

(2) Under the Acts, the Administrative Law Judge has jurisdiction over the subject matter of and the parties to this proceeding.

(3) MSHA inspectors Kirby L. Webb and Lonnie D. Conner were duly authorized representatives of the Secretary of Labor at all times relevant to the issuance of the orders of withdrawal which are the subject matter of this proceeding.

(4) The violations charged in Order No. 1 KLW, January 26, 1977, 30 CFR 75.301-4; Order No. 1 LDC, January 3, 1977, 30 CFR 75.301-4; and Order No. 1 LDC, January 19, 1977, 30 CFR 75.301-4 are found to have occurred as set forth in Part V, supra.

(5) Petitioner has failed to establish a violation of 30 CFR 75.400 as relates to Order No. 1 LDC, January 12, 1977.

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

VII. Proposed Findings of Fact and Conclusions of Law

Freeman United Coal Mining Company submitted a post-hearing brief. MSHA submitted no post-hearing brief. Such brief, insofar as

it can be considered to have contained proposed findings and conclusions, has been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalty Assessed

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

<u>Order No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Penalty</u>
1 KLW	01/26/77	75.301-4	\$ 800
1 LDC	01/03/77	75.301-4	600
1 LDC	01/19/77	75.301-4	600
			<u>\$2,000</u>

ORDER

Respondent is ORDERED to pay the civil penalty in the amount of \$2,000 assessed in this proceeding within 30 days of the date of this decision.

IT IS FURTHER ORDERED that the petition be DISMISSED as relates to Order No. 1 LDC, January 12, 1977, 30 CFR 75.400.


John F. Cook
Administrative Law Judge

Issued:

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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ARLINGTON, VIRGINIA 22203

AUG 30 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. NORT 79-14-P
Petitioner	:	A.C. No. 44-03613-03001
v.	:	
	:	No. 5-A Mine
HARMAN MINING CORPORATION,	:	
Respondent	:	Docket No. NORT 79-51-P
	:	A.C. No. 44-04559-03001
	:	
	:	No. 3-A Mine
	:	
	:	Docket No. NORT 79-57-P
	:	A.C. No. 44-03614-03004V
	:	
	:	No. 5-B Mine

DECISION

Appearances: Leo J. McGinn, Esq., Office of the Solicitor, Department of Labor, for Petitioner; Robert M. Richardson, Esq., and Peter Richardson, Esq., Richardson, Kemper, Hancock & Davis, Bluefield, West Virginia, for Respondent.

Before: Administrative Law Judge Michels

On June 19, 1979, a hearing was held in Abingdon, Virginia, for the above-captioned cases, at which both parties were represented by counsel. At this hearing, the following action was taken on the cases:

NORT 79-14-P

In this case, counsel for Petitioner moved to withdraw its petition for the assessment of civil penalties regarding the alleged violations docketed therein (Tr. 4). 1/ As grounds for the proposed action, Petitioner stated the following:

1/ Exhibit "A" of the petition for assessment of civil penalties listed 13 other citations besides the four involving 30 CFR 75.1710. At the hearing, Petitioner advised that these other alleged violations had been settled at the assessment conference level and that the petition had been incorrect in so listing these (Tr. 6-7).

Your Honor, Docket Number NORT 79-14-P consists of four alleged violations of 30 CFR 75.1710 issued in April, 1978. As the result of facts uncovered prior to this hearing, MSHA moves at this time to withdraw the petition for the assessment of civil penalty for each of these violations on the basis that a technical investigation of the mine conducted on May 5th, or prior to May 5th and reported to MSHA on May -- excuse me, on May 5, 1976, a petition for modification under Section 30, seeking to be released from the requirements of 75.1710. The technical investigation was subsequently conducted, in which it was determined that the mining heights ranged from thirty-seven to forty-eight inches, and that the mine consisted of undulating bottom conditions. In each of the instances involved in the allegations here, they were terminated on the basis that the application was withdrawn and the mines permanently sealed and abandoned in May, 1978. In a letter from the district office to the MSHA national office, received in May, 1978, this was verified, and that the bottom conditions were undulating and the mine mining heights did range below the minimum forty-two inches requirement. Because of the large number of petitions for modification which were currently under consideration and because of the change over from the Interior to Labor, the decision was not issued until November, 1978, at which time the petition was granted and the proceeding was dismissed. Further investigation with the MSHA field office determined that at the time violations were issued, the mine mining heights did range to a low of thirty-seven inches, below the mandatory requirement of forty-two inches, and the bottom was continually undulating at that height. And that MSHA felt it could not sustain the burden of proof required under 75.1710, and moves to withdraw the petition.

(Tr. 4-6).

Respondent did not object to the proposed action. Thereupon, a decision was issued from the bench granting Petitioner's request to withdraw its petition for assessment and the proceeding was dismissed (Tr. 8). I hereby AFFIRM that ruling.

NORT 79-51-P

This docket involves one violation of 30 CFR 75.400. The regulation provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

After considering the evidence which both parties placed on the record, a decision was issued from the bench which sets forth findings

as to the fact of the violation and the statutory criteria. This decision from pages 84-91 of the transcript, with grammatical corrections and some changes where the text is garbled, is set forth below:

The first matter that I have to decide, of course, is whether or not there was a violation and if there is found to be a violation, then I have to make findings from this record on the criteria in order to assess the appropriate penalty.

Much was made of the Old Ben decision, that is, 8 IBMA 98, (1977), and that was by the Board of Mine Operations Appeals, which reviewed the case coming up under the Coal Mine Act. Now then, I have had the opportunity to review this particular decision and I won't say that the words that I am now going to state are the last word on the matter, but here is my belief: that the decision lays down certain criteria for the inspectors to follow and I am going to hold at least for now, that this is to be discretionary and advisory. I don't say it isn't important, that maybe the inspector should follow that and perhaps by failing to follow it, maybe the Secretary takes the risk of not sustaining its case when it gets into court. But I am going to hold that the mere fact of the failure to follow that would not mean that MSHA could not have a sustainable case.

There are, however, certain other requirements which the Board has laid down and I believe those are requirements which I would have to follow in assessing this case. And the first one is that an accumulation of a combustible material existed in the active workings and on electrical equipment in the active workings of a coal mine. My finding on that is that there were combustible accumulations here. I will give you the reason. First, I want to state, however, that none of these findings at this point bear on either the seriousness or the degree of negligence. I am dealing merely with the fact of the violation. My reason for finding that there was an accumulation is based on the inspector's testimony. I accept his testimony that there was relatively fine dust in an area, covering I guess anywhere from ten by ten to fifteen feet around the tail piece, and up to three inches in depth and tapering off. I don't suppose that this would be a large accumulation, but I think that it is a pile of dust and it did accumulate. The mere fact that he didn't see it accumulating at the time, I don't think is important. It was there and it had accumulated, at least insofar as whether it was an accumulation within the meaning of the Act. And certainly it was of a combustible material since it was coal and coal dust.

The next requirement -- this is again according to the Board -- that the coal mine operator was aware and by exercise of due diligence and concern for safety of the miners should have been aware of the existence of such accumulation. To continue on the question of awareness, my finding would be that the operator should have been aware of this. And I will try to give my reasons here if I can. The inspector was the only witness that testified that saw or was near this accumulation until after it was cleaned up. Nobody testified as to having seen it beforehand, so the question of awareness it seems to me, depends to a degree on how long it was there. And whether, therefore, it should have been observed by the preshift inspector or onshift inspector or other people that normally inspect this area of the mine. And the length of time that it was there again depends to a degree on the inspector's testimony, or at least I accept his testimony as to the fact that it had been there for sometime and probably before that shift. In other words, it existed from the prior shift.

I recognize that others did testify there was a cleanup plan and it was regularly complied with and that, and the presumption being then, therefore, that the accumulation could not have been there that long. But you see, nobody else had been at the site around this mine. The inspector made his evaluation based on the looks of it, the way in which it appeared to him that it had accumulated. It is possible that even though there is a plan in effect, it had been cleaned up within a reasonable time. It is difficult to say. But there was nobody that testified that he was there on that shift or on the end of the last shift and that it wasn't there at that time. Any evidence like that I think would have certainly been sufficient to rebut the inspector's testimony, but on the basis of the record as I have it, I believe that I would have to give his testimony weight and I accept that and I find, therefore, that it was there for sometime and should have been noted.

