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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 2, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
v.	:	Docket No. HOPE 75-699 IBMA 76-98
EASTERN ASSOCIATED COAL COMPANY	:	

DECISION

This case arises under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977)["the 1969 Act"], and involves the interpretation of section 103(f) of that act. 1/ Section 103(f) provided:

> In the event of any accident occurring in a coal mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal mine, and the operator of such mine shall obtain the approval of such representative in consultation with the appropriate state representative, when feasible, of any plan to recover any person in the mine or to return the affected areas of the mine to normal.

On January 8, 1975, an inspector of the Interior Department's Mining Enforcement and Safety Administration ("MESA") issued to Eastern Associated Coal Company ("Eastern") an order under section 103(f). The order required the withdrawal of miners from a section of Eastern's Keystone No. 1 Mine.

The MESA inspector had been in another area of the mine when he was informed by the general mine foreman that a miner had been pushed against a rib by a shuttle car. The administrative law judge described the circumstances as follows:

> The accident had occurred as coal was being loaded from a shuttle car into mine cars. Shuttle cars loaded with coal go to the track entry by means of a slight ramp. The coal is discharged from the shuttle car into the mine cars by a boom. The mine cars are

1/ Commissioner Backley did not participate in the consideration or decision of this case.

located on a track just below the shuttle car ramp. There were eight cars in this particular mine car trip. The mine cars were initially placed in the loading area by a locomotive. After arriving in the area, an electric hoist, using a hook attached to a rope, was connected to the rear car of the mine car trip in order to position the mine cars in the loading area. The locomotive leaves once the cars are hooked to the hoist. The loading area track has a slight grade, approximately 2 percent, hence the electric hoist, rope, and the hook prevent the mine car trip from rolling down the grade under the influence of gravity. As each mine car is loaded with coal from the shuttle car boom, an empty mine car is positioned to be loaded by the electric hoist. In this case, empty oil drums were also placed on the loaded mine cars. The oil drums were placed there in order to haul them out of the mine (Tr. 45-48, 50-56).

In this case, the victim was unloading his shuttle car, which was properly located in the entry ramp to the loading area. The hook which was attached to the mine car trip from the hoist became dislodged. The mine car trip then began to move down the slight grade. As it did so, the shuttle car boom came in contact with an empty oil drum on one of the mine cars which had already been loaded with coal. As the shuttle boom came in contact with the oil drum, it pushed the shuttle car crossways into the rib, trapping the victim [the shuttle car operator] between the rib and the shuttle car (Tr. 50, 51, 56).

* * *

Upon arriving [at the accident scene, the inspector] observed that the victim was conscious and being treated for shock and a possible broken back. The inspector felt that the victim had been seriously injured although he did not have positive knowledge of the extent of these injuries at that time. There was no one in the mine then capable of accurately ascertaining the victim's injuries (Tr. 41, 43, 48-50, 63).

The judge relied upon the inspector's testimony that the accident was precipitated by the hoist hook coming loose, that he was uncertain as to why the hook had come loose, and that he considered himself unqualified to conduct the investigation. The judge found the inspector was prompted to issue the section 103(f) order to preserve the evidence pending an investigation of why the hook came loose. The next day the inspector issued an order modifying the initial section 103(f) order. The modification order stated:

This modification will permit the operator to operate 4 mains section provided that:

(I) Persons involved in loading operations will be instructed to inspect the hoist hook to ascertain that the hook is properly positioned prior to uncoupling the locomotive from the trip.

(II) To provide the hoist rope with a device to preclude twisting, which may dislodge the hook.

(III) To provide and install a device to maintain control of mine cars in the event of a runaway.

(IV) Until such time that item No. 3 can be provided the operator will provide a suitable locomotive manned by a competent motorman, which will be coupled to the mine cars at all times during loading operations.

The order was terminated when a device was installed in the loading track to stop runaway mine cars.

Eastern filed an application for review with the Interior Department's Office of Hearings and Appeals. The administrative law judge held that he had no authority to review the order. Eastern appealed to the Interior Department's Board of Mine Operations Appeals, which held that the judge did have authority to review the order and remanded for a decision on the merits. 5 IBMA 74, 1975-76 CCH OSHD ¶19,921 (1975). In his decision of June 4, 1976, the judge affirmed the section 103(f) order and the modification. Eastern then appealed again to the Board. While the appeal was pending before the Board, the 1969 Act was substantially amended by the Federal Mine Safety and Health Amendments Act of 1977, and was re-named the Federal Mine Safety and Health Act of 1977, §801 et seq. (Supp. II 1978)["the 1977 Act"]. The 1977 Act transferred adjudication functions to this Commission and transferred investigation, inspection, prosecution and rule-making functions to the Secretary of Labor.

The United Mine Workers of America (the "Union") argued to the Board that it could not review section 103(f) orders. MESA concurred with the Union's position that the Board could not do so, but for a different reason--that the Board was not authorized by the Secretary of the Interior to review section 103(f) orders and that, in effect, the Interior Secretary had reserved this power, if it existed, to himself. 2/

2/ See Oral Argument Tr. 28-29, 35 (July 9, 1975)(before the Board). In deciding this case, we considered the arguments of these same parties in a similar case, Eastern Associated Coal Corp., Docket No. HOPE 76-289, IBMA 77-20.

We observe at the outset that the issue of whether section 103(f) orders are administratively reviewable is not quite in the same posture as it was before the Board. The Board was merely a delegatee of some of the Secretary of the Interior's adjudicative functions. The transfer provision of the 1977 Amendments Act transferred to the Commission the adjudicative powers of the Secretary of the Interior, not those of his Board 3/ nor his Office of Hearings and Appeals. The adjudicative powers of the Commission of cases under the 1969 Act that were pending on the effective date of the 1977 Act are therefore not derivative of the Board's powers, but are derivative of the Secretary of the Interior's powers. Accordingly, the question is not whether the Board was authorized by the Secretary of the Interior to decide this case, but rather, whether the Secretary of the Interior could have reviewed this order.

We conclude that the Secretary of the Interior could have reviewed this section 103(f) order. As the superior of the MESA inspector the Secretary of the Interior had the power to voluntarily review the actions of his subordinate. We see no reason why he could not have done so in an adjudicative manner. 4/ The 1969 Act contained no express prohibition that would have prevented the Secretary from voluntarily creating an administrative adjudicative system for reviewing section 103(f) orders. The mere absence of a requirement that the Secretary review these orders, even coupled with the express requirement of review of orders issued under section 104, does not sufficiently indicate that Congress formed an intent to forbid such review. There is no indication in the legislative history of the 1969 Act that Congress so intended and review of section 103(f) orders can cause no deprivation of the protection accorded to miners by the Act. Compare Mine Workers v. Andrus (Carbon Fuel Co.), 581 F.2d 888, 892-894 (D.C. Cir.), cert. denied, 439 U.S. 928 (1978). The Board concluded, when it first considered this case, that the Interior Secretary had established an administrative adjudication system for review of section 103(f) orders, and we agree with that conclusion. 5 IBMA 74.

3/ Section 301(a) of the 1977 Amendments Act, 30 U.S.C. §861(a), reads in part as follows:

> (a) [T]he functions of the Secretary of the Interior under the Federal Coal Mine Health and Safety Act of 1969, as amended, and the Federal Metal and Nonmetallic Mine Safety Act are transferred to the Secretary of Labor, except those which are expressly transferred to the Commission by this Act. [Emphasis added.]

4/ Cf. Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950)(agency holds hearing by "special dispensation"); Cross-Sound Ferry Services, Inc. v. United States, 573 F.2d 725, 732 n. 4 (2d Cir. 1978)(hearings on environmental impact statement discretionary with agency); Attorney General's Manual on the Administrative Procedure Act, at 41 (1947) (hearing held "as a matter of agency policy or practice").

We also conclude that the Commission succeeded to the Interior Secretary's power to adjudicate this case. Although section 301 of the 1977 Amendments Act does not clearly state the particular adjudicative powers that were transferred, we think it obvious that Congress intended all adjudicative matters pending before the Secretary of Interior on the effective date of the 1977 Act be continued before the Commission, except those which the Secretary of Labor had been given the function of deciding under the 1977 Act, such as petitions for modification. See section 301(c) of the 1977 Act. 5/ This view is most consistent with Congress' preference under the 1977 Act for independent, administrative review by the Commission, not the Secretary of Labor. Accordingly, we conclude that the Commission may decide this case. 6/

We now turn to Eastern's arguments that both the section 103(f) order and its modification were invalid. Eastern argues that the section 103(f) order continued beyond the period of danger to the safety of the miners caused by the accident, and that section 103(f) did not authorize issuance of "post-inspection withdrawal orders to serve the purpose of future accident prevention". MESA (now MSHA) maintains that issuing a section 103(f) order to preserve evidence is authorized by section 103(f) because the resumption of mining operations would have resulted in the loss of evidence that could have established the underlying cause of the accident and thus assure that a similar accident would not recur on the same equipment. Preservation of the evidence in such circumstances thereby helped insure miner safety, MSHA argues.

5/ Section 301(c)(3) of the 1977 Amendments Act, 30 U.S.C. §861(c)(3), reads in part as follows:

> The provisions of this section shall not affect any proceedings pending at the time this section takes effect before any department, agency, or component thereof, functions of which are transferred by this section, except that such proceedings, to the extent that they relate to functions so transferred, shall be continued before the Secretary of Labor or the Federal Mine Safety and Health Review Commission, by a court of competent jurisdiction, or by operation of law.... [Emphasis added.]

6/ The Union maintains that this case is moot because Eastern complied with the order even before it filed its application for review. The Board briefly rejected the argument on the authority of Eastern Associated Coal Corp. v. IBMOA, 491 F.2d 277 (4th Cir. 1974), and Freeman Coal Mining Co. v. IBMOA, 504 F.2d 741, 743 (7th Cir. 1974). See 5 IBMA at 80 n.3. The Union in its renewed mootness argument vigorously maintains that these cases are distinguishable and furnish no authority for the Board's holding. We find no need to resolve this dispute for we have placed our holding on a different ground. The philosophy of review of both the 1969 and 1977 Acts is that operators are to comply with administrative orders first and litigate their merits later. The Union's argument would contravene this approach. It would condition the operator's opportunity to be heard on his disobedience to an order, and would eviscerate the opportunity to be heard for conscientious mine operators.

The judge concluded that a section 103(f) order cannot be routinely issued for the sole purpose of preserving evidence pending a post-accident investigation. He observed, however, that there may be circumstances in which a section 103(f) order issued to preserve evidence might be appropriate. The judge concluded that where there is "a strong possibility that the accident might be repeated if operations were allowed to resume," a section 103(f) order may be used to ensure that the accident scene remains undisturbed if "the accident investigation has a direct relationship to the accident ... and [if] the investigation is necessary to determine the cause of the accident and means to prevent a recurrence." He concluded that this was the case here because one accident had resulted in injuries to the shuttle car operator, and the inspector's inability to determine why the cable hook became loose caused concern that the accident might recur. Finally, the judge found the inspector "acted reasonably" in imposing in the later modification of the order conditions precedent to terminating the order because "the conditions were directly related to insuring that a similar accident would not occur while mining was in progress". The judge rejected Eastern's argument that the modification of the order was invalid because it imposed duties upon the operator that were not imposed by any mandatory mine health or safety standard. The judge noted that section 103(f) expressly required the operator to obtain the approval of the inspector in order to return the mine to normal after an accident, and stated that "I am not persuaded that the inspector exceeded his authority by modifying the order to insure the safety of miners in the area."

With respect to the original order, we adopt the judge's views. On the facts of this case, the judge correctly found that the order comported with the express, remedial purpose of section 103(f)--to insure the safety of any person in the coal mine.

We also agree with the judge's view that the requirements in the modification of the order were valid. Section 103(f) permits an inspector to issue orders "he deems appropriate to insure the safety of any person in the mine", and requires that "the operator of such mine shall obtain the approval of [the inspector] ... of any plan ... to return the affected areas of the mine to normal." Nothing in section 103(f) restricted the inspector to enforcing only mandatory safety standards or preventing imminent dangers. Compare sections 104(a) (imminent danger), 104(b) and (c)(standards), and 104(i)(dust standard) 7/

Accordingly, the judge's decision is affirmed.

Frank F. Nastrau, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

7/ We have no occasion here to determine whether the inspector's action is reviewable on an "arbitrary or capricious", "reasonableness", or de novo basis.

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September 2, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. HOPE 76-289
v.	:	IBMA 77-20
EASTERN ASSOCIATED COAL COMPANY	:	

DECISION

The decision of the administrative law judge is vacated and the case is remanded for reconsideration in light of, and entry of a new decision consistent with, Eastern Associated Coal Co., Docket No. HOPE 75-699, IBMA 76-98 (September 2, 1980).

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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1730 K STREET NW, 6TH FLOOR
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September 26, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA 79-51
PARAMONT MINING COMPANY	:	

DECISION

This civil penalty proceeding concerns the interpretation of 30 C.F.R. §75.313 (1979) 1/. The question is whether the administrative law judge erred in holding the Secretary must prove that coal was being mined, cut or loaded in order to establish a violation of that mandatory safety standard. We hold that he did.

Paramont Mining Company was cited for a violation of 30 C.F.R. §75.313. The Secretary petitioned for assessment of a civil penalty. At the hearing the inspector who issued the withdrawal order testified that when he reached the working section of the mine, he saw the continuous mining machine backing out from inby the last open crosscut. He inspected the machine and found that its methane monitor was bridged out (i.e., there was an electric detour around the methane monitor so that the machine could function when the monitor was not operating). This testimony was undisputed.

1/ That standard, which restates section 303(1) of the Federal Mine Safety and Health Act of 1977, provides in relevant part:

> The Secretary or his authorized representative shall require, as an additional device for detecting concentrations of methane, that a methane monitor, ... be installed, when available, on any electric face cutting equipment, continuous miner, longwall face equipment, and loading machine, ... When installed on any such equipment, such monitor shall be kept operative and properly maintained and frequently tested as prescribed by the Secretary. The sensing device of such monitor shall be installed as close to the working face as practicable. Such monitor shall be set to deenergize automatically such equipment when such monitor is not operating properly and to give a warning automatically when the concentration of methane reaches a maximum percentage determined by an authorized representative of the Secretary which shall not be more than 1.0 volume per centum of methane.

The administrative law judge held, however, that the Secretary must prove not only that the continuous miner was not equipped with an operative methane monitor, but also that coal was actually being produced, i.e., cut, mined, or loaded, while the monitor was bridged out, in order to establish a violation of §75.313. He found that the Secretary failed to prove the latter element.

We reverse. Production of coal is not a necessary element of a violation of this safety standard. The language of the standard is clear. It requires that monitors "be kept operative and ... be set to deenergize automatically such equipment when such monitor is not operating properly...." The facts show that six days after its monitor had failed, this continuous miner was energized and moving near the face with an inoperative methane monitor. We hold that this is sufficient to establish a prima facie violation of 30 C.F.R. §75.313, and that Paramont has not rebutted the Secretary's case by proving, for example, that the equipment was being moved elsewhere to be repaired.

The decision of the administrative law judge is reversed and the case is remanded for further proceedings consistent with this opinion.

Richard V. Backley, Commissioner

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A. E. Lawson, Commissioner

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September 26, 1980

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
	:	Docket Nos. HOPE 79-6-P
v.	:	HOPE 79-227-P
SEWELL COAL COMPANY	:	

DECISION

On June 5, 1979, the administrative law judge issued a prehearing order in this penalty proceeding, stating that if the parties were unable to settle the case, they were to "recommend a mutually acceptable time and site for hearing." In letters to the judge, Sewell Coal Company recommended several hearing dates in October 1979, while the Secretary stated that he "has no preference."

On January 2, 1980, the judge set these cases for hearing on February 5, 1980, in Charleston, West Virginia, apparently without calling counsel first to inquire if that would be a "mutually acceptable time ... for hearing." Two days later, the counsel for Sewell notified the judge that he had a schedule conflict because a case before a different Commission judge had previously been scheduled to be heard in Arlington, Virginia, on February 5. Sewell's counsel requested that the hearing in this case be postponed until March. On January 15 the judge denied the request, stating that "[o]ur exceedingly heavy docket makes it impossible to delay or adjust hearing dates based on the availability of one attorney."

The hearing was convened on February 5; no attorney appeared on behalf of Sewell. The judge held Sewell to be in default, and a decision was entered assessing a total of $1,220 in penalties, the amount originally proposed by the Secretary.

In his decision, the judge noted that the case load of the Commission's judges has become increasingly heavy and complex, that he is often required to travel to all parts of the country to conduct hearings, and that his itinerary is often tightly packed with hearing dates and involves numerous lawyers. He noted, as the Commission has, 1/ that Congress has forcefully expressed its desire that penalty cases be expeditiously adjudicated by the Commission. The judge considered the desire of Sewell to have its present counsel represent it in these cases, but rejected Sewell's argument that this attorney's expertise in mine safety and health matters is so great that only he can adquately represent Sewell. The judge also stated that "our moving this large number of cases cannot be dependent on [present counsel's] availability."

We granted Sewell's petition for discretionary review on April 21, 1980. 2/ We now reverse and remand.

In its brief on review, Sewell relies heavily upon the alleged expertise of its present attorney in arguing that the judge abused his discretion in refusing to grant a continuance. Sewell notes that this attorney has been the only lawyer, with the exception of two instances within the past two years, to represent the large Pittston Group of mine companies, of which Sewell is a part, in MSHA and surface mining matters. Sewell's argument, however, overlooks that right to counsel of its choice is not unqualified. The public interest in the expeditious adjudication of penalty cases demanded under the 1977 Mine Act and the convenience of the administrative law judge also must be considered. 3/ We are of the view that due process is given in this regard when a party has been afforded the opportunity to obtain competent counsel, since the public and Congress' interest in expediting adjudication is compelling, and the agency's flexibility cannot be limited in the manner suggested by the operator's counsel in this instance. This is not the extraordinary case in which due process requires that a party's choice of one particular counsel is overriding.

1/ Scotia Coal Mining Co., 2 FMSHRC 633, 1 BNA MSHC 2327, 1980 CCH OSHD ¶24,333 (1980), pet for rev. filed, No. 80-3303 (6th Cir., April 29, 1980).

2/ In its petition, Sewell did not object to the default sanction imposed by the judge. It raised only the question of whether the judge lawfully denied a continuance. We therefore have no occasion to discuss the use of a default here. Section 113(d)(2)(A)(iii) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. II 1978)["the 1977 Mine Act"].

3/ N.L.R.B. v. Glacier Packing Company, Inc., 507 F.2d 415 (9th Cir. 1974); N.L.R.B. v. American Potash & Chemical Corp., 98 F.2d 488 (9th Cir. 1938).

Nevertheless, the judge's discretion in setting a date for a hearing is not absolute. Section 5(a) of the APA, 5 U.S.C. §554(b), which is made applicable by section 105(d) of the 1977 Mine Act, states that "[i]n fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives." The administrative law judge must therefore balance the public interest and the due execution of the agency's functions with the convenience of the parties. 4/ The amount of "due regard" given in this case to the convenience of Sewell and its lawyer before the hearing was scheduled was little or none. In the prehearing order, the judge requested that all parties provide him with a list of proposed hearing dates. The Secretary responded that he had no preference for a date; Sewell's attorney specifically requested that the hearing be held on one of various dates in October 1979. There was no response from the judge until January 2, 1980, when he scheduled the hearing. It does not appear from the record that the judge considered Sewell's response to his prehearing order regarding hearing dates.

After the judge docketed the hearing for February 5, 1980, the attorney for Sewell immediately notified the judge of his schedule conflict. In denying Sewell's motion for a continuance, the judge said that his heavy caseload and docketing problems made rescheduling the hearing impossible. The judge's consideration was heavily influenced by the fact that he had already set a hearing date. The judge, to a large extent, presented Sewell with a fait accompli and did not consider the matter afresh when Sewell objected.

Although the question is a very close one, we conclude that, in the circumstances of this case, the judge abused his discretion in denying a short continuance without any apparent indication that the suggested October dates were considered and rejected. Although the judge may not have been required to solicit a "mutually acceptable time ... for hearing" in this case, once he embarked upon this course, it was arbitrary for him to have forced the operator to a hearing without even attempting the minimal scheduling accommodation sought by Sewell's counsel. We do not mean to imply, however, that a judge must schedule hearing dates only to suit the needs or desires of the parties. The considerations voiced by the judge are very real and legitimate ones. However, had the judge in this instance acknowledged Sewell's response to his prehearing order, and inquired of counsel's availability prior to establishing his hearing schedule, an accommodation might (though not necessarily) have been possible, and "due regard" to the parties' needs, in addition to the

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4/ See Attorney General's Manual on the Administrative Procedure Act, 46 (1947). See also Burnham Trucking Co. v. United States, 216 F. Supp. 561, 564 (E.D. Pa. 1963):

> The statute expressly speaks of the convenience of the "parties" and we interpret this to mean that in scheduling an application for hearing, the convenience of all persons concerned ... must be accorded due recognition. Due regard for the convenience and necessity of the parties cannot be divorced from the convenience of the agency.

agency's, could have been accorded at the outset. Because he did not do so, the judge was required to flexibly exercise his discretion anew when Sewell objected. If a judge inquires of the parties before setting a hearing date, he should at least give consideration to their responses. Whether he should accommodate such responses is a matter that falls within his discretion, dependent upon several factors, including, but not limited to, the convenience of the parties.

Nevertheless, the conduct of counsel for Sewell in ignoring the judge's hearing order and neither appearing at the hearing as scheduled, nor providing a representative even for purposes of setting forth on the record his client's position, is not condoned and we trust will not be repeated.

Accordingly, the judge's order is vacated and the case is remanded for further proceedings.

Richard V. Backley, Commissioner

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September 29, 1980

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 80-201-M
MULZER CRUSHED STONE COMPANY	:	

DIRECTION FOR REVIEW AND ORDER

The petition for discretionary review filed by Mulzer Crushed Stone Company is granted with respect to the following issue raised: whether a prejudicial error of procedure was committed by the Administrative Law Judge in that the mine operator was denied an opportunity to submit a brief with proposed findings and conclusions prior to issuance of the decision.

An August 12, 1980, order issued by the Judge set September 15, 1980, as the deadline for filing post-hearing briefs. Prior to receiving any briefs the decision was issued on September 3rd. A post-hearing brief was received at the Commission from counsel for Mulzer on September 11th. On the face of the record before us, it does appear that Mulzer, as well as the Secretary, was improperly denied an opportunity to submit its brief prior to the issuance of the judge's decision. Accordingly, the judge's decision of September 3rd is vacated, and the case is remanded for the sole purpose of permitting the judge to reconsider his decision in view of briefs submitted.

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Administrative Law Judge Decisions

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SEP 3 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	
Petitioner,	CIVIL PENALTY PROCEEDING DOCKET NO. CENT 79-377-M ASSESSMENT NO. 29-00591-05004
v.	
UNITED NUCLEAR-HOMESTAKE PARTNERS,	DOCKET NO. CENT 79-378-M ASSESSMENT NO. 29-00591-05005
Respondent.	MINE: SECTION 25

DECISION

APPEARANCES:

Eve Chesbro, Esq., Office of the Solicitor, United States Department of Labor, Dallas, Texas
for the Petitioner,

Wayne E. Bingham, Esq., of Albuquerque, New Mexico
for the Respondent.

Before: Judge Virgil E. Vail

I. Procedural Background

The above-captioned civil penalty proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The proposals for penalties allege three violations of mandatory safety standards contained in 30 CFR Part 56.

Pursuant to notice, a hearing on the merits was held in Albuquerque, New Mexico, on February 26, 1980. Charles H. Sisk, federal mine inspector, testified on behalf of the petitioner. Ronald W. Guill and Roy Souther testified for the respondent.

II. Stipulations

During the course of the hearing, counsel for both parties entered into the following stipulations:

(a) Respondent had 26 previously assessed violations during the 14 month period preceding the issuance of the citations involved herein.

(b) Respondent acted in good faith in abating the citations within the specified time allowed.

(c) The proposed penalties would not adversely affect the ability of the company to continue in business.

(d) Respondent employed approximately 66 people at Section 25 during 1978.

III. Exhibits.

Petitioner introduced the following exhibits into evidence:

(a) P-1 is a diagram drawn by Charles Sisk.

(b) Petitioner requested that the record be left open after the hearing in order to allow counsel to submit a computer printout sheet from the Office of Assessments. At the time of the hearing, respondent's counsel objected to the admittance of the printout into evidence. The undersigned Judge instructed respondent's counsel to restate his objection after he received a copy of the printout. Since counsel has failed to do so, the printout will be admitted into evidence for the sole purpose of examining respondent's prior history of assessments.

Respondent introduced the following exhibits into evidence:

Respondent's exhibits were incorrectly labelled as 'defendant.' They will be referred to herein as respondent's exhibits.

(a) R-A is a photograph.

(b) R-B is a photograph.

(c) R-C through R-I are weekly shaft inspection reports.

(d) R-J through R-L are photographs.

(e) R-M is a diagram of the gate prepared by Roy Souther.

(f) R-N is a diagram of the bonnet and shaft measurements prepared by Roy Souther.

(g) R-O through R-V are photographs.

IV. Findings of Fact and Conclusions.

Docket CENT 79-378-M.

Citation No. 151653

Citation No. 151653 alleges a violation of 30 CFR 57.15-5[1] and states that the action was taken under section 107(a) of the Act. At the hearing, counsel for the petitioner moved to amend the citation to allege section 104(a) as an alternative basis for the citation. Respondent objected to the motion and requested that counsel for both parties be permitted to submit briefs. Counsel for the petitioner submitted a position paper and respondent's counsel has, by letter dated March 10, 1980, concurred with the Secretary's motion to amend the citation to allege, in the alternative, that the action was taken under section 104(a) of the Act.

The citation was issued on June 22, 1979, by Charles Sisk, federal mine inspector. Mr. Sisk testified that during the course of his inspection he requested that Mr. Johnson, the company supervisor, who was accompanying him during the inpection prepare the conveyance for a shaft inspection.

In order to inspect the shaft a bonnet, which is an overhead protective device, is placed over the top of the conveyance so one can stand on top of the conveyance in the open shaft (Tr. 24).

According to Mr. Sisk's testimony, two men positioned the bonnet on the conveyance; however, since the conveyance had not been spotted precisely at collar level, it was necessary for one of the miners to step up

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1/ 57.15-5 Mandatory. Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

approximately one foot onto the conveyance in order to tighten an attachment to the hoisting rope. The miner who climbed up onto the conveyance was wearing a safety belt, but failed to attach it to the safety line which was provided.

Mr. Sisk testified that he issued a withdrawal order based on his belief that the miner could have fallen or tripped, and in doing so, could have fallen into the adjoining shaft. Since the conveyance had not been spotted perfectly, Mr. Sisk believed that it would also have been possible for the miner to have fallen into a hole on the other side of the conveyance or a gap on the back side (Tr. 27).

Mr. Guill, mine superintendent at Section 25, testified that on the west side of the conveyance there is an open shaft. The two shafts are separated by a guide and three dividers. As illustrated by Respondent's Exhibits V and P, the first divider is approximately one foot or eighteen inches from the ground and the second is three and a half feet from the ground. The third divider is seven feet above collar level. Mr. Guill stated that he believed there existed only a remote possibility that someone could fall into the open shaft (Tr. 113).

Roy Souther, safety director at Section 25, testified that he concurred with Mr. Guill's opinion as to the remote possibility of someone injuring himself by falling from the shaft conveyance (Tr. 124).

I find that a violation did occur. There was conflicting testimony presented as to the amount of space between the conveyance and the front and back of the shaft. The parties also disagreed as to the depth of the drop from the collar level to the ground on the east side of the conveyance. I find the testimony of the respondent's witnesses and its exhibits to be more persuasive than that presented by the petitioner. On that basis, I conclude

that there was no danger of someone falling off the conveyance either on the east side or front or back and, therefore, no violation of the standard. However, I find that there was a possibility of someone falling off the conveyance and into the open shaft. Mandatory Safety Standard 57.15-5 requires that safety belts and lines be worn when there is a danger of falling. I conclude that a danger did in fact exist.

Section 110(i) of the Act directs that in assessing a penalty, I consider six criteria: (a) the operator's history of previous violations; (b) the appropriateness of the penalty to the size of the business; (c) the degree of negligence; (d) the effect on the operator's ability to continue in business; (e) the gravity of the violation; and (f) the good faith in achievement of rapid compliance after notification of violations.

As stated above, the parties stipulated to three of the criteria. The respondent employed approximately 66 employees in 1978 and is therefore to be considered as a medium size business.

Although I have concluded that the possibility of someone falling into the open shaft was unlikely, if it were to happen, it would result in serious injury.

The company was unaware that the violation existed. This fact coupled with the fact that the possibility of injury was remote, I reduce the proposed penalty and assess a penalty of $100.00 for the violation.

Docket Cent 79-377-M

Citation No. 151649

Citation No. 151649, issued on June 21, 1979, alleges a violation of

mandatory safety standard 57.19-100.[2]

Mr. Sisk testified that he got off the conveyance at the 745 level. The gate at that level which had a metal frame with wire mesh over it, had a hole approximately 1 X 1 1/2 feet. Mr. Sisk stated that he issued the citation based on his belief that the skip tender or anyone else working below the gate could be injured if materials fell through the hole. The inspector stated that there were no materials stored in the immediate area, however, there was a storage area across the track from the gate where trash was stored until it was removed (Tr. 40).

Mr. Guill disagreed with the inspector's testimony that the skip tender worked below the gate and would therefore be in danger (Tr. 98). However, Mr. Guill did state that on occasion someone could be in the bottom of the shaft to perform an inspection or to change the shaft pump (Tr. 97). In explaining the loading procedures used in removing the trash, Mr. Guill stated that there would be a remote chance that something could fall through the hole and even less chance that someone would be injured (Tr. 99 - 100).

I find that a violation did occur. As depicted in Respondent's Exhibit A, the hole was large enough for materials to fall through, and therefore constituted a violation of the Act. The hole was obvious and the company knew or should have known of its existance. There was a possibility of serious injury resulting from the violation. I assess a penalty of $140.00 for the violation.

2/ 57.19-100 Mandatory. Shaft landings shall be equipped with substantial safety gates so constructed that materials will not go through or under them; gates shall be closed except when loading or unloading shaft conveyances.

Citation 151654

On June 22, 1979, Mr. Sisk issued a citation alleging a violation of mandatory safety standard 57.19-106.[3] While traveling on top of the conveyance, Mr. Sisk testified that he was using a dead blow hammer to strike the guides and sets in an attempt to determine if there was any loose material in the shaft. Mr. Sisk testified that when he began to hear a different sound, he hooked the hammer onto the guide and jerked it. As he did so the conveyance moved. He stated that the 37th set up from the 640 level was broken and that 10 to 12 other sets were loose.

Respondent offered Exhibits C through I into evidence which are the company's weekly shaft inspection forms. Exhibit F indicates that a shaft inspection had been performed on June 22, 1979, the same day Mr. Sisk conducted his inspection. The respondent's records show that the employees who inspected the shaft found nothing wrong and did not indicate that any work needed to be performed.

Mr. Guill testified that he went down into the shaft on June 23, 1979, and during his inspection concluded that the guides were in good condition (Tr. 80). Although he found that there was slight movement of the cage, Mr. Guill attributed it to dryness in the shaft which causes movement in the pivot points around the guide hangers (Tr. 81 and 87). He testified that there were no broken sets, although one was cracked (Tr. 86).

I find that a violation did exist. In the opinion of Mr. Guill all that was needed was to put water into the shaft in order to swell the timbers (Tr. 83). This, however, had not been done and Respondent's Exhibit F indicates that the employees who inspected the shaft did not think it was

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3/ 57.19-106 Mandatory. Shaft sets shall be kept in good repair and clean of hazardous material.

necessary and had not recommended that it be done. In considering the number of employees who were exposed to the danger and the type of injuries which could result, I conclude that the violation was serious. The testimony reveals a conflict as to whether the Respondent should have known that the violation did exist. I find that Respondent's negligence was slight in light of its weekly inspection and record keeping procedures. I therefore assess a penalty of $100.00 for the violation.

ORDER

Wherefore, it is ordered that Respondent pay the penalty of $340.00 within 30 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 3 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. LAKE 80-57-M
	:	A.O. No. 12-01397-05001
v.	:	
	:	Docket No. LAKE 80-201-M
MULZER CRUSHED STONE COMPANY, Respondent	:	A.O. No. 12-01423-05002
	:	
	:	Derby UG Quarry

DECISIONS

Appearances: William C. Posternak, Attorney, Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the petitioner;
Philip E. Balcomb, Tell City, Indiana, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with two alleged violations of certain mandatory safety standards found in Part 57, Title 30, Code of Federal Regulations.

Respondent filed timely answers contesting the civil penalty proposals and requested a hearing. A hearing was convened on June 25, 1980, in Evansville, Indiana, and the parties appeared and participated fully therein.

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

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (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, 30 U.S.C. § 801 et seq.

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

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

Discussion

Docket No. LAKE 80-201-M

Citation No. 366596, November 27, 1979, 30 C.F.R. § 57.6-168, states as follows: "Two missed holes were noted in the left rib of tunnel 14, crosscut 3 East Drift. The area had been mucked out and missed holes were readily visible to indicate that they had not been reported or no effort was made to dispose of them."

30 C.F.R. § 57.6-168 provides as follows: "Misfires shall be reported to the proper supervisor and shall be disposed of safely before any other work is performed in that blasting area."

By motion filed June 20, 1980, petitioner moved to amend its pleadings to charge a violation of section 57.6-177 rather than 57.6-168. In support of the motion, petitioner asserted that standard 57.6-168 was cited in error in that the standard applies to surface mines, whereas the mine in question was an underground mine. Standard 57.6-177 is the appropriate standard in that it pertains to reporting and disposing of misfired holes in underground mines, and the condition charged has not changed, and the obligation of the respondent under both 57.6-168 and 57.6-177, as it pertains to the citation, is the same.

The parties were afforded an opportunity to present arguments in support and opposition to the motion, and after due consideration of those arguments, petitioner's motion was granted (Tr. 3-16).

Stipulations (Exhs. P-1 and P-5)

1. Respondent's Derby Slope Mine and Underground Quarry are subject to the provisions of the Act.

2. Respondent is a small mine operator and the proposed penalties will not adversely affect its ability to remain in business.

3. During the 24-month period prior to the issuance of Citation No. 366596, respondent had only two assessed violations at its Derby Slope Mine, and three citations at its quarry.

Petitioner's Testimony and Evidence

MSHA inspector George LaLumondiere confirmed that he conducted a safety inspection of respondent's Derby Underground Mine, that he was accompanied by mine superintendent Bill Tsantis, assistant safety engineer Bob Scheible, MSHA inspector Jerry Spruell, and that he issued Citation No. 366596 after finding two misfired blasting holes that did not totally detonate during an ammonium nitrate blast. Ammonium nitrate was still in the two holes. He observed two lead wires with an electric cap protruding some 6 inches out of the holes in the face, and since there were no indications that the misfires were reported or disposed of, he issued the citation. Mr. Tsantis and Mr. Scheible denied any prior knowlege concerning the two misfired holes, and one cannot determine whether they had been fired until they were washed out. He saw no evidence that any attempts were made to dispose of the misfires since the rock from the blast had already been loaded and cleaned out and the holes were still there. The two wires he observed were not shunted off, and he believed that respondent should have known of the two misfires because the area should have been checked before the men went back in to work.

Inspector Lalumondiere explained that he marked the item "improbable" on the gravity portion of his inspector's statement (Exh. P-4) because at the time of his observations the area had been cleaned up and no work was taking place. However, he indicated that ammonium nitrate is an explosive that could possibly be detonated by a sudden jarring or striking by a loading machine, and since there was no way to determine whether the firing cap was still "live," this added to the potential hazards. Eight to nine men are usually underground at the mine, but no one was working at the location cited (Tr. 19-26). The misfires were immediately taken care of by washing them out with water under pressure and abatement was rapidly achieved (Tr. 31, 35-40).

On cross-examination, Inspector Lalumondiere testified that one of the misfired holes was located in the upper lefthand corner of the face and the second misfired hole was located in the lower lefthand corner. The likelihood of an accidental explosion was very low, but an accidental drilling into the misfired holes from the back of the drift could result in an accident. While he could not determine whether the caps and primer had fired, it was obvious to him that there was a partial firing failure because parts of the holes were still present in the face area noted (Tr. 40-53).

The inspector stated that he believed the respondent was negligent because section 57.3.3-20 requires each worker to check his work area before

he starts work and periodically while work is being performed. He identified Exhibit R-2 as an MSHA program directive dealing with the examination of working places under mandatory standards 55, 56, and 57.18-2. He confirmed that the directive defines "working place" as "anyplace in or about a mine where work is being performed," and that no work was being performed when he discovered the conditions cited. The work had been completed and the area had been cleaned and no workers were there. He could not determine when the area had last been worked, and he believed that the holes were not subsequently checked because they were so readily visible and stated that "I don't see how anybody could miss them, if they had checked the area at all" (Tr. 54-63).

In response to bench questions, the inspector stated that it was not likely that the remaining charges could have detonated by a stray charge, and that normally a face is drilled and loaded for 30 holes to detonate, but in the instant case, he was told that less than 30 were loaded, two holes remained, and the cap wires were not shunted or tied together to prevent stray current from getting to it (Tr. 64-73). However, until such time as the hole is washed out, it is difficult to determine all of the conditions by observation (Tr. 78).

Respondent's Testimony and Evidence

Dennis Riddle testified that he has worked at the mine in question for some 4 years as a miner and was present during the inspection of November 27. He identified Exhibit R-1 as a sketch of the face area in question, and explained that the dimensions of the face were 32 feet wide and 21 feet high with standard-sized drill holes prepared for blasting. Nine men were working in the mine on the day in question, and he identified the locations of the holes which were drilled for blasting and the two which did not totally detonate by marking them with an "X" on the sketch. He also explained the drilling, shooting, and cleanup procedures, and indicated that it was impossible to see holes which may have misfired until the blasted rock is removed because the bulk of the face area which is shot is covered by blasted rock. The night-shift mucking crew is responsible for cleaning and removing the rock, but there are times when all of the rock is not removed and the next oncoming shift may not detect misfires which may be covered or obscured by rock which is still left in the area. One man usually loads the rock out with a front-end loader and he checks for misfires, and if any are detected he shunts them out, reports it, and tests may then be made with a galvanometer. If it is not tested, the hole is washed out. He also explained that up to seven headings a day may be shot and cleaned up in a routine and progressive manner, and a person has no reason to go back into an area that has been shot out and is uncleaned until the routine procedure is followed. On the day in question, the nearest men were some 400 feet away in several other rooms and he believes they were well protected from any possible hazard (Tr. 83-97).

Mr. Riddle stated that in his opinion the top hole was not a misfire, but he was not sure about the bottom one without testing it. The shot was fired between 3:30 and 4 p.m. on the evening before the citation issued,

and it is normal procedure to fire shots at the end of the day shift so that the night shift can start mucking and loading out the rocks. Misfires are not common occurrences, average less than one a month, and they are generally very obvious because one can see the rock still protruding. Five to seven faces are drilled and fired every day, and it is common for a hang-up to occur in the corner of the face, and the top holes are difficult to check because of the bad top which has to be roof bolted first (Tr. 96-103).

On cross-examination, Mr. Riddle stated that his duties include drilling and loading holes for blasting, and that the day before the citation issued, he was helping with the loading and mucking operations. He was not in the section cited and was working 400 feet away and saw the holes only after they were brought to his attention. He saw the two holes and they were not obstructed by any rocks. He agreed that the detonating wires were protruding from the two holes and that anpho explosive was in the two holes, a little in the top one, but quite a bit in the bottom one. The top hole had blown at the backside of the face, but that before he could examine it closely, there was no way to determine how much anpho was still in the hole by standing and looking at it from 21 feet below the face. The clean-up loader operator is responsible for inspecting for and reporting misfires. No one was cleaning in the area in question because the morning shift was working in another heading (Tr. 104-111). If the holes are not visible, one cannot tell whether the detonator has fired until the hole is tested or washed out (Tr. 112). Anpho-blasting agent sometimes does not detonate or explode if it is wet and he did not inspect the face on the morning of the inspection before the inspector arrived because no one had been in the area that morning and the boss had not conducted his daily inspection of that area (Tr. 113-117). Abatement was achieved by bringing in a generator from another area 400 feet away to pump in water used to wash the hole (Tr. 122). The misfired holes which he washed out would have been visible the night before after the mucking operation had taken place if someone had gotten out of their machine to inspect them but the night shift does not leave their equipment to inspect if they do not observe any knots humped out of the face, and on this occasion, the face was straight and square. If drilling were to take place, the driller would inspect the face area, and if not, Superintendent Tsantis would inspect it sometime during the day (Tr. 123-124).

Findings and Conclusions

Fact of Violation

As indicated earlier, respondent was originally charged with a violation of section 57.6-168, and the petitioner was permitted to amend its pleadings to charge a violation of section 57.6-177, which provides as follows:

> Misfires shall be reported to the proper supervisor. The blast area shall be dangered-off until misfired holes are disposed of. Where explosives other than black powder have been used, misfired holes shall be disposed of as soon as possible by one of the following methods:

(a) Washing the stemming and charge from the borehole with water;

(b) Reattempting to fire the holes if leg wires are exposed; or

(c) Inserting new primers after the stemming has been washed out.

Petitioner's counsel asserted that its charges of a violation are limited to the contention that the misfired holes were not reported and were not disposed of in any manner. Counsel also asserted that petitioner is not charging the respondent with a failure to danger off the area, nor is petitioner requiring that respondent undertake to dispose of the misfires by alternative method (c) found in section 57.6-177. The essence of the charge, asserted counsel, is the contention that respondent failed to dispose of the misfires by any method (Tr. 8-12). Counsel asserted that respondent is obliged to report misfires and to dispose of them as soon as possible and that the critical question is whether the misfires were disposed of as soon as possible (Tr. 141). Insofar as the requirement that misfires be reported, counsel conceded that the standard contains no time frame as to when they must be reported, but the implication is that they must be reported as soon as they become known (Tr. 151).

Petitioner argues that the misfired holes should have been detected and properly disposed of during the evening shift at the time the mucking cycle was taking place. Since such misfires can be readily detected by observation, and since the presence of the explosive anpho is a sign that a misfire has occurred, the holes in question should have been detected at the conclusion of the mucking operation since both holes would not have been obstructed by the materials which were shot from the face. Since the mucking crew had left the area and the oncoming crew was working in another section, petitioner asserts that it is reasonable to infer that no one detected or reported the misfires, and had the inspector not discovered them, it is also reasonable to infer that mine management would not have discovered them until such time as men had some reason to go back to the area when the mining cycle again reached that point, and this would not have been "as soon as possible." Both holes were clearly identifiable at the conclusion of the mucking operation and the failure to dispose of them at that time constitutes a violation since they were not disposed of as soon as possible as required by the cited standard. Correction and disposition of the misfires was no monumental task and immediate detection and disposition of the condition should have been made by the respondent (Tr. 127-133, 140-143).

Respondent argues that while it is true that the large bulk of the material blasted had been mucked out, the final cleanup of the area cited, including the careful examination of the face, had not been accomplished. In addition, no one was working in the area, but as soon as the orderly mining cycle had returned the men back to the area which had been shot, the misfired holes would have been discovered and disposed of in the normal course of business. Respondent maintains that its mining method,

which entails proceeding in an orderly manner from one heading to the next, by blasting, mucking, and then cleaning carefully while inspecting for misfires and disposing of them as soon as they are discovered, is reasonable, proper, and safe. Respondent further argues that during the mucking operation, the loader operator is working with a machine which is nearly as high as the roof in front of him and he has a large bucket in front of him. Thus, he is in no position to alight from his machine to carefully inspect for misfires as an inspector would do when he goes in later with his head lamp. Respondent believes it is proper to do as was done in this case, since within a few hours after the face was blasted, the face area would have been cleaned out (Tr. 143-146).

Respondent believes further that any misfires could not have been determined by any reasonable standards until such time as the cleanup man returned to the face area to make a detailed inspection for such misfires (Tr. 147). The thrust of respondent's defense is its belief that since five to seven headings are shot down every day, there are five to seven muck piles which obscure most of the holes constituting the blasting pattern, and some reasonable judgment must be exercised as to when it is feasible to realistically make a determination as to the presence of any misfires. That determination, maintains the respondent, cannot be made until total cleanup has been accomplished (Tr. 153). In its operation, the superintendent inspects the faces and muck piles immediately after firing before he goes home at the end of the day shift and after the air is cleared out enough to facilitate his inspection, and this cannot be done until the face is totally exposed and the holes can be observed. In the instant case, respondent maintains that the area cited had been mucked out, but not totally cleaned up. While most of the material is removed during any mucking operation, a third of the material may still be present which would obscure some of the face (Tr. 154). Respondent submits that the reason the standard language contains no specific time frame is to permit an operator some flexibility to follow his own mining cycle which, in this case, calls for orderly and safe sequential mining procedures which are so necessary to any successful mining operation (Tr. 151-152).

The inspector conceded that he could have cited the respondent with a violation of section 57.6-106, which specifically requires examination of faces and muck piles by a competent person for undetonated explosives or blasting agents, and requires the disposition of such explosives or agents when they are found. He did not do so because he considered the holes to be misfires and believed that section 57.6-177 was more appropriate (Tr. 137). MSHA's counsel also believed that the misfire standard is more specific than the general requirement found in section 57.6-106, requiring a general inspection after an explosion (Tr. 138).

When asked whether there is any specific mandatory standard requiring examination of any area which has been blasted for hazards such as misfires, the inspector replied "57.3-22" (Tr. 65). That section requires that miners examine and test the back, face, and rib of their working places "at the beginning of each shift and frequently thereafter." "Working place" is defined by section 57.2 as "any place in or about a mine where work is being

performed." (Emphasis added.) There is no dispute that at the time the citation issued no one was working in the face area in question, and the inspector issued no citation for failure to examine the area during the mucking operation. I assume that he did not do so because he made no determination that the face area was not inspected while work was being carried out there.

In addition to section 57.2, section 57.18-2 requires examinations of working places by a competent person designated by the operator or at least once each shift for conditions which may adversely affect safety or health. If such conditions are detected, an operator is required to promptly initiate appropriate action to correct such conditions. MSHA's program directive dealing with the application of this standard (Exh. R-2), indicates that this standard shall be cited where there is a failure to conduct an examination of the working place or to record the fact such an examination has been made.

The theory of petitioner's case rests on its assertion that the inspector discovered two misfired holes which were clearly visible to him after the face area had been blasted and cleaned out. Since the misfires were still present, petitioner believes that it is obvious that they were not reported, nor disposed of, since respondent's own people advised the inspector that they had no knowledge of the existence of the misfired holes (Tr. 148-149). Petitioner's counsel conceded that section 57.6-177 contains no specific time frame for the disposition of misfired holes and that the language "as soon as possible" implies that they are to be reported when they become known (Tr. 150151). It seems obvious to me, however, that petitioner's case relies on an assumption that there was no way that the respondent could not have known about the existence of the misfires.

At the time the citation issued, the inspector did not inquire of Mr. Riddle as to when the face was blasted, but he did ask Mr. Scheible, the assistant safety engineer, who told him that he did not know when the blasting had taken place (Tr. 59). The inspector made no determination as to the time interval between the mucking of the face area in question and the time he observed the misfires, nor did he know when the blasting had taken place (Tr. 67). He also testified that he has operated front-end loaders, has engaged in mucking out places in a mine, and believed the one top misfired hole should have been visible at anytime during the mucking process, and that it would take very little mucking to be able to detect the bottom misfire. He knew of no reason which would have prevented the mucking operator from observing the misfired holes on the day in question (Tr. 133-135). He agreed that the mining cycle calls for mucking to be done on the evening shift and that it was possible that the face area was shot down the day before his inspection and that it was cleaned out the night before his arrival on the scene (Tr. 136).

As indicated earlier, the thrust of petitioner's case, including the basis for the alleged violation of section 57.6-177, rests on petitioner's assertion that the respondent failed to dispose of the two misfired holes

as soon as possible after they were detected or should have been detected. Since it is obvious from the evidence adduced in this case that they were not detected by the respondent until the inspector arrived on the scene and issued the citation, the threshold question is whther the respondent's failure to detect the two misfires after it completed its initial mucking operation and prior to the final cleanup and inspection of the area which had been blasted constitutes a violation. In other words, does the requirement "as soon as possible" impose an obligation on the respondent to detect and dispose of any misfires immediately after completion of any blasting, or may the respondent wait until it completes its final cleanup and inspection of the area before it is obligated to inspect for and dispose of misfires?

Respondent's testimony regarding its mining cycle, including the blasting and cleanup sequence, is not rebutted by the petitioner. Further, I have to assume that the mining sequence and cleanup procedures are accomplished in accordance with an MSHA approved plan, and petitioner has not indicated otherwise. In these circumstances, I believe that it is permissible for an operator to complete its regularly approved and routine mining cycle before conducting any inspection for misfired holes, and if its plan calls for the inspection and disposition of such misfires after it has completed its cleanup, then I believe it is reasonable to find that the operator is in compliance with section 57.6-177, because complete inspection of a face cannot be thoroughly examined until such time as all of the blasted material has been removed from the face area, and once that is accomplished, I believe that it then becomes possible to inspect for misfires. However, on the facts of this case, I cannot conclude that the respondent complied with the standard, and I find that the petitioner has established a violation. My reasons for this follow.

Inspector Lalumondiere testified that the face area which had been blasted on the evening before his inspection had been cleaned up and no one was working there. The mining crew had obviously moved on to another section of the mine. Although respondent's witness Riddle testified as to the general cleanup procedure and indicated that no one has any reason to go back to an area which had previously been blasted until it is completely cleaned up, he also indicated that when the two misfires were called to his attention after the issuance of the citation, he observed that the two holes were not obstructed by any debris or rocks. This leads me to conclude that the face area in question had been cleaned up to the point where the two misfired holes were readily visible to anyone in the area, and it supports the inspector's testimony that the area had been cleaned up. In other words, while I accept respondent's assertions concerning the general cleanup and mucking procedures, I conclude and find that on the day the citatation issued, mucking and cleanup had been completed, the two misfired holes were readily visible, and at that point in time they should have been detected and disposed of.

Respondent's assertion that it should have been given an opportunity to go into the face area to inspect for misfires as part of its routine mining cycle in advance of the inspector's arrival on the scene is rejected as a

defense to the citation issued in this case. According to the testimony, the responsibility for inspecting the area after it is shot down and mucked rested with the loader operator who mucked the area out after it was shot down. However, he did not testify. Under the circumstances, the only credible testimony of the conditions which prevailed on the day the citation issued is the testimony of the inspetor and Mr. Riddle, and, as indicated above, the inspector's testimony supports the citation as issued. In addition, I also find that petitioner has established the fact that the two holes were in fact misfires as that term is defined in section 57.2. The citation is AFFIRMED.

Gravity

While it is true that no one was working in the area which had been blasted on the day the citation issued, the fact remains that men were underground working some 400 feet away in another section. Although the possibility of an accidental detonation was rather remote due to the fact that no one was working in the area, the fact is that no one can predict such an occurrence, and I believe that failure to detect or dispose of misfired holes constitutes a serious violation, particularly in an underground mine. I find that the violation was serious.

Negligence

Respondent's suggestion that it is not feasible or convenient for a loader operator to alight from his machine during the mucking operation to inspect for misfired holes is rejected. Mr. Riddle testified that after the initial mucking operation, it is the responsibililty of the front-end loader operator to inspect the area for misfires during the asserted "final and careful" cleanup of the area. Since I have found that the testimony adduced supports a finding that the area had been cleaned up when the inspector arrived on the scene, I conclude that it is reasonable to assume that the loader operator either did not inspect the area at all after finishing his cleanup chores, or he did so in such a casual manner that he did not detect the two holes located in the corner of the face which was blasted. In these circumstances, I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care and that this constitutes ordinary negligence.

Good Faith Compliance

The evidence adduced reflects that the two misfired holes were immediately washed out as soon as they were brought to the attention of mine management, and I conclude that this constitutes rapid good faith compliance on respondent's part.

Prior History of Violations

The evidence adduced supports a finding that respondent has a good safety record and that its prior history of violation at the mine in question is excellent.

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

The parties stipulated that respondent is a small mine operator and that the penalties assessed will not adversely affect its ability to remain in business. I adopt these stipulations as my findings on these issues.

Docket No. LAKE 80-57-M

Citation No. 364712, May 9, 1979, 30 C.F.R. § 57.20-20, states as follows:

> The unattended mine openings were not restricted by gates or doors. Two men were seen in the mine. These men did not have self rescuers, individual lights, and had not checked in. This mine has not operated for at least 6 months and is being used for some storage at present time. The men in the mine work at the Derby Quarry.

30 C.F.R. § 57.20-20 provides as follows: "Access to unattended mine openings shall be restricted by gates or doors, or the openings shall be fenced and posted."

Petitioner's Testimony and Evidence

MSHA inspector Raymond Roesler testified that he conducted a safety inspection of respondent's Derby Underground Mine on May 9, 1979, and that he was accompanied by Bill Tsantis and inspector George Lalumondiere. He confirmed that he issued the citation charging that the respondent failed to have gates or doors to entrances of the mine. He observed two men working underground, and they were loading a pickup truck with some lumber in the second crosscut from the mine face. The mine had been shut down for some 6 months and the two men did not check in and were not equipped with self-rescuers or cap lamps. He described the mine as an underground limestone mine which uses the room and pillar mining method, and he observed some five mine openings which were not restricted by any barrier devices. The only barrier he observed was a large pipe that swung across the surface road by the entrance to the property approximately a quarter of a mile from the five openings. Although the pipe barrier was swung open at the time, even if it were closed, anyone could easily climb over, under, or around it.

Inspector Roesler stated that he cited section 57.20-20 because the mine adit is on the surface and the required barriers are for installation on the surface of an underground mine, and the area cited was just that. The mine was not abandoned, but was worked on an intermittent basis when the weather is good. He discussed the lack of gates or doors with underground superintendent Bill Tsantis, and Mr. Tsantis advised him that the two men were in fact surface miners who normally worked at the quarry and that they were not his responsibility. The pipe gate was some 4 feet high, and while it could prevent someone from driving on the property if it were locked closed, anyone on foot could go past it while it was closed. None of the

other four openings were restricted by gates, doors, or other barriers. He extended the abatement time because work was still required to be done to correct the conditions when he first went back to the mine, and the conditions were subsequently abated the next time he had occasion to visit the mine (Tr. 161-173).

Mr. Roesler described one of the mine openings as large enough for a truck to drive through, or some 15 feet high by 20 feet wide. The smallest opening was approximately 10 feet by 10 feet, and all of the openings were provided with gates and fences to abate the citation. He determined that the respondent should have been aware of the conditions cited because the opening were plainly visible, but the chances of the men in the mine being injured as a result of the cited conditions were remote. However, for a nonminer who might venture into the mine, loose rocks or pillars could present a possible hazard. There was a mine check-in and check-out system at the adit and he and his inspection party checked in, but the two men underground had not. Abatement was achieved in good faith (Tr. 173-177).

On cross-examination, Mr. Roesler identified Exhibit R-3 as a sketch of the area cited, and it depicts the approximate locations of the pipe entrance gate and the unguarded adits he was concerned with. He conceded that many underground limestone quarries are used for a variety of nonmining purposes, including storage facilities (Tr. 180-182).

In response to bench questions, the inspector indicated that the unattended mine openings were in fact adits that had been shot out from the inside of the mine to the outside. Several were originally intended to be used as adits, but since the rock, shale, and roof conditions were bad in these areas, they were barricaded from the inside of the mine and not used as adits, but they would extend into the mine for approximately a quarter of a mile (Tr. 180-188). The usual procedure for attending these openings when active mining is taking place is to check in and out when anyone goes into the mine. The normal check-in location is at the mine office across the highway alongside the Derby Slope Mine (Tr. 190).

Respondent's Testimony and Evidence

Arnold Mulzer, one of the mine owners, testified that he has been engaged in limestone quarrying since 1942. He confirmed that mining underground was dependent on dry weather and he indicated that the mine roof is in good condition and that the mine is used for storage of lumber, tires, and other mining equipment and materials. Storage of materials underground is a common practice because the roof is high and storage costs are cheap. Anyone who wishes to get into a mine can do so regardless of what type of barriers are installed. Four of the open adits in question are used only for ventilation and vehicles cannot drive through the openings. They are simply shot out and left that way, and are not intended to be used as a regular means of mine access. They are barred from the inside some 50 feet into the mine (Tr. 197-201).

On cross-examination, Mr. Mulzer could not state whether any limestone production had taken place subsequent to May 9, 1979, and that he visits the operating drifts and slopes about once a week. He did not deny that the two miners were underground securing lumber on the day in question, but maintained that the adits were primarily used for ventilation and the mine was primarily a storage area (Tr. 203). The truck drove through the truck mine opening and not through any of the ventilation adit openings, which he characterized as "holes" which are simply shot through to facilitate ventilation so that the installation of mine fans is unnecessary (Tr. 204). The pipe gate at the main road entrance was installed at the insistence of a MESA mine inspector in 1973 to achieve compliance with the identical standard cited by Mr. Roesler (Tr. 206), and respondent takes the position that this should satisfy the requirements imposed by MSHA in this case (Tr. 207). The men in the mine were simply picking up some lumber and were not bolting faces or mining and the place is clean (Tr. 208).

Findings and Conclusions

Fact of Violation

Petitioner takes the position that since no one was attending the mine area cited by the inspector, that is, no one was physically present to check people in and out, the mine openings in question were unattended within the meaning of the cited standard . Petitioner's counsel took the position that if someone were stationed at the main road entrance where the pipe gate was swung open to check people in and out of the mine, compliance would have been achieved since that person would have prevented unauthorized persons from going beyond that pipe gate and into the remaining adit openings which were unprotected by gates or barriers and possibly injuring themselves. On the other hand, if the pipe gate were swung shut and locked and no one was present to check anyone in and out, compliance would not be achieved because anyone could easily go through or around the closed pipe gate and gain entry into the remaining open adits (Tr. 190-193). Since the mine was totally unattended, it necessarily follows that the mine openings were also and that a violation has been established (Tr. 214).

Respondent does not dispute the fact that the mine openings cited and testified to by the inspector did in fact exist and that they were unattended and not provided with gates or other devices restricting anyone who wanted to enter the mine at those openings from doing so, nor were they fenced or posted. Responent's defense is that the pipe gate at the main road entrance to the mine sufficiently restricted any unauthorized persons from entering the mine, and that regardless of the type of devices installed to prevent persons from entering mine openings, someone will find a way to enter if they so desire.

Respondent's reliance on the pipe gate as a defense to the citation is rejected. While that gate may have offered some protection against unauthorized entry, I cannot conclude that it was sufficient to provide protection against entry into the other unattended mine openings. Section 57.20-20 requires that unattended mine openings be restricted by gates or doors or that they be fenced and posted. Since none of these devices were being utilized at the time the citation issued, I conclude and find that the petitioner has established a violation and Citation No. 364712 is AFFIRMED.

Negligence

The inspector found two miners underground who went into the mine through one of the larger openings used for vehicle entry and there was no indication that they had checked in with anyone, although the usual mine procedure is for persons who go underground to check in and out at the mine office used for that purpose. Although Respondent maintained that the pipe gate at the mine road entrance was placed there in 1973 in order to comply with a prior citation for section 57.20-20, I do not consider that to be a defense to the citation issued by another inspector on May 9, 1979, some 6 years later. The fact is that aside from the pipe gate, the other mine openings cited were the direct result of respondent's blasting them out to facilitate its mine ventilation and to permit vehicles to enter for purposes of storing and retrieving equipment, and there is no evidence that these openings were present during any prior inspection which may have resulted in the 1973 inspection. Further, since the prior inspection resulted in a citation, I believe it is reasonable to expect an operator to be aware of the fact that additional mine openings may require him to install barriers or other protective devices to provide the protection required by section 57.20-20. In these circumstances, I conclude and find that the respondent failed to exercise reasonable care to prevent the conditions cited and that its failure in this regard constitutes ordinary negligence.

Gravity

The evidence adduced in this proceeding reflects that the underground mine in question was mined on a seasonal and intermittent basis and that at the time the citation issued, no mining was taking place and the men underground went there only to retrieve some lumber from the storage area. Further, the mine road is usually locked with the pipe gate, and a check-in and out system is in use at the mine, although there is no indication that the two men underground used it on the day the citation issued. Based on the circumstances of this case, and in light of the inspector's finding that the possibility of the men underground being injured as a result of the conditions cited was rather remote, I conclude that the violation is nonserious.

Good Faith Compliance

The evidence establishes that abatement was achieved within the extended time fixed by the inspector and the open adits were protected with gates or fences to achieve compliance. I conclude that respondent exercised good faith abatement in correcting the cited conditions.

History of Prior Violations

Respondent's history of prior violations at its Derby Slope Mine consists of two prior citations during the 24-month period prior to the issuance of the citation in issue in this case. I conclude that this is an indication of a good record of prior citations on respondent's part and I have considered this fact in the amount of the penalty assessed in this matter.

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

The parties stipulated that respondent is a small mine operator and that the penalties assessed will not adversely affect its ability to remain in business. I adopt these stipulations as my findings and conclusions on these issues.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and after consideration of the criteria for penalty assessments set forth in section 110(i) of the Act, civil penalties are assessed as follows in these proceedings:

Docket No. LAKE 80-201-M

Citation No.	Date	30 C.F.R. Section	Assessment
366596	11/27/79	57.6-177	$75

Docket No. LAKE 80-57-M

Citation No.	Date	30 C.F.R. Section	Assessment
364712	05/09/79	57.20-20	$25

ORDER

The respondent IS ORDERED to pay the civil penalties assessed by me in these proceedings, in the amounts shown above, within thirty (30) days of the date of these decision. Upon receipt of payment by MSHA, these proceedings are DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SEP 3 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding	
	:	Docket Nos.	Assessment Control Nos.
v.	:	PIKE 79-19-P	15-09727-03002
	:	PIKE 79-111-P	15-09727-03005
	:	PIKE 79-112-P	15-09727-03006 V
C.C.C.-POMPEY COAL COMPANY, INC., Respondent	:	PIKE 79-117-P	15-09727-03003 V
	:	PIKE 79-125-P	15-09727-03004 V 1/
	:	KENT 79-116	15-09727-03007 V
	:	No. 3 Mine	

DECISION ON REMAND IN DOCKET NO. PIKE 79-125-P
AND AMENDMENTS OF FINDINGS AND ORDER ACCOMPANYING
ORIGINAL DECISION ISSUED IN DOCKET NOS. PIKE 79-19-P, ET AL.

The Commission on June 12, 1980, issued its decision in Secretary of Labor v. C.C.C.-Pompey Coal Company, Inc., Docket No. PIKE 79-125-P, 2 FMSHRC 1195 (1980), remanding my decision in the above-entitled proceeding with instruction that I rewrite the portion of my decision disposing of an alleged violation of 30 C.F.R. § 75.400 cited in Order No. 66869 dated May 12, 1978, so as to apply the holding of the Commission in Secretary of Labor v. Old Ben Coal Co., 1 FMSHRC 1954 (1979), instead of the holding of the former Board of Mine Operations Appeals in Old Ben Coal Co., 8 IBMA 98 (1977), which had, in effect, been reversed by the Commission's Old Ben decision, supra.

In footnote 6 on page 1197 of its decision on remand, the Commission indicated that I might wish to give the parties an opportunity to comment upon the effect of applying the principles set forth in the Commission's Old Ben decision to the facts surrounding the issuance of Order No. 66869 before complying with the Commission's instructions on remand. In response to the Commission's suggestion in footnote 6, I issued an order on July 7, 1980, providing that counsel for the parties could file appropriate comments by August 11, 1980. Counsel for the Secretary of Labor filed a three-page memorandum on August 7, 1980, in response to my order of July 7, 1980, but no comments have been received from counsel for respondent.

1/ The Commission's remand pertained only to one alleged violation out of the 11 violations alleged by the Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-125-P. This decision on remand, however, can appropriately be issued only in the consolidated proceeding because the evidence concerning all alleged violations was introduced in the consolidated proceeding and the result of the remand requires changes in the findings and order which accompanied the decision originally issued in Docket Nos. PIKE 79-19-P, et al. Also, I have had to deal with respondent's untimely request to reopen the entire consolidated proceeding.

Inasmuch as the Commission's remand applies only to a single violation alleged by the Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-125-P, my decision on remand will be written under that docket number.

Docket No. PIKE 79-125-P

Order No. 66869 dated 5/12/78 § 75.400

Findings. Section 75.400 provides that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein. Respondent violated section 75.400 because oil and float coal dust had been allowed to accumulate to a depth of from 1/8 inch to 1 inch on and around the electrical components of the S and S Scoop having Serial No. 168 (Tr. 398). The scoop was being used to load coal and contained permissibility violations consisting of eight missing bolts around the control panel and missing conduits around power wires (Tr. 410; 416). The lack of permissibility increased the gravity of the violation because it would have been possible for a spark from an electrical component to produce a fire inasmuch as oil and float coal dust had accumulated around the electrical components (Tr. 416-417). A high degree of negligence was associated with the violation because the last electrical inspection had been made only 2 days before the order was written and an electrical inspector (who had checked the scoop for permissibility, but who did not write Order No. 66869) testified that the amount of combustible materials he had observed on the scoop could not have accumulated within a period of 2 days (Tr. 421). Respondent demonstrated a good faith effort to achieve compliance.

Conclusions. In its decision in the Old Ben case, supra, the Commission stated that one of the primary purposes of the Act is to prevent death and injury by fire and explosions. In the Commission's opinion, section 75.400 was designed to prevent accumulations rather than to require that accumulations be cleaned up within a reasonable period of time as the Board had held. Under the Commission's view of section 75.400, there is no doubt but that a violation of section 75.400 occurred.

Both of respondent's witnesses agreed that there were accumulations of coal, mud, and oil on the scoop (Tr. 423; 430). The primary point made by respondent's witnesses was that the inspector who cited respondent for the violation of section 75.400 with respect to the scoop should have written a routine citation under section 104(a) of the Act instead of an unwarrantable failure order under section 104(d) of the Act. While the validity of the order itself was not under review in this civil penalty proceeding, the evidence did show that the violation was serious and that a high degree of negligence was associated with it because the accumulations were caked in a form which showed that they had existed longer than the 2 days which had elapsed since the scoop had been given an electrical inspection on May 10, 1978, or 2 days prior to the writing of the order on May 12, 1978. Thus,

there is evidence to show that the violation was a definite hazard to the miners and that respondent knew or should have known about the violation, but had done nothing to clean up the accumulations.

The findings I have made above are consistent with the recommendations as to the criteria of gravity, negligence, and good faith effort to achieve compliance which are contained in the memorandum filed by the Secretary's attorney. While the inspector who wrote the order said that he felt the operator had not shown good faith in achieving compliance, he based that conclusion on the fact that he wrote the order on May 12, 1978, and it was not terminated until May 25, 1978 (Tr. 406; 413). An inspector other than the one who wrote Order No. 66869 wrote the subsequent action sheet which terminated the order. Also other evidence in the record shows that respondent had received a large number of orders and citations on May 12, 1978, so that a considerable amount of time was required to correct them. Consequently, it would be improper to find that respondent failed to demonstrate a good faith effort to achieve compliance solely because several days elapsed between the time the order was written and the time it was terminated. Additionally, inspectors do not fix an abatement period in orders because no production can be performed in any event until the hazardous conditions cited in the order have been corrected.

The stipulations of the parties in this proceeding show that respondent produced about 60,000 tons of coal annually and employed between 20 and 40 miners (Tr. 5). On the basis of the stipulation, I find that respondent operates a relatively small coal business.

In my original decision I stated that payment of penalties would not have an adverse effect on respondent's ability to continue in business because respondent had not introduced any evidence with respect to its financial condition (Buffalo Mining Co., 2 IBMA 226 (1973), and Associated Drilling, Inc., 3 IBMA 164 (1974)). Although counsel for respondent filed a letter with me on March 5, 1980, asking that I reopen the record to permit him to introduce facts about respondent's present financial condition, I denied the request because I had lost jurisdiction over the case at the time his letter was received inasmuch as my decision had been issued on January 28, 1980.

I explained in my letter in response to the request for reopening the record that the Commission had granted the Secretary's petition for discretionary review and I suggested that he take up the matter of having the record reopened for receipt of additional evidence with the Commission when he filed his brief in the review proceedings. In my order issued July 7, 1980, I gave additional reasons for my belief that I am precluded from reopening the record. Respondent's counsel did not file a brief in the review proceedings before the Commission and did not file any comments in response to my order of July 7, 1980. Therefore, I feel that I must adhere to the finding originally made in this proceeding with respect to the criterion of whether the payment of penalties would cause respondent to discontinue in business.

The discussion above has dealt with all of the six criteria except the criterion of history of previous violations. Exhibit 1 shows that respondent violated section 75.400 twice in 1976 and eight times in 1977. That is a very adverse trend in number of violations of section 75.400. Therefore, the penalty for the instant violation of section 75.400 should be $100 under the criterion of history of previous violations.

The findings and conclusions above show that respondent is a relatively small operator, that the violation was serious, that there was a high degree of negligence, that respondent demonstrated a good faith effort to achieve compliance, and that payment of penalties will not cause respondent to discontinue in business. Based on those findings, a penalty of $300 should be assessed and that penalty should be increased by $100 under the criterion of history of previous violations to the total penalty of $400 recommended in the Secretary's memorandum.

WHEREFORE, it is ordered:

(A) Paragraph (1) on page 23 of my decision issued in this proceeding on January 28, 1980, is amended by inserting under the heading "Docket No. PIKE 79-125-P" the following entry:

Order No. 66869 5/12/78 §75.400 .... (Contested) .... $ 400.00

(B) Paragraph (1) on page 23 of my decision issued in this proceeding on January 28, 1980, is amended by changing the total settlement and contested penalties for Docket No. PIKE 79-125-P from "$3,550.00" to "$3,950.00."

(C) Paragraph (1) on page 23 of my decision issued in this proceeding on January 28, 1980, is amended by changing the total settlement and contested penalties to be assessed from "$12,965.00" to "$13,365.00."

(D) Paragraph (B) on page 24 of my decision issued in this proceeding on January 28, 1980, is amended to require respondent to pay, within 30 days from the date of this decision, civil penalties totaling $13,365.00 instead of total penalties of $12,965.00 as originally provided. If respondent has already paid the civil penalties of $12,965.00 required by paragraph (B) of my decision issued January 28, 1980, respondent should within 30 days from the date of this decision on remand submit an additional penalty of $400.00 for the violation of section 75.400 cited in Order No. 66869 dated May 12, 1978.

Richard C. Steffey

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

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4 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceeding Docket No. SE 79-46-PM AC No. 01-00040-05006 F
v.		Montevallo Quarry & Mill
ALLIED PRODUCTS COMPANY,	Respondent	

DECISION

Appearances: Murray A. Battles, Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Gilbert E. Johnston, Counsel for Respondent.

Before: Judge William Fauver

This proceeding was brought by the Secretary of Labor under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for assessment of civil penalties for alleged violations of mandatory safety standards. The case was heard at Birmingham, Alabama. Both parties were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript.

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

FINDINGS OF FACT

1. At all pertinent times, Respondent Allied Products Company operated a lime quarry and mill known as the Montevallo Lime Plant in Shelby County, Alabama, which produced crushed limestone for sales in or substantially affecting interstate commerce.

2. Respondent employed about 135 people at the plant and operated the quarry in two 8-hour shifts, 6 days a week and the mill in three 8-hour shifts, 7 days a week. Limestone was mined from the quarry and hauled to the mill, where it was crushed and screened before being transported by conveyor belt for storage or further processing in rotary kilns and ball mills.

3. An elevated dirt haulage road with a crushed limestone surface led to a spoil dump about 1 mile from the plant. The road was 33 feet wide, on a 7-percent grade, and had an elevation ranging from 5 to 30 feet. Berms along the road were 6 to 18 inches high. However, at some points along the road the berms were washed away by drainage.

4. William E. Evans, the quarry foreman, was responsible for maintaining the berms along the dump haulage road. The berms, which were a mixture of clay and stone, were left behind as road scrapings when the road was constructed. When the berms washed out, they were purposely left unrepaired so that water would drain off the road instead of into the quarry.

5. Between September 5, 1974, and March 30, 1977, Respondent was issued 12 citations charging violations for inadequate berms throughout the quarry and plant.

6. On Saturday morning, November 25, 1978, one of Respondent's employees, Herman Shirley, was fatally injured while operating a Clark 620 Bobcat front-end loader on the dump haulage road. Shirley, who was 67 years old, worked in Respondent's storeroom and would normally travel to supply houses in Montevallo and Birmingham to pick up parts and accessories for the plant's machinery and equipment. He was under the direct supervision of Respondent's purchasing agent, Charlie Thornton and the storekeeper, S. D. Posey. When he was not picking up parts, Shirley would clean in and around the storeroom and haul trash to the spoil dump in a pick-up truck, which the general mill foreman, Joe Dial, used to drive to and from work.

7. Shirley normally worked on Saturday. However, he was not scheduled to work on November 25, 1978, because all laborers and clerks were off until Monday, November 27, following the Thanksgiving holiday. He reported for work anyway at his usual time, 7 a.m. The packing yard foreman, J. C. Smith, and the day shift leadman were in charge because Joe Dial was off. Smith did not question Shirley's presence or tell him to go home for the holiday week-end. The shop needed to be cleaned and he decided to let Shirley work that day. After Shirley cleaned the shop and bathhouses, he proceeded to load trash on the Bobcat because the company truck that he normally used to carry trash was not available. Edward Majors, a co-worker and friend of Shirley's, saw Shirley about 9 a.m. in the lunchroom removing trash to haul to the dump. He warned Shirley not to use the Bobcat because he believed it was dangerous for Shirley to operate it.

8. Shirley made one trip to the dump, apparently hauling two 55-gallon barrels of trash in the bucket of the Bobcat. On the second trip, about 10:30 a.m., when he was hauling two 55-gallon drums, the Bobcat overturned on his return down the haulage road. The vehicle went through a washed-out area that had no berm overturned down a 6-foot embankment and landed on Mr. Shirley, who was killed in the accident. At about 4:45 p.m., Paul Misenhimer, Respondent's safety and personnel director, notified the MSHA field office in Birmingham of the fatality and an investigation began the following day.

9. On November 26, 1978, Joe Garcia, a federal mine inspector, inspected Respondent's plant after learning of the fatality the preceding evening. He was accompanied by Bart Collinge, his supervisor for mining safety, Paul Misenhimer, Respondent's personnel and safety director, and an insurance consultant. When they arrived at the accident site, the area was barricaded and the Bobcat was still upside down. When Shirley's body was removed the day before, the back end of the Bobcat was picked up and swung around 90 degrees and laid back down. They found the bucket to be lowered but not in its lowest position. Inspector Garcia observed a green fluid leaking from the Bobcat, which he determined to be motor oil. No hydraulic fluid appeared to be leaking from the Bobcat in its position at the accident site. The roll-over protective structure (ROPS) had been removed from the Bobcat before the accident.

10. Normally, the Bobcat was used in confined areas in the plant, which was level, for cleaning spillage under overhead conveyor belts, horizontal rotary kilns and coolers. However, Terry Davidson, an oiler, regularly used the Bobcat about twice each month to travel up a ramp that led into the cooler pit on the No. 2 kiln. Rich Gilbert, the usual operator, was also observed using the Bobcat on this ramp on several occasions, including the night before the accident.