Furthermore, even if the plan was being followed there was an accumulation that, again accepting the inspector's testimony, did create a potential hazard. It was up to the belt. It is true it wasn't over the roller, but it was up to the belt. It was being kicked up. If it was up that far, that it could be blown into the air, it seems to me that it certainly had the potential for a hazard there. So, therefore, even if the plan was being followed on a daily basis, it appeared to me, and I would say it was the kind of thing that should have been cleaned up on an accelerated basis or sometime during the course of the shift.

That brings us down then to the third and final requirement which the Board has laid out, and that is the operator failed to clean up the accumulation or failed to undertake to clean it up within a reasonable time after discovering or within a reasonable time after discovery should have been made. I believe I have already addressed that in my comments on how long the accumulation apparently existed I have made some notes here, and this may be somewhat repetitive, but it is based on the inspector's testimony that this was comparatively fine dust even if not float coal dust, and it was being picked up by the belt. It was an accumulation that would need to be cleaned up, perhaps on an accelerated basis more than once a shift or without waiting for the normal once-a-shift cleanup. I recognize that Mr. O'Quinn did testify that this was not, in his view, a real bad accumulation and it probably would not need to be cleaned up, in his view, until it had reached the roller, in which case it would create a hazard. And I am going to take that kind of testimony into account as far as the gravity is concerned, but I do not give his testimony on that a great deal of weight otherwise insofar as the hazard involved is concerned. I conclude, therefore, that, that this accumulation did constitute a violation of 30 CFR 75.400.

The criteria for the assessment of a penalty are: First, the history. As I previously indicated, there is no indication of a significant history, and I would so find. There apparently was no other violation that would involve this particular standard.

Secondly, the company is small, based on the production of 700 tons a day and the employment of twenty or so miners.

Good Faith. The mine operator did abate this violation promptly and in good faith. Based on G-2, which the inspector wrote, the coal dust and fine coal was removed promptly.

There is another criterion; that is, whether the fine that would be assessed here would affect the operator's ability to continue in business and there was nothing adduced which would indicate any reasonable fine here would affect the operator's ability. So I so find.

There are two other criteria; the first is negligence and I have already somewhat indicated, I believe, my finding on that in my finding on the fact of the violation. I believe that this operator should have known of an accumulation which has been shown had existed for sometime. I accept the statements that an oral cleanup plan was in

effect and was being followed and so therefore, it would mean this might have been an oversight or somehow it was overlooked. Also, I recognize the fact that there is some dispute that this was a pile or an accumulation which needed to be cleaned up immediately. It is to that extent, perhaps, partly a judgment proposition, and so I would find as the result, small or little negligence in the failure to clean up.

Insofar as gravity is concerned I would find, based on the fact that it was a comparatively small accumulation, that it was not serious. I don't believe that I have ever had a matter in which an accumulation was of this relatively small size. I don't mean for a moment that this doesn't mean it couldn't be hazardous, depending on the conditions. And I have already indicated that I accept the inspector's statement. He was there and he saw it and he was able to make the judgment on the spot and I accept that. But I do have to agree that it was not very large, and as indicated by the fact that it was cleaned up in a very short time.

(Tr. 84-91).

Respondent was assessed a penalty of \$25 for the violation (Tr. 92). I hereby AFFIRM the above decision and penalty and it is ORDERED that Respondent pay the sum of \$25 for the violation in NORT 79-51-P within 30 days of the date of the issuance of this decision.

NORT 79-57-P

This docket involves one violation of 30 CFR 75.200 which covers roof-control programs and plans. The pertinent portion of this standard reads:

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.

On the basis of the evidence which Petitioner and Respondent introduced at the hearing, a decision was issued from the bench which sets forth findings as to the fact of the violation and the statutory

criteria. This decision found on pages 124-130 of the transcript, with grammatical corrections and some changes where the transcript is garbled, is set forth below:

The first point that I must decide, obviously, is whether or not there was a violation as alleged. In looking at this, I tend to agree with Mr. Richardson, but don't go as far as he goes. Most of this can be reconciled between the testimony of Mr. Owens and the inspector, with the exception of Mr. Owens' testimony that he was there. Now, I don't know how I can reconcile that; the testimony just differs. [While] Mr. Tipton did say it was to the best of his knowledge, it was possible that he at the moment was not aware of the presence of Mr. Owens. In any event, as I see it, I just think the problem here is that we are looking at a sketch that's not to scale, so it puts everything out of proportion. [See Exhibit G-3.] If we could see this as it really was, with that to scale, with the actual feet there, and the roof bolter, the size of the roof bolter, how it went in that entry and how far it would extend out, and so forth, I think I would get a much different perspective. That's the kind of perspective I want to try to elaborate on here, and it will be the basis for my decision. The basis for it, of course, is the area of unsupported roof. I think it is admitted that's not to scale and surely was smaller than this, and therefore, nearer the right rib.

The testimony certainly is [not] conflicting on a number of points; that is, that a bolt was being installed. There was a bolt being installed; there were no jacks set. The witnesses agree on that. The jacks were laying down, located away from the face. There is some real difference as to where exactly they were located, but they were not set. It could have been that those jacks were originally set at that face possibly across or maybe just on the left side, I don't know. They could have been set -- that's one possibility -- and then removed because of the plan to come in there and to drill an additional hole in that unsupported roof. But I don't look at the allegation that narrowly. It said safety posts were not installed. I look upon that as being not set then, with miners working under unsupported roof. There was no disagreement there was some unsupported roof. And if there are miners working in there, the plan, as I understand it, would have required those [jacks] to be set and not only to be set but to remain there, until -- that is, as long as somebody was working in that area.

Now, we come to the second [point], and there is an apparent disagreement as to where that roof bolter was located and what the bolter was actually doing. And this

is where the lack of scale really throws us. It is possible that both men were saying the same thing; that what looked to the inspector like bolting in that series, might have been [bolting] the brow, or vice versa. We don't exactly know what it was, but the inspector did testify in spite of all that, [that] this bolter -- and this is the important thing -- was working there in nonsupported roof, where the jacks were not located; that is, not set where they should have been set. That they had been there originally, I don't think is too material. If the roof bolter was working there and bolting a brow and was still close up to that unsupported roof, it was, as I would construe it, a violation of that plan, which requires those jacks to be installed. Furthermore, [they are] to remain there in sequence as I read the plan, until the permanent supports are put in.

I grant you there possibly could be some variation for this additional bolting that was contemplated, but it certainly wouldn't permit a roof bolter to work in there. So, weighing all the testimony and attempting as I can to reconcile the two different witnesses who testified, I simply find that there was a bolting taking place without the jacks being in place at the time and leaving a miner in nonsupported roof. This, I think is in violation of the plan, and therefore, in violation of 30 CFR 75.200.

That leads me to the assessment of the penalty and various criteria which I must find on that. The first item, of course, is the history and the print-out does show [prior] citations or notices, starting in 1976 and up through March of 1978, six prior violations of 30 CFR 75.200. These could be, of course, any kind of a roof violation, not necessarily the failure to set the posts. It does show some history, however, and I will take that into account. The company, based on the testimony, is a small company, producing 400 tons daily and employing twenty-eight men. There is no evidence on the effect of the operator's ability to continue in business, based on the penalty to be assessed. So, I need not take that into account. There was no evidence that I recall of good faith efforts to achieve rapid compliance. I will find -- well, I will just leave that then as a neutral or a criteria on which there's no particular evidence to take into account.

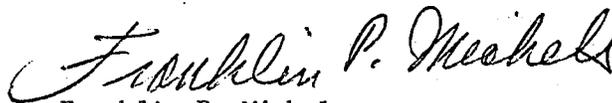
That leaves the seriousness, as well as the negligence. But insofar as the seriousness is concerned, this does constitute a roof violation. And I believe it is practically self-evident that a failure to follow that plan, and particularly working under nonsupported roof, is a serious violation and I find it to be serious.

The negligence -- on this counsel for the Government has asked me to find ordinary negligence -- I think there is some negligence in the sense that the mine foreman and the section foreman were there and were aware or should have been aware of what was going on. There is a difficulty, though, and it may be that there was good faith involved in what you could describe as [an] unusual or different situation and they were attempting to adjust it; namely, a portion of the roof that was, that was scaling, I guess, was the term, or falling and had to be bolted or blasted out. So in connection with that deviation, you might say, from the plan, they were not actually following it strictly, but had left an area of roof unsupported. I find some negligence at least, if not ordinary negligence. So, I believe that completes then, all of the criteria.

(Tr. 124-130).

The Government had previously asked for \$1,000.00 for this alleged violation which I found to be a violation. I think this amount, in the circumstances as revealed here in the course of this hearing now, is somewhat high. In reviewing the amounts assessed for the previous citations of roof control, they are considerably lower, and the highest being \$150.00 payment. I recognize, though, that we are dealing now with a history and in that context I believe that a somewhat higher assessment is justified. So, I would add another \$100.00 to that, making the assessment for this violation \$250.00.

I hereby AFFIRM the above decision. It is ORDERED that Respondent pay the sum of \$250 for the violation in NORT 79-57-P within 30 days of the date of the issuance of this decision.



Franklin P. Michels
Administrative Law Judge

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AUG 30 1979

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. DENV 78-565-P
Petitioner	:	A.C. No. 24-00108-02004V
v.	:	
	:	Big Sky Surface Mine
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION DISMISSING PROCEEDING FOR FAILURE TO PROSECUTE

Petitioner, on July 23, 1979, filed a motion to vacate the citation and withdraw the petition for assessment of civil penalty, stating: "There is insufficient evidence to establish a violation of the aforesaid mandatory standard [30 CFR 77.701] as the only witness who can testify as to the alleged violation is unavailable to testify at the hearing as scheduled." 1/

No written response to such motion was filed by Respondent, although Respondent indicated at the phone conference that it would have no objection.

This matter was first scheduled for hearing on April 6, 1979, by Judge Malcolm P. Littlefield and thereafter rescheduled and continued twice. Finally, after assignment to the undersigned, it was

1/ The full text of the motion is as follows:

"Now comes the Secretary of Labor, by his undersigned counsel, and moves the Commission, pursuant to 29 CFR 2700.15, Interim Rules of the Federal Mine Safety and Health Review Commission, to vacate the citation issued and withdraw his petition for assessment of civil money penalty, and states the following grounds in support thereof:

"1. On January 5, 1978, Notice No. 6-JWO was issued to Respondent for an alleged violation of 30 CFR 701 of Part 77.

"2. On March 15, 1978, the Federal Mine Safety and Health Administration, Office of Assessments, assessed a penalty in the amount of \$1,000.00 for the aforesaid alleged violation.

"3. There is insufficient evidence to establish a violation of the aforesaid mandatory standard as the only witness who can testify as to the condition of the alleged violation is unavailable to testify at the hearing as scheduled."

set for hearing on July 24, 1979. The parties were orally notified of this rescheduling on June 28, 1979, and the notice was issued on June 29. A subsequent request by Respondent, Peabody Coal Company, for a continuance was denied.

Thereafter, on the morning of Thursday, July 19, 1979, only a few days before the hearing scheduled for Tuesday, July 24, Mr. Jerry Atencio, speaking on behalf of the Denver Solicitor's Office, telephoned to advise my law clerk that the citation involved in this proceeding was going to be vacated by MSHA. Upon being informed of this proposed action, at my direction, my clerk telephoned Mr. Atencio to advise him to contact Respondent to determine if there was an objection to the proposed action; and, if there was no objection, to file a motion requesting approval for the vacation and listing grounds for the action. Since the scheduled hearing date of July 24 was imminent, Mr. Atencio was directed that such motion be filed in an expedited manner. The use of a teletype machine or Federal Express was suggested.

Late in the day on July 19, Mr. Atencio telephoned and advised my law clerk of the following: (1) MSHA would not make an appearance at the scheduled hearing; (2) messages had been left at the operator's attorney's office advising him of the proposed action, but no personal telephone contact had been made with that party's attorney; (3) the Solicitor's Denver Office does not have a teletype machine and he interpreted the Commission's Interim Procedural Rules not to require that any motions be filed by expedited means such as Federal Express; and (4) the grounds for the vacation would be the unavailability of MSHA's witness and that the Solicitor had determined that there was insufficient evidence to support the citation.

The following day, Friday, July 20, after it was determined that the operator had not been informed of the proposal to vacate, a telephone conference was arranged. Mr. Thomas Gallagher, counsel for the operator and Mr. Atencio were advised that morning of the conference. However, when the conference was held, since Mr. Atencio was not then available, the Solicitor was represented by Mr. Thomas Korson.

Mr. Korson stated, upon questioning by the Presiding Judge, that the citation was to be vacated for no specific reason, but that it was not for any reason of scheduling. Since this information was different from that which Mr. Atencio had provided the night before, the Presiding Judge further inquired specifically if the vacation had anything to do with the unavailability of a witness. Mr. Korson again affirmed that it had nothing to do with a witness or the scheduling. When invited to state why the matter was being vacated, Mr. Korson replied that no reasons would be given and that it was the prosecutor's privilege to vacate in his own discretion. Mr. Gallagher, speaking for the Respondent, advised that he would not oppose the vacating of the citation. With that understanding, the Presiding Judge stated that upon receipt of the motion and the Respondent's answer, the proceeding would be dismissed.

Thereafter, on July 23, 1979, the Petitioner filed its motion to vacate and withdraw, quoted above.

On August 6, 1979, I issued an order for the Petitioner to show cause why the proceeding should not be dismissed for failure to prosecute. As pointed out in such order, it was obvious that the representations made by the Solicitor's representative to the Presiding Judge at the phone conference were completely at odds with the statements made in the motion to vacate and to withdraw. At the conference, I was told that the withdrawal was not due to the scheduling, while the motion to withdraw explicitly states that the reason was the insufficiency of evidence, as the only witness who could testify was unavailable for the hearing as scheduled.

The situation, as viewed at that time, was summarized in the show cause order as follows:

The Petitioner had ample opportunity to file with the court a motion for continuance if it, in fact, had a serious problem of witness availability. It confined its contacts wholly to oral communication with my law clerk, and, in fact, did not raise this matter except orally at almost the very last moment. I arranged for a prehearing conference for the express purpose of determining whether there might be a problem because of the scheduling. As indicated, I was told affirmatively, at least twice, there was no such problem. In these circumstances, I believe that the Solicitor or his representative not only misrepresented the situation to the Presiding Judge, but otherwise engaged in such mishandling and lack of interest in prosecuting this case that it appears it should be dismissed for a failure to prosecute.

Petitioner's response, filed August 13, 1979, is quoted in full below:

NOW COMES the Secretary of Labor, by his undersigned counsel and responds to the Order to Show Cause entered in the above entitled case on August 6, 1979.

1. The chronology of the July 19, 1979 discussions does not fully and clearly set forth the substance of conversations had between Mr. Atencio and Judge Michels' law clerk that the Secretary of Labor would be filing a motion to vacate the citation and withdraw his petition for assessment of civil money penalty. The basis for the aforesaid motion, as stated to the law clerk, was insufficiency of evidence due to the unavailability of the Secretary's only witness. Mr. Atencio informed Judge Michels' law clerk that the unavailability of the witness was of a permanent nature. Judge Michels' law clerk inquired of Mr. Atencio

whether the operator had approved of the Secretary's proposed motion. Mr. Atencio informed the law clerk that the Secretary had not sought such approval prior to filing, as he believed the determination to file such a motion to lie with the Secretary, Mr. Atencio informed the law clerk that attempts had been made to contact Thomas Gallagher, attorney for the respondent but were to no avail; that Mr. Atencio contacted respondent's counsel's office in Denver, Colorado and was informed all the respondent's attorneys were unavailable. Mr. Atencio left a message with the aforesaid office of the Secretary's filing of his motion and requested respondent's counsel to return the call if there were any questions and for respondent to similarly file its objections, if any. At this juncture the law clerk stated the Secretary must file his motion by July 20, 1979, and should have it served either by having it teletyped, delivered by Federal Express, or hand delivered by the Washington, D.C. Office of the Solicitor. At this time Mr. Atencio informed the law clerk that he would discuss this with the Associate Regional Solicitor. In a second conversation with Judge Michels' law clerk, Mr. Atencio informed him that the aforesaid motion would be filed in accordance with 29 C.F.R. § 2700.12, by first class mail; that another attempt to contact respondent's Denver counsel had been made to attempt to inform him of the Secretary's motion; and that the Office of the Solicitor was unwilling to expend the funds to dispatch an attorney to the hearing scheduled on July 24, 1979, in light of the fact that the only witness was not available and thus there was no evidence to support prosecution of this action. On Thursday afternoon Mr. Atencio received a call from an attorney (other than Mr. Gallagher or Mr. Linn) in respondent's Denver office acknowledging receipt of Mr. Atencio's earlier advice that the motion to vacate had been filed and informing him that respondent had no objection.