11. The Bobcat came equipped with a roll-over protective structure. Respondent removed the ROPS so that the Bobcat could maneuver inside the plant. Normally, the operator wore a hard hat and no employee, before Mr. Shirley, had been injured while operating the Bobcat with the ROPS removed. Respondent did not obtain an MSHA modification approval to remove the ROPS. After the accident, Respondent replaced the 620 Bobcat with a 720 Bobcat and reduced the ROPS about 5 inches so that it could be used inside the plant. Also, Respondent built a suitable berm of large rocks, which allowed drainage over the edge of the dump haulage road.

12. The Bobcat, which weighed about 3 tons, was powered by two hydrostatic motors and could attain a speed of 6.6 mph. The operator powered and steered the Bobcat with two hand levers located directly in front of his seat. To move forward or backwards, he would push or pull both levers simultaneously in the direction he wanted to travel. If he wanted to turn right or left, he would push one lever forward and pull the other lever back. To stop the machine, he would release both levers and a spring mechanism would return them to an upright position.

13. The hydrostatic motors were located under the operator's seat. When the operator pushed the levers forward or pulled them back, a valve was activated, causing a vane pump to draw hydraulic fluid from two reservoir tanks, which were joined by a cross-pipe or manifold so that they would always contain an equal amount of fluid. The tube through which fluid was drawn was about 1 inch from the bottom of the reservoir tanks.

14. The Bobcat developed a hydraulic fluid leak several weeks before the accident. The hydrostatic system depended on an equal balance of pressure so that the more air that became trapped in the system, the less

efficiently the Bobcat would operate. As the level of fluid in the reservoir tanks diminished, the operator would experience increasing difficulty in driving, steering and operating the bucket, which was controlled by a separate valve. Symptoms of an imbalance in pressure ranged from squeaking noises to erratic or "jerky" movements when engaging the hand levers. Occasionally, the operator would have to stop the machine to add more fluid and some of the other employees using the Bobcat experienced difficulty keeping the engine running. Freddie Smitherman, who was unaware of the leak, noticed that the bucket would squeak when raised or lowered. Terry Davidson, who was aware of the leak, testified that as the machine traveled forward, it left a stream of hydraulic fluid in its path. He also testified that while operating the Bobcat, he would sometimes have difficulty turning and occasionally he would hear squeaking noises. One time, when he wanted to stop the machine, the levers remained in the forward position, causing the machine to creep forward.

15. For about 3 weeks before the accident, the Bobcat was leaking hydraulic fluid from the rear axle and from the pump and pump fittings, causing the machine to malfunction. The loading yard foreman had been aware of the leak for about 3 weeks before the accident. The Montevallo Welding Company had been requested to pick up the Bobcat for servicing on Friday, November 24. However, it picked up a different piece of equipment, which also needed servicing, and the Bobcat was not repaired before Mr. Shirley's accident.

16. In investigating the accident site, Inspector Garcia observed two faint impressions in the road that he determined to be tire tracks. The right track was 142 feet long and veered gradually to the right side of the road where the Bobcat overturned. Before photographs were taken of the accident site, the right tire track was painted to ensure that it would be visible.

17. The Bobcat was transported to the shop on Monday, November 27, to conduct tests on its driving, steering and bucket functions. Inspectors Garcia and Scotty Wallace, safety director Misenhimer, State Inspector Henson, Rich Gilbert, the operator, and others were present. Motor oil was added to the engine before the tests began. No hydraulic fluid was added. The level of hydraulic fluid in the reservoirs was measured to be about 1-1/2 inches, which was about 10 gallons. The Bobcat's reservoir capacity was 17-1/2 gallons. No hydraulic fluid leaked from the machine while upside down following the accident.

18. The first test involved operating the Bobcat on the level concrete surface inside the shop. All the machine's functions, including steering and movement of the bucket, operated smoothly.

19. The Bobcat was then taken outside with the motor running and driven into a small ditch to approximate the grade on the haulage road. With the front of the Bobcat lower than its rear, the fluid was expected to run to the front of the machine; this test was to determine whether the pumps were able to pick up fluid from the reservoirs on a downward grade. When the operator, Rich Gilbert, tried to move the machine from the ditch, none of its functions (forward and reverse movement, steering, bucket operation) would operate.

20. The Bobcat was left in that position for about two weeks until the sales representative from Altanta, Mr. Shoeback, arrived. He determined that the level of hydraulic fluid had decreased about one-quarter inch since November 27. Before more tests were conducted, the sales representative added 7-1/2 gallons of fluid to the reservoirs. With the reservoir tanks filled, the operator was able to move the Bobcat out of the ditch without difficulty. After driving aound the yard and returning to the ditch, the operator released the hand levers. However, they remained in a forward position instead of returning to an upright position.

21. In the MSHA inspector's opinion, three factors contributed to the cause of the accident and Mr. Shirley's death: a defect in the equipment that caused hydraulic fluid to leak and affect the Bobcat's steering; the absence of roll-over protection; and the absence of a berm on the elevated haulage road where the Bobcat left the road and overturned down an embankment.

22. On November 26, 1978, Inspector Garcia issued a citation to Respondent, reading in part: "The road leading up the elevated ramp to the spoil dump was not provided with a berm to prevent equipment from going over the bank on the open side." The cited condition was abated on November 28, 1978, after Respondent constructed adequate berms.

23. On November 27, 1978, Inspector Garcia issued a citation to Respondent, reading in part: "An oil leak existed in the hydraulic system on the Clark 620 Bobcat front-end loader which adversely affected steering and contributed to a fatal accident on 11/25/78." The cited condition was abated on January 23, 1979, by repairing the source of the leak.

24. On December 4, 1978, Inspector Garcia issued an order of withdrawal to Respondent, reading in part: "The roll-over protection structure had been removed from the Clark Melroe Bobcat model 620 front-end loader, serial 4970-M-11013 that was involved in a fatal accident on November 25, 1978." The cited condition was abated on January 23, 1979, by installing a modified ROPS on the Bobcat. No exception had been taken to the absence of ROPS on the Bobcat during the last inspection of the Montevallo Plant in March, 1977.

25. In May 1978, when Harry Reeves became general manager of Respondent's plant, there was no safety program and he directed Paul Misenhimer to establish a program that would meet the needs of the company and the requirements of MSHA. The safety program that was subsequently established required that the minutes of every meeting be forwarded to Reeves' office for review. The meetings were conducted by Misenhimer and Respondent's supervisors, including Joe Dial. Misenhimer conducted 12 to 15 meetings in 1978. However, he was unable to maintain accurate records of all the meetings because he did not conduct all of them.

26. Terry Davidson testified that he could not recall one way or the other whether he attended any safety meetings prior to the accident. Freddie Smitherman testified that he could not say how many safety meetings were held in 1978.

27. Respondent's safety rules prohibited any employee from starting or operating any machine or piece of equipment without authorization or without being qualified to operate it, which included knowing how to start, stop and operate it in a safe manner. Mr. Shirley was required to sign a written statement that acknowledged receipt of Respondent's safety rules booklet.

28. Authority to operate the Bobcat and other pieces of equipment was given by the plant superintendent, the general manager, Harry Reeves, or the plant manager, Joe Dial. Rich Gilbert, Wesley Smith and the leadman, Freddie Smitherman, were authorized to operate the Bobcat. Before an employee could obtain authorization to operate the Bobcat, which was considered more difficult to operate than other pieces of equipment, he was supposed to become qualified. Normally, when an employee successfully bid on a piece of equipment for which he had no prior experience he would be placed in a training program with an experienced operator so that he could gain the necessary experience to become qualified and authorized. As shown below, Respondent did not enforce its equipment-qualifying rule with any regularity or by an established program.

29. Freddie Smitherman operated the Bobcat before he was "qualified" to operate it.

30. Various employees who were not authorized to operate the Bobcat, including, Herman Shirley, were seen operating it. Terry Davidson, the oiler, operated the Bobcat without authorization at times when he needed a heavy object moved between oil stations located on either side of the plant and a regular operator was not present. He had been using the Bobcat about twice a week during the 5 months before the accident. Dial was aware that Davidson drove the Bobcat. Ball mill helpers and the burner helpers also drove the Bobcat without authorization. In July, 1978, Dial observed Shirley operating the Bobcat in trying to remove a piece of equipment from a pick-up truck and told him that he was not authorized to operate it and that he should get a regular Bobcat operator to handle the job. Another time, a few months later, Dial told Shirley, in the presence of Freddie Smitherman, to stop using the Bobcat when he observed him moving the machine out of the path of a truck he was driving. The former plant superintendent, Lyle Butterworth, also told Shirley on another occasion, in Dial's presence, to get off the Bobcat.

31. Dial testified that Shirley was not qualified to operate the Bobcat because he was tempermental and preferred to do things his own way, and that he also tended to handle equipment roughly.

32. Shirley was never disciplined for operating the Bobcat without authorization. Evans had reprimanded a number of employees for violating safety rules but he never fired anyone for a safety violation. While Evans was in charge, there were a total of 5 fatalities in the whole plant.

DISCUSSION WITH FURTHER FINDINGS

On November 26, 1978, Inspector Garcia charged Respondent with a violation of 30 C.F.R. § 56.9-22, which provides: "Berms or guards shall be provided on the outer bank of elevated roadways." The basic issue as to this citation is whether the berm on the outer bank of Respondent's elevated haulage road was adequate to prevent equipment from going over the side of the road.

The Secretary argues that the berms along Respondent's haulage road were inadequate and that this condition contributed to the death of Herman Shirley when the Bobcat he was operating left the road and overturned on him.

The Secretary recommends a penalty of $10,000.

Respondent contends that the cited standard is "vague and uncertain" because it does not specify a required height for berms or guards. Respondent also contends that the Secretary's application of section 56.9-22, which requires a berm to be as high as the mid-axle of the largest piece of equipment that travels the road, is not published in 30 C.F.R. Part 56 and, therefore, is not binding on Respondent. Respondent argues that the berm along the road, which was 6 to 18 inches, was adequate to stop the Bobcat from going over the side.

I find that Respondent violated 30 C.F.R. § 56.9-22 by failing to provide or maintain a berm on the outer bank of the haulage road at the site of the accident. A preponderance of the evidence shows that the berm was constructed of road scrapings, that it was 6 to 18 inches high and that at the site of the accident it was washed out and deliberately allowed to remain open for drainage. A visual examination of the photographs taken on November 26 shows an absence of a berm where the Bobcat overturned. William Evans, the quarry foreman, testified that when berms were washed out they were left unrepaired. I find that Respondent was aware that the berm was inadequate and that this condition allowed the Bobcat to leave the road and contributed to the fatal accident on November 25, 1978.

Respondent's argument that the cited standard is "vague and uncertain" is unpersuasive. There was no berm at the point where the Bobcat overturned. This was not a situation in which the inspector was given unbridled discretion to determine whether or not a berm was adequate. In this case, the berm had washed out and Respondent purposely left it unrepaired in spite of the obvious safety hazard.

On November 27, 1978, Inspector Garcia charged Respondent with a violation of 30 C.F.R. § 56.9-2, which provides: "Equipment defects affecting safety shall be corrected before equipment is used." The basic issue as to this citation is whether the leak in the Bobcat's hydraulic system affected the safety of its operation.

The Secretary argues that the Bobcat leaked hydraulic fluid, that Respondent was aware of the leak and that the leak caused the operation of

the Bobcat, including steering and bucket movement, to malfunction. The Secretary contends that the leak constituted a defect that prevented the hydrostatic pump from drawing enough fluid into the system, causing the Bobcat to operate improperly, and that this defect contributed to the fatal accident.

The Secretary recommends a penalty of $10,000.

Respondent argues that the Bobcat was not defective and that the leak in the hydrostatic system did not affect the operation of its driving and steering functions. Respondent argues that the Bobcat was supposed to be used only on the level surface of the plant's shop and that no one had previously taken it on the haulage road. Respondent contends that the Bobcat operated satisfactorily during the 3 weeks prior to the accident even though the pumps leaked hydraulic fluid and that it was used the night before the accident without incident. Respondent contends that the tests conducted after the accident show that the Bobcat operated smoothly on the level plant surface even though its reservoirs contained only 10 gallons of fluid.

I find that Respondent violated 30 C.F.R. § 56.9-2 by allowing the Bobcat to be used before a defect in the hydrostatic system was corrected. A preponderance of the evidence shows that the Bobcat had been leaking fluid for about 3 weeks prior to the accident and that Respondent was aware of the leak. At the time of the accident, 7-1/2 gallons of fluid had leaked from the machine and it was scheduled to be repaired. Terry Davidson, the oiler, testified that the leak was very obvious and as the Bobcat traveled forward it left a stream of fluid in its path. He also testified that sometimes he would have trouble turning the Bobcat and that he heard it make squeaking noises. He stated that on one occasion he released the levers to stop the machine but they remained in the forward position. This defect would prevent stopping the vehicle so long as the motor was running. Freddie Smitherman, who used the Bobcat the night before the accident, testified that the bucket squeaked when raised or lowered and Rich Gilbert testified that he would occasionally have to stop the machine to add more fluid.

On irregular terrain, an operator could stop the Bobcat by lowering the bucket and causing it to stike a substantial mound or hill before the machine. However, I find that the bucket was neither intended to serve nor functioned reliably as a brake on a graded surface such as the dump haulage road. Lowering the bucket could not stop the Bobcat on the elevated road to the spoil dump.

The tests conducted on November 27, 1978, show that the Bobcat operated smoothly on a level surface. However, when placed in a ditch with its front end down to approximate the grade of the haulage road, the Bobcat would move neither forward or backward. This test would not explain why the Bobcat seemed to operate properly on the haulage road on Shirley's first trip to and from the dump but it raises a substantial question about the machine's reliability. A preponderance of the evidence shows that the Bobcat's steering, driving and bucket functions were adversely affected by the leak, particularly when the Bobcat was used on a downward slope.

On December 4, 1978, Inspector Garcia charged Respondent with a violation of 30 C.F.R. §56.9-88, which provides in pertinent part: " * * * all * * * front-end loaders * * * as used in metal and nonmetal mining operations, with or without attachments, shall be used in such mining only when equipped with * * * Roll-over protective structures (ROPS)."

The Secretary contends that this violation contributed to the fatal accident, and recommends a penalty of $10,000.

The basic issue as to this citation is whether Respondent's Bobcat 620 front-end loader was required to be equipped with ROPS. Respondent admits that it removed the roll-over protective structure from the Bobcat so that it could manuever inside the plant to clean in and around confined areas under overhead conveyor belts and rotary kilns and coolers. Respondent argues that because the Bobcat was used only in the plant area the equipment was subject to 30 C.F.R. § 56.14-13, which requires all front-end loaders to be equipped with protective canopies "when necessary to protect the operator," rather than the cited standard. Respondent contends that since all operators using the Bobcat in the plant area wore hardhats, it was not necessary to install an overhead canopy, and it was also unnecessary to provide ROPS because there was no danger of the Bobcat overturning. Respondent argues that the Bobcat was used only in the plant area, that the operator always wore a hardhat, and that no employee had been previously injured while operating the Bobcat without ROPS. Respondent contends that no exceptions were taken by inspectors during the last inspection of the Montevallo Plant in 1977 after the Bobcat's ROPS had been removed.

I find that Respondent violated 30 C.F.R. § 56.9-88 by allowing the Bobcat to be used with the roll-over protective structure removed. The cited standard unabiguously requires that ROPS be provided on all front-end loaders. I find unpersuasive Respondent's argument that because the Bobcat was used in the plant area it was relieved of this requirment and I also find unpersuasive its argument that section 56.14-13 applied rather than section 56.9-88. Respondent's arguments confuse the purpose of protective canopies with the purpose of ROPS. The standard that requires overhead canopies only when needed to protect the operator does not supersede or negate the requirement that all front-end loaders be provided with ROPS. In many instances, an overhead canopy will provide the same protection afforded by ROPS. However, when an overhead canopy is not required, the operator must still be protected should the piece of equipment overturn, which is what ROPS are designed to do. In addition, the fact that the Bobcat was regularly driven on the elevated ramp in the plant refutes the contention that it was confined to level areas.

Respondent contends that it should not be held responsible for the negligence and unauthorized conduct of an employee, and asserts that the cause of the fatal accident was Shirley's unauthorized and unsafe use of the Bobcat in direct violation of the company's safety rules. Respondent contends that on three previous occasions Shirley had been reprimanded for using the Bobcat and that he knew he was not allowed to operate equipment without authorization or without knowing how to operate it.

The evidence shows that a safety program was established about 5 months before the accident. However, the testimony of Paul Misenhimer, the safety director, and Harry Reeves, the general manager, indicate that records of the meeting were not well kept. Terry Davidson and Freddie Smitherman, the only employees to testify about the substance of the safety meetings, which were supposedly held once a week, remembered very little about the meetings or whether any were held.

I find that Respondent did not adequately train its employees about the dangers of operating equipment without being qualified or without obtaining authority. There was evidence that Herman Shirley acknowledged receipt of the company's safety handbook and that he knew of the rule against operating equipment without authorization. However, a preponderance of the evidence shows that various employees who were not authorized to operate the Bobcat used the machine anyway and on three previous occasions management personnel observed Shirley using it. When observed using the equipment without authorization, he was not disciplined but was told simply to cease using it. There was also evidence, which I credit, that Respondent permitted its employees to use the Bobcat without being qualified. Freddie Smitherman stated that he used the Bobcat with the consent of Joe Dial, the plant foreman, before becoming qualified. Only after gaining experience in this fashion did he become qualified and, subsequently, authorized.

I find that Respondent was negligent in not taking appropriate measures to prevent or deter Shirley (1) from operating the Bobcat without authorization and (2) from operating it on the dump haulage road. I find that Respondent's safety program failed to impress upon Shirley an absolute necessity to refrain from using equipment without authorization. I find that Respondent took no measures, such as a warning sign, to prevent employees from using the Bobcat on the dump haulage road. I also find that Respondent neglected to warn its employees who used the haulage road, including Shirley, of the washed out berms on the outer bank.

Respondent also asserts that the Secretary failed to prove by a preponderance of the evidence that the accident was caused by a defect in the Bobcat's steering and driving systems and argues that it was just as likely the result of Herman Shirley suffering a heart attack while operating the Bobcat. Respondent argues that the fact that Shirley was 67 years old and that the Bobcat veered gradually for 142 feet to the side of the road lead to a reasonable inference that Shirley became unconscious and slumped forward onto the levers, causing the machine to continue traveling down the haulage road and to leave the road. However, there was no medical evidence to support a conclusion that Herman Shirley was rendered unconscious before the machine left the road, and I find this theory to be mere speculation. The preponderance of the evidence establishes that death was due to a combination of defects negligently caused and permitted by Respondent, including: (1) the hydraulic fluid leak; (2) the missing berm; and (3) the removal of the ROPS. These negligent defects combined with Respondent's negligence in not taking more effective and reasonable measures to prevent or deter Shirley from operating the Bobcat without authorization and from operating it on the dump haulage road.

CONCLUSIONS OF LAW

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

2. Respondent violated 30 C.F.R. § 56.9-22 by failing to provide a berm on the outer bank of the elevated roadway as alleged in Citation No. 81004. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of $10,000 for this violation.

3. Respondent violated 30 C.F.R. § 56.9-2 by using defective equipment, i.e., the Bobcat front-end loader, as alleged in Citation No. 81007. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of $5,000 for this violation.

4. Respondent violated 30 C.F.R. § 56.9-88 by failing to provide roll-over protection on the Bobcat front-end loader as alleged in Citation/Order No. 81053. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of $10,000 for this violation.

ORDER

WHEREFORE IT IS ORDERED that Allied Products Company shall pay the Secretary of Labor the above-assessed civil penalties, in the total amount of $25,000.00,within 30 days from the date of this decision.

William Fauver

WILLIAM FAUVER, JUDGE

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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5 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. BARB 79-307-P
	:	A.O. No. 15-11348-03002
v.	:	Docket No. BARB 79-285-P
	:	A.O. No. 15-11348-03001
THE PITTSBURG & MIDWAY COAL MINING COMPANY, Respondent	:	Docket No. PIKE 79-129-P
	:	A.O. No. 11348-03004 F
	:	Docket No. KENT 79-74
	:	A.O. No. 15-11348-03006
	:	Docket No. KENT 79-180
	:	A.O. No. 15-13348-03007
	:	Docket No. KENT 79-367
	:	A.O. No. 15-13348-03009
	:	Docket No. KENT 79-269
	:	A.O. No. 15-11348-03008
	:	Docket No. KENT 79-99
	:	A.O. No. 15-11348-03003
	:	Pleasant Hill Surface Mine
	:	Docket No. KENT 79-229
	:	A.O. No. 15-02021-03005
	:	Colonial Strip Mine

DECISIONS

In its Decision of August 4, 1980, the Commission remanded the captioned "independent contractor" cases to me for the limited purpose of affording the Secretary an opportunity to consider several enforcement options available to him as a result of my decisions of February 8, 1980,

affirming his decision to proceed against the respondent mine owner-operator rather than against a number of independent contractors. As I interpret the Commission's remand, the Secretary had thirty (30) days to make up his mind, and to inform me as to any enforcement decision in this regard. On September 4, 1980, the Secretary filed a response to the Commission's decision on remand and a copy is attached and incorporated herein by reference.

In view of the fact that the Secretary indicated to the Commission during the appeal of these cases that he now desires to achieve "fair enforcement" of the Act in independent contractor cases, and in view of Commissioner Jestrab's observations in his dissent concerning the Secretary's concession that the respondent is not the operator, it seems to me that it is incumbent on the Secretary to decide how he now wishes to proceed in these cases, and that is precisely how I interpret the Commission's remand. However, rather than doing this, the Secretary is now attempting to shift the burden to the respondent and to the contractors to take the initiative for the substitution or parties, and in the alternative he suggests that the case be reopened to permit the respondent to implead the contractor as a third party. The Secretary's apparent refusal to comply with the Commission's decision that he take the enforcement initiative in these cases is apparently based on some mysterious policy question which is characterized by the Secretary at pg. 2 of his remand statement as something not in his interest.

It seems obvious to me that the Secretary has not complied with the Commission's decision on remand. Accordingly, in order to give the Secretary a fresh opportunity to apply his new enforcement policy, and in keeping with his avowed intent to insure that "fair enforcement of the Act" will be followed in contractor cases, IT IS ORDERED that all of these dockets be DISMISSED, without prejudice to the Secretary instituting new proceedings against any and all parties who he believes should be pursued.

George A. Koutras
Administrative Law Judge

Attachment

Distribution:

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

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION Petitioner	)	CIVIL PENALTY PROCEEDING
	)	DOCKET NOS. BARB 79-307-P
	)	BARB 79-285-P
v.	)	PIKE 79-129-P
PITTSBURG & MIDWAY COAL MINING COMPANY Respondent	)	KENT 79-74
	)	KENT 79-180
	)	KENT 79-367
	)	KENT 79-269
	)	KENT 79-99
	)	KENT 79-229

SECRETARY OF LABOR'S
STATEMENT ON REMAND

On August 4, 1980, the Federal Mine Safety and Health Review Commission (Commission) remanded this case in order to afford the Secretary of Labor (Secretary) "an opportunity to determine whether to continue to prosecute these citations against Pittsburgh & Midway Coal Mining Company (P&M), or any independent contractors which are claimed to have violated the standards cited, or both." As noted by the Commission in its order, the Secretary suggested a remand concerning this case at oral argument.

In making his reply to the remand order, the Secretary recognizes that his response may not neatly fit the categories outlined in the Commission's order. In the Secretary's view, each case stands in its own right and his action must be geared to that particular case. However, one central point remains unchanged: mine operators remain liable for violations committed by independent contractors at their mine site. What has changed

is the enforcement policy of citing the production operator and only the production operator for these violations. Under new policy guidelines effective in late June, independent contractors, in most instances, will be cited in their own right for violations they have committed. Only in limited circumstances will production operators be cited for such violations. See 45 F.R. 44494 et seq. July 1, 1980. This enforcement policy is essentially prospective, i.e., it affects enforcement actions taken after the policy change. It was not intended, nor should it be so construed, as an admission that previously issued citations given to production operators are in any way legally unenforceable. However, the new policy directive does permit some additional flexibility in trying the older cases. Several options are potentially open. The Secretary could attempt to either substitute the contractor-operator for the owner-operator or attempt to join the contractor. While legal efforts of this nature may be possible in some cases (procedural difficulties may exist in both courses of action), they do not appear to be in the Secretary's interest in this case. Two other courses remain. One is for the producer and contractor to join in a motion to substitute contractor for producer. The Secretary, based on his new policy, would not oppose this course. If the private parties agree to this action and the contractor in consenting to this course clearly waives all possible procedural objections, the Secretary would have no reason to object to a result which would conform to the new policy. The other option is to reopen the case to permit the operator an opportunity to perfect an attempt to implead the

contractor as a third party respondent. As you may know, this course was recently taken in Secretary of Labor v. Morton Salt Division v. Frontier-Kemper Contractors, CENT 80-59-M, April 14, 1980.

Accordingly, the Secretary suggests that the record should remain open to permit the production operator, P&M, to explore either of its options and advise the presiding judge if it wishes to pursue either course. While the Secretary may, in other as yet untried cases, consider and attempt to involuntarily join the contractor, that course does not appear appropriate in this case where the initial decision of the presiding judge is favorable to the Secretary and attempting to retry the case would be of little value.

Respectfully submitted,

Thomas A. Mascolino
Counsel for Trial Litigation

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Arlington, Virginia 22203
Telephone: (703) 235-1153

CERTIFICATE OF SERVICE

A copy of the foregoing Secretary of Labor's Statement on Remand was served by U. S. Mail, postage prepaid, this 3rd day of September, 1980, upon:

Terrance M. Cullen, Esq.
The Pittsburg & Midway Coal
Mining Company
1720 South Bellaire St.
Denver, Colorado 80222

Thomas A. Mascolino

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

5 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. SE 79-10
Petitioner	:	A/O No. 01-01492-03005 V
v.	:	
	:	Blocton Strip Operation
BURGESS MINING AND CONSTRUCTION CORPORATION,	:	
Respondent	:	

DECISION

ORDER OF DISMISSAL

Appearances: Murray A. Battles, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner, MSHA;
W. E. Prescott III, Burgess Mining and Construction Corporation, Birmingham, Alabama, for Respondent, Burgess Mining and Construction Corporation.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Government against Burgess Mining and Construction Corporation. A hearing was held on August 20, 1980.

At the hearing, the parties agreed to the following stipulations (Tr. 4-5):

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

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

3. The Administrative Law Judge has jurisdiction over these proceedings.

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

5. A true and correct copy of the subject citation and termination were properly served upon the operator in accordance with the Act.

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

7. The operator is medium in size.

8. The alleged violation was abated in a timely manner and the operator demonstrated good faith in obtaining abatement.

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

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 10-96). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench (Tr. 96). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. 105-107).

BENCH DECISION

The bench decision is as follows:

This case is a petition for the assessment of a civil penalty. The alleged violation is of section 77.1301(a) which provides as follows: "Detonators and explosives other than blasting agents shall be stored in magazines."

The subject citation sets forth, in pertinent part, that a box-type magazine used to store explosives or detonators in the work areas was not provided in the drilling and hole loading area of the coal pit where three men were working at drilling and loading holes, and that there were five caps and five primers and approximately 100 ammonium nitrate fuel oil bags in the cargo space of a flatbed truck located within 50 feet of holes already loaded and the men working in the area on the drill bench.

The MSHA inspector testified that he did not know how the caps, primers, and ammonium nitrate bags were brought to the pit area from their permanent storage magazines, which

magazines had 4 inches of steel around them. At the time the inspector saw these materials in the pit area, the hopper truck, which was the approved means to transport them, was being used elsewhere and the materials were lying on the flatbed truck referred to in the citation. According to the inspector, when the citation was issued the holes were being drilled and the caps, primers, and ammonium nitrate would be used in a short period of time, i.e., a matter of minutes.

The Solicitor argues that 1301(a) applies because everything is stored until it is actually used. I am unable to accept this argument.

First, the verb to "store" is defined as "to put aside, or accumulate, for use when needed;" Webster's New World Dictionary, Second Edition. These articles were not put aside. On the contrary, they had been taken from the storage magazine, where they had been put aside, and now had been brought to the pit area where they were just about to be used.

Secondly, application of 1301(a) to this case would ignore the entire scheme and sequence of subpart "N" which deals with "Explosives and Blasting." Section 1301, with its many subparts, obviously deals with explosives when they are not going to be immediately used. Section 1302 deals with the transportation of explosives and, finally, section 1303 sets forth the many requirements for the handling of explosives as they are about to be used. In particular, section 1303(f) provides that "Explosives shall be kept separated from detonators until charging is started."

The Solicitor admitted that 1303(f) and 1301(a) might overlap. However, I do not believe I should attribute needless overlapping and sloppy drafting to the regulations where it is neither necessary nor appropriate. The sequence set forth in subpart "N" is clear. Accordingly, I conclude section 1301(a) does not apply and that the instant petition must be dismissed.

I must state, however, that the operator hardly covers itself with glory in this matter. The juxtaposition of these materials on the flatbed truck appears to have been hazardous. It may be that, despite the time lapse, consideration should be given by the Secretary to amending the citation by changing the cited mandatory standard and to filing another petition.

In light of the foregoing, therefore, the instant petition is dimissed and no penalty is assessed.

DENIAL OF MOTION TO AMEND

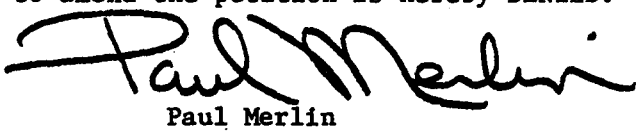
After the close of the hearing and rendition of the bench decision, the Solicitor on August 25, 1980, filed a written motion to amend the instant petition for civil penalty to substitute section 77.1303(f) instead of section 77.1301(a). The operator then filed a vigorous objection. I find the Solicitor's motion wholly without merit. At the hearing in this case, the operator defended itself only against a charge of violating section 77.1301(a). As set forth above, the bench decision raised only the possibility that another petition for assessment of a civil penalty might be filed in the future based upon an amended citation. If the citation were amended by MSHA and a new petition filed by the Solicitor, the operator would then be entitled to all the Secretary of Labor's prehearing procedures with respect to any alleged violation including the assessment conference. The bench decision here did not and indeed, could not decide that there was a violation of section 77.1303(f). To grant the Solicitor's request would result in a denial to the operator of fundamental due process. This I cannot do. The motion is denied.

ORDER

The foregoing bench decision is hereby AFFIRMED.

The petition to assess a civil penalty in the above-captioned proceeding is DISMISSED.

The Solicitor's motion to amend the petition is hereby DENIED.



Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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W. E. Prescott III, Authorized Representative, Burgess Mining and Construction Corporation, P.O. Box 26340, Birmingham, AL 35226 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

5 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
Petitioner	:	Docket No. SE 79-9
v.	:	A.C. No. 01-01897-03002
	:	Gurnee Strip Operation No. 2
BURGESS MINING AND CONSTRUCTION CORPORATION,	:	
Respondent	:	

DECISION

ORDER TO PAY

Appearances: Murray A. Battles, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama for Petitioner, MSHA;
W. E. Prescott III, Burgess Mining and Construction Corporation, Birmingham, Alabama, for Respondent, Burgess Mining and Construction Corporation.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the government against Burgess Mining and Construction Corporation. A hearing was held on August 20, 1980.

At the hearing, the parties agreed to the following stipulations (Tr. 4-6):

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

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

3. The Administrative Law Judge has jurisdiction over this proceeding.

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

5. A true and correct copy of the subject citation and termination was properly served upon the operator in accordance with the Act.

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

7. In 1977, the Gurnee Strip Operation No. 2 produced an annual tonnage of 55,772. The controlling company, Burgess Mining and Construction Corporation, had an annual tonnage of 540,361. The operator is medium in size.

8. Gurnee Strip Operation No. 2 had no assessed violations in the preceding 24 months and the company, as a whole, had 116 assessed violations.

9. The alleged violation was abated in a timely manner and the operator demonstrated good faith in obtaining abatement.

10. The assessment of a civil penalty in this proceeding will not affect the operator's ability to continue in business; but it noted that the Gurnee Strip Operation No. 2 is no longer operating although, of course, Burgess Mining continues to operate other mines.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 7-56). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench (Tr. 56). A decision was rendered from the bench setting forth findings, conclusions, and determinations with respect to the alleged violation (Tr. 75-79).

BENCH DECISION

The bench decision is as follows:

This case is a petition for the assessment of a civil penalty. The alleged violation is of Section 77.410 of the mandatory standards, which provides the following: "Mobile equipment, such as trucks, forklifts, front-end loaders, tractors, and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse."

The subject citation recites in pertinent part that the mechanics truck, working in the pit area, was not provided with an automatic warning device which would give an audible alarm when it was put in reverse.

It is undisputed that the cited truck did not have a backup alarm. The operator contends, however, that Section 77.410 is so ambiguous that it should be invalidated. I reject this argument because I am convinced that the standard is not ambiguous. On the contrary, its meaning is plain and clear. Mobile equipment such as trucks must have automatic backup alarms. The regulation, therefore, applies to all specified equipment which moves.

The Court of Appeals for the Third Circuit, in Lucas Coal Company v. Interior Board of Mine Operations Appeals, 522 F.2d 581 (1975), not only recognized the validity of this standard but went further and applied it to bulldozers which are not specifically mentioned in this standard. The Third Circuit held that the examples given in the mandatory standard are not all inclusive. This case, therefore, is even stronger than Lucas for application of the standard.

The cited equipment in this case is a truck, which is mobile. It falls, therefore, squarely within the terms of 77.410. I find, therefore, that a violation exists.

In addition, I note that 77.410 does not distinguish between various types of trucks. I will not create an exception to the plain language of the standard for pickup trucks or for any other kind of trucks. If it is desirable to do so, then proper procedures exist through the rulemaking process. Administrative Law Judge Melick in Secretary of Labor v. King Knob Coal Company, WEVA 79-360, (June 27, 1980), held that pickup trucks were covered by this standard.

A great deal of testimony was taken with respect to whether the rear view from the truck was obstructed. I find it more probative and accept the inspector's testimony that it was. The operator's witness did not see the truck on the day in question. It appeared from the testimony of the inspector and from statements by the Solicitor that the Secretary has adopted a policy whereby these warning devices need not be provided for pickup trucks unless the rear view is obstructed. I was not furnished with any documentary evidence of this policy. However, I have with me the particular page from the March 9, 1978, MSHA Surface Manual which provides in pertinent part as follows: "The warning device required by this Section need not be provided for automobiles, jeeps, pickup trucks, and similar vehicles where the operator's view directly behind the vehicle, is not obstructed."

I believe that if the Secretary wishes to so circumscribe this standard, then he should follow the rule-making process rather than just placing a change in the inspector's manual. I am not bound by the manual. North American Coal Corporation, 3 IBMA 93, 106 (1974). Kaiser Steel Corporation, 3 IBMA 489, 498 (1974). Indeed, the Third Circuit, in Lucas said: "We need only say that there is nothing in 77.410 which limits its coverage to vehicles with an obstructed view to the rear." 522 F.2d at 585.

In any event, having accepted the inspector's testimony, I find a violation existed even under the interpretation set forth in the manual because based upon the inspector's testimony the rear view from the truck was obstructed.

I conclude the violation was serious because a major injury could result. This truck was used in areas where people work.

I conclude the operator was negligent because, as I have already stated, the language of the mandatory standard is so clear. I further conclude the operator was negligent because even under the interpretation set forth in the inspector's manual the operator knew, or should have known, that the rear view from the truck should not be obstructed.

I reject the operator's contention with respect to what customary usage of various terms are in the mining industry as a basis for not applying the standard. It would be an easy matter for the mandatory standard to specifically incorporate industry interpretation. This standard does not do so. Its meaning is plain on its face.

Other criteria have been stipulated to and I take them into account into fixing the penalty.

In light of the foregoing, and having due regard for all the statutory criteria, a penalty of $250.00 is assessed.

ORDER

The foregoing bench decision is hereby, AFFIRMED.

The operator is ORDERED to pay $250 within 30 days from the date of this decision.

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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W. E. Prescott III, Authorized Representative, Burgess Mining and Construction Corporation, P.O. Box 26340, Birmingham, AL 35226 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 8 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket Nos. HOPE 76-210-P
Petitioner	:	HOPE 76-211-P
v.	:	HOPE 76-212-P
	:	HOPE 76-213-P
COWIN AND COMPANY, INC.,	:	
Respondent	:	Beckley No. 1 Mine,

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner, Secretary of Labor;
William H. Howe, Esq., Loomis, Owen, Fellman & Howe, Washington, D.C., for Respondent, Cowin and Company, Inc.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

This case was originally tried under section 109(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 819(c). The decision was issued on September 14, 1978. The Fourth Circuit Court of Appeals held on December 28, 1979, that Respondent should not have been charged as an "agent" of an operator under section 109(c) of the Act, but as an operator under section 109(a). Cowin and Company, Inc. v. FMSHRC, 612 F.2d 838, 840 (4th Cir. 1979). The case was remanded so that the administrative record could be reopened "for the submission of additional relevant evidence and arguments before Cowin's civil liability is determined and penalties can be assessed under the proper section." Id. at 841.

By order dated March 27, 1980, I granted leave to amend the petition for assessment of civil penalties to allege liability under section 109(a)(1) of the Act. Respondent's answer was filed on April 18, 1980. The parties have stated that they do not wish to submit additional evidence. A briefing schedule was set on June 4, 1980. Respondent filed a brief on June 26, 1980, and Petitioner filed a reply brief on July 11, 1980. Respondent has elected not to respond to Petitioner's reply brief.

STATUTORY PROVISIONS

Section 109(a)(1) 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.