2. In the morning of July 20, 1979, Mr. Atencio received a call from Judge Michels' law clerk inquiring whether Mr. Atencio would be available for a conference call with Judge Michels and Mr. Thomas Gallagher, sometime in the afternoon of the same date. No specific time could be arranged for the conference call at this time due to the fact that it was unknown when Mr. Gallagher would be available. Mr. Atencio informed the law clerk at that time that he (Mr. Atencio) would be in the office during the afternoon. The conference call was placed when Mr. Atencio was on his lunch hour.

3. On July 20, 1979, Mr. Korson was aware that the Judge's secretary had been attempting to arrange a conference call with Mr. Atencio and counsel for the operator.

One of our secretaries informed him (Mr. Korson) (during the temporary absence of Mr. Atencio) that the Judge wished to schedule a conference call. Since Mr. Atencio was not available Mr. Korson assumed that Mr. Atencio would be available at a particular time of day, and he told the secretary to inform the Judge's secretary that the call could be scheduled later in the day at a time when Mr. Atencio would be available. Unfortunately, Mr. Atencio was not available at the time that Mr. Korson had indicated. Under the circumstances, he substituted for Mr. Atencio. In doing so, he was trying to accommodate the Judge. He was not fully informed of the underlying facts, and perhaps should not have spoken for the Secretary in this matter, for that reason.

4. The aforesaid response and the Order to Show Cause clearly indicate there was a misunderstanding in that the Secretary's burden in establishing his case at any hearing would depend on the testimony of one witness who was unavailable and would continue to be unavailable. The unavailability of this witness was not for any reason of scheduling; otherwise the Secretary would have filed a motion to postpone the hearing for a date certain, had the availability of this witness been related to a scheduling problem.

5. Based on the aforementioned grounds, the Secretary respectfully submits his motion be granted, as there is no evidence on the record of any lack of interest or diligence in his prosecuting this matter.

The response has not only failed to clarify matters, it has added further confusion. In the prehearing conference, the Presiding Judge was told one thing, i.e., that the withdrawal was not caused by the scheduling; in the motion to withdraw another, i.e., that it was caused by the scheduling; and finally, in response to the show cause order, the Presiding Judge was told both things. In his response, the Solicitor claims now that the witness is unavailable and will continue to be unavailable and, thus, there is no evidence to support prosecution of the action. This expressly contradicts his earlier formal motion which states that the witness "is unavailable to testify at the hearing as scheduled." Yet, the Solicitor in his response requests that such motion be granted. He has not corrected, withdrawn or explained the reason for the statement in his motion; he simply reaffirms his request that the Judge grant it. Clearly, the motion cannot be granted as it stands, because it states the petition is withdrawn for the reason of scheduling, whereas that is expressly contradicted by other statements made by the Solicitor.

This contradiction is not a minor matter. If the petition is withdrawn because of the insufficiency of proof due to the permanent

unavailability of a witness, it is a matter over which the Presiding Judge has little, if any, control. If, however, the withdrawal is due to the unavailability of a witness at a hearing as scheduled and that witness would be otherwise available, then it is a matter over which the Judge has some control and responsibility. In his discretion, he may decide to grant the motion based on all the circumstances, or he might attempt to reschedule the hearing. If the Judge is misinformed as to the actual reason for the withdrawal, he is deprived of the opportunity to exercise his function in deciding the issue.

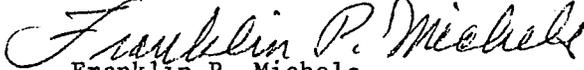
The Solicitor states in his response to the show cause order that the unavailability of the witness was not for any reason of scheduling and that the witness was unavailable and would continue to be unavailable. If this is true, then there is more than a mere misunderstanding. The motion to vacate and withdraw could not be more explicit, stating that the witness could not appear at the hearing as scheduled. That statement has not been withdrawn or corrected.

The Presiding Judge has given the Solicitor every opportunity to clarify his position, first, by a phone call conference, and later by means of an order to show cause. All efforts have resulted in failure. The outcome has been nothing more than the submission of contradictory and obfuscatory statements.

In these circumstances, I can say with all honesty that I do not know which of the Solicitor's assertions to believe. There are too many areas creating doubt. For instance, if the reason for withdrawal is, in fact, the insufficiency of evidence, why did Mr. Atencio file a motion stating that the reason was the unavailability of a witness to testify at the hearing as scheduled? Mr. Korson appeared to know that scheduling was not the reason for withdrawal, though strangely and inexplicably, the Solicitor now claims he was not fully informed. If Mr. Atencio, in filing his motion, meant that the witness was permanently unavailable, why has not he corrected the record, or at least explained why he stated something different? Was the phrasing in the motion, in fact, deliberate with an intent to deceive? Furthermore, because no reason or even a hint of a reason was given for the asserted "unavailability" or the "permanent unavailability" of the witness, there is no basis in the record for determining the accuracy of such representations.

It should be clear that with the record in the state as described above, there is no way that I could grant the motion to vacate and withdraw for the reason stated therein. In my order to show cause, I indicated that I believed the Solicitor or his representative not only misrepresented the situation to the Presiding Judge, but otherwise engaged in such mishandling and lack of interest in prosecuting this case, that it should be dismissed for a failure to prosecute. Nothing in the response has dissuaded me from that view; rather, I am now fully confirmed in it. Accordingly,

This proceeding is hereby DISMISSED for failure of prosecution.


Franklin P. Michels
Administrative Law Judge

Distribution:

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

AUG 21 1979

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PITT 77-50-P
Petitioner : A.C. No. 36-00840-02004 F
v. :
: Cambria Slope No. 33 Mine
BETHLEHEM MINES CORPORATION, :
Respondent :

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor,
U.S. Department of Labor, for Petitioner;
T. W. Ehrke, Esq., Bethlehem Mines Corporation,
Bethlehem, Pennsylvania, for Respondent.

Before: Judge Charles C. Moore, Jr.

On April 16, 1976, Denton R. Bodenschatz, a shuttle car operator for Bethlehem Mines Corporation, was killed in the No. 5 air course of the 3 Right 6 South section of the Cambria Slope No. 33 Mine in Cambria County, Pennsylvania. The decedent who was operating the No. 50 shuttle car immediately prior to the accident, was in the process of hauling coal to the conveyor belt tail when the said shuttle car became stuck. Then, for a reason that remains unknown, the shuttle car lurched forward causing the decedent, who had partially moved out from under the protection of the canopy, to be squeezed between the belt tail jack and the shuttle car frame.

Immediately following the accident, the Mining Enforcement and Safety Administration of the Department of the Interior (hereinafter referred to as MESA), 1/ initiated an investigation. As a result of the investigation, MESA issued citations and on August 24, 1977, filed a petition for assessment of a civil penalty in accordance with section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 819(a). 2/

1/ As of March 9, 1978, by operation of law the Mining Enforcement and Safety Administration was transferred to the Department of Labor where it became the Mine Safety and Health Administration.

2/ The corresponding section under the Federal Mine Safety and Health Act of 1977, P.L. 95-164, 91 Stat. 1290, is section 110(a).

The Respondent filed an answer on September 15, 1977, denying the violation alleged in the petition for assessment of civil penalty. A hearing on the merits was held in Ebensburg, Pennsylvania, on January 23 and 24, 1979.

Notice of Violation No. 1 CMB, April 19, 1976

The notice of violation, which bears the closest relation to the fatality, alleges a violation of 30 CFR 75.1725(a). It states:

The standard shuttle car, Joy 21SC Serial # ET11903, in the 3 Rt. 6 South Section (056) was not maintained in a safe operating condition, in that coal was permitted to accumulate around the tram lever and control linkage and the machine was not taken out of service to completely correct the condition. This violation was observed during an investigation of a fatality and was a contributing factor in the fatality.

Section 75.1725(a) of Title 30, Code of Federal Regulations states: "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."

Government Exhibit 2 contains the following description:

DESCRIPTION OF ACCIDENT

On Friday, April 16, 1976, the crew for 3 right 6 south section entered the mine at about 7:55 a.m. and arrived in the face area approximately 25 minutes later. Robert Wolfe, section foreman, made an examination of the section. Owen D. Croyle, roof-bolter helper, had been assigned to operate the standard shuttle car this shift because the regular operator was absent. He first had to clean an accumulation of loose coal 12 to 18 inches deep which had been left by the previous shift from the operator's cab of the standard shuttle car. Denton R. Bodenschatz, shuttle-car operator, began cleaning loose coal which had been left by the previous shift from around the belt tail while William Perkins, miner helper, and Andrew Orlovsky, miner operator, pulled down loose ribs. After Wolfe completed the examination of the section, production activities began as Orlovsky used the continuous miner to push spilled runway coal into the pillar split of the pillar between Nos. 6 and 7 air courses. One car of coal was loaded and dumped. When the second shuttle car of coal was hauled to the belt tail, Croyle had difficulty positioning the shuttle car to dump because of coal spillage. While maneuvering the shuttle car, it became stuck

near the inby corner of the intersection. Bodenschatz, who had been cleaning coal spillage at the belt tail with Michael Korinchak, roof bolter, attempted to free the shuttle car but was unsuccessful. It was necessary to use the continuous miner to pull it free. Bodenschatz then volunteered to haul a load since Croyle had been having trouble. When he arrived at the face, he had difficulty in positioning the shuttle car under the tail of the continuous miner because the tram control was sticking. He and Perkins cleaned the cab out and found that the helper spring on the forward tram pedal had very little tension on it. They repositioned the spring in another hole which provided more tension. Bodenschatz tried the pedal several times and commented that it was working all right. The shuttle car was loaded, and he drove it toward the belt tail to dump the load. As he approached the corner of the intersection of No. 5 entry, the operator's side of the shuttle car was too close to the rib and the top of the canopy began to wedge against the roof. Wolfe, who was behind the check curtain assisting William Clarke, mechanic, with repairs to the Kersey tractor, was then informed of the trouble in trying to position the shuttle car to unload. Wolfe evaluated the situation and instructed Bodenschatz to back out and to swing wider. Bodenschatz tried to start the car but could not do so. He told Croyle, who was standing between the shuttle car and the rib, that the shuttle car would not start. Croyle noticed that the shuttle-car light was on and he also heard the control circuit contactors close but without the pump motors starting. An instant later, the shuttle car unexpectedly lunged forward in the direction opposite to that intended until it struck the belt tail. As the shuttle car traveled the short distance, Bodenschatz's head was squeezed between the top frame of the shuttle car and the belt tail jack. Croyle ran forward and used the panic bar to deenergize the shuttle car. First-aid materials were obtained and first-aid care was administered. Bodenschatz was transported to the intensive care unit at Conemaugh Valley Memorial Hospital, Johnstown, Pennsylvania. He died at 8:25 p.m. the same day of a severe head injury.

Petitioner alleges that at the time of the accident, there were coal accumulations around the control levers which interfered with the normal operation of the machine (Tr. 199, 200) and Respondent had knowledge of these accumulations. Petitioner introduced Exhibit Nos. 16 and 17 which depicted the coal and coal dust accumulations mixed in with the blood of the victim on the floor of the cab (Tr. 22, 28). Although these pictures were taken on April 19, 1976, 3 days after the fatal accident, they allegedly are an accurate representation of the floor of the cab immediately following the

accident. Petitioner asserts that these exhibits clearly illustrate that the blood of the victim fell on the coal, which would imply that these accumulations were already present at the time of the accident (Petitioner's Brief, p. 13, Tr. 22, 23, 157, 158).

I find that these pictures (Exh. Nos. 16 and 17) cannot be accepted as a true and accurate portrayal of the cab of the shuttle car as it looked immediately following the accident. In the first place, the two exhibits show the brake pedal in different positions. Someone moved it before the second picture was taken. Also, Inspector Biesinger testified that the initial investigation revealed that the helper spring was found disconnected following the accident, whereas Exhibit Nos. 16 and 17 show the helper spring to be connected (Tr. 127). Mr. Ford, director of safety and environmental health for Bethlehem, who was one of the first persons to arrive at the scene of the accident, stated in reference to observing the helper spring in Exhibit Nos. 16 and 17, "Well, it looks like it's attached, but that's not what I saw" (Tr. 391). The preceding evidence clearly establishes that the shuttle car had been tampered with subsequent to the accident and prior to taking the photographs. Petitioner made no attempt to explain this discrepancy in its evidence.

It is also noted that Petitioner had some difficulty with determining the exact date when the pictures were taken. The evidence presented by both parties establishes that the pictures were taken on April 19, 1976, 3 days after the accident, yet, towards the end of the hearing, after one of Respondent's witnesses had testified that the pictures were not taken on April 16, Mr. O'Donnell, after consulting with one of the inspectors who had previously testified, proceeded to ask "You heard them testify they did take the pictures on the 16th?" (Tr. 403).

The evidence also indicates that the MESA inspectors may not have made their first examination of the cab until April 20, 1976 (Tr. 55). 3/

3/ At page 55 of the transcript, Inspector Biesinger states: "Let me make a correction there. I believe it was on April 20 that we removed the shuttle car and made the first examination of the cab and control levers." At page 134 of the transcript, he states: "[W]e found it stuck in the forward position upon examining it on the day of the accident." At page 175 of the transcript, Inspector Koba states: "When he did find the shuttle car immediately after the accident, the tram lever was jammed in the forward position which would make it tram towards the tailpiece." The only definite conclusion I can make from this testimony is that at some time between April 16, the day of the accident, and April 20, the inspectors found the tram lever jammed in the forward position, although according to Inspector Biesinger, that tram lever was merely in a full throttle position because he was of the opinion that the forward and reverse tram switch was in another part of the cab.

If so, that was even after the pictures (Govt. Exh. Nos. 16 and 17) were taken and I have already rejected them as accurate depictions of the accident scene. Respondent's witness, Mr. Ford, however, had observed the cab of the shuttle car on April 16, 1976, shortly after the fatal accident. Mr. Ford and two other management personnel were the first persons to arrive at the scene of the accident during the initial investigation. Mr. Ford testified that he observed a large pool of blood, approximately 15 to 17 inches in diameter, on the deck of the shuttle car (Tr. 378). He observed that the deck did not contain one handful of dirt (Tr. 378). In response to Government Exhibit Nos. 16 and 17, Mr. Ford stated, "Without a doubt that is not the condition I observed. This definitely shows coal all around the place. Whenever I looked at it, why, hey, it was perfectly clean" (Tr. 381).

Mr. Ford explained that immediately after he had observed the shuttle car, all investigative personnel were ordered out of the accident area so that additional roof support could be installed (Tr. 400). He estimated that a MESA inspector could not have examined the cab for at least 1-1/2 hours while the roof support was being installed (Tr. 401). He speculated that coal may have been spilled into the cab during the installation of roof supports.

Petitioner does not refute the fact that Mr. Ford examined the shuttle car at least 1-1/2 hours before the MESA investigation team. I use the phrase "at least" because of the sworn testimony that the inspectors first examined the cab 4 days after the accident on April 20. Petitioner's only explanation as to why Mr. Ford observed a clean cab was that the witness was upset and therefore he imagined the cab was clean (Petitioner's Brief, p. 13).

I accept Mr. Ford's testimony and find that the shuttle car was, in fact, clean immediately after the accident. It should also be noted that the cab of the shuttle car was cleaned immediately before it was loaded at the face and during the same run in which the fatal accident occurred (Govt. Exh. No. 2, p. 5, Tr. 52). If the tram pedal was stuck at the time of the accident, it was not because of accumulations of coal and coal dust in the cab of the shuttle car.