Section 109(c) provides:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) of this section or section 110(b)(2) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b) of this section.

FINDINGS OF FACT

The discussions entitled "The Eleven Alleged Violations" (pp. 9-15) and "Appropriate Penalties" (pp. 19-21) in my decision of September 14, 1978, are incorporated herein by reference.

ISSUES

1. Did Respondent violate the standards as charged by Petitioner?

2. Is 30 C.F.R. § 77.1903(b) a mandatory standard?

3. Is Respondent an "operator" within the meaning of section 109(a)(1)?

4. Should the case be dismissed because of Petitioner's alleged failure to follow its own procedures for assessment of civil penalties?

DISCUSSION

Four arguments have been raised by Respondent since the remand. Two may be disposed of by referring to my prior decision. Respondent claims that 30 C.F.R. § 77.1903(b) is not a mandatory standard upon which an order may be issued and a penalty imposed. This claim was raised and rejected in the first decision, on pages 12-13. Respondent also argues that there were no violations of mandatory standards, referring to its brief filed on July 10, 1978. The first decision also took account of this claim and rejected it. This case is before me "for the submission of additional relevant evidence and arguments." Cowin and Company, Inc. v. FMSHRC, supra. No additional evidence has been offered and these two arguments are not new. The court of appeals considered the whole record and it disagreed only with the finding that Respondent was liable under section 109(c). "No merit" was found in Respondent's other contentions. Id. I have found unpersuasive the additional analysis put forth in support of the first argument since the remand. Respondent's first two arguments are rejected.

Respondent next asserts that the Secretary cannot now deviate from its "operators only" policy of enforcement, adopted in 1975 and sustained by the Commission in MSHA v. Old Ben Coal Company, 1 FMSHRC 1480 (October 29, 1979). According to that policy, Ranger Fuel, the mine operator, would be the party responsible for any violation on the part of Cowin and Company, Inc.

The independent contractor problem has long plagued enforcement of coal mine safety regulations. At the time of the accident on January 7, 1974, the controlling view was that independent contractors could be liable as "operators" under the 1969 Coal Act. Affinity Mining Company, 2 IBMA 57 (1973). In May of 1975, a district court disagreed, after which the Secretary adopted his "operators only" policy. Association of Bituminous Contractors v. Morton, No. 1058-74 (D.D.C. 1975). The petition for assessment of penalties was filed on January 15, 1976. Before the case was decided in September of 1978, two circuit courts had concluded that independent contractors could be liable as "operators," reincarnating the Affinity rule. Association of Bituminous Contractors v. Andrus, 581 F.2d 853 (D.C. Cir., February 22, 1978); BCOA v. Secretary of Interior, 547 F.2d 240, 246 (4th Cir. 1977). Despite this, the Commission in Old Ben approved the Secretary of Labor's "interim" policy of citing only mine operators, for two reasons. First, "unpredictability, confusion and potential unfairness"

were said to be threatened by giving inspectors blanket discretion to decide who is the "operator" for purposes of liability. Second, tolerance for the Secretary's policy was warranted since the Secretary of Labor had been assigned responsibility for mine safety just recently.

The Secretary's new rules on independent contractor liability have been published. 45 Fed. Reg. 44494 (July 1, 1980). No unpredictability, confusion or potential unfairness can result from holding Cowin and Company, Inc., to the section 109(a) standard in any event. The violations were clearly caused by the company and it had ample opportunity to present evidence on all matters bearing on section 109(a)(1) liability.

Furthermore, the simple fact is that, despite the Secretary's policy, the law prevailing at the time of the first decision and still prevailing is that independent contractors may be liable as operators under the 1969 Coal Act. The court, therefore, appears to have decided that continued adherence to the "operators only" policy is insupportable in this case.

Even assuming that the policy is a rule which the Secretary is ordinarily bound to observe, the purpose of the doctrine that an agency is bound by its own rules is "to prevent the arbitrainess which is inherently characteristic of an agency's violation of its own procedures." United States v. Heffner, 420 F.2d 809, 812 (4th Cir. 1970). Rooted as it is in notions of due process, this doctrine is not inflexible. Adherence to agency policy in this case produced a result more arbitrary than departure from it: failure to cite an independent contractor under the provision of law intended by Congress to apply to such entities. Moreover, the decision to depart from the policy was not the result of agency caprice but was directed by a federal court. I conclude that Respondent is subject to liability as an operator under section 109(a)(1).

Respondent's final claim is that the petition should be dismissed since the Secretary failed to follow his own regulations for assessment of civil penalties. Specifically, Respondent states it was not afforded a conference with an assessment officer or a chance to negotiate a reduction in penalties before the assessments became final.

It is true that 30 C.F.R. Part 100, as it read from 1974 to 1978, detailed penalty assessment procedures only for section 109(a) cases. However, Petitioner states in its reply brief that Respondent was, in fact, originally charged as an operator under section 109(a) and thus had the opportunity to avail itself of Part 100 procedures. Due to the change in enforcement policy discussed above, Respondent had to be recharged as an agent of an operator. Petitioner also states that it offered to enter into settlement discussions with Respondent after this case was remanded by the Fourth Circuit.

Respondent's assertion that the procedures in 30 C.F.R., Part 100, were not followed, even if true, is inconsequential. The Petitioner and his predecessor, the Secretary of Interior, always have been vested with prosecutorial discretion to engage in settlement negotiations in civil penalty cases of this nature. Respondent does not contend that it ever requested an opportunity to discuss settlement which was denied by the charging party. Respondent's final claim is rejected.

Petitioner in its reply brief states that the civil penalties previously assessed should remain the same and be reaffirmed. Respondent has not addressed the issue of the appropriate penalty. No new evidence having been introduced, there is no basis to change the penalty originally imposed.

CONCLUSIONS OF LAW

1. Based on my decision of September 14, 1978, I find that Respondent violated the mandatory standards as alleged in Petitioner's amended petition for assessment of civil penalty filed on April 7, 1980.

2. 30 C.F.R. § 77.1903(b) is a mandatory standard.

3. Respondent is subject to liability as an operator under section 109(a)(1) of the 1969 Act.

4. The claim that Respondent has not been afforded the procedures in 30 C.F.R., Part 100 even if true does not warrant dismissal of this case.

ORDER

Respondent is ORDERED to pay the sum of $74,000 within 30 days of the date of this decision.

James A Broderick

James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

William H. Howe, Esq., Attorney for Cowin & Company, Inc., Loomis, Owen, Fellman & Howe, 2020 K Street, N.W., Washington, DC 20006

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 9, 1980

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

DECISION

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

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

Respondent is charged with a violation of 30 C.F.R. § 75.301, a mandatory standard dealing with ventilation of working areas in underground mines. The order forming the basis for this charge was issued by a Federal mine inspector on February 2, 1977. The case thus arose under the Federal Coal Mine Health and Safety of 1969, 30 U.S.C. § 801 et seq. (1970).

A hearing was held at Raton, New Mexico, on November 1, 1979, before Administrative Law Judge Michels. Witnesses were Lawrence Rivera, a Federal Mine inspector, George Krulyac, foreman for Respondent, and Paul McConnell, a mine safety inspector employed by Respondent. Because of the retirement of Judge Michels, the case was, with the consent of counsel, assigned to me for decision on the transcript of the hearing before Judge Michels.

I issued a decision on May 13, 1980. The Commission then granted Respondent's petition for discretionary review. Upon discovering that several of the exhibits introduced at the hearing were absent from the record, the Commission vacated my decision and

remanded the case for further proceedings or appropriate reconsideration. Copies of the missing exhibits have been received and placed in the record. I have reexamined the entire record, and reconsidered the contentions of the parties. Based on that reexamination and reconsideration, I am issuing a new decision which follows.

ISSUES

1. Did Respondent violate 30 C.F.R. § 75.301 as charged by Petitioner?

2. If so, was the violation due to Respondent's negligence?

3. Can accumulations of methane at the working face be taken into account in determining the gravity of a violation of 30 C.F.R. § 75.301?

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

REGULATION

The portion of 30 C.F.R. § 75.301 most pertinent to this case reads:

> All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes. The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute, and the minimum quantity of air reaching the intake end of a pillar line shall be 9,000 cubic feet a minute.

FINDINGS OF FACT

1. Respondent is the operator of the York Canyon No. 1 Coal Mine in Raton, New Mexico.

2. Respondent's operations in York Canyon produce nearly a million tons of coal per year and it employs approximately 400 employees. I conclude that Respondent is a large operator and,

there being no evidence to the contrary, I further conclude that imposition of the penalty proposed by Petitioner would have no effect on Respondent's ability to continue in business.

3. On February 2, 1977, in section 6L of the subject mine, the last open crosscut was not being ventilated by a current of air at least 9,000 cubic feet per minute in velocity. Based on the testimony, I find that there was no perceptible movement of air in the last open crosscut.

4. The loss of air flow was caused by a brattice in the previous open crosscut which was not functioning properly.

5. The brattice was improperly installed; its condition was obvious and should have been noticed by Respondent during the prior working shift.

6. Another brattice, hung from the last open crosscut to the working face, was so severely damaged that it could not have provided sufficient air flow across the working face.

7. At the time the lack of air flow was detected, the air in the working face area contained 3.55 percent methane.

8. Four miners were in the vicinity of the face area at the time the methane was detected, three of them performing maintenance work on an energized continuous miner.

9. Paul McConnell, a mine safety inspector working for Respondent, was with Federal inspector Lawrence Rivera when the latter detected the absence of air flow in the last open crosscut at 6 a.m. He did not attempt to correct the problem at that time but left for other areas of the mine, before Mr. Rivera began to check for methane.

10. After ordering all miners out of the affected area and ordering the power deenergized, Mr. Rivera issued an order of withdrawal to George Krulyac, the foreman of the morning shift, at 7:15 a.m. The air flow was restored and the area cleared of harmful quantities of gas by 8:45 a.m.

DISCUSSION

Federal inspector Lawrence Rivera arrived at the York Canyon No. 1 Mine at about 1 a.m. on February 2, 1977. At 3 a.m., during the maintenance shift, he and Paul McConnell, a mine examiner employed by Respondent, entered the mine. The two arrived at section 6L at approximately 6 a.m. Mr. Rivera attempted to test the air velocity in the last open crosscut, first with an anemometer and then with a smoke tube. He was unable to obtain any readings.

He told Mr. McConnell that something was wrong with the air supply, whereupon, he says Mr. McConnell told him he had other locations to check and would have to leave (Tr. 20). Mr. McConnell admits that he left the section but thinks that on the way to his other duties, he tightened the brattice in the previous open crosscut to correct the loss of air flow (Tr. 86). Mr. Rivera disputes this (Tr. 37) and I find that Mr. McConnell left without investigating the condition further and attempting to correct it.

After Mr. McConnell departed, Mr. Rivera walked to the working face and obtained a reading of more than 2 percent methane. Laboratory tests on bottle samples taken by Mr. Rivera revealed that the methane concentration exceeded 3.5 percent (Exh. P-3). Mr. Rivera, recognized at the hearing as an expert on mine safety (Tr. 11), believed this to be a dangerous condition and ordered the miners in the area to deenergize the power center and leave the section. They had been performing maintenance work on an energized continuous miner. A concentration of methane at or above 5 percent is explosive. Less than 1 percent methane at the face is what is acceptable (Tr. 20-22).

Mr. Krulyac arrived at the section at 7:15 a.m. at which time he was handed the subject order. He left his crew behind the power center and proceeded to correct the loss of air flow. By ensuring that brattices at the previous open crosscut and the last open crosscut were functioning properly, he abated the violation before 8:45 a.m. I find that, as the parties stipulated, Respondent abated the violation in good faith.

Respondent does not deny that it violated 30 C.F.R. § 75.301 and I find that it did. The issue is the appropriate penalty to be imposed. I have previously found that Respondent is a large operator, that its ability to continue in business will not be affected by the proposed penalty, and that Respondent displayed ordinary good faith in abating the violation. The criteria remaining to be evaluated are negligence, history of previous violations and gravity.

HISTORY OF PRIOR VIOLATIONS

Exhibit P-5 shows that during the period from February 2, 1975, to February 2, 1977, there were 170 paid violations of mandatory standards at the subject mine. Four were violations of 30 C.F.R. § 75.301; 11 others were violations of other ventilation standards. In addition to these violations, Respondent was cited on February 1, 1977, the day before the order herein was issued, for a ventilation violation in another section of the mine. After a hearing before Judge Koutras, a penalty was assessed for a violation found to have been serious and caused by Respondent's negligence. The decision was affirmed by the Commission. MSHA v. Kaiser Steel Corp., DENV

78-31-P, 1 FMSHRC 984 (August 3, 1979). I find that these facts demonstrate a significant history of prior violations.

GRAVITY

The failure of ventilation in an underground coal mine can have serious, even tragic, consequences. The Senate Committee Report on the Federal Mine Safety and Health Act of 1977 states: "* * * ventilation of a mine is important not only to provide fresh air to miners, and to control dust accumulation, but also to sweep away liberated methane before it can reach the range where the gas could become explosive. In terms then of the safety of miners, the requirement that a mine be adequately ventilated becomes one of the more important safety standards under the Coal Act." S. Rept. No. 95-181, 95th Cong., 1st Sess. 41 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 629 (1978).

The evidence in this case shows the absence of any movement of air in the last open crosscut at a time when the continuous miner was energized, a short time prior to the beginning of a production shift. This is a serious violation of the standard. It is compounded by the finding that 3.55 percent methane was present in the air at the working face. Although the percentage of methane was not in the explosive range, it could easily and swiftly build up to that range. Ignition sources were present and an explosion could have resulted. I conclude that the condition was very serious. Respondent argues that the methane concentration should not be considered in assessing a penalty because it was charged with a ventilation violation. It is sufficient response to note that one of the most important reasons for the ventilation requirements is to "dilute, render harmless, and to carry away * * * noxious and harmful gases * * *."

NEGLIGENCE

The subject order charges a failure of ventilation. The evidence shows that it was primarily due to the condition of the brattice in the crosscut outby the last open crosscut (point "C" on Exh. P-6). There is evidence that the brattice cloth in the last open crosscut (point "B" on Exh. P-6) was "spaced and damaged" (Tr. 24). The latter condition, even if it did not cause the ventilation problem, is evidence that Respondent was careless in maintaining brattice in the section. The condition was obvious and had been present for some time.

The testimony is conflicting as to the condition of the brattice cloth at point C. The inspector testified that it was too short to cover the opening by about 3-1/2 feet, causing the air flow to be "short circuited." Mr. Krulyac testified that the brattice

was ripped and blowing open in one corner. The inspector stated that the condition was abated by adding a new strip of brattice across the "whole length" of the existing brattice. Mr. Krulyac stated that he corrected the condition by nailing a strip alongside the rip to a timber to hold it down.

I accept the testimony of the inspector and find that the brattice at point C on Exhibit P-6 was too short to seal the crosscut. The inspector's testimony was inconsistent on the question of whether this brattice was damaged, but he was steadfast in his insistence that it was too short to cover the crosscut opening. It seems to me inherently unlikely that the inspector would either invent such a claim or that his memory would fail him on a question so vital to his order. His notes (Exh. P-1) are not inconsistent with his testimony. Mr. Krulyac's written statement (Exh. R-5) describes what was done to abate the violation: "We went back to the next X cut and sealed it tight with brattice. Although there already was a curtain there but the air was going through in some places." This indicates that additional brattice was used to cover the crosscut.

Therefore, I find that the brattice was improperly installed. It is reasonable to infer that it was there at least since the prior production shift. I reject as unreliable the preshift report indicating sufficient ventilation in the section and conclude that the ventilation problem had existed since the production shift. Therefore, Respondent should have been aware of it and corrected it. The carelessness shown by the record includes (1) the improperly installed brattice; (2) an additional damaged brattice; (3) an energized continuous miner in the face area with no air ventilation and in the presence of 3.55 percent methane; (4) a ventilation violation had been cited in another section the previous day and, (5) the subject order was charged as an unwarrantable failure to comply with the standard as a part of a 104(c)(1) chain.

These factors persuade me that the condition was caused by Respondent's gross negligence.

In view of the fact that the violation in this case was very serious, a substantial penalty must be imposed to induce an operator of this size to prevent similar violations in the future.

CONCLUSIONS OF LAW

1. Respondent on February 2, 1977, violated 30 C.F.R. § 75.301.

2. Accumulations of methane at the working face may be taken into account in fixing an appropriate penalty for violation of 30 C.F.R. § 75.301.

3. Under the circumstances of this case, a similar violation occurring on February 1, 1977, at the same mine, is relevant and may be considered in fixing an appropriate penalty.

4. The violation described in Conclusion No. 1 was very serious.

5. The violation described in Conclusion No. 1 was the result of Respondent's gross negligence.

6. Based on the above findings of fact and conclusions of law, and considering the statutory criteria, I conclude that the appropriate penalty in this case is $4,000.

ORDER

Respondent is ORDERED to pay the sum of $4,000 within 30 days of the date of this decision.

James A Broderick

James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

9 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	Civil Penalty Proceeding DOCKET NO. WEST 80-12-M MSHA Case No. 48-00145-05005 DOCKET NO. WEST 80-13-M MSHA Case No. 48-00145-05004
UNITED STATES STEEL CORPORATION, Respondent.	Mine: Atlantic City Ore Operations and Plant

DECISION AND ORDER

APPEARANCES:

Phyllis K. Caldwell, Esq., Office of the Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294,
for the Petitioner;

Louise Q. Symons, Esq., 600 Grant Street, Pittsburgh, Pennsylvania 15230,
for the Respondent.

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

Pursuant to provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the Petitioner seeks an order assessing civil monetary penalties against the Respondent for violations alleged in the three citations involved in the above-captioned cases. The cases were consolidated for a hearing held in Denver, Colorado, on June 12, 1980. The Respondent denies it violated any of the standards cited by the Petitioner.

FINDINGS OF FACT

Based upon stipulation of the parties, the following Findings of Fact are made:

1. Respondent is a large operator, employing 529 employees at the plant where the alleged violations took place.

2. The penalties imposed will not affect Respondent's ability to continue in business.

3. The citations were issued by an authorized representative of the Secretary of Labor.

4. In the 24 months prior to the issuance of the citations involved in these cases, there were 33 assessed violations against the Respondent.

ADDITIONAL FINDINGS OF FACT AND DISCUSSION
DOCKET NUMBER WEST 80-12-M
Citation Number 33865

A violation of 30 CFR § 55.18-20 is alleged.[1]

5. In a building located at the Respondent's taconite plant there is a tripper gallery approximately 200 feet long. The gallery may be reached by means of an elevator or by a stairway. (Tr. 11, 22, 55.)

6. A conveyor brings the material up to the tripper gallery where a tripper mechanism causes the material to fall through a pants chute. The chute directs the material through two rows of grizzlies which are located over openings in the floor. The grizzlies are located on each side of the conveyor and after the material falls through the grizzlies and openings in the floor it goes into the ore bin, located approximately 60 feet below the floor of the tripper gallery. (Tr. 14, 76.)

7. The openings in the floor are approximately 60 feet in length and approximately 10 to 16 inches in width. They are covered by metal grizzlies bars spaced about 1 foot apart. A seal belt covers the bars. (Tr. 11, 55, 56, 76.)

8. At the time of the inspection, some of the grizzly bars on both sides of the conveyor were missing, thus leaving an opening approximately 10 feet in length and 10 to 16 inches in width. (Tr. 72.)

9. On May 15, 1979, by assignment of the Respondent, an employee was working alone washing down the floor of the tripper gallery with a water hose. (Tr. 11.)

10. While working in the tripper gallery, this cleanup person could not been seen nor could her voice be heard by other employees. (Tr. 16.)

11. None of the equipment in the tripper gallery is in operation when the cleanup employee is working there. (Tr. 61.)

12. Light bulbs were located in the tripper gallery ceiling, approximately 15 feet above the gallery floor. (Tr. 58.)

1/ Mandatory. No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen.

13. At the time the cleanup employee was working in the gallery, the drive motor of the equipment was locked out at the electrical junction box. (Tr. 52, 58.)

The citation should be affirmed. The first determination to be made is whether the area where the employee was assigned to work by herself was an area where hazardous conditions existed that could endanger her safety.

"Hazardous" is defined as "[e]xposed to or involving danger; perilous; risky." Black's Law Dictionary 850 (rev. 4th ed. 1968). The mine inspector testified that there were several hazardous conditions present, including the possibility of an employee stumbling in the dust and the possibility of hose water contact with the light bulbs. These possible incidents are too remote to be considered "perilous" or "risky." The inspector testified that the most hazardous condition present was the open area in the floor where the grizzly bars were missing. I agree. Although there is some confusion as to what the employee told the inspector on the date of the violation, the import of the testimony was that the employee was mucking directly over the open hole in the floor on that date (Tr. 26). If the grizzly bars had been in place, so that the opening would have been approximately 10 to 16 inches in width and 1 foot in length, there probably would have been no hazardous condition present within the meaning of 30 CFR § 55.18-20. However, because the openings were about 10 feet long, due to the absence of the bars, I find that a hazardous condition did exist which would endanger the safety of the employee due to the possibility of the employee slipping and falling into the opening.

Since there was a hazardous condition in the area where the employee worked, it was necessary that she be able to communicate with others. Turning again to the dictionary, to "communicate" is defined as follows: "To bestow, convey, make known, recount, impart; to give by way of information." Id, at 349.

The Respondent argues in its brief that there were two means of communication available, a "pager" and the alarm bell in the elevator. The evidence shows that there was a paging system available for use by the employee and presumably she could "make known, impart, or give information" by means of this equipment. However, the equipment was not operable at the time of the inspection. As far as the alarm bell in the elevator is concerned, even if the definition of to "communicate" were stretched sufficiently to sanction use of the elevator alarm bell, there was no evidence showing that the elevator would always be available and would not be in use on a different floor when the employee would need to use it. Such evidence falls far short of the communication definition.

I find that the employee was unable to communicate with others within the meaning of the regulation. The citation was abated immediately by the assignment of an additional employee to work in the area. (Tr. 18.)

DOCKET NUMBER WEST 80-13-M
Citation Number 339622

A violation of 30 CFR § 55.20-3(a) is alleged.[2]

14. In the electrical shop on May 7, 1979, approximately 30 wooden blocks were located behind some lockers in an area used to dry electric motors. The girth of the blocks measured 4 by 4 inches and 4 by 6 inches and they were from 1 to 3 feet long. (Tr. 84, 87, 92.)

15. The wooden blocks were in a 2 by 3 foot pile and a maximum of four candy wrappers were observed in and around the wooden blocks. (Tr. 92.)

16. The wooden blocks were used in connection with work on electric motors. (Tr. 96.)

This citation should be vacated. The evidence shows that the blocks were used in the shop to block electric motors, auto engines, and other equipment so that slings, cables and forklift trucks could secure and lift them. The blocks are heavy and when not in use were tossed into the area in which they were observed by the inspector. (Tr. 103, 104.) However, the inspector testified that there was no safety hazard in regard to the method in which the blocks were piled (Tr. 100), although it appeared to him that the employees had begun to use the area as a refuse pile (Tr. 95). Under these circumstances it would be a strained interpretation of the regulation to find that up to four candy wrappers located in or near the wood blocks constituted a failure to keep the work place clean and orderly, particularly when there was no evidence as to how long the paper might have been there, 1 hour or 1 month.

Citation Number 339620

A violation of 30 CFR § 55.12-30 is alleged.[3]

17. An electric grinder with two grinding wheels measuring approximately 16 inches in diameter was located in the dozer and loader repair area. The wheels were contained within a housing, the top of which was 3 1/2 to 4 feet above the floor. (Tr. 120, 140, Exhibit P-4.)

18. When a grinding wheel is spinning under electrical power and the power is turned off, the wheel continues to spin for 6 minutes before coming to a full stop. (Tr. 107.)

19. Each wheel is contained within a cast iron peripheral guard that encloses the wheel except for the opening where grinding takes place. (Tr. 135.)

2/ Mandatory. At all mining operations: (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.

3/ Mandatory. When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

This citation should be vacated. From the evidence presented, I cannot find that a potentially dangerous condition existed in regard to the electric grinder. The Petitioner showed that the grinder was in a well traveled area of the shop and that the citation would not have been issued if the equipment had been located in an area where fewer persons came into contact with it. Thus, there was no defect complained of in regard to the equipment itself--just its location. There were other grinding wheels in the shop. When turned off, it took approximately 1 1/2 minutes for their grinding wheels to come to a full stop. Since the grinding wheels are well guarded with a cast iron guard that completely surrounds each wheel, except for the small opening where grinding takes place, I find that the risk of injury is too remote to be considered a "potentially dangerous condition" within the meaning of the cited regulation.

CONCLUSIONS OF LAW

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

2. The Respondent violated 30 CFR § 55.18-20 as alleged in Citation Number 33865.

3. The Petitioner failed to prove that Respondent violated the regulations cited in Citation Numbers 339622 and 339620.

ORDER

Citation Numbers 339622 and 339620 and the penalties therefor are VACATED. Respondent is ORDERED to pay a civil penalty of $72, in regard to Citation 33865 within 30 days of the date of this Decision.

Jon D. Boltz
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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9 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 80-308 A.O. No. 46-01297-02026 V
v.	:	Siltix Mine
THE NEW RIVER COMPANY, Respondent	:	

DECISION AND ORDER

The parties move for approval of a settlement of a willful violation of the prohibition against by-passing the ground fault protection on the circuit breaker feeding the high voltage circuit to the belt feeder on the 023 section of the Siltix Mine. Counsel for the parties advise that the perpretrator has never been identified. It further appears that at the time of the violation, June 14, 1979, no concerted effort was made either by MSHA or the operator to determine, by the use of appropriate investigative techniques, the culpable individual or individuals. 1/ For these reasons, I conclude an investigation at this late date to determine the identity of the individual or individuals chargeable with this act of reckless indifference to the safety would be unproductive.

1/ The inspector's statement furnished an investigatory lead that was never followed. Under his remarks on negligence the inspector stated:

> "The person who did this has a thorough knowledge of the electrical circuit and knew exactly where to place the bridge in order to render the ground fault relay inoperative.
>
> This occurs often at this mine due to the fact that the maintenance foremen find it easier and quicker to bridge or block a circuit out than to repair it."

I wish to take this occasion to once again emphasize that in my view individual miners of whatever rank who deliberately endanger fellow workers by knowing and willful disregard for compliance with the mandatory safety standards should be the subject of a civil or criminal investigation and, where appropriate, prosecution under section 110(c) of the Act. See, Secretary v. Southern Ohio Coal Co., 2 FMSHRC ___ (August 4, 1980) and cases cited.

Sooner or later, Congress or the Secretary must face up to the present glaring deficiencies in the Secretary's enforcement scheme. Unless and until MSHA, management, and the unions join forces to ensure that noncompliance by any miner will result in a severe monetary or other penalty voluntary compliance will remain an illusion and miners and their families will continue to suffer untimely deaths and disabling injuries.

In my opinion, MSHA's policy of nonenforcement against the workforce, and particularly the rank-and-file, undermines effective compliance and serves only to (1) engender a cynical disregard for the law, (2) discourage voluntary compliance and (3) create an atmosphere in which miners are induced to cut corners on safety in the interest of increased production. Management's claim that immunizing the workforce is the price paid for industrial peace and productivity has a hollow ring when in case after case it appears immunity is purchased at the expense of safety. 2/ When the flaws in the present enforcement scheme are

---

2/ While compliance with the Mine Safety Law has increased the cost of labor and reduced productivity, it has also sharply reduced the number of mine disasters. The principal reason for the reduction in productivity, however, is the fact that increased costs of production have not been offset by breakthroughs in mining technology. The last major innovation in the underground mines, the continuous miner, was introduced twenty years ago. The World Coal Study notes the industry has been slow to adopt the longwall, shortwall and other techniques that greatly increase the percentage of recovery.

MSHA and the industry can take pride and comfort in the fact that the disaster rate is down. But the sad fact that the miners and their families must live with is the tragedy rate. This is the rate of individual deaths and seriously disabling injuries, which is sharply up. This rate, in my judgment, will only be tolled when every miner of whatever rank is held publicly accountable for compliance with the Mine Safety Law. Much more effective enforcement at less cost can be achieved by imposing personal accountability on the miners. Penalties rightly criticized as ineffective, if not paltry, when imposed on the corporate entity should be supplemented and reinforced by imposition on culpable individuals. There the corrective impact in terms of deterrent and encouragement to voluntary compliance is much greater. Close scrutiny of the present regulatory apparatus reveals that reliance on corporate accountability results in ineffective overregulation at a cost greater than the benefits conferred.

(Footnote 2 continued on next page)

frankly confronted, it is a small wonder that MSHA seems to have all the clout of a moth hitting a summer screen.

Turning to the instant motion, an independent evaluation and de novo review of the circumstances persuades me that given the prevailing enforcement policy the one-third reduction in the penalty proposed for the corporate operator, from $3,000 to $2,000, is fully justified. The time may come, however, when I may feel compelled to deny such a settlement because MSHA and the operator were remiss in their duty to produce the culprit or culprits and implead them as third-party respondents. See, Secretary v. Morton Salt v. Frontier-Kemper Contractors, CENT 80-59-M, 2 FMSHRC, August 8, 1980. But that is a matter for another day.

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, $2,000, on or before Friday, September 19, 1980, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

(Footnote 2 continued)

There is no inherent conflict between safety and productivity. As the President's Commission on Coal noted:

> * * * conversations with industry, labor, and Government regulatory officials and surveys undertaken by the Commission staff suggest that the safest underground mines--apart from any advantage owing to favorable geological conditions and assuming full compliance with the safety law--are those in which the commitment of top management to safety is strong and well known, efforts to achieve good labor-management relations and open communication are practiced, regular equipment maintenance is performed, and training of miners in safe practices is stressed.

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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10 SEP 1980

BETHLEHEM MINES CORPORATION, Contestant	:	Contest of Citation
v.	:	Docket No. PENN 80-52-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine No. 33
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. PENN 80-144
	:	A.C. No. 36-00840-03040
v.	:	
	:	Mine No. 33
BETHLEHEM MINES CORPORATION, Respondent	:	

DECISION

Appearances: John M. Gallick, Administrative Assistant, Bethlehem Mines Corporation, Bethlehem, Pennsylvania, for Bethlehem Mines Corporation;
James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Secretary of Labor.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding arises out of the consolidation of a contest of citation and a civil penalty proceeding arising out of that citation. On November 6, 1979, Bethlehem Mines Corporation (hereinafter Bethlehem) filed a notice of contest of a citation issued under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d)(1) (hereinafter the Act). On February 13, 1980, the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) filed a proposal for assessment of a civil penalty against Bethlehem for violation of 30 C.F.R. § 75.1726(a). On April 30, 1980, I ordered these cases consolidated under Procedural Rule 12 of the Federal Mine Safety and Health Review Commission, 29 C.F.R. § 2700.12.

A hearing was held in Ebensburg, Pennsylvania, on August 12, 1980. Joseph Karpinski testified on behalf of MSHA. Paul Rainey, Robert Moore, and Ronald Riley testified on behalf of Bethlehem.

ISSUES

The first issue is whether the citation under section 104(d)(1) was properly issued. The second issue is whether Bethlehem violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), provides in pertinent part as follows:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

30 C.F.R. § 75.1726(a) provides in pertinent part as follows: "Men shall not work on or from a piece of mobile equipment in a raised position until it has been blocked in place securely."

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

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

STIPULATIONS

The parties stipulated the following:

1. Bethlehem owns and operates the No. 33 Mine.

2. Bethlehem and the No. 33 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over the parties and subject matter of this case.

4. Bethlehem is a large operator within the meaning of the Act and employs 1,316 employees; the coal production for the No. 33 Mine in 1979 was 1,546,544 and the total corporate production for Bethlehem at that time was 10,424,003.

5. Bethlehem demonstrated good faith in abatement with normal compliance after the citation was issued.

6. The assessment of a civil penalty in this case will not adversely affect Bethlehem's ability to continue in business.

7. The conditions or practices listed in the citation constituted a violation of 30 C.F.R. § 75.1726(a).

8. Bethlehem Mine No. 33 was assessed for 366 violations in the 24-month period prior to October 5, 1979. This comes out to a rate of .25 violations per inspection day or one violation every four inspection days.

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. On October 5, 1979, Joseph Karpinsky, a duly authorized representative of the Secretary was conducting a regular quarterly inspection of Bethlehem's Mine No. 33 in Cambria County, Pennsylvania.

2. During the course of his inspection, he observed a miner working on the boom of a roof-bolting machine which was raised 3 feet above ground level and which was not blocked in place.

3. The miner was attempting to straighten a post which supported the line curtain.

4. At the time the miner was working on the raised part of the roof-bolting machine, the section foreman was in the immediate vicinity of that miner and was assisting the miner in attempting to straighten the post.

5. The section foreman was unfamiliar with 30 C.F.R. § 75.1726(a) which prohibits men from working on or from mobile equipment in a raised position until it has been blocked in place securely.

6. After the inspector informed the section foreman of the above provisions of law, the section foreman directed the miner to get down from the raised portion of the roof-bolting machine and the miner did so.

7. The miner who was working on the raised portion of the roof-bolting machine was exposed to physical injuries in the event of a fall.

8. Bethlehem demonstrated good faith in abatement of this citation with normal compliance after the citation was issued.

9. Bethlehem is a large operator and the assessment of a civil penalty will not affect the operator's ability to continue in business.

10. This mine was assessed for 366 violations in the 24 months preceding this citation.

DISCUSSION

In the instant case, Bethlehem concedes that it violated 30 C.F.R. § 75.1726(a) but contends that its violation did not amount to an unwarrantable failure and that the proposed penalty in the amount of $255 is excessive. In my Findings of Fact, supra, I found that the violation in controversy occurred in the presence of Bethlehem's management, to wit, its section foreman. Bethlehem's defense is based upon the following assertions: (1) the section foreman was unaware of the provisions of the regulation at issue; (2) the section foreman told the miner to get off the raised portion of the roof bolter before being cited by the MSHA inspector; and (3) it was unlikely that the raised portion of the roof bolter would move.

The term "unwarrantable failure" was defined by the Interior Board of Mine Operations Appeals as follows:

> [A]n inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or a lack of reasonable care. Zeigler Coal Company, 7 IBMA 280 (1977).

This definition was approved in the legislative history of the Act. S. Rpt. No. 95-181, 95th Cong., 1st Sess. 32 (1977).

The facts of the instant case establish that the violation occurred in the presence of the section foreman and that he took no action to abate this violation until he was made aware of the law by the inspector. The contrary testimony of Bethlehem's witnesses that the foreman told the miner to get off the raised part of the roof-bolting machine before talking to the inspector is rejected because it is less credible than the testimony of the inspector. This conclusion is further supported by the fact that the foreman admitted that he was unaware of the fact that this condition constituted a violation of the regulations. Moreover, the foreman admitted that he never claimed to have told the inspector that he directed the miner to get down before he was advised of the violation. Therefore, under the above principle of law, it is apparent that the violation in question was one of unwarrantable failure

because the foreman failed to exercise reasonable care and due diligence to abate this condition. It should also be noted that an operator cannot escape a finding of unwarrantable failure by establishing that its foreman did not know that a condition constituted a violation of law. Operators are chargeable with knowledge of the law and the test for unwarrantability announced in Zeigler Coal Company, supra, includes the following: "conditions or practices the operator knew or should have known existed * * *." (Emphasis supplied.) This finding of unwarrantable failure implicitly includes a determination that Bethlehem was negligent.

The remaining defenses of Bethlehem go to the gravity of the violation. The only violation charged here is a failure to securely block in place mobile equipment in a raised position. Thus, the only probability of occurrence that is relevant here is the likelihood of injury resulting from some movement of the mobile equipment. I find that only one miner was exposed to injury and the probability of an occurrence was slight.

Based upon the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty of $200 should be imposed for the violation found to have occurred.

CONCLUSIONS OF LAW

1. Bethlehem and its No. 33 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

2. The Administrative Law Judge has jurisdiction over the parties and subject matter of this case.

3. Bethlehem violated 30 C.F.R. § 75.1726(a) as alleged by MSHA and that violation was caused by the unwarrantable failure of Bethlehem to comply with the above regulation because of the following: (A) Bethlehem's section foreman should have known that working on the raised portion of mobile equipment which was not blocked in place securely was a violation of the above regulation; (B) the section foreman was present when the violation occurred and failed to exercise reasonable care and due diligence to abate this violation; and (C) the violation could significantly and substantially contribute to the cause and effect of a mine safety and health hazard.

4. Citation No. 0815883 was properly issued and Bethlehem's contest of that citation is denied.

5. Bethlehem is assessed a civil penalty in the amount of $200 for the violation.

ORDER

THEREFORE, IT IS ORDERED that the contest of citation is DENIED and the citation is AFFIRMED.

IT IS FURTHER ORDERED that Bethlehem pay the sum of $200 within 30 days of the date of this decision for violation of 30 C.F.R. § 75.1726(a).

James A. Laurenson, Judge

Distribution by Certified Mail:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

11 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket Nos. WEVA 80-59
v.	:	WEVA 80-60
	:	WEVA 80-199
	:	WEVA 80-200
MICHAEL JILES AND RICKEY C. BENNETT, Respondents	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Michael Jiles and Rickey C. Mennett, pro se, for Respondents.

Before: Judge Lasher

This matter arises under section 110(c) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Sutton, West Virginia, on July 22, 1980. After considering evidence submitted by both parties, I entered an opinion on the record. 1/ My oral decision containing findings, conclusions, and rationale appears below as it appears in the record, other than for minor corrections in grammar, punctuation, and the excision of obiter dicta:

> This proceeding arises on the filing of a petition for assessment of civil penalty by the Secretary of Labor pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c). The two Respondents, Michael Jiles and Ricky C. Bennett, are charged with and have admitted being an agent of the corporate mine operator, Kerstan Corporation, and knowingly authorizing or ordering or carrying out said operator's violations of two mandatory health and safety standards, i.e., 30 C.F.R. §§ 75.200 and 75.316, which are reflected, respectively, in a section 107(a) withdrawal order dated October 13, 1978, No. 054239 and a section 104(d)(1) citation dated October 13, 1978, No. 054603 for which Petitioner seeks against each of the Respondents penalties of $300 and $200 respectively.

1/ Tr. 80-89.

There are no constitutional issues raised in this case under the equal protection or due process clauses nor are there any issues with respect to the construction of the section of the Act involved, section 110(c).

Both Respondents have forthrightly admitted the violations charged and the only material focus of this proceeding today was to take evidence with respect to penalty assessment factors. Since these are individual Respondents and not mine operators the section 110(i) factors of size of business and effect on an operator's ability to continue in business are not directly relevant. In their place I have substituted the economic ability of the individual Respondents to pay penalties.

Turning now to the first factor, that is the history of previous violations, I find, based upon the stipulation of MSHA, that neither Respondent has a history of any previous violations. Preliminarily, it also should be noted that based upon the testimony of MSHA inspector Carlin Lucky, that both Respondents, Jiles and Bennett, exercised good faith in achieving rapid compliance with the violated standards upon being notified of the two violations involved. Thus, the remaining factors upon which evidence was taken and remain to be discussed are the gravity or seriousness of the two violations; the negligence or other culpability of the two Respondents in failing to correct the two violations; and the economic condition of the two Respondents.

MSHA's evidence indicates that at approximately 11:30 p.m. on October 12, 1978, and after MSHA's supervisory inspector, Clyde Perry, had received a telephone call from a complaining anonymous miner at the Kerstan No. 1 Mine, MSHA inspectors Carlin Lucky and George Moore arrived at the mine to conduct an inspection. Upon their arrival they noted that no preshift examination had been made and after Lucky spoke to Jiles with respect thereto a preshift examination was made which was studied by Lucky and after which Lucky and Moore went underground to make their visual inspection.

It should be noted at this point that the No. 1 Mine had a daily production of approximately 100 tons; that it had approximately 19 employees, 2 surface and 17 underground; and that it operated in two shifts, a production shift from 8:00 a.m. to 4:00 p.m. and a maintenance shift from midnight to 8:00 a.m. Resondent Jiles was section foreman on the day-production shift and supervised between 10 and 13 men, and Bennett was maintenance foreman on the night shift and supervised between four and six employees. Other than the

president of the Kerstan Corporation, Mr. C. K. Scott, Jiles and Bennett were the only supervisory personnel at the mine. According to Inspector Lucky, they ran the entire operation.

The evidence, based on Inspector Lucky's testimony, indicates that the roof control violation, 30 C.F.R. § 75.200, was extremely serious. Inspector Lucky indicated in explanation of his description of the violation contained on the withdrawal order itself, Petitioner's Exhibit 4, that six posts had been installed some 6 or 7 feet from the face whereas the roof control plan at page 17 thereof required such posts to be on 5-foot centers. He also specified on the mine map introduced by MSHA, Exhibit P-8, that four crosscuts outby the face had been mined some 43 feet from the bolting and that this violation, i.e., mining inby permanent roof support, was likewise an infraction of the requirements of the roof control plan as is reflected in drawing No. 1 at page 17 of the plan. Inspector Lucky described five instances where there were infractions of the 20-foot width requirement contained in the plan and that in these places mining widths of 21 to 26 feet had been carried on. He also described dangerous roof conditions where roof bolts were discovered with the heads sheered. In other areas the mine roof was loose and heavy and was falling out around the roof bolts. Finally, Inspector Lucky described areas where roof falls had occurred. The sum of his testimony indicated extremely serious violations which arise out of, caused and occurred in dangerous and hazardous areas of the mine. Since roof falls are the singlemost cause of coal mine fatalities and since most of the violations which were discovered by Inspectors Lucky and Moore were in areas where miners conducted their work, the violation described in Withdrawal Order 054239, with which both Respondents are charged, is found to have a gravity which would call for a substantial penalty.

With respect to the seriousness of the ventilation violation, the infraction is described in the subject citation as follows: "The approved ventilation plan was not being complied with in that seven open crosscuts were present between the main intake and return air courses on the main section." Inspector Lucky pointed out that section 6, page 2 of the ventilation plan was violated since there were not seven stoppings as required by the plan. I find this violation to be only moderately serious, since there was no urgent or proximate danger of any hazard coming to immediate fruition at the time. The hazards are distinct but not remote, there being (1) the presence of respirable dust which constitutes a health hazard in view of its potential for the acquisition of pneumoconiosis by the miners working in the area and (2) the potential for inadequate ventilation to

sweep away any concentration of methane gas liberated by the mining process which might constitute a factor in an explosion. There was no showing that there was methane gas present at the time-or any concentration of respirable dust. Therefore, the court concludes that this violation is only moderately serious.

It appears that the roof control violation had been in existence approximately 2 weeks and the ventilation violation for more than 1 week. No real justification for permitting such violations to occur and continue was advanced by Respondents. I find on the basis of the admissions in the record, as well as the evidence in the record generally, that both Respondents were aware of the two violations with which they are charged and failed to correct them. There appears to be, therefore, the failure to discharge their responsibilities as supervisory personnel, indeed sole supervisory personnel on duty during the two shifts in which the mine was operated, to comply with the mandatory health and safety standards. Such failure is somewhat attributable to the pressure for production which came down from the president of the corporation, Mr. C. K. Scott. However, there is no indication that this pressure which is described in Mr. Jiles' letter to Judge Broderick dated February 15, 1980, was sufficiently overwhelming to excuse the failure of either Respondent from discharging his responsibility to comply with the mandatory health and safety standards.

I therefore find that with respect to the so-called negligence factor that the degree of culpability of Mr. Jiles and Mr. Bennett exceeds ordinary negligence and as agents of the corporate Respondent they did with full knowledge of the fact proceed to allow the two violations to occur and continue.

Both Respondents were given the opportunity to present an economic defense with respect to their ability to pay penalties. Neither Respondent, in my judgment, made out a sufficient case of economic inability to pay reasonable penalties in this case. Such evidence, in the context of the situation of the two Respondents, requires a showing of heavy indebtedness, repossessions, foreclosures, out of work due to health, or the like. Both Respondents have been employed in the past. Respondent Jiles earned in excess of $23,000 in 1979; Mr. Bennett earned considerably less, for which I do plan to make an adjustment, his having earned in a 1979 only $11,000. Generally speaking, it does appear that Mr. Bennett's financial situation is a little more severe than that of Mr. Jiles and perhaps his earning capacity is less than Mr. Jiles, which militates for a different penalty between the two.

Summing up then the factors which militate for a very substantial penalty are the seriousness of the two violations and the culpability of the two Respondents, supervisory employees, in allowing a rather serious hazard to exist which jeopardized the life and health of their fellow miners. Age is sometimes a hidden criterion in evaluating the intent of one in committing certain acts as well as the moral turpitude of those committing certain actions. I realize that when one is younger and lacks experience in life the possibility that accidents and hazards can occur is not nearly as well recognized or in the forefront of the conscious mind as it becomes as one gets older and sees more tragedies, accidents and the like. This is why young people think they're invulnerable when they drive a car and why people, when they get older, slow down. To an extent it is an intelligence test and the understanding can only come with years. So I find (age to be) an exculpatory factor-to a limited extent-with both these Respondents. * * * Other mitigating factors are that neither Respondent has had any history of previous violations and that they exhibited good faith in attempting to achieve rapid compliance with the standards after the inspector notified them of the violations. With respect to Mr. Bennett, I recognize that he has been totally straightforward in stating that he was wrong and; that he is in a relatively disadvantageous economic position.

Weighing all these factors I conclude that Respondent Michael Jiles be assessed a penalty in Docket WEVA 80-59-for the violation described in the subject withdrawal order-of $250, and for the violation described in the citation of 30 C.F.R. § 75.316 (Docket WEVA 80-60) of $175.

Respondent Rickey Bennett is assessed a penalty in Docket WEVA 80-199 for a violation of 30 C.F.R. § 75.200 described in the subject withdrawal order of $175 and a penalty for the violation of 30 C.F.R. § 75.316 described in the subject citation in Docket WEVA 80-200 of $125. 2/

ORDER

Respondent Michael Jiles is ordered to pay $425 and Respondent Rickey Bennett is ordered to pay $300, if they have not already done so, to the Secretary of Labor within 30 days of receipt of this decision.

Michael A. Lasher, Jr., Judge

2/ The thorough preparation for, and professional handling of, this matter by MSHA's counsel has been noted in the record.

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

11 SEP 1980

NATIONAL MINES CORPORATION, Contestant	:	Contest of Order
v.	:	Docket No. KENT 80-130-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 997527 December 10, 1979 Stinson No. 5 Mine

DECISION GRANTING MOTION TO VACATE

When counsel for the Secretary of Labor filed his answer in the above-entitled proceeding, he moved that the proceeding be stayed because the Commission's decisions in the The Helen Mining Co., 1 FMSHRC 1796 (1979), and Kentland-Elkhorn Coal Corp., 1 FMSHRC 1833 (1979), had been appealed by the Secretary and UMWA to the United States Court of Appeals for the District of Columbia Circuit. My order issued February 4, 1980, in this proceeding granted the motion for stay. After I became aware that the Commission in The Helen Mining Co., 2 FMSHRC 778 (1980), had denied a motion for stay based on the same argument which had been used by the Secretary's counsel in the motion for stay granted by my order issued February 4, 1980, I issued a further order on July 8, 1980, dissolving the stay and requiring the parties to state whether they wished to have the case disposed of on the basis of a hearing or a stipulation of facts. If the parties were agreeable to stipulating the facts, the order required that stipulations be submitted and the parties were also given the opportunity of submitting a legal memorandum in support of their respective positions if they wished to do so.

Although there are return receipts in the official file showing that counsel for both parties received the order of July 8, 1980, dissolving the stay, I received an answer to the order only from the Secretary's counsel. His reply stated that he believed the facts could be stipulated and his reply also stated that "[t]he sole legal issue raised in this proceeding is whether an operator is required by section 103(f) of the Federal Mine Safety and Health Act of 1977 to pay a miner representative for the time involved in accompanying an inspector who is conducting a spot inspection as opposed to the so-called complete or regular inspection of the mine."

The Secretary's counsel still requests that the case be stayed pending the outcome of the court proceedings, but I am unable to grant that sort of

relief as I explained in my order issued July 8, 1980. Since a copy of the Secretary's response to my order of July 8, 1980, was sent to counsel for National Mines Corporation, I am interpreting his failure to submit any reply as agreement with the position expressed by the Secretary's counsel, namely, that if the proceeding cannot be stayed, it can be disposed of on the basis of a stipulation of the facts.

The facts are stipulated as follows:

> Inspector Lester Banks issued on December 10, 1979, at 1:55 p.m., Withdrawal Order No. 997527 citing a violation of section 103(f) of the Act because National Mines Corporation had failed to pay a miners' representative who accompanied an inspector during a spot inspection made on November 7, 1979. Order No. 997527 was terminated at 2:15 p.m. on December 10, 1979, afer National Mines Corporation paid the miners' representative for accompanying the inspector on November 7, 1979.

I find that the Commission's decisions in the Helen Mining and Kentland-Elkhorn cases, supra, are dispositive of the issue raised by the Contest of Order or Application for Review filed in this proceeding. As stated above, the sole issue is whether National Mines Corporation violated section 103(f) when it initially refused to compensate the miners' representative who accompanied the inspector during a "spot" inspection. Although National Mines did subsequently pay the miners' representative under protest so as to bring about a termination of Order No. 997527, it is clear under Commission precedent that National Mines did not violate section 103(f) by initially refusing to pay the miners' representative on November 7, 1979. Therefore, I find that Order No. 997527 should be vacated as requested in the Contest of Order or Application for Review filed on January 7, 1980, in this proceeding.

WHEREFORE, it is ordered:

The Contest of Order or Application for Review filed on January 7, 1980, in this proceeding is granted and Order No. 997527 issued December 10, 1979, is vacated.

Richard C. Steffey

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

11 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. VA 79-78 Assessment Control No. 44-02253-03007
v.	:	
JEWELL RIDGE COAL CORPORATION, Respondent	:	Seaboard No. 1 Mine

DECISION

Appearances: Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Donald R. Johnson, Esq., Lebanon, Virginia, for Respondent.

Before: Administrative Law Judge Steffey

When the hearing in the above-entitled proceeding was convened in Abingdon, Virginia, on May 2, 1980, pursuant to a notice of hearing issued February 29, 1980, the parties asked that I approve a settlement agreement which the parties had reached with respect to a violation of 30 C.F.R. § 75.1722. I stated at the hearing that I would approve the parties' settlement agreement when I acted upon the other matters raised by the Petition for Assessment of Civil Penalty filed in Docket No. VA 79-78, namely, the question of whether respondent had violated section 103(f) of the Federal Mine Safety and Health Act of 1977 as alleged by Citation No. 693846 dated March 19, 1979.

The issue raised by Citation No. 693846 is whether respondent is required to pay a miners' representative if he accompanies an inspector who is conducting a regular inspection on the same day that a coal company pays another miners' representative who walks around with an inspector who is conducting a "spot" inspection. In Magma Copper Co., 1 FMSHRC 1948 (1979), the Commission held that two or more miners' representatives have to be paid if on the same day at the same mine they accompany different inspectors who have split into groups to conduct a regular inspection. The Commission's decision in the Magma Copper case has been appealed by Magma Copper to the Ninth Circuit Court of Appeals. After the notice of hearing had been served on the parties to this proceeding, I received from the Secretary's counsel

a motion requesting that the hearing be stayed insofar as it pertains to the question of payment of compensation for miners' representatives who walk around with inspectors. By order issued April 1, 1980, I stayed the hearing with respect to the issue of payment of compensation of the miners' representative, but provided that the hearing would be convened with respect to the alleged violation of section 75.1722. When the hearing was subsequently convened on May 2, 1980, counsel for the parties orally asked that I approve a settlement agreement which had been reached by the parties just prior to the convening of the hearing.

After I became aware that the Commission in The Helen Mining Co., 2 FMSHRC 778 (1980), had denied a motion for stay based on the same argument which had been used by the Secretary's counsel in the motion for stay granted by my order issued April 1, 1980, I issued a further order on July 10, 1980, dissolving the stay and requiring the parties to state whether the issue with respect to payment of compensation for the miners' representative could be disposed of on the basis of stipulations so as to avoid a second convening of a hearing in this proceeding.

In response to my order of July 10, 1980, counsel for the Secretary filed on August 14, 1980, a letter in which he set forth some proposed stipulations of facts and requested that respondent's counsel advise me as to whether respondent agreed with the proposed stipulations. Counsel for respondent filed on August 20, 1980, some stipulations of facts which do not disagree with the stipulations set forth in the letter filed by the Secretary's counsel. Therefore, the issue of whether respondent violated section 103(f), as alleged in Citation No. 693846, can be decided on the basis of the parties' stipulations of facts.

The stipulation of facts shows that respondent paid a miners' representative for walking around with an inspector on March 13, 1979, while that inspector was making an electrical, or "spot", inspection at the Seaboard No. 1 Mine, but declined to pay a miners' representative who walked around on March 13, 1979, with an inspector who was conducting a regular inspection at the same mine. The Commission held in The Helen Mining Co., 1 FMSHRC 1796 (1979), that an operator has to pay a miners' representative only when he walks around with an inspector who is engaged in conducting a regular inspection. In the Magma Copper case, supra, the Commission held that an operator has to pay two or more miners' representatives if they walk around at the same mine on the same day with different inspectors who are traveling separately while making a regular inspection. Applying the Commission's holdings in the Helen Mining and Magma Copper cases to the facts in this proceeding requires that respondent compensate the miners' representative who walked around with the inspector who was conducting the regular inspection on March 13, 1979. The fact that respondent had also on March 13, 1979, paid a miners' representative who accompanied an inspector who was making a "spot" inspection is immaterial to respondent's obligation to pay compensation to the miners' representative who accompanied the inspector who was making the regular inspection. Therefore, I find that Citation No. 694653 dated March 19, 1979, properly alleged a violation of section 103(f).

Having found that a violation of section 103(f) occurred, it is necessary that I now consider the six criteria set forth in section 110(i) of the Act for the purpose of assessing a civil penalty for that violation. The Proposed Assessment in the official file in this proceeding shows that respondent produces 6,355,484 tons of coal on an annual basis. It was also stipulated at the hearing that respondent is owned by the Pittston Company. On the basis of the aforementioned facts, I find that respondent is a large operator. Respondent introduced no evidence at the hearing to show that payment of penalties would affect its ability to continue in business. Therefore, I find that payment of penalties will not have an adverse effect on respondent's ability to continue in business (Buffalo Mining Co., 2 IBMA 226 (1973), and Associated Drilling, Inc., 3 IBMA 164 (1974)).

I find that respondent was not negligent in declining to pay compensation to more than one miners' representative at the same mine on the same day because section 103(f) was reasonably subject to the interpretation given to it by respondent prior to the issuance of the Commission's decisions discussed above. I find that the violation was nonserious because respondent did not interfere with the right of a miners' representative to accompany more than one inspector at the same mine on the same day. Respondent declined to compensate the second miners' representative until a withdrawal order was issued, but, since respondent's refusal to pay prior to the issuance of the order was based on a reasonable legal interpretation of section 103(f), I believe that no increase in a civil penalty would be warranted under the criterion of whether respondent demonstrated a good faith effort to achieve rapid compliance. The Secretary's counsel submitted some data prior to the hearing which show that respondent has not previously violated section 103(f). On the basis of the aforesaid findings with respect to the six criteria, I conclude that respondent should be assessed a civil penalty of $25 for the violation of section 103(f) alleged in Citation No. 693846. As the court stated in Bituminous Coal Operators' Assn. v. Ray Marshall, 82 FRD 350 (D.D.C. 1979), at page 354, "* * * it would seem improbable that stiff supplemental civil penalties would be imposed where a genuine interpretative question was raised as to section 103(f), a provision which normally is not absolutely vital to human health and safety."

Settlement Agreements

Despite the fact that I stated in footnote 1 of my order issued July 10, 1980, dissolving the stay in this proceeding, that the parties had moved at the hearing convened on May 2, 1980, that I approve a settlement agreement reached by the parties with respect to the violation of section 75.1722 alleged in this proceeding, I received on August 26, 1980, a written motion for approval of settlement pertaining to that same alleged violation of section 75.1722. I have chosen to approve the first settlement agreement because it was entered into on May 2, 1980, whereas the written motion for approval of settlement was not filed until August 26, 1980. 1/

1/ The parties twice settled the issues with respect to the alleged violation of section 75.1722 because the attorneys representing the parties at the hearing convened on May 2, 1980, were different from those who represented the parties in connection with the filing of the motion for stay.

Citation No. 694653 was issued on Feburary 13, 1979, under section 104(a) of the Act alleging a violation of section 75.1722. That section requires the guarding of fan inlets and other moving machine parts. Citation No. 694653 alleged that respondent had violated section 75.1722 because the guard at the main fan inlet had fallen and had not been replaced. The Assessment Office found that the violation was the result of ordinary negligence, that it was serious, that a good faith effort to achieve compliance had been made, and that a penalty of $122 should be imposed. Respondent has agreed to pay a reduced penalty of $100. The Assessment Office based its proposed penalty of $122 on findings justifying a total of 34 penalty points under 30 C.F.R. § 100.3.

Under section 100.3, an operator is entitled to a reduction of up to 10 penalty points for demonstrating a rapid good faith effort to achieve compliance. The inspector's statement evaluating negligence and gravity shows that respondent corrected the alleged violation within one-third of the time allowed by the inspector. In such circumstances, respondent would be entitled to a reduction of 3 penalty points instead of having been given 0 penalty points as found by the Assessment Office. A reduction in penalty points to 31 would result in a penalty of $98 under section 100.3. Additionally, at the hearing convened on May 2, 1980, counsel for the Secretary stated that there was reason to believe that the guard had fallen down only a short time before it was observed to be inadequate by the inspector. Counsel for the Secretary indicated that he believed there was a low degree of negligence which would warrant some reduction in the proposed penalty.

On the basis of the discussion above, I find that the parties' settlement agreement presented to me on May 2, 1980, should be approved. Since the first motion for approval of settlement rendered moot the second motion for approval of settlement of the same alleged violation, I shall deny the motion for approval of settlement filed on August 26, 1980.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement made at the hearing convened on May 2, 1980, is granted and the settlement agreement is approved.

(B) Within 30 days from the date of this decision, respondent shall pay civil penalties totaling $125.00 which are allocated to the respective violations as follows:

Citation No. 694653 2/13/79 § 75.1722 .. (Settled)	$100.00
Citation No. 693846 3/19/79 § 103(f) ... (Contested) ...	25.00
Total Contested and Settled Penalties in This Proceeding	$125.00

(C) The motion for approval of settlement filed August 26, 1980, is denied as moot because a previous motion for approval of settlement had already been made at a hearing convened in this proceeding on May 2, 1980.

Richard C. Steffey

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

11 SEP 1980

ISLAND CREEK COAL COMPANY, Contestant	:	Contest of Citation
v.	:	Docket No. VA 79-74-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 694946 June 4, 1979 Virginia Pocahontas No. 4 Mine
and	:	
UNITED MINE WORKERS OF AMERICA, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. VA 80-9 Assessment Control No. 44-02134-03011
v.	:	
ISLAND CREEK COAL COMPANY, Respondent	:	Virginia Pocahontas No. 4 Mine

DECISION GRANTING MOTION TO DISMISS

The issues involved in the above-entitled cases were consolidated and scheduled for hearing in an order issued on February 29, 1980. The issue raised by the Notice of Contest in Docket No. VA 79-74-R and by the Petition for Assessment of Civil Penalty in Docket No. VA 80-9 is whether Island Creek Coal Company violated section 103(f) of the Federal Mine Safety and Health Act of 1977 by refusing to pay a miners' representative for accompanying an inspector who was conducting other than a regular inspection pursuant to section 103(a) of the Act.

The Commission held in The Helen Mining Co., 1 FMSHRC 1796 (1979), and in Kentland-Elkhorn Coal Corp., 1 FMSHRC 1833 (1979), that an operator does not have to pay a miner who accompanies an inspector who is making a "spot" inspection. Those decisions have been appealed by the Secretary and UMWA to the United States Court of Appeals for the District of Columbia Circuit. In subsequent orders issued March 11, 1980, and April 1, 1980, I granted motions for stay filed by counsel for the Secretary. After I became aware that the

Commission in The Helen Mining Co., 2 FMSHRC 778 (1980), had denied a motion for stay based on the same argument which had been used by the Secretary's counsel in the motions for stay granted by my orders issued in this proceeding, I issued a further order on July 8, 1980, dissolving the stay and requiring the parties to state whether these cases could be disposed of on the basis of stipulations in lieu of holding hearings.

In response to my order of July 8, 1980, counsel for the Secretary filed on August 12, 1980, the following stipulation:

> Island Creek Coal Company, Virginia Pocahontas No. 4 Mine, VA 80-9 (A/O No. 44-02134-03011) and Island Creek Coal Company, same mine, VA 79-74-R. Both of these proceedings concern §104(a) Citation No. 0694946, issued on June 4, 1979, when the Mine Operator failed to compensate a representative of the miners who accompanied an inspector on May 14, 1979, during a §103(i) five day spot inspection. [Emphasis part of quoted material.]

Counsel for Island Creek filed on August 18, 1980, a letter in which he concurred in the description of the facts set forth above and moved that I dismiss the proceedings in Docket Nos. VA 79-74-R and VA 80-9 on the grounds that both proceedings pertained to a spot inspection for which Island Creek does not have to compensate the representative of miners who accompanied the inspector who was making a "spot" inspection.

Counsel for the Secretary filed a letter on August 19, 1980, in which he recognized that the Commission's decisions in the Helen Mining and Kentland-Elkhorn cases, supra, would require the granting of the motion filed by counsel for Island Creek, but stated that he opposes the grant of the motions in order to preserve the Secretary's position in the court proceedings challenging the Commission's decisions in the aforesaid cases.

I find that the Commission's decisions in the Helen Mining and Kentland-Elkhorn cases, supra, are dispositive of the issue raised by the Notice of Contest and Petition for Assessment of Civil Penalty filed in this consolidated proceeding. The sole issue is whether Island Creek violated section 103(f) when it refused to compensate the miners' representative who accompanied the inspector during a "spot" inspection. Although Island Creek did subsequently pay the miner under protest so as to keep the inspector from issuing a withdrawal order, it is clear under Commission precedent that Island Creek did not violate section 103(f) by initially refusing to pay the miners' representative on May 14, 1979. Therefore, I find that Citation No. 694946 dated June 4, 1979, should be vacated and the Notice of Contest should be granted. Likewise, I find that the Petition for Assessment of Civil Penalty, seeking to have a penalty assessed for Island Creek's violation of section 103(f) alleged in Citation No. 694946, should be dismissed because no violation of section 103(f) occurred.

WHEREFORE, it is ordered:

(A) The Notice of Contest filed in Docket No. VA 79-74-R is granted and Citation No. 694946 dated June 4, 1979, is vacated.

(B) The Petition for Assessment of Civil Penalty filed in Docket No. VA 80-9 is dismissed because no violation of section 103(f) exists for which a penalty may be assessed.

Richard C. Steffey

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

Distribution:

Marshall S. Peace, Esq., Attorney for Island Creek Coal Company, 2355 Harrodsburg Road, P.O. Box 11430, Lexington, KY 40575 (Certified Mail)

John H. O'Donnell, Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

11 SEP 1980

VIRGINIA POCAHONTAS COMPANY, Contestant	: Contest of Citations		
v.	:	Citation	
	: Docket Nos.	Nos.	Date
SECRETARY OF LABOR,	:		
MINE SAFETY AND HEALTH	: VA 79-131-R	696067	8/17/79
ADMINISTRATION (MSHA),	: VA 79-137-R	696089	8/17/79
Respondent	:		
	: Virginia Pocahontas No. 2 Mine		

DECISION GRANTING MOTION TO DISMISS

The issues involved in the above-entitled cases were consolidated and scheduled for hearing in an order issued February 29, 1980. The issues raised by the Notices of Contest are whether Virginia Pocahontas Company violated section 103(f) of the Federal Mine Safety and Health Act of 1977 by refusing to pay miners' representatives for accompanying inspectors who were conducting other than regular inspections pursuant to section 103(a) of the Act.

The Commission held in The Helen Mining Co., 1 FMSHRC 1796 (1979), and in Kentland-Elkhorn Coal Corp., 1 FMSHRC 1833 (1979), that an operator does not have to pay a miner who accompanies an inspector who is making a "spot" inspection. Those decisions have been appealed by the Secretary and UMWA to the United States Court of Appeals for the District of Columbia Circuit. In a subsequent order issued March 11, 1980, I granted a motion for stay filed by counsel for the Secretary. After I became aware that the Commission in The Helen Mining Co., 2 FMSHRC 778 (1980), had denied a motion for stay based on the same argument which had been used by the Secretary's counsel in the motion for stay granted by my order issued March 11, 1980, I issued a further order on July 8, 1980, dissolving the stay and requiring the parties to state whether these cases could be disposed of on the basis of stipulations in lieu of holding hearings.

In response to my order of July 8, 1980, counsel for the Secretary filed on August 12, 1980, the following stipulations:

> Virginia Pocahontas Company, Virginia Pocahontas No. 2 Mine, I.D. No. 44-01009, VA 79-131-R. This proceeding concerns §104(a) Citation No. 0696067, issued on August 17, 1979, when

the Mine Operator refused to compensate Mary Griffith, miners' representative, who accompanied a Federal mine inspector on May 3, 1979, on a ventilation technical inspection.

Virginia Pocahontas Company, Virginia Pocahontas No. 2 Mine, VA 79-137-R. This proceeding concerns §104(a) Citation No. 0696089, issued on August 17, 1979, when the Mine Operator failed to compensate three different representatives of the miners for accompanying three different inspectors on July 17, 1979, on a ventilation survey.

The Office of the Solicitor and MSHA stipulate that none of the above inspections was a regular inspection. [Emphasis is part of all material quoted above.]

Counsel for Virginia Pocahontas filed on August 18, 1980, a letter in which he concurred in the descriptions of the facts set forth in the stipulations above and moved that I vacate Citation Nos. 696067 and 696089 on the grounds that both citations alleged violations of section 103(f) pertaining to other than regular inspections for which Virginia Pocahontas does not have to compensate the representatives of miners who accompanied the inspectors who were making "spot" inspections.

Counsel for the Secretary filed a letter on August 19, 1980, in which he recognized that the Commission's decision in the Helen Mining and Kentland Elkhorn cases, supra, would require the granting of the motion to vacate filed by counsel for Virginia Pocahontas, but stated that he opposes the grant of the motion in order to preserve the Secretary's position in the court proceedings challenging the Commission's decisions in the aforesaid cases.

I find that the Commission's decisions in the Helen Mining and Kentland-Elkhorn cases, supra, are dispositive of the issues raised by the Notices of Contest filed in this consolidated proceeding. The sole issue is whether Virginia Pocahontas violated section 103(f) when it refused to compensate the miners' representatives who accompanied the inspectors during their "spot" inspections. Although Virginia Pocahontas did subsequently pay the miners under protest so as to keep the inspector from issuing withdrawal orders, it is clear under Commission precedent that Virginia Pocahontas did not vioate section 103(f) by initially refusing to pay the miners' representatives on May 3, 1979, and July 17, 1979. Therefore, I find that Citation Nos. 696067 and 696089 dated August 17, 1979, should be vacated and the Notices of Contest should be granted.

My order setting the cases in this proceeding for hearing consolidated for purposes of hearing and decision all civil penalty issues which might be raised when and if Petitions for Assessment of Civil Penalty were subsequently filed with respect to Citation Nos. 696067 and 696089. If counsel for Virginia Pocahontas will ask in any answer to such prospective Petitions that the cases be assigned to me, I shall dismiss those Petitions on the

basis of my ruling in this decision if there is no change in the outstanding law at that time.

It should be noted that my order of February 29, 1980, had consolidated with the issues raised in Docket Nos. VA 79-131-R and VA 79-137-R all issues raised by Virginia Pocahontas in its Notice of Contest in Docket No. VA 79-136-R. The Commission's Helen Mining and Kentland-Elkhorn decisions did not dispose of one of the issues raised by the Notice of Contest in Docket No. VA 79-136-R. Therefore, the parties have requested that a hearing be held concerning one of the issues raised in Docket No. VA 79-136-R. The issues raised in Docket No. VA 79-136-R will be set for hearing by separate order. The order in this case will sever the issues raised in Docket No. VA 79-136-R from the issues raised by the other two Notices of Contest involved in this proceeding.

WHEREFORE, it is ordered:

(A) The issues raised by the Notice of Contest filed in Docket No. VA 79-136-R are severed from this consolidated proceeding and the Notice of Contest filed in Docket No. VA 79-136-R will be scheduled for hearing by a separate order as requested by the parties.

(B) The Notices of Contest filed in Docket Nos. VA 79-131-R and VA 79-137-R are granted and Citation Nos. 696067 and 696089 dated August 17, 1979, are vacated.

Richard C. Steffey

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

Distribution:

Marshall S. Peace, Esq., Attorney for Island Creek Coal Company, 2355 Harrodsburg Road, P.O. Box 11430, Lexington, KY 40575 (Certified Mail)

John H. O'Donnell, Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

12 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. KENT 80-92
	:	A/O No. 15-11423-03002
v.	:	
	:	Docket No. KENT 80-158
MIDDLE KENTUCKY CONSTRUCTION, INC., Respondent	:	A/O No. 15-11423-03003
	:	
	:	Crapshooter No. 3 Strip Mine

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; Byron W. Terry, Safety Director, Middle Kentucky Construction, Inc., Owensboro, Kentucky, for Respondent.

Before: Judge Cook

I. Procedural Background

The Mine Safety and Health Administration (Petitioner) filed proposals for penalties in Docket Nos. KENT 80-92 and KENT 80-158 on January 7, 1980, and February 11, 1980, respectively. The proposals were filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) (1977 Mine Act), and allege a total of five violations of various provisions of the Code of Federal Regulations as set forth in citations issued pursuant to section 104(a) of the 1977 Mine Act. Answers were filed by Middle Kentucky Construction, Inc. (Respondent), a prehearing order was issued and the cases were scheduled for hearing.

The hearing was held on June 24, 1980, in Owensboro, Kentucky with representatives of both parties present and participating. The cases were consolidated for purposes of hearing and decision. Petitioner made an oral motion for approval of settlement as relates to Citation No. 799605, and an order approving the settlement is included in this decision.

The parties waived the right to file posthearing briefs and proposed findings of fact and conclusions of law.

II. Violations Charged

(A) Docket No. KENT 80-92

Citation No.	Date	30 C.F.R. Standard
799603	09/07/79	77.1605(d)
799604	09/07/79	77.1605(b)
799605	09/10/79	71.500(a)

(B) Docket No. KENT 80-158

Citation No.	Date	30 C.F.R. Standard
799602	09/07/79	77.1605(b)
799618	10/15/79	77.1605(b)

III. Witnesses and Exhibits

(A) Witnesses

Petitioner called Federal mine inspector Earl T. Liesure as a witness.

Respondent called Byron W. Terry, the company's safety director, as a witness.

(B) Exhibits

(1) Petitioner introduced the following exhibits in evidence:

M-1 is a copy of a computer printout compiled by the Directorate of Assessments listing the history of previous violations at the Crapshooter No. 2 Strip Mine for which Respondent had paid assessments beginning November 1, 1976, and ending October 31, 1978.

M-2 is a copy of Citation No. 799603, September 7, 1979, 30 C.F.R. § 77.1605(d) and a copy of the termination thereof.

M-3 is a copy of Citation No. 799604, September 7, 1979, 30 C.F.R. § 77.1605(b) and a copy of the termination thereof.

M-4 is a copy of Citation No. 799605, September 10, 1979, 30 C.F.R. § 71.500(a) and a copy of the termination thereof.

M-5, page 1, is a copy of Citation No. 799602, September 7, 1979, 30 C.F.R. § 77.1605(b) and a copy of a subsequent action form extending the time period for abatement.

M-5, page 2, is a copy of the termination of Citation No. 799602, September 7, 1979, 30 C.F.R. § 77.1605(b).

M-6 is a copy of Citation No. 799618, October 15, 1979, 30 C.F.R. § 77.1605(b) and a copy of the termination thereof.

(2) Respondent introduced the following exhibits in evidence:

O-1 contains photocopies of two photographs.

O-2 contains photocopies of four photographs.

IV. Issues

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

V. Opinion and Findings of Fact

(A) Stipulations

(1) Respondent is subject to the 1977 Mine Act (Tr. 2-3).

(2) The Administrative Law Judge has jurisdiction in the above-captioned cases (Tr. 2-3).

(3) Respondent operates the mine designated as Crapshooter No. 3 (Tr. 2-3).

(4) Respondent is a mine operator with only one mine and currently employs 21 employees or miners (Tr. 2-3).

(5) Respondent's previous history of violations is not excessive and there appear to be no repeated violations within the preceding 24 months (Tr. 2-3).

(6) Respondent's Crapshooter No. 3 Mine was inspected by Inspector Earl T. Liesure on the dates in question (Tr. 3).

(7) The citations were properly issued to Respondent (Tr. 3).

(8) Any penalty assessed will not adversely affect Respondent's ability to continue in business (Tr. 3).

(B) Citation No. 799603, September 7, 1979, 30 C.F.R. § 77.1605(d)

Occurrence of Violation

This citation was issued by Federal mine inspector Earl T. Liesure at approximately 9:45 a.m. on September 7, 1979, alleging a violation of mandatory safety standard 30 C.F.R. § 77.1605(d), in that "[t]he red Chevrolet Model 10 explosives truck is not provided with an adequate audible warning device (horn) in that the horn will not operate when control button is pushed. This truck is often loaded with explosives and MUST be capable of sounding a warning to other vehicles when necessary to avert collision" (Exh. M-2). The cited mandatory safety standard provides, in pertinent part, as follows: "Mobile equipment shall be provided with audible warning devices."

Inspector Liesure described the vehicle in question as a red Chevrolet, Model 10, half ton pickup truck, and testified that it was parked at the drill site. The drill site was described as an area atop the highwall where a drill rig had been set up for the purpose of boring holes into the earth for the insertion of explosive charges to blast away the overburden covering the coal seam. The inspector asked an employee to test the horn, and thereupon discovered that it would not operate when the horn button was pushed.

Respondent concedes that the truck was not provided with an adequate audible warning device, but claims by way of an affirmative defense that the truck had been removed from service on or around September 5, 1979, because of poor brake pressure on the service brake and was therefore not in use on September 7, 1979.

The testimony of Mr. Byron Terry, Respondent's safety director, reveals that the procedure allegedly used at the Crapshooter No. 3 Strip Mine to remove the vehicle from service was insufficient as a matter of law to constitute removal from service within the meaning of the 1977 Mine Act. In Eastern Associated Coal Corporation, 1 FMSHRC 1473, 1979 OSHD par. 23,980 (1979), a roof fall on the underground track haulage made it impossible to remove a jitney to the maintenance shop to repair an inoperable parking brake. Accordingly, the mine operator placed a danger tag on the machine and permitted the machine to remain in the mine's active workings. The Federal Mine Safety and Health Review Commission (Commission) set forth the following test for determining what constitutes removal from service within the meaning of the 1977 Mine Act:

> It is undisputed that the inoperable parking brake was a violation. For a violation such as this, there are two basic ways to abate - repair or withdrawal from service. Assuming that the jitney could not have been repaired safely in the time set for abatement, the question in this case is whether a danger tag alone constitutes withdrawal from service. We hold that tagging the jitney was not sufficient to withdraw the jitney from service because the danger tag did not prevent

the use of the defective piece of equipment. The jitney was still operable and the danger tag could have been ignored. To abate under these circumstances, the jitney should have been made inoperable.