The Petitioner alleges that the operator should have known that the helper spring was malfunctioning. (See Continuation Sheet No. 3 of Govt. Exh. No. 7.) The helper spring is not the principal means of returning the tram pedal to the neutral position. The pedal is otherwise spring-loaded to return to the neutral position and the helper spring is attached so as to assist the other spring in returning the tram to neutral. The operator's foot works against both the main spring and the helper spring when he trams the shuttle car. The Petitioner argues that Bethlehem personnel had knowledge of the defective helper spring because "the time of the accident was not the first time this spring had detached so Bethlehem personnel had been warned before the accident and knew that the helper spring was stretched." (See Petitioner's Brief, p. 10.).

The evidence does not establish that the operator had any knowledge concerning the defective helper spring. On the contrary, the evidence establishes that only the decedent, Denton R. Bodenschatz, and the miner helper, William Perkins, were aware of the difficulty with the helper spring (Govt. Exh. No. 2, p. 5, Tr. 29, 30, 86, 87). ^{4/} When Inspector Biesinger was asked whether Mr. Perkins had informed either the mechanic or the section foreman that the spring had been repositioned, he responded, "I don't recall" (Tr. 134). Mr. Perkins was not called as a witness. Furthermore, Robert Wolfe, who was the section foreman at the time of the accident, testified that at no time during his shift, up to the time of the accident, was he advised of any problems with the shuttle car (Tr. 352).

As to the tram pedal, Petitioner asserts that Respondent knew or should have known that it was sticking. At the time the shuttle car was examined, whether on the 16th or 20th, the tram lever was found in the forward position, the opposite direction the decedent intended to travel (Govt. Exh. No. 2, p. 6). It was thus concluded by MESA investigators that the tram lever was stuck in this position at the time of the accident.

Petitioner had two inspectors testify about the alleged sticking tram pedal. Their testimony concerning the location of the tram pedal on the machine and the operation of the machine was inconsistent. Inspector Biesinger repeatedly testified that the left foot pedal operates the brake and the right foot pedal operates the tram pedal (Tr. 27, 125, 159). He also testified that there was a switch on the control panel that had to be turned to the forward or reverse position before one could go backwards or forwards in the shuttle car (Tr. 27, 34, 69, 150). Conversely, Inspector Koba indicated that the tram lever is always on the left side and the brake lever is on the right (Tr. 169, 170, 191-193). He also testified that the directional control switch is connected to the tram pedal and the switch is automatically activated upon depressing the tram pedal (Tr. 168-172, 192, 194). Inspector Koba destroys his own credibility, however, when he states in reference to the brake and tram pedals, "Whether it was the right or left foot, I don't--I could be wrong on that. But the tramming lever was the one that was connected to the control switch" (Tr. 194).

The testimony of the two inspectors that they found the tram control was stuck in the forward position is rendered somewhat less than convincing by the fact that neither was sure which pedal was the tram control. But assuming that the tram lever was, in fact, stuck at the time of the accident investigation, the evidence does not establish conclusively that it was stuck at the time of the accident.

^{4/} Andrew Orlovsky may have also been aware of it (Tr. 36), but he was not called as a witness.

There is no way of actually knowing whether the tram lever was stuck in the forward position at the time of the accident (Tr. 134). It must be remembered that the decedent had difficulty in starting the shuttle car, and although it is obvious that his head must have been out from under the canopy in order for him to have been injured as he was, there is no evidence as to the position of the rest of his body at the time of the accident. This is understandable because the only light available was from a miner's cap lamp and unless one of the witnesses was shining his lamp directly at the decedent, he would have no way of knowing his position. But there is the possibility that the decedent's foot was on the forward tram lever and that the lever did not become stuck in that position until the shuttle car crashed into the tailpiece. I am accepting as a fact, despite the discrepancies in the evidence, that after the accident the tram lever was found stuck in the forward position. While I think it is unlikely that Mr. Bodenschatz kept his foot on the tram lever until the collision with the tailpiece, I cannot find as a fact that the accident did not happen that way. I think it is more likely that the tram pedal was stuck in the forward position immediately prior to the accident and that the decedent somehow managed to start the shuttle car while the tram pedal was stuck in that position. But again, the evidence is not sufficiently convincing for me to find as a fact that that was the way the accident happened. Assuming it did happen that way, however, in order to prevail, the Government must show that Respondent knew or should have known of the malfunctioning equipment.

Hearsay evidence does indicate that the tram pedal had been stuck on several prior occasions (Tr. 60, 61). Inspector Biesinger testified that management, upon being notified of the problem with the tram lever, did not exercise reasonable care in alleviating the problem (Tr. 112-114). Inspector Koba testified that the condition (the sticking tram lever) existed for quite a length of time, and when it was reported, the foreman did not act expeditiously (Tr. 201). Inspector Bernazzoli was of the opinion that the machine should have been taken out of service the first time the tram lever had been reported sticking (Tr. 225).

Nowhere does Petitioner establish one concrete example where management, upon being informed of the tram lever problem, did not take corrective action. In fact, the evidence points to the opposite conclusion. Joe Stauski, section foreman of the shift preceding the accident, testified that he observed the shuttle car being greased and cleaned quite a few times during his shift (Tr. 305). Lynn Baum, section foreman on a different shift testified that upon being informed of a problem with the tram pedal, he had the mechanic and the shuttle car operator clean and grease around the pedals (Tr. 372). Robert Wolfe, the section foreman of the shift on which the fatal accident occurred, testified that he was not aware of any problems with the operation of the shuttle car during the shift (Tr. 343, 352, 353).

The testimony of the MESA investigators indicates that the operator had inadequately repaired the tram lever. Yet, there is no evidence presented by Petitioner revealing what action should have been taken by the operator, other than cleaning and greasing the pedals, to adequately repair the sticking pedal (Tr. 231). In fact, in the abatement notice, MESA condoned the greasing of the tram control levers as the appropriate method of repair. (See Govt. Exh. No. 8, Continuation Sheet No. 3.) I find no violation of 30 CFR 1725(a).

Section 104(b) Notice of Violation No. 3 CMB, April 19, 1976

The 104(b) notice of violation which alleges a violation of 30 CFR 75.400 states:

Loose coal and coal dust was permitted to accumulate from 3 to 8 inches thick for a distance of approximately 30 feet from tailpiece inby, on the shuttle car travelway where the accident occurred in the No. 5 entry of the 3 Rt. off the 6 South Section (056). This was a contributing factor to the fatality.

Section 75.400 of the Code of Federal Regulations states:

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

In accordance with the holding of Old Ben Coal Company, 8 IBMA 98 (1977), it is necessary for the Petitioner not only to prove that an accumulation existed, but also to submit evidence as to the inspector's determination, prior to issuing the citation, as to how long the accumulation had been present and what cleanup actions were taken, if any, upon discovery of the accumulation by the operator.

The evidence does establish that accumulations existed as described in 104(b) Notice of Violation No. 3 CMB, Government Exhibit No. 9 (hereinafter referred to as accumulation No. 1) (Tr. 76, 152, 234-235); Modification Sheet No. 2 CMB, Government Exhibit No. 10 (hereinafter referred to as accumulation No. 2) (Tr. 236-237); and Continuation Sheet No. 2 attached to Notice of Violation No. 3 CMB. (This sheet describes two separate accumulations. They shall hereinafter be described as accumulation No. 3 and accumulation No. 4) (Tr. 241, 242). Yet, only for accumulation Nos. 1, 3 and 4 does the evidence establish that the inspector, prior to issuing his citation, made a determination as to how long the accumulations had been present (Tr. 243, 245). Furthermore, the evidence reveals that only for accumulation No. 1 was there a determination by the inspector, prior to issuing his notice, as to what actions the operator took upon discovery of the accumulation. The evidence indicates that the decedent

had begun cleaning loose coal from around the belt tail (Tr. 75, Govt. Exh. No. 2, p. 5). In light of the preceding, I find that Petitioner has established a prima facie case for a violation of section 75.400 only for accumulation No. 1.

It should be noted that Mr. Carpinello, Bethlehem's general mine foreman, did not refute the fact that accumulation No. 1 had not been cleaned up (Tr. 281). He indicated that he felt the determination of an accumulation was a judgment call (Tr. 282). He and one of the section foremen were of the opinion, however, that the accumulation could not have been present for six shifts because the area had been shoveled the day before and it was cleaned every shift (Tr. 316, 317, 355). He also testified that the belt tail area had taken only 20 to 30 minutes to clean up (Tr. 325). There was a cleanup program in effect at the time of the accident (Respondent's Exh. C, Tr. 270).

Petitioner also alleged that the loose coal on the mine floor in the area of the belt tail (accumulation No. 1) was a contributing factor to the accident in that it made it difficult to maneuver the shuttle car properly. There is no convincing evidence which substantiates this allegation. In fact, the description of the accident in the accident report does not make any reference to the decedent having any difficulty maneuvering the shuttle car as a result of coal accumulations (Govt. Exh. No. 2, p. 5). I do not find a connection between the accumulation and the accident, but I do find a violation.

I find that the operator is large in size, abated the violation promptly and in good faith, the penalty assessed herein will not affect its ability to continue in business, and the operator has a significant history of violations.

I find there is negligence in that the operator, who had knowledge of the accumulation, failed to clean it up (Tr. 281).

I find this to be a serious violation in that the potential for an explosion was increased because of the excessive amounts of methane liberated in the mine (Tr. 291). The relevant section of the mine was dry (Tr. 247) and the cables in the area could have provided an ignition source (Tr. 80, 81, 153). A penalty of \$1,000 will be assessed.

Section 104(b) Notice of Violation No. 1 CMB, May 26, 1976

The 104(b) notice of violation which alleges a violation of 30 CFR 75.304 states:

Evidence observed and revealed during an investigation of a fatal accident that occurred in the 3 Right 6 South section (056) on 4/16/76 was substantial to support that a proper on shift examination of the working section was not made for at least 6 shifts preceding the

accident in that the following conditions were cited and observed; the roof was inadequately supported and accumulations of loose coal and coal dust were present in the active shuttle-car roadway, also, the tail of the belt (shuttle car dumping point) was installed in a hazardous location and in a hazardous manner.

Section 75.304 of the Code of Federal Regulations states:

At least once during each coal-producing shift, or more often if necessary for safety, each working section shall be examined for hazardous conditions by certified persons designated by the operator to do so. Any such conditions shall be corrected immediately. If such condition creates an imminent danger, the operator shall withdraw all persons from the area affected by such conditions to a safe area, except those persons referred to in section 104(d) of the Act, until the danger is abated. Such examination shall include tests for methane with a means approved by the Secretary for detecting methane and for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary.

This 104(b) notice of violation was issued on May 26, 1976, and was precipitated by a fatal accident which occurred on April 16, 1976. The accident investigation was completed on April 21, 1976. (See Government Exhibit No. 2.) This means that the notice of violation was issued 40 days after the occurrence of the fatal accident and 35 days after the completion of the accident investigation. I am of the opinion that the issuance of a citation 35 days after the completion of the accident investigation, without good cause, is an unreasonable delay in informing Respondent of the allegations lodged against it. On its face, the notice of violation indicates that it was issued because of the presence of improperly supported roof, accumulations of loose coal and coal dust, and because the tail belt was installed in a haphazard location and manner. From reading the notice, it would appear that the existence of the three conditions proved that a proper onshift examination had not been made. But the testimony of Inspector Bernazzoli makes it clear that he issued the notice because the conditions had not been properly recorded in the onshift examination book (Tr. 55, line 8, Tr. 52, lines 5-11). It should also be noted that with respect to two of the items that the inspector thought should have been noted in the book, no citations were issued (no citation was issued with respect to the unsupported roof or the so-called haphazardly-installed tailpiece). But the essential flaw with respect to this notice is that the section cited does not require the keeping of any records. 5/ The notice is VACATED.

5/ See my decision in MESA v. Hobbs Brothers Coal Company, Inc.,
NORT 74-815-P, p. 6 (March 31, 1975); also see 30 CFR 75.1802.

Section 104(b) Notice of Violation No. 2 CMB, May 26, 1976

The 104(b) notice of violation which alleges a violation of 30 CFR 75.303(a) states:

Evidence observed and revealed during an investigation of a fatal accident that occurred in the 3 Right 6 South section (056) on 04/16/76 was substantial to support that a proper pre-shift examination of the working section was not made for at least 6 shifts preceding the accident in that the following conditions were observed and cited; the roof was inadequately supported and accumulations of loose coal and coal dust were present in the active shuttle car roadway, also, the tail of the belt (shuttle car dumping point) was installed in a hazardous location and in a hazardous manner. The pre-shift examiner recorded in the book that the section was safe for the men to enter.

Section 75.303(a) of Title 30, Code of Federal Regulations, states, in part:

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 mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

This 104(b) notice of violation, like the prior notice, was issued 35 days after the completion of the accident investigation. Again, I am of the opinion that this time period amounts to an unreasonable delay in informing Respondent of the allegations lodged against it. Unlike the section involved in the previous violation, however, 30 CFR 75.303(a) does require that the results of the examination be recorded in an approved book. In order to find a violation, I would have to decide that the three items listed in the notice were hazardous conditions. Inasmuch as there was no citation issued in connection with the installation of the tail belt, I do not see how I could agree that it was a hazardous situation that should have been included in the preshift examiner's report. As to the unsupported roof, while it apparently existed after the accident, I think it safe to assume that if the inspectors had thought that it had existed for any significant time, they would have issued a citation in connection

with that condition. I therefore cannot agree that the preshift examiner ignored the unsupported roof for six shifts.

Respondent was cited for accumulations of loose coal and coal dust and I have previously found that accumulations of coal and coal dust in this mine are serious. Since, however, it is not the practice in Respondent's mine to include coal and coal dust accumulations on a preshift report, and inasmuch as there is a program wherein one shift is supposed to clean up whatever coal and coal dust was left by the prior shift, I cannot find that there was a significant degree of negligence on the part of the preshift examiner in failing to include the condition on the preshift examination report. A penalty of \$100 will be assessed.

ORDER

It is therefore ORDERED that Respondent pay to MSHA, within 30 days of the entry of this decision, a civil penalty in the amount of \$1,100.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Issued:

Distribution:

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Standard Distribution

in that area. When the roof rock is inadvertently exposed, but the roof is otherwise sound, the miner head may be dropped down and a brow of top coal no greater than six (6) feet deep may be established prior to withdrawal. * * * [2/]

In order to prove a violation of section 109(c) of the 1969 Act, the Petitioner must establish that (a) the corporate operator violated 30 CFR 75.200 (b) Respondent was the agent of the corporate operator (c) Respondent knowingly authorized, ordered, or carried out these violation. Everett L. Pritt, 8 IBMA 216 (1977).

The term "agent" as defined under section 3(e) of the 1969 Act, 30 U.S.C § 802 (1970), is "any person charged with responsibility for the operation of all or part of a coal mine or the supervision of the miners in a coal mine." The evidence clearly establishes that the respondent was the section foreman, who was in charge of the relevant area of the mine where the roof fall occurred (Tr. Vol. I 95-96, Vol. II 140-141). I therefore find that the Respondent, as section foreman, is an agent of the corporate operator. MESA v. Daniel Hensler, Docket No. VINC 75-374-P (March 31, 1976).

The contentions of MSHA are, in my opinion, well summarized in the following portion of GX-11.

On the day of the accident, November 21, 1977, Mr. Terry Gossett, continuous miner operator was operating the continuous mining machine in the 45 degree crosscut between rooms 27 and 28 and during this time roof and rib rock became exposed. Mr. Terry Gossett, continuous miner operator stated that he showed the foreman Mr. Hubert Williams, the exposed rock and ask him if he wanted to back out and bolt and Williams said no, to drive it all the way up. Mr. Gossett stated that he drove the place into where the unsupported rock was over his head and then Williams, the foreman got on the machine and drove the place the rest of the way. To summarize the event, the section foreman knew about the exposed rock top and ordered the miner operator, Mr. Terry Gossett, to drive the place up and when the miner operator, did not do so, Hubert Williams, foreman ran the machine himself and mined 25 feet past exposed rock top.

2/ Respondent had been furnished the wrong roof-control plan prior to the prehearing conference. He was furnished the proper plan prior to the hearing on the merits and while this may have inconvenienced Respondent, it was not a fatal error. Also, I am of the opinion that it does not matter whether the miners were engaged in advancing or retreating since the quoted part applies to both types of mining.

Hubert Williams, foreman then backed the machine out and ordered Terry Gossett to take a couple of buggies off the corner before making the move to start another 45 degree crosscut. As Terry Gossett was taking the second buggy off the corner, Hubert Williams, foreman was standing nearby observing when the roof fell in.