1 FMSHRC at 1474. (footnote omitted)

The alleged removal from service at the Crapshooter No. 3 Strip Mine did not entail rendering the equipment inoperable and, in fact, did not even entail the use of danger tags. Respondent relied upon oral instructions to miners directing them not to use those pieces of equipment classified as unsafe. Nothing prevented actual use of the equipment. A breakdown in those channels of communication upon which Respondent relied could result in a miner remaining unapprised of Respondent's decision to remove a given piece of equipment from service. Additionally, miners actually apprised of the decision could knowingly or inadvertently fail to heed the instructions. In order to affect removal from service within the meaning of Eastern Associated Coal Corporation, the truck should have been rendered inoperable because the truck remained in the mine's active workings. The term "active workings" is defined as "any place in a coal mine where miners are normally required to work or travel." 30 C.F.R. § 77.2(a).

Furthermore, Mr. Terry saw the truck on or around August 30, 1979, but did not see it again until on or around September 10, 1979. Therefore, he had no actual, firsthand knowledge as to either its status or location when the citation was issued, and testified on the basis of information provided to him by hearsay declarants. The record does not disclose the requisite information necessary to determine whether the hearsay statements are reliable. For example, it does not disclose the number of hearsay declarants, their identities, or whether they had actual, firsthand knowledge as to the status and location of the truck when the citation was issued. It is particularly significant to note that the testimony adduced by Respondent as to the truck's location is contradictory. At one point, Mr. Terry testified that it was in the pit area (Tr. 68) and at another point appeared to imply that it had been left at the drill site because employees simply had not yet removed it to a suitable location for an out of use vehicle. I am unable to classify the assertion that the truck was in the pit area as accurate because it contradicts the actual observations of the inspector. Furthermore, I am unable to accept the testimony of Mr. Terry insofar as it implies that an out of service vehicle would be kept at the drill site because such placement would impede the drilling operation and also subject the truck to damage when explosive charges were detonated.

In view of the foregoing, it is found that the cited vehicle was in actual use at the drill site on September 7, 1979, and that it was not provided with an adequate audible warning device. A violation fo 30 C.F.R. § 77.1605(d) has been established by a preponderance of the evidence.

Negligence of the Operator

The condition should have been detected during the inspection required by 30 C.F.R. § 77.1606(a). Therefore, Respondent should have known that the cited condition existed.

Accordingly, it is found that Respondent demonstrated ordinary negligence.

Gravity of the Violation

The truck bore markings designating it as an explosives carrier and was located in an area of the mine where explosives carriers are customarily found (Tr. 20-21). Such vehicles are used to transport explosives from the magazine to the job site, but the best available evidence indicates that no explosives were actually on the truck.

Respondent contends that another truck had been assigned to serve as explosives transport after September 5, 1979, and that such truck was in use on the day in question but that it did not bear the warning signs required by 30 C.F.R. § 77.1302(c). Accordingly, Mr. Terry speculated that the employees attempted to conceal the truck from the inspector by delaying its departure from the magazine so as to avoid the issuance of another citation. However, no reliable evidence was presented to support this claim.

The fact that a vehicle bearing markings designating it as an explosives carrier was in actual use, in an area of the mine where such vehicles are customarily found when in use, is sufficient circumstantial evidence to establish that the vehicle was in actual use as an explosives carrier. Since Respondent has failed to adduce reliable evidence to the contrary, it is found that the truck in question was in actual use as an explosives carrier.

The lack of a horn would prevent the sounding of an audible warning in the event of an emergency. The two or three individuals normally involved in the operation of the explosives truck, occupants of other vehicles and pedestrians were thus exposed to the possibility of injury (See, Tr. 10-12).

Accordingly, it is found that moderate gravity was present.

Good Faith in Attempting Rapid Abatement

Abatement was due by 12 noon on September 10, 1979 (Exh. M-2). The citation was terminated at 7:30 p.m., on September 10, 1979, when the inspector returned to the mine and determined that the horn had been repaired (Exh. M-2).

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

(C) Citation No. 799604, September 7, 1979, 30 C.F.R. § 77.1605(b)

Occurrence of Violation

This citation was issued by Inspector Liesure at approximately 11:15 a.m., on September 7, 1979, citing Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.1605(b), in that "[t]he Michigan 275 front-end loader

(SN425C284) is not equipped with an adequate park brake in that they will not hold the equipment on grade when the control is applied." (Exh. M-3). The cited mandatory safety standard provides as follows: "Mobile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes."

The inspector's testimony is in accord with the statements contained in the citation, and is sufficient to establish a prima facie showing that the parking brake on the front-end loader was inoperable.

It is clear that the term "parking brakes," as used in the regulation, refers to a braking system separate and independent from the service and emergency brakes on the front-end loader. Respondent presented evidence as to how the emergency brake system functioned. Respondent's arguments are rejected to the extent they imply that the emergency brake system meets the requirement for "parking brakes" as set forth in the regulation.

Accordingly, it is found that a violation of 30 C.F.R. § 77.1605(b) has been established by a preponderance of the evidence in that the cited front-end loader was not equipped with an adequate parking brake.

Negligence of the Operator

The condition should have been detected during the inspection required by 30 C.F.R. § 77.1606(a) (Tr. 31). Therefore, Respondent should have known of the condition.

Accordingly, it is found that Respondent demonstrated ordinary negligence.

Gravity of the Violation

The front-end loader was parked on a slight grade in the general parking area. Employees and other pieces of equipment were in the area. The additional equipment was within a few feet of the front-end loader. The inspector's testimony indicates that the absence of the required parking brake could permit the machine to roll down an incline resulting in injuries to miners.

The front-end loader was equipped with emergency and service brakes, both of which resulted in brake application when air pressure was reduced below 60 pounds per square inch. According to Byron Terry, who possessed actual experience in the operation of front-end loaders, using the emergency brake system to release the air pressure when the machine was parked resulted in an automatic brake application.

In view of the foregoing, it is found that the violation was accompanied by moderate gravity.

Good Faith in Attempting Rapid Abatement

Abatement was due by 8 a.m. on September 14, 1979 (Exh. M-3). The citation was terminated on September 10, 1979, when the inspector returned to the mine and determined that the parking brake had been repaired (Exh. M-3).

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

(D) Citation No. 799602, September 7, 1979, 30 C.F.R. § 77.1605(b)

Occurrence of Violation

Inspector Liesure issued this citation at approximately 9:45 a.m. on September 7, 1979, citing Respondent for a violation of 30 C.F.R. § 77.1605(b), in that "[t]he red chevrolet Model 10 explosives truck is not equipped with adequate parking brakes in that when control is applied the brakes will not hold truck on grade." (Exh. M-5, p.1).

The truck in question was the same truck cited by Inspector Liesure in Citation No. 799603 and was located at the drill site when the subject citation was issued. The inspector's testimony as to the condition of the parking brakes is in accord with the statements contained in the citation.

Respondent concedes that the truck was not equipped with an adequate parking brake, but raises the same defense raised in connection with Citation No. 799603. For the reasons set forth previously in this decision, the defense is specifically rejected.

Accordingly, it is found that a violation of 30 C.F.R. § 77.1605(b) has been established by a preponderance of the evidence in that the truck in question was not equipped with an adequate parking brake.

Negligence of the Operator

The condition should have been detected during the inspection required by 30 C.F.R. § 77.1606(a). Therefore, Respondent should have known of the condition.

Accordingly, it is found that Respondent demonstrated ordinary negligence.

Gravity of the Violation

The truck was parked in gear and on a grade at the drill site. It was within 15 to 20 feet of other equipment and approximately four to six people were exposed to physical injury. As noted previously, the best available evidence indicates that no explosives were actually on the truck.

Accordingly, it is found that the violation was accompanied by moderate gravity.

Good Faith in Attempting Rapid Abatement

The citation set forth 12 noon on September 10, 1979, as the termination due date. The time period for abatement was ultimately extended to 8 a.m. on September 27, 1979, because repair parts were on order, but had not arrived (Exh. M-5, p. 1). When the inspector returned to the mine on October 31, 1979, he examined the truck and determined that the parking brake had been repaired. Accordingly, the citation was terminated (Exh. M-5, p. 2).

In view of the foregoing, it is found that Respondent demonstrated good faith in attempting rapid abatement.

(E) Citation No. 799618, October 15, 1979, 30 C.F.R. § 77.1605(b)

Occurrence of Violation

Inspector Liesure issued this citation at approximately 11:15 a.m. on October 15, 1979, citing Respondent for a violation of mandatory safety standard 30 C.F.R. § 77.1605(b), in that "[t]he red Chevrolet Model 10 explosives truck is not equipped with adequate service brakes in that when control pedal is activated there is no braking action to wheels." (Exh. M-6). The truck in question is the same truck cited in Citation Nos. 799602 and 799603.

The inspector's testimony as to the condition of the service brakes is in accord with the statements contained in the citation, and reveals that the brake failure was caused by hydraulic fluid leaking from the brake system. The inspector's testimony further reveals that the truck was not in actual use when the citation was issued, but that it was parked in a parking area near the pit.

Respondent concedes that the truck was not provided with adequate service brakes, but raises the same defense asserted with respect to Citation No. 799603, claiming that the vehicle had been removed from service on or around September 5, 1979. It is significant to note that the machine had not been rendered inoperable and, in accordance with the Commission's decision in Eastern Associated Coal Corporation, it is found that the truck in question remained in service as a matter of law on October 15, 1979. Accordingly, Respondent's proffered defense is rejected.

In view of the foregoing, it is found that a violation of 30 C.F.R. § 77.1605(b) has been established by a preponderance of the evidence in that the truck in question was not provided with adequate service brakes.

Negligence of the Operator

Respondent reached the conclusion on or around September 5, 1979, that the vehicle was not safe to be operated due to service brake defects. Yet the truck was in actual use on September 7, 1979, and had not been effectively removed from service as of October 15, 1979.

Accordingly, it is found that Respondent demonstrated more than ordinary negligence.

Gravity of the Violation

The absence of operable service brakes exposed the occupants of the vehicle, the occupants of other vehicles, and pedestrians to serious injury. Accordingly, it is found that the violation was serious.

Good Faith in Attempting Rapid Abatement

The inspector was of the opinion that the operator demonstrated good faith based upon the fact that the vehicle was removed from service. The citation was terminated when the inspector returned to the mine on October 31, 1979, and determined that the brakes had been repaired (Exh. M-6).

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

(F) Size of the Operator's Business

The parties stipulated that Respondent operates only one mine and employees 21 miners. Therefore, it can be inferred that Respondent is a small operator.

(G) History of Previous Violations

The parties stipulated that Respondent's history of previous violations is not excessive. Additionally, Exhibit M-1 reveals that Respondent had eight violations at its Crapshooter No. 2 Strip Mine for which assessments had been paid between November 1, 1976, and October 31, 1978. The most recent violations listed thereon occurred on July 14, 1977.

Accordingly, it is found that Respondent has a good history of previous violations.

(H) Effect of a Penalty on the Operator's Ability to Remain in Business

The parties stipulated that any penalty assessed will not affect Respondent's ability to remain in business.

VI. Motion to Approve Settlement

Petitioner made an oral motion on the record to approve settlement which is identified as follows:

Citation No.	Date	30 C.F.R. Standard	Assessment	Settlement
799605	09/10/79	71.500(a)	$48	$48

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 foregoing reasons were advanced in support of the proposed settlement:

[MR. DRUMMING:] With respect to Citation No. 799605, violation of standard 71500A, for lack of toilet, a sanitary toilet and toilet tissue. Mr. Terry has advised that they do not wish to contest this citation and at this point shall I offer it as a motion to settle for this one or --

JUDGE COOK: (COURT INTERPOSES) If you desire to, yes.

MR. DRUMMING: Okay.

JUDGE COOK: It is not necessary to go into any other details other than question of gravity and negligence and good faith and if Mr. Terry wants to propose or agree to some settlement, you can proceed with that now.

MR. DRUMMING: Okay. Standard 71500A and it was assessed by assessment officer at $48. The degree of negligence such as ordinary negligence. The seriousness listed as not serious. The lack of toilet paper and sanitary toilet will not lead to any immediate injury or harm to the employees, but over the long run or long term effects of inadequate health facilities for the elimination of waste materials, that would adversely effect [sic] the health and welfare of the mine employees. The good faith abatement of this citation was assessed as being normal good faith and that it was assessed in the time stipulated.

JUDGE COOK: Alright. Now, Mr. Terry, what's your position?

MR. TERRY: Sir, on that one as I indicated to Mr. Drumming, we did state that we would like to go ahead and settle this. It was a case of oversight on the company's part. We had the facilities at a previous mine that had neglected to be moved over and due to the high frequency of use, actually these portable toilets when they moved it, rather than bring the old one over they acquired two new ones and had them placed on the mine site. This inspection was on the tenth of September and as of this date they have been cleaned periodically, but they have not been used from the time that they were installed. So, this is the reason of the negligence on our part. They are not a heavy demand use. And we goofed, I mean, that's, but, we don't feel that it was an extremely serious situation, but we didn't stay in compliance with what we should have.

JUDGE COOK: Alright. Then, are you agreeing with the settlement?

MR. TERRY: Yes, sir.

JUDGE COOK: Alright. Mr. Drumming and I take it that you are moving at this time for approval of that?

MR. DRUMMING: Yes, Your Honor. We are moving for approval of the settlement of 100 percent payment of the $48 penalty.

(Tr. 46-48).

The reasons given above in support of the proposed settlement have been reviewed in conjunction with the information submitted as to the six statutory criteria contained in section 110 of the Act. After according this information due consideration, it has been found to support the proposed settlement. It therefore appears that a disposition approving the settlement will adequately protect the public interest. Accordingly, an order will be entered approving the settlement.

VII. Conclusions of Law

(1) Middle Kentucky Construction, Inc., and its Crapshooter No. 3 Strip Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

(2) Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

(3) Federal mine inspector Earl T. Liesure was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the citations involved in these proceedings.

(4) The violations charged in Citation Nos. 799602, 799603, 799604, and 799618 are found to have occurred as alleged.

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

VIII. Penalties Assessed

Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of penalties is warranted as follows:

(A) Docket No. KENT 80-92

Citation No.	Date	30 C.F.R. Standard	Penalty
799603	09/07/79	77.1605(d)	$ 75
799604	09/07/79	77.1605(b)	100
799605	09/10/79	71.500(a)	48 (settlement)

(B) Docket No. KENT 80-158

Citation No.	Date	30 C.F.R. Standard	Penalty
799602	09/07/79	77.1605(b)	$100
799618	10/15/79	77.1605(b)	100

ORDER

IT IS ORDERED that the proposed settlement outlined in Part VI, supra, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that Respondent pay civil penalties in the amount of $423 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

Distribution:

George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Byron W. Terry, Safety Director, Middle Kentucky Construction, Inc., 2237 Lovell Drive, Owensboro, KY 42301 (Certified Mail)

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

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

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

12 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceedings Docket No. BARB 79-222-PM A/O No. 54-00120-05002 F
v.		
SAN JUAN CEMENT COMPANY, INC.,	Respondent	Docket No. BARB 79-283-PM A/O No. 54-00120-05003 Cantera Espinosa Mine

DECISION

Appearances: James J. Manzanares, Esq., Office of the Solicitor, U.S. Department of Labor, Hato Rey, Puerto Rico, for Petitioner; Alex Gonzalez, Esq., and Mario Arroyo Davila, Esq., Dubon, Gonzalez and Vazquez, San Juan, Puerto Rico, for Respondent.

Before: Judge Cook

I. Procedural Background

The Mine Safety and Health Administration (Petitioner) filed petitions for assessment of civil penalty in Docket Nos. BARB 79-222-PM and BARB 79-283-PM on January 18, and February 15, 1979, respectively. The petitions were filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1978) (1977 Mine Act), and collectively allege three violations of various provisions of the Code of Federal Regulations. On March 19, 1979, San Juan Cement Company, Inc. (Respondent) filed both answers to the petitions and a motion requesting consolidation of the cases. On March 26, 1979, Petitioner filed a motion to authorize discovery. The parties respective motions were granted by orders dated June 13, 1979.

On August 24, 1979, a notice of hearing was issued scheduling the hearing to commence on December 11, 1979, in Hato Rey, Puerto Rico. On December 3, 1979, the parties filed joint motions to approve settlement and Petitioner filed supplementary motions pertaining thereto. The joint motions were denied by an order dated December 7, 1979. Additionally, the December 7, 1979, order recounted the results of a December 5, 1979, telephone conference during which the representatives of the parties agreed to continue the hearing to December 20, 1979.

The hearing was held as scheduled with representatives of both parties present and participating. Following the presentation of the evidence, a schedule was agreed upon for the posthearing filing of Exhibits 0-8 and 0-9 and for the filing of posthearing briefs. The exhibits were received in evidence by an order dated April 3, 1980. On April 22, 1980, Petitioner filed its posthearing brief and proposed findings of fact and conclusions of law. No posthearing brief was filed by Respondent.

II. Violations Charged

A. Docket No. BARB 79-222-PM

Citation No. 94602, March 20, 1978, 30 C.F.R. § 56.12-71.

B. Docket No. BARB 79-283-PM

Citation No. 94601, March 20, 1978, 30 C.F.R. § 50.10.

Citation No. 93262, April 20, 1978, 30 C.F.R. § 56.20-11.

III. Witnesses and Exhibits

A. Witnesses

Petitioner called as its witnesses Pedro Sarkis, a Federal mine inspector; Salvador Lugo Cortes, area engineer for the electric power company; Luis Figueroa Arroyo, a maintenance employee of the San Juan Cement Company; and Francisco Martinez Ortiz, safety officer of San Juan Cement Company.

Respondent called as its witnesses William Miranda Marin, senior vice president of San Juan Cement Company; Salvador Torros, vice president of marketing and sales for San Juan Cement Company; and David Cintron, chief engineer of Arnold Green Testing Laboratories in Puerto Rico.

B. Exhibits

1. Petitioner introduced the following exhibits in evidence:

M-2 is a drawing prepared by Salvador Lugo during the course of his testimony.

M-3 is a drawing prepared by Salvador Lugo during the course of his testimony.

M-4 is a copy of Pedro Sarkis' curriculum vitae (resume).

M-5 is a copy of Citation No. 94602, March 20, 1978, 30 C.F.R. § 56.12-71.

M-6 is a copy of a subsequent action form pertaining to M-5 extending the time period for abatement to 2 p.m., April 28, 1978.

M-7 is a copy of a subsequent action form pertaining to M-5 extending the time period for abatement to 9 a.m., May 11, 1978.

M-8 is a copy of the termination of M-5.

M-9 is a photograph.

M-10 is a memorandum to James J. Manzanares from Debbie L. Hines, supervisory assessment clerk, addressing Respondent's history of previous violations.

M-11 is a copy of Citation No. 93262, April 20, 1978, 30 C.F.R. § 56.20-11.

M-12 is a copy of a subsequent action form pertaining to M-11 extending the time period for abatement to 3 p.m., April 24, 1978.

M-13 is a copy of the termination of M-11.

M-14 is a photograph.

M-15 is a drawing prepared by Pedro Sarkis during the course of his testimony.

M-16 is a copy of Citation No. 94601, March 20, 1978, 30 C.F.R. § 50.10.

M-17 is a copy of a modification of M-16.

M-18 is a copy of a document styled "Mine Accident, Injury, and Illness Report."

M-19 is a copy of a memorandum from Francisco Martinez Ortiz, safety officer of San Juan Cement Company, to Federal mine inspector Pedro Sarkis wherein the author reports the results of his investigation of the fatal accident.

M-19-A is an initial report pertaining to the subject matter of M-19.

M-20 is a photograph.

M-21 is a photograph.

M-23-A is a request for admission of facts filed by Petitioner in Docket No. BARB 79-222-PM.

M-23-B is Respondent's response to M-23-A.

M-23-C is a request for admission of facts filed by Petitioner in Docket No. BARB 79-283-PM.

M-23-D is Respondent's response to M-23-C.

2. Respondent introduced the following exhibits in evidence:

O-1 is a copy of a letter dated April 11, 1978, from the electric power company to William Miranda Marin.

O-2 is a letter dated March 27, 1978, from San Juan Cement Company to the electric power company.

O-3 is a copy of a letter dated April 20, 1978, from San Juan Cement Company to the electric power company.

O-4 is a copy of a check in the amount of $3,461 drawn on the account of San Juan Cement Company and made payable to the electric power company.

O-5 is a topographic survey plan of the subject plant.

O-6 is a copy of a memorandum dated December 18, 1979, from Luis M. Gonzalez to William Miranda Marin addressing the number and distribution of persons employed at the subject plant.

O-7-A is a set of interrogatories from Respondent to Petitioner.

O-7-B contains Petitioner's answers to O-7-A.

O-8 is a certified copy of Respondent's 1977 Commonwealth of Puerto Rico tax return.

O-9 is a certified copy of Respondent's 1978 Commonwealth of Puerto Rico tax return.

3. X-1 is a drawing prepared by Salvador Lugo during the course of his testimony.

IV. Issues

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

V. Opinion and Findings of Fact

A. Stipulations

1. The legal name of the Respondent is San Juan Cement Company, Inc.

2. The identification of the mine where the inspection was conducted is "Cantera Espinosa."

3. The location of said mine is Dorado, Puerto Rico.

4. San Juan Cement Company, Inc., is the operator of said mine.

5. San Juan Cement Company, Inc., operates an open pit limestone quarry where it extracts limestone for use in the production of cement. This establishment is a mine within the meaning of section 3(h) of the 1977 Mine Act.

6. The products of the Cantera Espinosa Mine enter and affect commerce.

7. Petitioner's requests for admissions and the answers thereto which are not denials, and Respondent's interrogatories and the answers thereto are part of the record and in evidence.

8. Assessment of the original penalty that was assessed by the Office of Assessments will not affect Respondent's ability to remain in business (Tr. 20-21).

9. Benjamin Alicea Diaz was the person who was electrocuted on March 16, 1978. He was 5 feet 6 inches tall (Tr. 232).

10. Exhibit 0-5 is drawn to scale such that one inch equals approximately 50 feet (Tr. 413).

11. The terms "Water Resources Authority," "Power Company" and "Authority of Electrical Energy" have been used interchangeably to refer to the electric power company (Tr. 343).

B. Jurisdiction

Respondent entered into two stipulations of particular significance to the issue of jurisdiction. First, Respondent stipulated that it operates an open-pit limestone quarry where it extracts limestone for use in the production of cement and that such establishment is a mine within the meaning of section 3(h) of the 1977 Mine Act. This stipulation is further refined by Respondent's answers to Petitioner's request for admissions which reveal that the Cantera Espinosa Mine is the facility referred to in the stipulation and that Respondent actually operates a cement production plant at the mine site (Admissions 2, 3 and 4 as set forth in Exhs. M-23-A through M-23-D). Second, Respondent stipulated that the products of the Cantera Espinosa Mine enter and affect commerce.

The parties evidenced considerable disagreement as to the legal effect of these stipulations, with Petitioner contending that they have the legal effect of admitting jurisdiction and Respondent contending that no such effect was intended. However, counsel for Respondent unequivocably admitted that the Federal Mine Safety and Health Review Commission (Commission) has jurisdiction over Respondent in this proceeding (Tr. 12-18).

A careful review of Respondent's position has revealed essentially two arguments outlining the issues that Respondent wishes the Judge to resolve.

First, Respondent appears to contend that it was improperly cited for violations of mandatory safety standards set forth in Part 56 of Title 30 of the Code of Federal Regulations because the Cantera Espinosa Mine is not a sand and gravel operation. Respondent characterizes its operation as an open pit mine and, by implication, appears to argue that its activities are subject exclusively to the provisions of Part 55 of Title 30 of the Code of Federal Regulations (Tr. 12). I disagree. Part 56 sets forth particularized requirements applicable to sand, gravel and crushed stone operations. The activities conducted by Respondent at the Cantera Espinosa Mine fall within the definition of a "crushed stone operation" and, accordingly, the requirements of Part 56 apply.

For purposes of the instant case, the key consideration is that the subject mine is an open pit limestone quarry from which Respondent extracts limestone for use in the production of cement and that cement production occurs at the mine. "Cement" is defined, amongst several definitions, as "a finely ground powder which, in the presence of an appropriate quantity of water, hardens and adheres to suitable aggregate, thus binding it into a hard agglomeration that is known as concrete or mortar." Paul W. Thrush (ed.), A Dictionary of Mining, Mineral, and Relate Terms (Washington, D.C.: U.S. Department of the Interior, Bureau of Mines) (1968) at p. 186. [Emphasis added.] "Crushed stone" is defined as the "product resulting from the artificial crushing of rocks, boulders, or large cobblestones, substantially all faces of which have resulted from the crushing operation," and is a "[t]erm applied to irregular fragments of rock crushed or ground to smaller sizes after quarrying." Paul W. Thrush (ed.), op cit., p. 284. These definitions establish that cement production at the Cantera Espinosa Mine requires, at a minimum, the crushing of limestone to produce a finely ground powder used in the finished product. Accordingly, the Cantera Espinosa Mine is a "crushed stone operation" subject to the requirements of Part 56 of Title 30 of the Code of Federal Regulations.

Respondent's second argument appears to imply that compliance with the safety regulations imposed by the Commonweatlh of Puerto Rico somehow absolves Respondent from a duty to comply with Federal mandatory safety standards (Tr. 15-17). Respondent never clearly articulated the principles underlying its argument, and the record contains only one specific reference to the requirements imposed by the Commonwealth, i.e., that the Electric Safety Code of Puerto Rico requires 38,000-volt powerlines to be maintained at least 20 feet above the ground (Tr. 88). As set forth later in this decision, the powerlines involved in the instant case met the Commonwealth's height requirements. However, assuming for purposes of argument that Respondent maintained compliance with all safety regulations mandated by the Commonwealth, such compliance in no way absolved Respondent from its obligation to comply with the more stringent requirements imposed by the 1977 Mine Act. Accordingly, Respondent's argument has no foundation.

In view of the foregoing considerations, I conclude that Respondent and its Cantera Espinosa Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings and that Respondent was properly charged under Part 56 of Title 30 of the Code of Federal Regulations.

C. Respondent's Motion to Dismiss

Respondent moved to dismiss the above-captioned cases at the close of Petitioner's case-in-chief (Tr. 346-354). The motion was preliminarily denied by the undersigned Administrative Law Judge, but made subject to reconsideration at the time of the writing of the decision (Tr. 355-356).

Respondent set forth essentially two grounds in arguing for dismissal: (1) that Petitioner had failed to establish a prima facie case as to the three violations charged; and (2) that, assuming for purposes of argument that the violations existed, the evidence presented established the existence of circumstances mitigating against the imposition of any civil penalties.

The evidence contained in the record at the time the motion was made has been reviewed carefully, and I conclude that the evidence in the record at that stage of the proceedings was more than sufficient to establish a prima facie case as to the occurrence of the three violations charged. The arguments advanced by Respondent are more appropriately addressed to civil penalty assessment determinations that must be made under the six statutory assessment criteria set forth in section 110 of the 1977 Mine Act and, accordingly, have been considered fully as relates to the penalty assessment stage of the proceedings.

Two arguments raised by Respondent are worthy of individual discussion at this time. First, Respondent appeared to argue that proof of operator negligence is essential to proving violations of the mandatory safety standards. This argument is specifically rejected as a ground for dismissal. It is well settled that mine operators are liable for violations of mandatory health and safety standards without regard to fault. United States Steel Corporation, 1 FMSHRC 1306, 1979 OSHD par. 23,863 (1979). Second, Respondent's argument that mitigating factors can warrant the assessment of no civil penalty for a proven violation is contrary to law. The 1977 Mine Act mandates the assessment of a civil penalty for any violation of a mandatory safety standard. Island Creek Coal Company, 2 FMSHRC 279, 1980 OSHD par. 24,248 (1980).

In view of the foregoing considerations, the oral determination made at the hearing denying Respondent's motion to dismiss is AFFIRMED.

D. Occurrence of Violations, Negligence, Gravity and Good Faith

At approximately 2 p.m. on March 16, 1978, Benjamin Alicea Diaz, a truck driver working for a customer of Respondent identified as Rio Grande Ready Mix, sustained a fatal injury at Respondent's Cantera Espinosa Mine

when he accidentally either achieved physical contact with a high-voltage powerline which crossed the main access road to the plant, or came sufficiently close to such powerline to be electrocuted. 1/ All vehicular traffic entering or leaving the plant passed beneath the powerlines in question. The circumstances surrounding his death are clear and relatively uncontroverted.

Mr. Alicea drove a cement bulk carrier onto the premises at approximately 2 p.m. to pick up a load of cement for Rio Grande Ready Mix. He parked his truck on the access road while waiting in line to reach the weighing station known as the scale house. The scale house was located approximately 90 feet from the site of the accident. Parked in this location, the truck was positioned directly beneath the high-voltage powerlines. The voltage passing through the lines was described as 38,000 volts, phase-to-phase, and 27,500 volts, phase-to-ground.

Mr. Alicea got out of the truck cab and proceeded to climb atop the bulk carrier in order to open the hatches. In his hand, he had a 14- to 16-1/2-inch long hammer composed entirely of metal. Mr. Alicea achieved physical contact with, or came within close proximity of, one of the high-voltage power lines while atop the bulk carrier. Witnesses to the accident reported hearing an explosion as the powerline broke, observed the victim fall to the pavement in flames and observed tires on the bulk carrier catch fire.

The three citations at issue in the above-captioned cases were issued as a result of an investigation into the circumstances surrounding the fatal accident.

1. Citation No. 94602, March 20, 1978, 30 C.F.R. 56.12-71

Occurrence of Violation

This citation alleges a violation of mandatory safety standard 30 C.F.R. § 56.12-71 in that "[t]he high tension cables that are located in the access road to the scale house do not have the minimum 10 feet of separation between the vehicles that drive under this electric line. (Measure must be taken from the highest vehicle that will move under the above-mentioned electric lines)" (Exh. M-5). The cited mandatory safety standard provides as follows: "When equipment must be moved or operated near energized high-voltage powerlines (other than trolley lines) and the clearance is less than 10 feet, the lines shall be deenergized or other precautionary measures shall be taken."

1/ The testimony of Mr. David Cintron reveals that electrocution could have occurred absent physical contact with the powerline. According to Mr. Cinton, high voltage electricity will jump, or arc, on air. Arcing on air depends upon such atmospheric conditions as humidity, rain or temperature. Experiments have established that under normal conditions, 38,000-volt, phase-to-phase, electricity can arc 12 to 18 inches on air. The National Electric Code specifies that it is safe for a man to work 36 inches or more from a 38,000-volt line under standard atmospheric conditions. The 36-inch figure contains a built in safety factor (Tr. 433-434).

The evidence in the record reveals that Mr. Salvador Lugo Cortes area engineer for the electric power company, visted the Cantera Espinosa Mine on March 16, 1978, to investigate the accident and that he measured the height of the powerline involved in the accident after it had been repaired and raised. The measurement was made by using a telescopic rod usually utilized to disconnect energy circuits which was in turn measured with a tape measure. This revealed that the powerline was 21 feet 3 inches above the ground. Mr. Lugo provided expert testimony revealing that the powerline was at approximately the same height before the accident as after it was repaired and raised based upon the type of repair and raising operation performed. His testimony reveals that the height of the lines after the completion of the repairs could have varied by approximately 2 or 3 inches from the height at the time of the accident (Tr. 42-43, 50-52, 87). Mr. Lugo's testimony on this point is confirmed by the testimony of Mr. Salvador Torros, Respondent's vice president of marketing and sales. Mr. Torros testified that he observed the powerline before the accident and after it was repaired and raised, and that there could not have been much difference in the height. It was his belief that any difference in the height would not have been noticeable (Tr. 424-425).

In addition to taking the above measurement, Mr. Lugo also measured the height of the lowest powerline that had not fallen and testified that it measured 21 feet 6 inches above the ground when measured from the side of the truck away from the victim's body.

In view of the foregoing, it is found that the powerline involved in the accident was within 2 or 3 inches of 21 feet 3 inches above the ground at the time of the accident, and that the lowest of the remaining powerlines was 21 feet 6 inches above the ground when measured from the side of the truck away from the body.

The evidence in the record further reveals that Mr. Lugo measured the height of the truck while it was still under the powerlines at the site of the accident. Mr. Torres Tome, an engineer employed by Respondent, and Mr. Francisco Martinez Ortiz, Respondent's safety officer, were present when the measurement was made. The measurement was taken from the ground to the highest point on the truck, and the testimony reveals that the measurement was taken with reference to the point located directly beneath the powerline where it was believed that Mr. Alicea was standing at the time of the electrocution. It can be concluded that this point could have been deduced with reasonable accuracy since Federal mine inspectors observed blood on the truck during the course of their March 17, 1978, investigation. The measurement revealed a height of 13 feet.

The accuracy of Mr. Lugo's height measurement was disputed by the testimony of Mr. David Cintron, chief engineer of Arnold Greene Testing Laboratories. Mr. Cintron examined the truck involved in the fatality. The examination was performed on the premises of Rio Grande Ready Mix. The truck was resting on wooden blocks with the tires removed when Mr. Cintron's height measurement was made. In this position, Mr. Cintron obtained a height measurement of 12 feet 3 inches and thereafter calculated a correction factor to to determine that the truck, with tires installed, would have measured approximately 12 feet in height.

Mr. Lugo's height measurement is deemed the more probative of the two for the following reasons: First, Mr. Cintron admitted that he could not establish a specific height for the truck. Second, Mr. Lugo's height measurement was obtained at the site of the accident with the truck in the same position it occupied at the time of the accident. Company employees, one of whom was an engineer, observed the measurements being made. There is no indication that any company employee interposed an objection to the accuracy of the measurement obtained or that they even expressed concern as to any perceived irregularities in the measurement procedure used. In fact, the evidence clearly reveals that Respondent's safety officer accepted the measurement as correct and included it in his report.

Accordingly, it is found that the truck measured 13 feet in height.

In view of the foregoing findings of fact, it is found that a violation of 30 C.F.R. § 56.12-71 has been established by a preponderance of the evidence.

Negligence of the Operator

On February 27 and 28, 1978, and March 1, 1978, Federal mine inspectors conducted an inspection at the Cantera Espinosa Mine pursuant to the provisions of the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. § 721 et seq. (1971) (Metal-Nonmetal Act). 2/ No citations were issued at that time as relates to the subject powerlines because the inspectors made no observations specifically attracting their attention to those lines. Additionally, the testimony of Mr. Lugo establishes that the powerlines complied with the 20-foot height requirement established by the Commonwealth of Puerto Rico.

Respondent places great reliance on these considerations in its arguments germane to the issue of operator negligence. Respondent's reliance thereon is misplaced. The failure of Federal mine inspectors to detect a given violation of a mandatory health or safety standard during the course of an inspection does not conclusively establish that the mine operator, through the exercise of due diligence, could not have detected the violative condition. The fact that Mr. Martinez, Respondent's safety officer, had no knowledge on the date of the accident as to the height of the lines (Tr. 320) indicates that Respondent had made no effort to ascertain whether they complied with the Federal height requirement in spite of actual knowledge that all vehicular traffic entering or leaving the plant passed under

2/ The Federal Mine Safety and Health Amendments Act of 1977 (Amendments Act) was signed into law by President Carter on November 9, 1977. Pursuant to section 307 of the Amendments Act, all provisions of the 1977 Mine Act relevant to these proceedings became effective on March 8, 1978. The Amendments Act repealed the Metal-Nonmental Act, but all mandatory standards relating to mines issued under the Metal-Nonmetal Act, in effect on the date of enactment of the Amendments Act, remain in effect as mandatory standards under the 1977 Mine Act until such time as new or revised standards are issued by the Secretary of Labor. See sections 301(b)(1) and 306(a) of the Amendments Act.

the lines and in spite of the fact that the area where the accident occurred was clearly visible from the plant office building located approximately 90 feet away. Respondent is lawfully charged with a duty to comply with the Federal mandatory safety standards notwithstanding its adherence to the less exacting standards imposed by the Commonwealth of Puerto Rico.

The fact that the lines may have been the property of the electric power company is of no assistance to Respondent. The evidence presented as to abatement of the violation reveals that the power company would raise the lines on request from the customer upon payment of the requisite costs.

Respondent attempts to characterize Mr. Alicea's conduct in climbing atop the bulk carrier as a voluntary act on his part beyond Respondent's control. However, Mr. David Cintron, who visited the plant to familiarize himself with the location of the accident, testified that during his visits to the site he discovered that the hatches on bulk carriers are always opened at the weighing station so as to make certain that the cargo compartment is empty or free of water. Respondent presented no evidence establishing that the procedure ordinarily employed around the time of the accident differed from those observed by Mr. Cintron and, in fact, the testimony of Mr. Martinez implies that it was the same. The evidence further reveals that most union employees staged a walkout at the Cantera Espinosa Mine on March 16, 1978, and that the plant was being operated by supervisory personnel and the remaining workers. The walkout resulted in slow service to the trucks arriving at the plant which, in turn, resulted in a backup of trucks waiting to reach the weighing station. According to Mr. Torros, the trucks usually remain on the scale for a short period of time and, accordingly, there is no delay.

It can be inferred from this testimony that the slow service resulting in the backlog of trucks was at least partially attributable to a shortage of personnel at the weighing station. Under these circumstances, it is highly foreseeable that a truck driver would undertake to open the hatches on his bulk carrier while waiting in line so as to save time upon reaching the scales, and it is equally foreseeable that the line of trucks would extend under the powerlines since only three trucks had to be in line for the last one to be positioned under those powerlines. Accordingly, the occurrence of the accident was foreseeable notwithstanding the fact that the actions of Mr. Alicea can legitimately be characterized as voluntary. It was therefore incumbent upon Respondent, since it chose to operate the plant that day, to make doubly certain that the high-voltage powerlines met Federal height requirements or that adequate precautionary measures were taken. Respondent's failure to so undertake these actions indicates that the occurrence of the accident was not completely beyond Respondent's control.

Of greater significance to the issue of operator negligence, is the testimony of Mr. Martinez and Inspector Pedro Sarkis. Inspector Sarkis testified that he observed vehicles parked under the powerlines during his March 20, 1978, and April 20, 1978, visits to the Canteral Espinosa Mine. The walkout referred to by Mr. Torros lasted only "a couple of days," thus

implying that the facility was operating at normal capacity at least as of April 20, 1978. Accordingly, it can be inferred that vehicles had parked under the powerlines prior to the date of the accident when the plant was operating normally. Additionally, the emphasized portion of the following passage from Mr. Martinez' testimony indicates that it was customary to perform work under the powerlines prior to the date of the accident:

> Q. Following the date of the accident, did you see trucks, bulk carriers of the type that was involved in the accident, go to the San Juan Cement Company, Inc., to pick up cement?
>
> A. There were trucks which went in of the bulk carrier type, but I cannot say whether they were the same type as the truck involved in the accident.
>
> Q. Did they drive under the electric lines under which the truck that was involved in the accident was parked at the moment of the accident?
>
> A. Would you repeat the question?
>
> Q. Did those trucks that we're talking about now, did they pass while being driven under the electric lines?
>
> A. All types of trucks have to go under.
>
> Q. Under the electric lines?
>
> A. Yes, because they are aerial lines and they pass under.
>
> Q. Under the electric lines that were involved in the accident?
>
> A . Exactly. What was not done was the usual work under.

(Tr. 318-319). [Emphasis added.]

In view of the foregoing considerations, it is found that Respondent demonstrated far more than ordinary negligence.

Gravity of the Violation

The testimony of Mr. Cintron, an individual with impressive credentials in the fields of electrical engineering, occupational safety, and accident reconstruction, implies that mandatory safety standard 30 C.F.R. § 56.12-71 is not specifically directed against the occurrence of an injury of the type involved in this case. However, Mr. Cintron's opinion notwithstanding, the evidence reveals that Respondent's failure to comply with the mandatory safety standard significantly contributed to the occurrence of the accident.

Accordingly, it is found that the violation was extremely serious.

Good Faith in Attempting Rapid Abatement

Inspector Sarkis testified that increasing the height of the powerlines was necessary to abate the violation. The citation set forth 1 p.m., April 3, 1978, as the termination due date (Exh. M-5). Extensions were issued on April 20, 1978, and May 1, 1978, which ultimately extended the time period for abatement to 9 a.m., May 11, 1978 (Exhs. M-6, M-7). The extensions were issued based upon arrangements with the Electric Authority to increase the height of the lines and based upon the existence of a prolonged strike at the power company (Exhs. O-1, O-2). The violation was abated by replacing the 45-foot telephone poles with 55-foot telephone poles, thus raising the height of the lines by approximately an additional 10 feet (Exhs. O-1, M-8). The Electric Authority charged Respondent $3,461 to raise the lines (Exh. O-4).

Inspector Sarkis did not know the exact date of abatement, but testified that it was safe to assume that Respondent raised the lines by 9 a.m. on May 11, 1978. The citation was terminated at 4 p.m. on May 16, 1978 (Exh. M-8).

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

2. Citation No. 93262, April 20, 1978, 30 C.F.R. § 56.20-11

Occurrence of Violation

This citation was issued at 1:45 p.m. on April 20, 1978, alleging a violation of mandatory standard 30 C.F.R. § 56.20-11 in that "[t]here is no warning or sign to alert the operators of the equipment to the electric lines of high-voltage in the area which cross the entrance of the plant" (Exh. M-11). 30 C.F.R. § 56.20-11 provides as follows: "Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, display the nature of the hazard, and any protective action required."

The findings of fact set forth previously in this decision reveal that the area in which the high-voltage powerlines crossed the main access road was an area where a safety hazard existed and that the hazard was not immediately obvious to employees. The testimony of Inspector Sarkis reveals that neither barricades nor warning signs were present when the citation was issued.

Accordingly, it is found that a violation has been established by a preponderance of the evidence.

Negligence of the Operator

On March 17, 1978, Federal mine inspectors requested Mr. Marcos Corrada, the plant manager, to post a warning sign to protect the lives of other individuals using the subject portion of the access road (Tr. 167-168, 189).

Yet, the sign had not been posted as of April 20, 1978, nor had barricades been installed. Vehicles similar to the one involved in the fatality continued to use the access road and, in fact, vehicles were observed parked under the powerlines during Inspector Sarkis' March 20, 1978, and April 20, 1978, visits to the plant. The area involved was clearly visible from the plant office.

The electrocution of Mr. Alicea should have apprised Respondent of the actual dangers, given the proper circumstances, posed to individuals using the area beneath the powerlines. It was entirely foreseeable that another electrocution could occur. The thought that first springs into the mind of a reasonable man upon the occurrence of a fatality of the type involved in this case, under the type of circumstances present in this case, is the need to post effective warnings or to take other steps so as to prevent the occurrence of a similar tragedy. Yet, Respondent did absolutely nothing. The issuance of a citation was required in order to force Respondent to discharge the basic and self evident duty that could, and should, have been undertaken with minimal effort immediately following Mr. Alicea's death.

Accordingly, it is found that the violation was accompanied by a wanton disregard for the safety of others.

Gravity of the Violation

One fatality had occurred in the area and the occurrence of another fatality was foreseeable. Accordingly, it is found that the violation was extremely serious.

Good Faith in Attempting Rapid Abatement

The citation set forth 3 p.m., April 22, 1978, as the termination due date (Exh. M-11). When Inspector Sarkis returned to the Cantera Espinosa Mine on April 24, 1978, Respondent had posted a warning sign 30 inches long by 14 inches wide on one of the telephone poles (Exh. M-14). The sign was so small that a truck driver would have been unable to read it. Accordingly, at 9 a.m., Inspector Sarkis extended the time period for abatement to 3 p.m., April 24, 1978 (Exh. M-12). The citation was terminated at 8:40 a.m. on April 25, 1978, following the posting of an adequate warning sign (Exh. M-13).

Respondent's conduct between April 20, 1978, and April 24, 1978, indicates that Respondent viewed the requirement to post a warning sign as a nuisance, and therefore undertook half-hearted action which was clearly not designed to provide adequate warning to others. Accordingly, it is found that Respondent demonstrated extreme bad faith in attempting rapid abatement of the violation.

3. Citation No. 94601, March 20, 1978, 30 C.F.R. § 50.10

Occurrence of Violation

This citation alleges a violation of 30 C.F.R. § 50.10 in that "[t]he fatal accident that occurred on March 16, 1978, was not immediately notified to MSHA by officials of the company. The fatal accident was discovered by

inspectors from MSHA who arrived on the property for other reasons one day after the accident" (Exhs. M-16, M-17). At all times relevant to this proceeding, 30 C.F.R. § 50.10 reported at 42 Fed. Reg. 65536 (1977) (effective date: January 1, 1978), provided as follows:

> If an accident occurs, an operator shall immediately contact the MESA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MESA District or Subdistrict Office, it shall immediately contact the MESA Headquarters Office in Washington, D.C. by telephone, toll free, at 800-737-2000.

The evidence presented reveals that Federal mine inspectors visited the Cantera Espinosa Mine at approximately 3:30 p.m. on March 17, 1978, to provide Respondent with a print on safety load operations. Mr. Luis Gonzalez Rivo, Respondent's personnel manager, thereupon apprised the inspectors of the March 16, 1978, fatality. Notification was not provided immediately following the accident as required by the regulation.

Accordingly, it is found that a violation of 30 C.F.R. § 50.10, reported at 42 Fed. Reg. 65536 (1977), has been established by a preponderance of the evidence.

Negligence of the Operator

Immediately following the accident, Respondent contacted the police and the insurance company and summoned an ambulance (Tr. 152). There is no indication that the failure to immediately notify the appropriate Federal mine safety authorities was the result of anything other than inadvertence.

Accordingly, it is found that Respondent demonstrated ordinary negligence.

Gravity of the Violation

Failure to notify the appropriate Federal mine safety authorities is potentially serious in that one of the purposes of the notification provision is to enable Federal mine inspectors to ascertain the cause of an accident and order the mine operator to institute corrective action designed to prevent the future occurrence of another accident. Additionally, the mine operator's failure to comply with the notification requirement can prevent the collection of evidence needed for a variety of legitimate Governmental purposes.

The evidence presented reveals that Federal authorities were able to gather the information necessary to determine the cause of the accident and order the implementation of corrective action, notwithstanding Respondent's failure to comply with the regulation. Accordingly, it is found that the violation was nonserious.

Good Faith in Attempting Rapid Abatement

The citation was terminated when the operator gave his assurance of future compliance (Exh. M-16). Accordingly, it is found that Respondent demonstrated good faith in attempting rapid abatement.

E. History of Previous Violations

Respondent had no previous violations for which assessments had been paid as of the dates of the violations involved in these proceedings (Exh. M-10). Accordingly, Respondent has no history of previous violations cognizable in these proceedings. Peggs Run Coal Company, 5 IBMA 144, 82 I.D. 445, 1975-1976 OSHD par. 20,001 (1975).

F. Size of the Operator's Business

Respondent is rated as a medium-size operator based upon the number of annual man-hours worked.

G. Effect of a Civil Penalty on Respondent's Ability to Remain in Business

In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972), the Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to the issue as to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. The parties stipulated in these proceedings that assessment of the civil penalties proposed by the Office of Assessments will not affect Respondent's ability to remain in business (Tr. 20-21). The proposed assessments are identified as follows:

Citation No.	Date	30 C.F.R. Standard	Proposed Assessment
94602	3/20/78	56.12-71	$1,150
94601	3/20/78	50.10	122
93262	4/20/78	56.20-11	255

Accordingly, the question presented is whether Respondent has sustained its burden of proof by establishing that assessment of an otherwise appropriate civil penalty in an amount greater than that proposed by the Office of Assessments will adversely affect its ability to remain in business.

The sole evidence presented on this point was the testimony of Mr. William Miranda Marin, vice president and treasurer of Respondent, and the posthearing receipt in evidence of certified copies of Respondent's 1977 and 1978 Commonwealth of Puerto Rico tax returns, denominated Exhibits O-8 and O-9, respectively.

A careful review of this evidence does not indicate that the civil penalty ultimately assessed in these proceedings would have an effect upon the Respondent's ability to remain in business.

VI. Conclusions of Law

1. San Juan Cement Company, Inc., and its Cantera Espinosa Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

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

3. Federal mine inspectors Pedro Sarkis and Juan Perez were duly authorized representatives the Secretary of Labor at all times relevant to these proceedings.

4. The oral determination made at the hearing denying Respondent's motion to dismiss is AFFIRMED.

5. The violations charged in the three subject citations are found to have occurred as alleged.

6. 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

Petitioner submitted a posthearing brief and proposed findings of fact and conclusions of law. Additionally, both parties set forth arguments on the record during the hearing. Such brief and arguments, 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 expressely 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 these cases.

VIII. Penalty Assessed

Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of penalties is warranted as follows:

A. Docket No. BARB 79-222-PM

Citation No.	Date	30 C.F.R. Standard	Penalty
94602	3/20/78	56.12-71	$2,000

B. Docket No. BARB 79-283-PM

Citation No.	Date	30 C.F.R. Standard	Penalty
94601	3/20/78	50.10	$ 85
93262	4/20/78	56.20-11	$3,000

ORDER

1. The oral determination made at the hearing denying Respondent's motion to dismiss is AFFIRMED.

2. Respondent is ORDERED to pay civil penalties in the amount of $5,085 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

Distribution:

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

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

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 12, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. LAKE 80-110-M
	:	A.C. No. 20-952-5003
v.	:	
	:	Karber Pit and Mill
KARBER GRAVEL COMPANY, INC., Respondent	:	

DECISION

Appearances: Gerald A. Hudson, Esq., Office of the Solicitor, U.S. Department of Labor, Detroit, Michigan, for Petitioner;
Larry Karber, President, Karber Gravel Company, Inc., for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

Petitioner seeks civil penalties for two alleged violations of 30 C.F.R. § 56.12-8 occurring on August 29, 1978. Pursuant to notice, a hearing was held in Lansing, Michigan, on August 8, 1980. Charles Millikan testified for Petitioner; Larry Karber testified for Respondent. Both parties waived their rights to file written proposed findings and briefs. Based upon the evidence presented at the hearing, I make the following

FINDINGS OF FACT

1. Respondent is the operator of a gravel pit and mill in Clinton County, Michigan, known as the Karber Pit and Mill.

2. Respondent produces sand and gravel for use and for sale. Its operation is in or affects interstate commerce. It is a small operator, having three employees.

3. Respondent does not have a history of prior violations.

4. On August 29, 1979, Charles Millikan, a Federal mine inspector and a duly authorized representative of the Secretary of Labor, issued two citations each alleging that a bushing was not provided for electrical wires going into a junction box at the power house. One box was located on the north wall of the power house, the other on the west wall.

5. The plant was not in operation at the time the citations were issued and the power lines were not energized.

6. The electrical wires entering the junction boxes described in the citations did not have bushings at the time of the inspection on August 29, 1979.

7. Approximately 2 or 3 days prior to the issuance of the citations, Respondent began experiencing intermittent shorts in the underground lines leading from the junction boxes to the main plant.

8. Respondent was unable to uncover the source of the shorts and had called an outside electrician to investigate.

9. The power had been turned off, the covers were removed from the junction boxes and the bushings had been removed in the course of testing the wires to find the short.

10. The situation described in Finding of Fact No. 9 was not explained to the inspector by Respondent's foreman who accompanied him during the inspection.

11. The source of the shorts was never found. The wires were rerouted overhead. The junction boxes were covered and the bushings were reinserted. The citation was terminated on September 7, 1979.

DISCUSSION

I accept as factual the testimony of Mr. Larry Karber explaining the absence of bushings. Had the situation been explained to Inspector Millikan at the time of the inspection, it is likely that the citations would not have been issued. Under the circumstances, I find that the violations charged did not occur.

CONCLUSIONS OF LAW

1. The Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in its operation of the Karber Pit and Mill.

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

3. The violations charged in Citation Nos. 294267 and 294268 issued on August 29, 1979, by Federal mine inspector Charles Millikan did not occur.

ORDER

Citation Nos. 294267 and 294268 issued August 29, 1979, are VACATED and no civil penalty is assessed.

James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

Mr. Larry Karber, President, Karber Gravel Company, Inc., 917 South Church Street, St. Johns, MI 48879

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

JAB2

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
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

(703) 756-6230

12 SEP 1980

JOHN WILSON AND RONALD RUMMEL, Applicants	:	Complaint of Discrimination
v.	:	Docket No. PITT 72-23
LAUREL SHAFT CONSTRUCTION COMPANY, INC., Respondent	:	

DECISION AND ORDER

On April 19, 1972, a decision was issued in the subject proceeding, finding that Respondent had illegally discharged Applicants in violation of section 110(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. Respondent was ordered: (1) to offer each Applicant reinstatement with the seniority, status, classification, pay and work shift that he would have held and enjoyed had Respondent not discharged him; (2) to pay each Applicant full back wages, with interest at 6 percent per annum for lost wages he would have received in the Respondent's employment from the discharge until the date he (a) was reinstated pursuant to an offer of reinstatement or (b) refused to accept such offer of reinstatement; (3) to deduct from such award of back pay "any wages which such Applicant received from other employment in the period for which back wages are due from the Respondent under this Order"; and (4) to pay to Applicants an aggregate amount for all costs and expenses, including attorney's fees, which have been reasonably incurred by Applicants for, or in connection with, the institution and prosecution of this proceeding.

It affirmatively appears from the record that, on February 9, 1973, Respondent offered each Applicant an opportunity to be reinstated and to report for work on February 15, 1973. Neither Applicant appeared for work on the specified date or notified Respondent of his refusal to accept the offer of reinstatement.

On March 27, 1973, the parties stipulated that Applicant John Wilson was entitled to $3,873.17 in back wages and other damages, including interest at 6 percent per annum, that Ronald Rummel was entitled to $6,239.14 in back wages and other damages, including interest at 6 percent per annum, and that both Applicants incurred costs and expenses in the amount of $824.85 and attorney's fees in the amount of $2,750.00.

The parties also stipulated that, in the period in which damages accrued Applicant John Wilson received $352.00 for 16 weeks as unemployment compensation benefits from the Commonwealth of Pennsylvania, Bureau of Employment Security, and that Applicant Ronald Rummel received $2,674.00 for 42 weeks as unemployment compensation benefits from the Commonwealth of Pennsylvania, Bureau of Employment Security.

Respondent contends that the unemployment compensation benefits received by Applicants should be deducted from the total amount of back pay and other benefits that Applicants would have received had they not been discharged. Respondent argues that unemployment compensation benefits are "wages which each Applicant received from other employment" and, therefore, should be deducted from the final award of back pay as required by the Decision and Order of April 19, 1972.

In N.L.R.B. v. Gullet Gin Company, Inc., 340 U.S. 361, 364 (1951), the Supreme Court upheld the Board's decision in refusing to deduct unemployment compensation benefits from an award of back pay. The Court followed an earlier decision in which the Court held that state unemployment compensation benefits were not "earnings" to be deducted from back pay. See N.L.R.B. v. Marshall Field & Co., 318 U.S. 253, 255 (1943).

I conclude that unemployment compensation benefits are not "earnings" to be deducted from a final award of back pay within the meaning of the Federal Coal Mine Safety and Health Act and my Decision and Order of April 19, 1972.

WHEREFORE IT IS ORDERED that:

(1) Within 30 days of this Decision, Laurel Shaft Construction Company shall pay John Wilson as back wages and other damages, including interest in the amount of 6 percent per annum until March 27, 1973, the total amount of $3,873.17. Interest on such amount shall not accrue after the date of the parties' stipulation of damages, viz., March 27, 1973.

(2) Within 30 days of this Decision, Laurel Shaft Construction Company shall pay Ronald Rummel as back wages and other damages, including interest in the amount of 6 percent per annum until March 27, 1973, the total amount of $6,239.14. Interest on such amount shall not accrue after the date of the parties' stipulation of damages, viz., March 27, 1973.

(3) Respondent shall pay both Applicants costs and expenses in the amount of $824.85 and attorney's fees in the amount of $2,750.00, within 30 days of this decision. Interest shall shall not be due on this amount.

William Fauver

WILLIAM FAUVER, JUDGE

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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16 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
Petitioner	:	Docket No. WEVA 80-284
v.	:	A.C. No. 46-06003-03002R
	:	Baker Strip Mine
BAKER COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Secretary of Labor, Mine Safety and Health Administration; Clark B. Frame, Esq., Wilson & Frame, Morgantown, West Virginia, for Baker Coal Company.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), to assess a civil penalty against Baker Coal Company for a violation of section 103(a) of the Act. A hearing was held in Morgantown, West Virginia on August 13, 1980. MSHA inspectors Ronald Marrara and Carl R. Buckner testified on behalf of MSHA. Wayne Baker testified on behalf of Baker Coal Company.

ISSUES

Whether Baker Coal Company violated the Act as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

Section 103(a) of the Act, 30 U.S.C. § 813(a), provides in pertinent part as follows: "For the purpose of making any inspection or investigation under this Act, * * * any authorized representative of the Secretary * * * shall have the right of entry to, upon, or through any coal or other mine."

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

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

STIPULATIONS

The parties stipulated the following:

1. The operator, Baker Coal Company, is small in size.

2. The operator's prior history of assessed violations constitutes a negligible history of prior violations and there was no prior violation of section 103(a) of the Act.

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. On June 7, 1979, Ronald Marrara and Carl Buckner were duly authorized representatives of the Secretary of Labor, Mine Safety and Health Administration, and were assigned to conduct a spot inspection at Baker Coal Company, Baker Strip Mine, in northern West Virginia.

2. Upon arriving at the mine site, Inspector Marrara identified himself to Wayne Baker, sole proprietor of Baker Coal Company, and informed him that the inspectors were aware that another MSHA inspector had been at the site on the prior day but that they were going to make another inspection.

3. At that point, Wayne Baker complained profanely that this was his tenth inspection in two weeks. Without provocation or warning, he struck Inspector Marrara, knocking him to the ground. Thereupon, he straddled Inspector Marrara, grabbed him by the shirt, lifted him off the ground, and slammed him back to the ground several times. During this assault on Inspector Marrara, Wayne Baker also threatened to throw the inspector in the sedimentation pond on the site.

4. After assaulting Inspector Marrara, Wayne Baker then shoved Inspector Buckner and his hard hat fell off. Baker then picked up the hard hat and threw it at Inspector Buckner.

5. At no time did either inspector strike Wayne Baker.

6. Wayne Baker then ordered both inspectors off the mine site and instructed them not to return.

7. As a result of this attack, Inspector Marrara received treatment in the emergency room of West Virginia University Hospital, sustained a left rotator cuff tear, and was off work for six weeks.

8. Inspector Marrara pressed criminal charges against Wayne Baker and Baker entered a plea of nolo contendre and was fined $250.

9. On March 12, 1980, Wayne Baker struck an investigator employed by the West Virginia Department of Natural Resources. He also entered a plea of nolo contendre to the criminal charge arising out of that incident and was fined $250.

10. Baker Coal Company is a small operator but Wayne Baker has not established that any civil penalty assessed under the Act will affect his ability to continue in business because Baker Coal Company offered no documentary evidence of its financial condition and the testimony of Wayne Baker in this regard was vague and unconvincing.

11. Since this incident on June 7, 1979, Baker Coal Company has not denied entry to any inspector employed by MSHA.

12. Baker Coal Company has a negligible history of assessed violations and there was no prior violation of section 103(a) of the Act.

DISCUSSION

Wayne Baker, sole proprietor of Baker Coal Company, admitted that he refused to allow two MSHA inspectors to conduct an inspection at his mine on June 7, 1979, and that he ordered them off of his property. The above admission establishes a violation of section 103(a) of the Act which provides in pertinent part as follows: "For the purpose of making any inspection or investigation under this Act * * * any authorized representative of the Secretary * * * shall have the right of entry to, upon, or through any coal or other mine." Since a violation of the Act has been admitted by the operator, the remaining issues concern the amount of the civil penalty which should be assessed.

The two MSHA inspectors allege that without warning or provocation Wayne Baker physically assaulted them after they announced their intention to make an inspection of his mine. Baker alleges the following: (1) he had only been on this job for eight working days but had been subjected to

ten inspections by agencies of the state and federal governments consuming 35 hours of his time and that MSHA had an inspector at this mine on the preceding day; (2) Inspector Marrara approached to a distance of 12 inches from him and said to him, "We are going to straighten you out"; (3) rather than slamming Inspector Marrara to the ground as alleged, Baker was attempting to lift the inspector to get him off the property but could not do so; and (4) Baker Coal Company is unable to pay any civil penalty assessed herein.

The claim of Wayne Baker that he had been subjected to an excessive number of inspections by federal and state agencies is without merit and constitutes neither a defense to the violation nor probative evidence concerning the criteria for assessment of a civil penalty. Suffice it to say that the mining of coal is a pervasively regulated industry and any operator who objects to this fact should seek employment elsewhere in the economy.

Wayne Baker's allegations that Inspector Marrara approached to within 12 inches of him is admitted by the inspector. This fact is of no consequence and Baker admitted that he was not afraid of the inspector. Baker's claim that the inspector told him, "We are going to straighten you out," is rejected. The testimony of the two inspectors that no such statement was made was more credible than the testimony of Wayne Baker.

Baker's claim that he was merely attempting to get Inspector Marrara off his property when he lifted him off the ground is also rejected. Credible testimony of the two inspectors established that Baker slammed Inspector Marrara to the ground several times.

Finally, Baker's assertion that he would be unable to pay any civil penalty assessed here is rejected because he failed to present any documentation of his financial condition and his testimony in this regard was vague and unpersuasive. Baker presented no evidence of his net worth and he was unsure of the value of his equipment and the extent of the liens thereon.

Section 110(i) mandates the consideration of six criteria in the assessment of a civil penalty. I have considered the operator's history of previous violations, the size of the business, the ability of the operator to stay in business, and the good faith of the operator to achieve rapid compliance after notification of the violation in my Findings of Fact Nos. 10-12. The remaining issues are whether the operator was negligent and the gravity of the violation.

The evidence of record in this matter fails to establish any justification for Wayne Baker's conduct. Baker's initial assault and battery upon Inspector Marrara, which knocked him to the ground, constituted gross negligence. However, this offense was further aggravated and compounded by Baker's subsequent actions of picking the inspector up and slamming him to the ground several times and threatening to throw him in the sedimentation pond. At no time did the inspector strike Baker. It is noted that all of

these actions took place in the presence of Baker's employees at the mine. The willful and unlawful use of force by Wayne Baker upon Inspector Marrara constitutes gross negligence under the Act.

The evidence establishes that Baker's assault upon the inspector caused him serious physical injuries which required medical attention and resulted in him being off the job for six weeks. In addition to the physical injuries suffered by the inspector, the gravity of this offense is compounded by the fact that Baker's conduct at the time of this violation threatens to undermine the integrity of mine safety enforcement. If MSHA inspectors are intimidated by the threat of a physical assault they will not issue the citations and orders required under the Act. While a civil penalty cannot be assessed as a means of punishment, it must be sufficient to deter subsequent violations and gain the operator's compliance with the Act. The violation prevented any inspection at the time it was committed. The manner in which the violation was committed could intimidate inspectors in the future so that future inspections would be less thorough. Therefore, the violation and the manner in which it was committed could result in dangerous conditions being undetected. I find that the violation was of extremely serious gravity.

Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty in the amount of $8,000.00 should be imposed for the violation of section 103(a) of the Act.

CONCLUSIONS OF LAW

1. The administrative law judge has jurisdiction of this proceeding pursuant to section 110(i) of the Act.

2. Baker Coal Company and Baker Strip Mine are subject to the Act.

3. On June 7, 1979, Baker Coal Company violated section 103(a) of the Act by refusing to allow duly authorized representatives of the Secretary of Labor entry to the Baker Strip Mine.

4. The conduct of Wayne Baker, sole proprietor of Baker Coal Company, in committing an assault and battery on MSHA inspector Ronald Marrara constituted gross negligence.

5. The violation in question was of extremely serious gravity in that it resulted in physical injuries to Inspector Marrara and was intended to intimidate MSHA inspectors from performing their job.

6. Under the criteria set forth in section 110(i) of the Act, a civil penalty in the amount of $8,000.00 shall be imposed for violation of section 103(a) of the Act.

ORDER

WHEREFORE IT IS ORDERED that Baker Coal Company pay the sum of $8,000.00 within 30 days of the date of this decision as a civil penalty for the violation of section 103(a) of the Act.

James A. Laurenson, Judge

Distribution by Certified Mail:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DENVER, COLORADO 80204

1 6 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. UNITED NUCLEAR-HOMESTAKE PARTNERS, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. CENT 80-45-M ASSESSMENT CONTROL NO. 29-00591-05006 MINE: SECTION 25

DECISION AND ORDER APPROVING SETTLEMENT AND DIRECTING PAYMENT

On July 15, 1980, pursuant to Commission Rule 30, 29 CFR § 2700.30, as amended by 45 Fed. Reg. 44301, a motion to approve settlement was filed with the Commission. All parties to the above-captioned proceeding agree to the settlement.

By stipulation and motion, the parties propose to settle this proceeding without a formal hearing. In support of the proposed settlement, the parties have taken into account, and submitted information concerning, the six statutory criteria set forth in section 110(i) of the Act.* Of significant interest were two letters submitted by Respondent, previously reviewed by counsel for Petitioner, which I have included as Appendix I and Appendix II to my Decision.

Due consideration of all factors contained in the record convinces me that the proposal is consistent with the purposes of the Act and should be approved.

Accordingly, it is ORDERED: that the settlement agreement is hereby APPROVED, that the joint motion is hereby GRANTED, and that Respondent shall pay the agreed amount within 40 days of the date of this Order.

Jon D. Boltz
Administrative Law Judge

*Section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(i), reads in pertinent part:

> ". . . In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent,

the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation...."

Distribution:

Robert A. Cohen, Esq., Office of the Solicitor, United States Department of Labor, 4015 Wilson Boulevard, Arlington, Virginia 22203

Wayne E. Bingham, Esq., PICKERING & BINGHAM, 920 Ortiz, NE, Albuquerque, New Mexico 87108

APPENDIX I

UNITED NUCLEAR-HOMESTAKE PARTNERS
P.O. BOX 98
GRANTS, NEW MEXICO
87020

August 4, 1980

Jon D. Boltz
Administrative Law Judge

Docket NO. CENT. 80-45-M
A/O No. 29-00591-05006
Section 25 Mine

Dear Judge Boltz:

This letter is written pursuant to your request of July 17, 1980, for clarification on those radiation citiations written against United Nuclear-Homestake Partners' (UN-HP) Section 25 mine during June and July, 1979 (citation members 151645, 152412, 152413, and 152415). These citations were written to indicate a violoation of 30 CFR 57.5-39, the 1 working level standard.

An exceedance of this standard indicates a failure in the mine's ventilation and radon daughter control system. Many things can contribute to a failure in the control systems, the most common of which include 1) barrometric pressure, 2) ventilation bag not installed properly at working area, and 3) ventilation bag restricting air flow by sagging, kinking or getting ripped. Some other less frequent causes for ventilation and radon daughter control system failures include primary and secondary ventilation fan failures, air control doors inadvertantly left open or closed, bulkhead failures, and drilling into old, abandonded stopes, all of which could very easily allow the working levels (WL) in the working area gradually, or very quickly, exceed 1 W.L. Because this is the case, UN-HP enforces a self-imposed restriction of closing down work areas at 0.7 WL until the ventilation is reduced to below that level.

It is part of UN-HP's standard practice procedures for the miner to pull his ventilation bag away from the work area when a face is to be dynamited, to prevent damaging the bag. When the miner than returns to the area to muck out the material, his first task is to return the ventilation bag to the area and purge it with fresh air. UN-HP's most common closure as a result of exceeding the 1 WL standard is the miner forgetting to bring his ventilation bag into his work area (this is the case in 50% of the closures).

UN-HP monitors radon daughters with an instrument called the MDA "instant working level meter". A sample of air can be collected and analyzed for its radon daughter content within a 5-minute period. If the elevated radon daughter content is attributed to the miner not bringing his ventilation bag forward, the area can usually be re-opened again within 20-minutes of being closed. While adjusting the ventilation system in the closed area, the miner is required to wear an approved respirator.

UN-HP's Ventilation Department is very thoroughly trained in evaluating conditions underground which may be contributing to elevated radon daughter concentrations. As the Ventilation Technician makes his rounds obtaining the working level concentrations in the individual work areas and employee accumulation points and travelways, he is continuously noting the condition of the ventilation and radon daughter control systems. Should he find an area exceeding UN-HP's 0.7 WL limit, he immediately closes the area and has any employees in the area withdrawn. The Ventilation Technician, fitted with an approved respirator, evaluates the situation and makes a determination as to what can be done to alleviate the problem. After seeing that the miner and backup personnel are fitted with respirators an attempt is made to correct the ventilation problem. After the area concentration is reduced to below 0.7 WL the miner and backup personnel are allowed to continue on with production work. The time of closure, work required to alleviate the problem, and time of re-opening are recorded and filed away for further evaluation. As previously indicated most areas are re-opened after about 20 minutes of being closed.

UN-HP currently monitors every work area at least once each shift, if the area is active that shift. The concentration observed that shift is averaged with the last radon daughter concentration observed in the area for determining each employee's personal exposure. The amount of time each employee spends in individual work areas, including lunchrooms, travelways and on ventilation work, is recorded on a daily basis and is accurate to the nearest one-half hour. The time an individual spends in a particular area is combined with the average WL concentration observed in that area for the same time period. Therefore, a true time weighted exposure is determined for each employee working for UN-HP. UN-HP utilizes a computer for determining their employee exposures to radon daughters. The daily concentrations observed in each work area are fed into the computer the day following sample collection. UN-HP's payroll is based on a twice per month basis. Therefore, when each employee's time is fed into the computer to determine the amount that person is to be paid for the two week period just worked, his time in each individual work area is also combined with the WL concentrations observed during the same period. Accumulated exposures are, therefore, updated twice each month.

The radiation citations issued/against Section 25 during June and July, 1979, in this case while at relatively high levels are exceptions to normal operating experience UN-HP had just begun to experience ventilation difficulties of an unusual nature which took several days to remedy. Bulkheads, airdoors, larger ventilation fans, and a more diverse ventilation bag system had to be installed. An additional large fan had to be installed on an adjoining property belonging to Kerr-McGee Nuclear Corporation, and some time delays were experienced there due to Kerr-McGee having to build additional bulkheads in some haulage ways. All of this was experienced due to apparent leakage from longholes inadvertantly penetrating some old workings. All production in this area was stopped for several days. Only ventilation work was performed until WL concentrations in that area were reduced to below 0.7 WL. No employees were overexposed to the 4 working months standard as a result of these exceedances to the 1 WL standard.

If you have any questions, or would like further clasification on how UN-HP handles their radon daughter monitoring program, please don't hesitate to contact me.

Very truly yours,

UNITED NUCLEAR-HOMESTAKE PARTNERS

Edward E. Kennedy

Edward E. Kennedy
Director of Environmental Affairs

EEK/jel

Wayne E. Bingham

Wayne E. Bingham
PICKERING & BINGHAM
Attys. for UN-HP

APPENDIX II

UNITED NUCLEAR-HOMESTAKE PARTNERS
P. O. BOX 98
GRANTS, NEW MEXICO
87020

August 11, 1980

Jon D. Boltz
Administrative Law Judge

Docket No. CENT. 80-45-M
A/O No. 29-00591-05006
Section 25 Mine

Dear Judge Boltz:

This letter is written to clarify what radon and radon daughters are and where they are found in nature, as well as describing what working levels and working level months are and how they are arrived at.

Small amounts of uranium and its radioactive daughter products including radium and radon are found everywhere in nature. We know of no substance which is free from them. Radon is present in the outdoor and indoor air everywhere on earth. Radon is not a mysterious substance, but is a well-studied, well-understood chemical element. Radon is a chemically inert gaseous element in the same family of chemical elements as helium, argon, and neon. Being chemically inert radon can have no biological effects on organisms.

Radon is produced as a gas when radium 226 (a radioactive decay product of uranium 238) decays naturally over long periods of time. Radon has a half-life of 3.8 days; in 3.8 days, 50 percent of the decay activity remains. When radon gas decays to its daughter products, a positively charged alpha particle is formed. These charged particles are called radon daughters.

Uranium ores are found in regions in which a geochemical concentration of the normal universal uranium distribution has taken place during an earlier geological period. Naturally there is also a proportionally increased concentration of radium and its gaseous daughter product, radon. In uranium mining, the underground environmental concentration of radon is kept low by intensive power ventilation which forces large quantities of fresh, outside air through the underground workings. This action dilutes and expels the radon gas which diffuses into the mine air from the ore bodies, as well as from the waste rock.

When the radon gas decays to its daughter products and forms positively charged particles, those particles actively seek out negatively charged particles such as can be found in dust particles, water droplets, smoke, etc. When these materials with attached radionuclides are inhaled by the miner, the radiation from them is delivered to those sites in the nose, pharynx, and trachio-bronchial tree where the particles are deposited. Extensive studies

have been conducted in this area and exposure regulations have been altered to better protect those employees working under these conditions.

Current Mine Safety and Health Administration standards require that 1) no person shall be permitted to receive an exposure in excess of 4 working level months in any calendar year (30 CFR 57.5-39), and 2) except as provided by standard 30 CFR 57.5-5, persons shall not be exposed to air containing concentrations of radon daughters exceeding 1 working level in active workings (30 CFR 57.5-39).

At the highest level of radon concentration which is now permitted in any active working area by a uranium mine operator the radon concentration corresponds to a negligible partial pressure. Thus 100 picocuries of radon per liter of air which can support at most one working level (1WL) of radon daughter products, contains less than one atom of radon per 10^{15} atoms -- that is per thousand million million atoms -- of oxygen and nitrogen. The radon daughter products have a maximium concentration in 1 WL air which is more than 100-fold smaller; that is one atom per 100,00 million million atoms of oxygen and nitrogen.

The "Working Level" (WL) is a special unit of radon daughter concentration in air. One WL is any combination of radon daughters in 1 liter of air that will ultimately release 1.3×10^5 MeV (million electron volts) of alpha energy during radioactive decay to lead-210. When an atom of radon or its daughter product decays, an expenditure of energy is realized. By collecting a known volume of air through a very fine filter, and observing the radioactive decay of the particles collected on the filter by the energy that is released, the radon daughter concentration can be calculated in working levels. A working level is a concentration of radon daughter products in the area, and does not indicate a person's exposure.

The "Working Level Month" (WLM) is the special unit used for indicating a person's cumulative exposure in which the hours worked is 173 hours (40 hours per week times 4-1/3 weeks per month). Four WLM has been determined to be the maximum allowable annual exposure. The method in which this annual limit was arrived at is discussed below:

> In 1967, the Federal Radiation Council unanimously recommended one WL as a safe continuous level, which meant that 12 WLM was the maximum annual exposure. Report No. 8 Revised titled "Guidance for the Control of Radiation Hazards in Uranium Mining, September, 1967, a Staff Report of the Federal Radiation Council" gives the full explanation and justification for supporting the 12 WLM standard. In 1971, the EPA which assumed the responsibility of the federal radiation council, had the standard reduced by a factor of 3, to 4 WLM per year. The reason given for the reduction was to throw in an additional factor of safety because the 12 WLM was felt to be inadequate it was determined that few health effects could be seen above a lifetime occupational exposure of 120 WLM, and that an extremely small portion of uranium miners work in underground uranium mines for more than 30 years. Therefore, with a maximum allowable annual exposure of 4 WLM for 30 years, no miner would be allowed to receive in excess of 120 WLM in his lifetime.