Based on the information outlined above, Hubert Williams, section foreman knowingly authorized, ordered and carried out a violation of a mandatory safety standard.

Under Section 109(c) of the Coal Mine Health and Safety Act of 1969 and Section 110(c) of the Federal Mine Safety and Health Act of 1977, a section foreman is considered to be an agent of the operator, and is subject to be assessed a civil. I recommend that Hubert Williams, Section Foreman, Old Ben Coal Company, Mine No. 21, be assessed a civil penalty of \$2,000.00.

The corporate operator has been assessed a civil penalty of \$10,000.00 for this same violation.

Respondent rigorously argues that the testimony as presented by MESA failed to establish that roof rock was exposed at the site of the alleged violation and Respondent had knowledge of such exposed rock. Instead, the Respondent contends that MESA has merely established that there was rock in the arch or rib rather than the roof; thus, this occurrence would not be violation of the above-stated roof control plan.

I am of the opinion that the evidence clearly establishes, not only the presence of exposed roof rock at the time of the violation, but also that Respondent had knowledge that such roof rock existed.

MESA introduced five witnesses who testified to the presence of the roof rock. Two of the witnesses had observed the roof immediately before the accident. Terry Gossett, the continuous miner operator, testified that not only did he observe exposed roof rock, which extended for approximately 15 feet (Tr. Vol. I 256), but he also had reported the presence of the roof rock to the Respondent (Tr. Vol. I 206, 207, 212). Mr. Gossett testified that upon being informed of the exposed roof rock, the Respondent instructed him to drive his machine up the short 45 without bolting the area (Tr. Vol. I, 207). After driving the machine about 20 feet, Mr. Gossett refused to drive the machine under the exposed rock (Tr. Vol. I, 223) and at this point Mr. Williams got on the machine and drove it the rest of the way up the short 45.

Gary Ritchason, a bottom laborer, had just left for dinner at the time of the roof fall. He testified that the roof rock was exposed prior to the accident and that Respondent had observed the roof rock.

Tr. Vol. 1, 249-251). In fact, he had heard Mr. Gossett report to the Respondent that there was exposed roof rock (Tr. Vol 1, 251). Mr. Ritchason specifically indentified the rock he was referring to as being located in the rib and on the roof (Tr. Vol. I, 250).

Maurice Messersmith, a roof control specialist for MESA, examined rooms 27 and 28 of the No. 21 Mine 1-1/2 hours after the roof fall (Tr. Vol. II, 29). He testified that the roof and rib rock were readily visible at this time (Tr. Vol. II, 28-30).

A second MESA roof control specialist, William Mitchell, examined the relevant section on the day following the accident and he indicated that the exposed rock extended down into the rib and also across the roof (Tr. Vol. I, Tr. 71, 72, 78). He was of the opinion that the exposed rock should have been apparent to anyone working in the section (Tr. Vol. I, 146).

The president of the local union, Terry Jones, also took part in the initial investigation, approximately 1-1/2 hours after the roof fall. He stated that the exposed rock was located in the roof and the rib (Tr. Vol. II, 85); the exposed rock should have been apparent to the section foreman (Tr. Vol. II, 88). As Respondent points out in his brief, the two MESA inspectors and the president of the local union could only give "after the fact " testimony in that their examination of the roof occurred after the fall. It was thus possible that the roof rock which they saw became exposed because of the fall (Tr. Vol. II, 56).

The Respondent denied that he observed any rock on the roof or that his conversation with Mr. Gossett had brought to his attention the exposed roof rock (Tr. Vol. II, 144, 147, 149, 150, 158, 169). Respondent, however, did recall taking over for Mr. Gossett and driving up the short 45, but he could not remember his reason for taking such action (Tr. Vol. II, 70) or the contents of his conversation with Mr. Gossett.

Upon evaluating the testimony of the Governments' two eyewitness in conjunction with the testimony of the three "after the fact" witnesses, I find that the evidence clearly and convincingly establishes that roof rock, as well as rib rock, was exposed in the relevant section of the No. 21 Mine prior to the roof fall. Furthermore, I find that Respondent was aware of the exposed roof rock at the time he permitted mining activities to proceed for a distance greater than 6 feet in violation of the roof-control plan. It follows that Respondent's principal, the corporate operator, was also guilty of violating the roof control plan.

As to the gravity of the violation, Respondent argues that the rock fall did not occur during the time of the alleged violation (Rx 1, Resp. Brief p. 14) and the rock fall occurred in a different area than the alleged violation (RX 1 and 2, Tr. 14). Respondent

bases these arguments on a motion to approve settlement and a decision approving settlement in a civil penalty proceeding in which Old Ben, the corporate operator, was charged with the same roof control plan violation of November 21, 1977. He argues that the decision contains official findings of the Commission.

A decision approving settlement, under our proceedings, is made without the benefit of a formal hearing. There is no opportunity to present expert and non-expert witnesses; or to cross examine anyone on the accuracy and the validity of the documents introduced for purposes of having the settlement agreement approved. In this case, where a hearing has been held on the question of violation, due process dictates, that the findings of fact shall be based on the record as established at the hearing rather than deferring to the findings of a prior settlement decision. I therefore hold that the factual findings in a decision to approve settlement have no binding or collateral estoppel effects on a subsequent hearing involving the same violation with a different defendant.

Respondent is nevertheless technically correct that the rock fall did not occur during the exact time of the alleged violation. The area of the exposed roof rock, the short 45, had already been driven up for approximately 50 feet and at the time of the fall the corner between the short 45 degree crosscut and Room 28 was being cut. Mr. Gossett estimated that approximately 10 minutes had elapsed between driving the short 45 all the way up 50 feet and when the said corner was cut (Tr. Vol I 208).

Respondent's argument that the roof fall occurred in a different area than the alleged violation is clearly refuted by the testimony and exhibits. The exposed roof rock was located near the left-hand side of the rib in the short 45 (Vol. I, 74, Vol II 84). Government Exhibits 4 and 5 depict the area of the roof fall as including part of the area near the lefthand side of the rib of the short 45 where the exposed roof rock was located. I thus find that part of the roof fall occurred where there was exposed roof rock and that mining had proceeded beyond 6 feet in this area.

The testimony from five Government witnesses who had examined the roof fall area indicates that had the roof been properly bolted, the roof fall would not have occurred (Tr. Vol. I, 213,258, Vol. II, 33, 102). Inspector Mitchell stated: (Tr. Vol. I, 73-74).

A. (Mr. Mitchell) All right sir. When that rock was--when that rock was exposed, right there on the corner, the left-hand corner leading into the short 45 degree crosscut, that place shouldn't have been driven over six feet. The continuous miner pulled out, the roof bolting machine brought in, and that area permanently supported with roof bolts before mining was continued on up to the face of this short 45.

He further stated: (Tr. Vol. I, 73).

* * * When you expose rock in a place like this, and you continue to drive, there is a time exposure element there that will contribute to a roof fall occurring. If--if this place would have been bolted, the roof fall wouldn't have occurred, in my opinion, because of the thickness of the roof fall. * * *

Inspector Mitchell went on to explain that the minimum length roof bolt used in the No. 21 mine was 60 inches. Whereas the fallen material was 3 feet thick, the bolts would have been anchored 2 feet above where the roof broke, thus preventing the fall (Tr. Vol. I, 75).

I find that the mining activities which violated the roof control plan and the subsequent mining of the corner occurred close enough in time (as well as location) to reasonably conclude that the roof fall was caused by the violation of the roof control plan.

In assessing a civil penalty under 109(c) I shall consider the seriousness of the violation, the degree of negligence involved, and the financial condition of the Respondent. The other criteria do not seem appropriate because Respondent was not involved in the abatement and has no prior history of violation.

I find that there was negligence on the part of the Respondent and that the violation was serious. I find that Respondent earns a salary of \$26,000 a year, and that Old Ben Coal Company which earns somewhat more than that settled its case involving this same order for \$6,000.

Based on the foregoing, I assess a penalty of \$1,000.00 against the Respondent. All pending motions are hereby DENIED.

ORDER

It is hereby ORDERED that Respondent, within 30 days hereof, pay to the Mine Safety and Health Administration the civil penalty assessed above.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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