An employee's annual exposure is determined by knowing the time he spends in each working area, lunch area, and travelway and the average radon daughter concentrations observed in those areas occupied. If an employee was to work in an underground environment exhibiting 1 WL radon daughter concentration, eight hours a day for 4 months he would be exposed to 4 WLM over that time period. An average concentration of 0.3 WL, 8-hours a day, over a 12-month period would also result in 4 WLM annual exposure. It can, therefore, easily be seen that short duration exposures to concentrations exceeding 1 WL does not pose an imminent threat to over-exposing an individual to 4 WLM per year. If, near the end of the year, an employee is approaching the 4 WLM limit, he can be moved to areas within the mine exhibiting lower radon daughter concentrations, or he can be taken out of the mine and allowed to work on the surface collecting his regular underground pay.

I hope these comments help to clarify what some of the terms and standards of the MSHA regulations mean. If I can be of any further assistance on these matters, please don't hesitate to contact me.

Very truly yours,

UNITED NUCLEAR-HOMESTAKE PARTNERS

Edward E. Kennedy

Edward E. Kennedy
Director of Environmental Affairs

EEK/jel

Wayne E. Bingham

Wayne E. Bingham
PICKERING & BINGHAM
Attys. for UN-HP

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

(703) 756-6230

18 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Complaint of Discrimination
	:	Docket No. VA 79-81-D
On behalf of Larry D. Long, Applicant	:	
v.	:	
ISLAND CREEK COAL COMPANY and	:	
LANGLEY & MORGAN CORPORATION, Respondents	:	

DECISION AND ORDER

On June 19, 1980, a decision was issued in the subject proceeding, finding that Respondents violated section 105(c) of the Federal Mine Safety and Health Act of 1977 (1) by reassigning Applicant to outfit an explosives truck on November 1, 1978, and (2) by reassigning Applicant to miscellaneous work outside his work classification on November 14, 1978.

On July 10, 1980, the Secretary filed a proposed order for relief, requesting that Island Creek Coal Company be assessed a penalty of $3,500 for each of the two violations, for a total of $7,000, and that Langley & Morgan Corporation be assessed a penalty of $2,000 for each of the two violations, for a total of $4,000.

The Secretary proposed that Larry D. Long be awarded costs and expenses reasonably incurred for, or in connection with, the institution and prosecution of the subject proceeding in the following amounts: $1,709.85 for 154 hours of lost time from work; $137.70 for mileage; and $61.44 in telephone calls.

The Secretary also requests that Respondents be ordered to cease and desist from discriminating against or interfering with Larry D. Long because of activities protected under section 105(c) of the Act; and that Respondents be ordered to post the Decision and Order in this proceeding at the Virginia Pocahontas No. 5 and No. 6 Mines.

On July 17, 1980, Respondents filed an objection to the proposed penalties as excessive and requested a hearing to determine the reasonableness of the costs and expenses in Applicant's proposed order for relief. A hearing was held on August 7, 1980.

At the hearing, Applicant modified his claim for costs and expenses to $543.75 by reducing the claim for lost wages to $287.04 for time lost to attend the hearings on December 4, 1979, on August 7, 1980, and to confer with his attorney on August 6, 1980; by increasing the mileage expense to $199.24; and by reducing the telephone expenses to $57.47. Counsel for Applicant explained that the amounts originally claimed differed from those claimed at the hearing on August 7, 1980, because Applicant did not have the documentary evidence to verify the claims before August 6, 1980. Counsel for Applicant determined that most of the 154 hours originally claimed as lost time "could not be characterized as expenses which were incurred in the pursuit of this case."

Respondents contend that Applicant may not recover "costs and expenses" under section 105(c)(3) for voluntary loss of time from work while attending the hearings on December 4, 1979, on August 7, 1980, and for consulting his attorney on August 6, 1980. Respondents contend that, even if Applicant can recover for time lost from work while attending the hearing on December 4, 1980, he is not entitled to recover for time lost on August 6-7, 1980. Respondents argue that had Applicant's original demand for costs and expenses been reasonable and had Respondents known that Applicant was going to reduce his claim for 154 hours of lost time from work, Respondents would not have raised an objection in the first place and no hearing would have been required on August 7, 1980. In no case, Respondents argue, is Applicant entitled to costs and expenses for the time he spent conferring with his attorney on August 6, 1980. Respondents also argue that had there been no hearing on August 7, 1980, Applicant's mileage expense would have remained at $137.70.

Section 105(c) of the Act provides in part:

> 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 miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.

The drafters of the Act intended that the complaining miner receive "all relief that is necessary to make [him] whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specific relief is only illustrative." S. Rep. No. 95-181, 95th Cong., 1st Sess. 37

(1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 625 (1978).

I find that Applicant is entitled to compensation for (1) lost wages in the amount of $247.04; (2) mileage expenses in the amount of $199.24; and (3) telephone expenses in the amount of $57.47. I find that these costs and expenses were reasonably incurred by Applicant for, or in connection with, the institution and prosecution of the subject proceeding.

Based upon the statutory criteria for assessing a civil penalty under the Federal Mine Safety and Health Act of 1977, Island Creek Coal Company is assessed a penalty of $3,500 for each of its violations found herein and Langley & Morgan Corporation is assessed a penalty of $2,000 for each of its violations found herein.

I find that Respondents should be ordered to cease and desist from discriminating against or interfering with Applicant because of activities protected under section 105(c) of the Act.

I also find that each Respondent should be ordered to post the prior Decision and this Decision and Order on the mine bulletin board, or in such other conspicuous place, where notices for the miners are posted at the Virginia Pocahontas No. 5 and No. 6 Mines.

WHEREFORE IT IS ORDERED that:

(1) Island Creek Coal Company shall pay the Secretary of Labor the above-assessed civil penalties, in the total amount of $7,000, within 30 days from the date of this Decision.

(2) Langley & Morgan Corporation shall pay the Secretary of Labor the above-assessed civil penalties, in the total amount of $4,000, within 30 days from the date of this Decision.

(3) Respondents are jointly and severally liable to Larry D. Long for the costs and expenses found above, in the total amount of $543.75, together with interest at the rate of 10 percent per annum accruing from August 7, 1980, until paid, and shall pay such sum and interest to Larry D. Long within 30 days of this Decision.

(4) Respondents shall cease and desist from discriminating against or interfering with Applicant because of activities protected under section 105(c) of the Act.

(5) Respondents shall post a copy of the Decision of June 19, 1980, and a copy of this Decision and Order on the mine bulletin board, or at such other conspicuous place where notices are normally posted for the employees, at the Virginia Pocahontas No. 5 and No. 6 Mines, and keep such copies so

posted unobstructed and protected from the weather for a consecutive period of at least 60 days.

William Fauver

WILLIAM FAUVER, JUDGE

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

19 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEVA 80-466 Assessment Control No. 46-01419-03031V
v.	:	
UNITED STATES STEEL CORPORATION, Respondent	:	Gary District No. 2 Mine

DECISION

Counsel for the Secretary of Labor filed on July 31, 1980, in Docket No. WEVA 80-466 a Petition for Assessment of Civil Penalty seeking to have a civil penalty assessed for a violation of 30 C.F.R. § 75.202 alleged in Withdrawal Order No. 655316 dated October 2, 1979. The civil penalty issues raised by the violation cited in Order No. 655316 were consolidated for hearing and decision with the proceedings in Docket Nos. WEVA 79-343-R, et al. My decision in United States Steel Corp. v. Secretary of Labor, Docket Nos. WEVA 79-343-R, et al., was issued on June 25, 1980. Paragraph (D) of the order accompanying my decision stated:

> (D) The civil penalty issues consolidated in this proceeding with respect to Order No. 655316 are severed from this decision and will be decided in a separate decision when I receive the file in which the Secretary seeks assessment of a penalty for the violation of section 75.202 alleged in Order No. 655316.

The case in which United States Steel sought review of Order No. 655316 was assigned Docket No. WEVA 80-81-R. In my decision issued June 25, 1980, I found that Order No. 655316 was improperly written under the unwarrantable failure provisions of section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 and the order was vacated by paragraph (C) of the order accompanying the decision.

Finding No. 8 on page 9 of my decision in Docket No. WEVA 80-81-R stated:

> 8. Section 75.202, to the extent here pertinent, provides "[l]oose roof and overhanging or loose faces and ribs shall be taken down or supported." A violation of section 75.202 was

proven by both the contestant's evidence and MSHA's evidence because some of the coal was loose on the right side and was taken down, even though the quantity only amounted to from one-half to three-quarters of a ton.

Since a violation of section 75.202 has been found to have occurred, it is necessary to consider the six criteria set forth in section 110(i) of the Act for the purpose of assessing a civil penalty (Eastern Associated Coal Corp., 1 IBMA 233 (1972); Zeigler Coal Co., 2 IBMA 216 (1973); Zeigler Coal Co., 3 IBMA 64 (1974); Island Creek Coal Co., 2 FMSHRC 279 (1980); and Van Mulvehill Coal Co., Inc., 2 FMSHRC 283 (1980)).

On page 9 of my decision in Docket No. WEVA 80-81-R, I found that United States Steel is a large operator, that it is subject to the jurisdiction of the Commission and to the provisions of the Act, and that payment of penalties will not affect U.S. Steel's ability to continue in business.

On page 8 of my decision in Docket No. WEVA 80-81-R, I found that U.S. Steel demonstrated very good faith in achieving rapid compliance by having abated the violation within a period of only 30 to 45 minutes after the violation was cited.

On page 10 of my decision in Docket No. WEVA 80-81-R, I stated that the following finding was made for the purpose of evaluating the criterion of gravity in a civil penalty proceeding:

> * * * There was very little rib surface which was loose enough to require it to be taken down and there was little likelihood that any of these ribs would have fallen with sufficient force to cause any serious injury. So I would find that the violation was moderately serious.

At page 11 of my decision in Docket No. WEVA 80-81-R, I stated:

> After listening to the testimony of the company's witnesses and that of Inspector Robbins, I am of the opinion that these particular loose ribs were simply not so obvious and dangerous that a preshift examiner would have picked them out as something requiring special attention, or that a section foreman would have done so either.

On the basis of the foregoing conclusion and other findings given in my decision in Docket No. WEVA 80-81-R, I conclude that respondent was non-negligent with respect to the occurrence of the violation.

In my decision in Docket No. WEVA 80-290, which was a part of the decision issued in the consolidated proceedings in Docket Nos. WEVA 79-343-R, et al., supra, I stated that "[t]here is nothing in the record to show that

respondent has such a significant history of previous violations as to warrant an increase in the penalty under the criterion of history of previous violations." That statement is correct with respect to the instant violation.

Considering that the violation was only moderately serious, that respondent was not negligent, and that immediate action to abate the violation was taken, I find that a nominal penalty of $75.00 is warranted.

WHEREFORE, it is ordered:

United States Steel Corporation, within 30 days from the date of this decision, shall pay a civil penalty of $75.00 for the violation of section 75.202 cited in Order No. 655316 dated October 2, 1979.

Richard C. Steffey

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

Distribution:

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(703) 756-6230

19 SEP 1980

CONSOLIDATION COAL COMPANY, Contestant	:	Contest of Citation
v.	:	Docket No. WEVA 80-224-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	McElroy Mine

DECISION

Appearances: Michel Nardi, Esq., Pittsburgh, Pennsylvania, for Contestant, Consolidation Coal Company;
David Street, Esq., Philadelphia, Pennsylvania, for Respondent Secretary of Labor.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This action was commenced on February 4, 1980, when Consolidation Coal Company (hereinafter Consol) filed a notice of contest of a citation issued on January 8, 1980, under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d)(1) (hereinafter the Act). Upon completion of prehearing requirements, this matter was heard in Pittsburgh, Pennsylvania, on June 18, 1980. Charles Coffield, Terry Kirk, David McCray, and Ronald Anderson testified on behalf of the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA). William M. McCluskey and Grayson Heard testified on behalf of Consol. Both parties submitted posthearing briefs.

ISSUE

The issue in this case is whether the citation for violation of 30 C.F.R. § 75.400 was properly issued.

APPLICABLE LAW

Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), provides in pertinent part as follows:

> If, upon inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

30 C.F.R. § 75.400 provides as follows: "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."

STIPULATIONS

The parties stipulated the following:

1. McElroy Mine is owned and operated by Consol.

2. Consol and the McElroy Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

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

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

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

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

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. McElroy Mine is owned and operated by Consol.

2. Inspector Charles Coffield, who issued the subject citation, was a duly authorized representative of the Secretary of Labor.

3. On January 8, 1980, Inspector Coffield performed a spot inspection of the McElroy Mine which included an examination of the following conveyor belts which were in operation: Mother belt, No. 1, and No. 2 belts.

4. During the course of his inspection, Inspector Coffield observed and measured the following piles of coal and coal dust along No. 1 and No. 2 conveyor belts:

(a) A pile of coal and coal dust 3 to 4 feet wide, 22 feet long, and 4 to 7 inches deep;

(b) A pile of coal and coal dust 3 to 5 feet wide, 18 feet long, and 4 to 5 inches deep;

(c) A pile of coal and coal dust 3 feet wide, 15 feet long, and 4 inches deep;

(d) A pile of coal and coal dust 3 to 5 feet wide, 18 feet long, and 5 to 12 inches deep; and

(e) A pile of coal and coal dust 3 to 5 feet wide, 18 feet long, and 3 to 14 inches deep.

5. In addition to the foregoing piles of coal and coal dust, Inspector Coffield observed a distance of approximately 2,000 feet along No. 1, No. 2, and the Mother conveyor belts which was covered with float coal and coal dust and was black in color and a distance of approximately 1,000 feet along the same belts which was covered with float coal and coal dust and was gray in color. The total length of the three belts in issue was approximately 8,000 feet.

6. For approximately 3 weeks prior to the day before this inspection, the conveyor belts had been idle and no coal was mined in this area. Prior to the inspection, the conveyor belts operated during two working shifts during which coal was mined in this area.

7. MSHA established that coal dust, float coal dust, and loose coal accumulated along the conveyor belts as set forth above.

8. The accumulation of coal dust, float coal dust, and loose coal in the active workings of the McElroy Mine did not constitute an imminent danger because there was no immediate source of ignition.

9. The accumulations of coal dust, float coal dust, and loose coal in the active workings of the McElroy Mine could significantly and substantially contribute to a coal mine safety hazard because, in the event of a fire or explosion, they would propagate such fire or explosion.

10. The accumulations of coal dust, float coal dust, and loose coal in the active workings of the McElroy Mine had been present for more than one working shift at the time the citation was issued.

DISCUSSION

Violation of 30 C.F.R. § 75.400

At the outset, it should be noted that on December 12, 1979, the Federal Mine Safety and Health Review Commission (hereinafter Commission) adopted a new standard for determining when a violation of 30 C.F.R. § 75.400 occurs. In Old Ben Coal Company, 1 BNA MSHR 2241, Docket No. VINC 74-111 (December 12, 1979), the Commission disagreed with the former standard announced by the Interior Board of Mine Operations Appeals that a violation of the mandatory standard did not occur even though an accumulation of combustible materials was present where the operator commenced abatement within a reasonable time after it had notice of the existence of the accumulation. The Commission held that the existence of an accumulation was a violation of the mandatory standard and the action of the operator thereafter to abate this condition was irrelevant to the issue of whether a violation occurred.

The issue of whether the standard was violated in this case was vigorously contested at the hearing. Consol's witnesses, William M. McCluskey and Grayson Heard, contended that the only coal dust or loose coal present along approximately 8,000 feet of conveyor belt consisted of a 14-inch high cone-shaped pile of fine coal by the tail roller of the No. 1 belt drive and an area 4 inches deep, 3 to 4 feet wide, and 20 feet long by the No. 2 belt which was covered with 2 inches of rock dust. Consol's witnesses testified that, at worst, the color of the material next to the belt was light gray. They also contended that some of the material identified by Inspector Coffield as coal dust was actually dried rock, dirt, and other noncombustible material. Consol put in evidence its preshift and onshift reports which showed that the No. 1 conveyor belt tailpiece had been dirty but that condition was corrected prior to the inspection. The Consol employees who conducted those examinations did not testify.

In support of Inspector Coffield, MSHA called the miner's representative on the inspection, Terry Kirk, as a witness. He testified that the area around No. 1 and No. 2 conveyor belts varied from black to light gray in color. He observed several piles of loose coal or coal dust along both of those conveyor belts. He observed Inspector Coffield make measurements and notes. He observed coal dust lying on the bottom and ribs along No. 1 and No. 2 conveyor belts. He testified that the float coal dust extended for a distance of approximately 2,000 feet along the above belts. While he saw one or two places along the Mother conveyor belt that required rock dusting, that belt was otherwise in good condition.

Consol, in its brief, complains about the absence of any objective criteria to distinguish between a "spillage" and an "accumulation" as follows:

> Certainly some coal spillage is inevitable, which the Mine Safety and Health Review Commission has wisely acknowledged. Old Ben Coal, 1 MSHRC 2244, Vinc 74-1, 1 IBMA 75-52 (December 12, 1979). The question then becomes what

> distinguishes a coal "spillage" from an "accumulation" which is a violation under the Coal Mine Safety and Health Act of 1977. The Commission and courts have thus far failed to define an accumulation as a measurable entity. As the Commission stated in its recent decision, "Whether a spillage constitutes an accumulation under the standard is a question, at least in part, of size and amount." Old Ben Coal, supra. However, the Commission has not attempted to narrow the definition beyond suggesting what merits should be considered when making this evaluation. Consequently, the ambiguity persists, and what may be an illegal "accumulation" in the mind of one inspector may be a legal "spillage" in the mind of another. Thus, the operators are victimized by the lack of definitive law in this area resulting in total reliance on the individual inspector's discretion. For this reason, the operators continue to receive notices for something they cannot even identify.

In the instant case, I find that the testimony of MSHA's witnesses concerning the amount and extent of coal dust, float coal dust, and loose coal was more credible than the testimony of Consol's witnesses. The testimony of Inspector Coffield was generally corroborated by the miner's representative, Terry Kirk. Inspector Coffield made and recorded measurements of the various piles of coal dust and loose coal that he encountered. For these reasons, I find that the amount and extent of coal dust and loose coal existed as alleged in the citation.

Therefore, the issue is: whether the coal dust and loose coal constituted a spillage or an accumulation. In Old Ben Coal Company, supra, the Commission stated, "whether a spillage constitutes an accumulation under the standard is a question, at least in part, of size and amount." Id. at 1958. In the instant case, the preponderance of the evidence establishes the following: five separate piles of coal dust and loose coal as set forth in Finding of Fact No. 4; a distance of approximately 2,000 feet along the conveyor belts which were covered with coal dust and float coal dust which was black in color; and another distance of approximately 1,000 feet along the conveyor belt which was covered with coal dust and float coal dust which was gray in color as set forth in Finding of Fact No. 5. The above facts establish a great amount of spillage which amounts to an accumulation under 30 C.F.R. § 75.400. Therefore, I find that Consol violated 30 C.F.R. § 75.400 as alleged by MSHA.

Unwarrantable Failure to Comply

The next issue is whether the violation was due to the "unwarrantable failure" of Consol to comply with mandatory health or safety standards. The term "unwarrantable failure" was defined by the Interior Board of Mine Operation Appeals as follows:

> [A]n inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with

> such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices which the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or a lack of reasonable care. Zeigler Coal Company, 7 IBMA 280 (1977).

This definition was approved in the legislative history of the 1977 Act. S. Rpt. No. 95-181, 95th Cong., 1st Sess. 32 (1977).

In Old Ben Coal Company, supra, the Commission upheld an order of withdrawal based upon the operator's unwarrantable failure to comply with 30 C.F.R. § 75.400. The Commission found that the violation was an unwarrantable failure even though the evidence established that the spillage occurred during the previous shift. In the instant case, Inspector Coffield testified that it would take a minimum of six shifts to accumulate the amount of coal dust that he observed. Miner's representative Terry Kirk testified that it would take several shifts to accumulate the amount of coal dust he observed. Consol's witnesses stated that the small amount of loose coal and coal dust that they observed must have been spilled shortly before the inspection because no spillage was reported on the preshift examiner's report. The preshift examiners did not testify.

Considering the size and amount of spillage involved, the preponderance of the credible evidence establishes that the accumulation had been present for more than one working shift before the citation was issued. Hence, Consol knew or should have known of the accumulations and failed to exercise reasonable care to abate the condition. Therefore, the violation was caused by Consol's unwarrantable failure to comply with the mandatory standard.

Significant and Substantial

In Alabama By-Products Corporation, 7 IBMA 85 (1976), the Interior Board of Mine Operations Appeals held that under the identical section of the Federal Coal Mine Health and Safety Act of 1969, all violations are significant and substantial except "violations posing no risk of injury at all, that is to say, purely technical violations, and violations posing a source of any injury which has only a remote or speculative chance of coming to fruition." Id. at 94 (emphasis in original). Since the violation in issue is not a technical one, the remaining question is whether the chance of injury is remote or speculative. In this regard, I accept the testimony of Inspector Coffield that the accumulations of coal dust and float coal dust create potential hazards of fire and explosion and these hazards are neither remote nor speculative. The violation was significant and substantial.

Assessment of a Civil Penalty

MSHA has requested that a civil penalty be assessed in this proceeding even though it has not filed any such proposal. Since Consol has not consented to this expedited procedure, I will not assess a civil penalty at

this time. Consol may avail itself of the administrative remedies prior to the filing of a proposal for the assessment of a civil penalty with the Commission. However, as I stated at the outset of the hearing of this case, I am directing the attorneys herein to notify me promptly of the filing of a civil penalty proceeding.

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction of this proceeding pursuant to section 105 of the Act.

2. Consol permitted coal dust, float coal dust, and loose coal to accumulate in the McElroy Mine on January 8, 1980, in violation of 30 C.F.R. § 75.400.

3. The violation of the above mandatory standard was caused by the unwarrantable failure of Consol to comply with the mandatory standard.

4. The violation of the above mandatory standard could significantly and substantially contribute to the cause and effect of a coal mine safety hazard.

5. Citation No. 0633622 was properly issued.

6. Consol's contest of Citation No. 0633622 is denied.

ORDER

WHEREFORE IT IS ORDERED that the contest of citation is DENIED and the subject citation is AFFIRMED.

James A. Laurenson

James A. Laurenson, Judge

Distribution by Certified Mail:

Michel Nardi, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241

David Street, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480, Gateway Building, 3535 Market Street, Philadelphia, PA 19104

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

19 SEP 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceeding	
MINE SAFETY AND HEALTH	:		
ADMINISTRATION (MSHA),	:	Docket Nos.	Assessment Control Nos.
Petitioner	:	KENT 79-51	15-07082-03007
	:	KENT 79-88	15-07082-03008
v.	:	KENT 79-148	15-07082-03009
	:	KENT 79-297	15-07082-03012
LESLIE COAL MINING COMPANY,	:		
Respondent	:	Leslie Mine	

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
John M. Stephens, Esq., Stephens, Combs & Page, Pikeville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued April 29, 1980, a hearing in the above-entitled proceeding was held on June 26, 1980, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

After the parties had completed their presentations of evidence with respect to the contested issues, I rendered the bench decisions which are set forth below (Tr. 105-111):

Contested Issues

This consolidated proceeding involves four cases for assessment of civil penalty filed by the Mine Safety and Health Administration. The petitions in Docket Nos. KENT 79-51 and KENT 79-88 were both filed on June 22, 1979, and seek assessment of civil penalties for five and two alleged violations, respectively, of the mandatory health and safety standards by Leslie Coal Mining Company.

The proposals in Docket Nos. KENT 79-148 and KENT 79-297 were filed on August 21, 1979, and October 11, 1979, respectively, and seek assessment of civil penalties for two alleged violations in each separate docket.

The issues in a civil penalty proceeding are whether a violation of the mandatory safety standards occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

Docket No. KENT 79-297

In this proceeding, evidence was first presented in Docket No. KENT 79-297. The first alleged violation in that docket was set forth in Citation No. 67917 dated May 5, 1978, alleging a violation of section 75.403.

The former Board of Mine Operations Appeals held in Valley Camp Coal Company, 3 IBMA 176 (1974), that before a violation of section 75.403 may be found to exist, the judge must first find that the conditions in section 75.402 do not exist. I have not asked specific questions about the conditions noted in section 75.402 in this proceeding, but we have had a diagram for reference and have had extensive discussions of the section so that I can conclude that the areas in which the inspector alleged a violation of section 75.403 were not so wet or so high in incombustible content as to be unsusceptible to an explosion. I also find that the areas are not inaccessible or unsafe to enter; and that the Secretary of Labor has not found that the Leslie Mine is a mine which requires no rock dusting.

Section 75.403 requires that rock dust be applied so as to render the areas which are in intake air to be at least 65 percent incombustible, and areas which are in return air to be at least 80 percent incombustible. The inspector, in this instance, took three rock-dust samples on the No. 4 section on May 5, 1978. According to those samples and the analyses made by the Mount Hope Laboratory, the inspector found that his sample taken in the alleged No. 3 return entry was 61.6 percent incombustible; and that the other two samples taken in the intake entries were 73 and 67 percent incombustible. Since the incombustibility was above 65 percent, according to the analyses, the inspector did not prove or claim that a violation occurred as to the two samples which he designated as intake samples, or samples taken in intake air.

The main thrust of the evidence has been a claim by respondent that the inspector's sample taken -- allegedly taken -- in return air, was not actually obtained in a return entry; and therefore, that the incombustibility did not have to be 80 percent, as required by section 75.403. The inspector was cross-examined at great length about how he knew for

certain that the No. 3 entry was a return. He primarily based his conclusion that it was a return entry upon the fact that the company's safety inspector, who accompanied him on the inspection, had indicated to him that the No. 3 entry was the return entry. The inspector, in addition, drew, as Exhibit 2(g), a diagram of his recollection of the No. 4 section.

According to that diagram, the inspector indicated that the company had just recently begun to produce coal from the fourth entry, in the No. 4 section. The inspector showed, on Exhibit 2(g), that until the No. 4 section was developed to the extent that intake air was passing across all three entries, air would not pass down the No. 4 entry. Therefore, the No. 3 entry would at times, before the full development of the fourth entry, be a return entry. However, the inspector conceded, upon cross-examination, that he could not be sure at what point the No. 3 entry might be a return.

Consequently, I find that his lack of certainty as to whether the No. 3 entry was a return entry prevents me from finding that the sample which he allegedly took in the return entry was in fact taken in return air.

Mr. Stewart has pointed out, in both cross-examination and oral statements, that regardless of whether that third sample was taken in intake air or return air, since it showed only 61.6 percent incombustibility, the sample would still indicate that there was a violation of section 75.403 as to the third sample because rock dusting would not have rendered it at least 65 percent incombustible.

Mr. Stephens does not disagree with that argument, but he has pointed out that that is certainly not a very serious infraction of the rules, since only a difference between 61.6 percent incombustible and 65 percent incombustible is involved. Therefore, I find that there was a violation of section 75.403.

Having found that a violation of section 75.403 occurred, I am required to assess a penalty based on the six criteria. As to the size of Respondent's business, which is the first criterion, it was stipulated that Leslie Coal Mining Company is a medium-sized company, producing 177,818 tons of coal per year. It was also stipulated that the payment of penalties would not cause the operator to discontinue in business.

There was introduced as Exhibit 1 a computer printout for the purpose of showing information about respondent's history of previous violations. That exhibit shows that

respondent has violated section 75.403 only once on a prior occasion. It has been my practice to assess some portion of the penalty under the criterion of history of previous violations, when the section allegedly violated in the case before me, has been previously violated. Therefore, under the criterion of history of previous violations, a penalty of $15 will be assessed.

It was stipulated that there was a good faith effort to achieve rapid compliance. That criterion will be given full credit in the assessment of the penalty.

Inspector Smith introduced, as Exhibit 2(e), a page on which he felt, or indicated his views as to the negligence involved, and he stated that the area had been checked by a certified fire boss prior to his inspection and that the company should have known that the area had not been adequately rock dusted.

Of course, the evidence in this proceeding shows that after Mr. Smith received the analyses showing the incombustibility of his samples, two of them indicated no violation, and the other one barely showed a violation. Consequently, I find that a certified fire boss would not necessarily have been able to determine, with his visual inspection, that this area had not been adequately rock dusted. Consequently, I find that the company was not negligent.

As to the gravity of the violation, the inspector indicated on Exhibit 2(e), that he thought that an explosion was probable because the mine does emit methane, that he did detect some methane when he was in the mine on May 5, and that he thought that some work days would be lost from such an explosion if it occurred. But he also indicated that an ignition of methane would be necessary before an explosion would be likely.

The evidence, of course, shows that the area was almost completely within the requirements of rock dusting. Consequently, I think that the preponderance of the evidence shows that there was a very low degree of danger in this instance.

Considering that a bare violation of section 75.403 was shown, a penalty of $5 will be assessed for the violation; and to that will be added a sum of $15 under the criterion of history of previous violations so as to make a total penalty of $20 for the violation of section 75.403 set forth in Citation No. 67917.

Docket No. KENT 79-148 (Tr. 183-186)

The next contested alleged violation in this proceeding dealt with Docket No. KENT 79-148. The first alleged violation in that docket relates to Citation No. 67918 dated May 8, 1978, alleging a violation of section 75.507. Section 75.507 provides, "[e]xcept where permissible power connection units are used, all power-connection points outby the last open crosscut shall be in intake air." I find that no violation of section 75.507 existed in this instance.

First of all, respondent implies that the power center here involved may be permissible, but Inspector Smith stated that it did not have a tag on it showing that it had been approved as a permissible piece of equipment. Therefore, I must find, on the basis of the evidence in this case, that it was a nonpermissible power center. However, the section required that a nonpermissible power connection, outby the last open crosscut, shall be in intake air.

In order for Inspector Smith to have shown that this particular power center is in intake air, he must use a definition of return air which is untenable in many respects. As shown in the inspector's Exhibit 3(c), the air which would pass over the power center would be air which had to pass over two entries, namely, the No. 4 and the No. 3 entries -- and thereby might pick up some methane. And if it did so, the methane could then pass over the power center. But it is also true that, after the air has traveled to the position where it might come into contact with the power center, it then has to pass across two other working faces before it would be exhausted into the No. 1 entry, which is the designated return entry.

We do not have, in this case, a definition for return air that is applicable to a situation like this, because we are still ventilating at these two working places with air which is technically intake air, until it has finally been exhausted into the No. 1 entry.

There is considerable merit to Inspector Smith's contention that it would be possible for some methane to get into the No. 2 entry, where it might pass across the power center and cause an explosion, if the methane content should become high enough to be in the explosive range of from 5 to 15 percent.

But the problem here, as I see it, is that respondent's ventilation plan has been amended, according to the company's evidence, to permit the company to put a check curtain in

front of the power center, where Mr. Smith had it moved in this instance, in order to abate the violation alleged in Citation No. 67918. But the company has also had its ventilation plan approved to permit the curtain to be outby the power center, in the same position it was situated when it was cited by Inspector Smith, on May 8, 1978, as being in violation of section 75.507.

A situation such as we have here, where the company can be cited for a violation of section 75.507, depending upon the inspector's view of what constitutes return air as opposed to what constitutes intake air, I find that it is not possible for me to find equitably that there was a violation of section 75.507. I believe that the company is entitled to rely upon its ventilation plan at any given time.

According to respondent's witness Evans, the ventilation plan on May 8, 1978, when Citation No. 67918 was written, provided that the curtain could be placed outby the power center. In such circumstances, I believe that the appropriate way for Inspector Smith to deal with this would have been to propose an amendment to the ventilation plan so as to require the curtain to be placed inby the power center. Apparently, that was done in this instance. But then, when a different inspector came by, he required that the ventilation curtain be moved back to a position outby the power center.

I do not believe that the company should be cited for a violation regardless of which of two ways it ventilates the power center. Therefore, I find that the Petition for Assessment of Civil Penalty in Docket No. KENT 79-148 should be dismissed to the extent that it alleged a violation of section 75.507 in Citation No. 67918.

Docket No. KENT 79-148 (Tr. 208-211)

The second alleged violation in Docket No. KENT 79-148 is contained in Citation No. 67886 dated May 12, 1978, which alleged a violation of section 75.326. That section provides that entries used as intake and return air courses shall be separated from belt haulage entries, and each operator of such mine shall limit the velocity of the air coursed through the belt haulage entries to the amount necessary to provide an adequate supply of oxygen in such entries, and to insure that the air therein shall contain less than 1 percent of methane, and such air shall not be used to ventilate active working places.

I find that a violation of section 75.326 occurred because the intake and return air courses were not separated adequately, that one stopping was missing between the No. 5

entry and the No. 6 entry which would have permitted a possible amount of return air carrying methane to get upon the track or belt entry, where electrical components existed, so that an explosion might occur.

I interpret section 75.326 to require that the return and intake air courses be separated. The other provisions in that section simply provide that some oxygen be in the belt and track entries and that the air in those entries not be used to ventilate an active working place.

Having found a violation, it is necessary that I assess a penalty. I have already made findings in connection with the size of the respondent's business and with respect to the fact that the payment of penalties would not cause it to discontinue in business.

The inspector's Exhibit 4(b) indicates that respondent shut down the section and immediately corrected the problem. That action should be given considerable weight so that the penalty that I might have assessed will be less than if respondent had not made that rapid effort to achieve compliance.

Exhibit 1 shows that respondent has only one previous violation of section 75.326, so under the criterion of history of previous violations, a penalty of $15 will be assessed.

With respect to negligence, the inspector's testimony indicated that the section foreman had moved up the belt and had failed to install one curtain before they began operations. So, I find that there was a normal degree of negligence.

As to the gravity of the violation, the inspector has, on Exhibit 4(b), given a rating which I would classify as a moderately serious violation. Considering that there was an unusually rapid effort to achieve compliance, that there was only a moderate seriousness to the violation, and that there was ordinary negligence, a penalty of $30 will be assessed, to which there will be added $15 under the criterion of history of previous violations, for a total penalty of $45.

Settled Issues

Docket No. KENT 79-51

All five of the violations alleged by the Petition for Assessment of Civil Penalty in Docket No. KENT 79-51 were the subject of settlement agreements.

The first violation was alleged in Citation No. 69599 dated June 2, 1978, claiming that respondent had violated section 75.516 because insulated low-voltage control cables had been allowed to come in contact with suspended conveyor belt structures. Counsel for the Secretary stated that the Petition for Assessment of Civil Penalty should be dismissed to the extent it alleged a violation of section 75.516 because he had concluded, after discussing the alleged violation with the inspector who wrote the citation, that the Secretary's evidence would be insufficient to establish that a violation of section 75.516 had occurred (Tr. 210).

The second violation was alleged in Citation No. 68385 dated October 4, 1978, claiming that respondent had violated section 70.250 because a respirable dust sample had not been timely submitted. The Secretary's counsel asked that the Petition for Assessment of Civil Penalty be dismissed as to Citation No. 68385 because MSHA's records show that respondent had submitted a miner's status change notice showing that the miner in question had terminated his employment on July 10, 1978, and that a respirable dust sample could not have been obtained for that employee on August 9, 1978, by which time it would have had to have been taken and submitted by respondent in order for respondent to have avoided being cited for a violation of section 70.250 (Tr. 113).

The third violation was alleged in Citation No. 72655 dated October 27, 1978, claiming that respondent had violated section 75.1704 by failing to maintain one of the designated escapeways in such a manner as to facilitate the transportation of a disabled person through the escapeway. The Assessment Office had recommended a penalty of $106 for that alleged violation, but the Secretary's counsel stated that, after discussing the facts pertaining to the violation, he did not believe the evidence would show that the violation was serious enough to warrant a penalty greater than $50 (Tr. 211).

The fourth and fifth violations alleged by the Petition for Assessment of Civil Penalty were of section 70.100(b) as claimed by Citation No. 72740 dated October 27, 1978, and Citation No. 9926469 dated November 15, 1978. Both citations stated that samples taken of the high-risk occupation had shown that the amount of respirable dust was greater than the applicable limit of 2.0 milligrams per cubic meter of air. The Assessment Office had proposed a penalty of $56 for the violation alleged in Citation No. 72740 and a penalty of $44 for the violation alleged in Citation No. 9926469. The Secretary's counsel felt that the respondent's agreement to pay $75 for each alleged violation was consistent with the intended purposes of the Act (Tr. 114-115).

I find that adequate reasons were given to justify granting the motions to dismiss as to two of the alleged violations and for acceptance of the settlement penalties for the remaining three alleged violations.

Docket No. KENT 79-88

The Secretary's Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-88 asks that civil penalties be assessed for two

violations of section 70.100(b) as alleged by Citation No. 71719 dated September 28, 1978, and Citation No. 9926520 dated January 15, 1979. Both violations alleged that the respirable dust concentration in the atmosphere of the high-risk occupation was greater than the amount allowed. The Assessment Office proposed a penalty of $98 for the violation alleged by Citation No. 71719 and a penalty of $66 for the violation alleged by Citation No. 9926520. The proposed penalty of $98 involves a greater concentration of respirable dust, by two-tenths of 1 milligram, than was cited in connection with the proposed penalty of $66. The Secretary's counsel stated that respondent had agreed to pay a penalty of $75 for each alleged violation and that he believed the intent and purpose of the Act would be served by accepting respondent's settlement offer (Tr. 115).

I find that respondent's offer should be accepted, especially since respondent agreed to pay greater penalties than were proposed by the Assessment Office with respect to two other alleged violations of section 70.100(b) cited by the Secretary's Petition filed in Docket No. KENT 79-51, supra.

Docket No. KENT 79-297

The Secretary's Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-297 requested that civil penalties be assessed for alleged violations of sections 75.403 and 70.250. The alleged violation of section 75.403 has been disposed of in a bench decision, supra.

The Secretary's counsel asked that the Petition be dismissed with respect to the violation of section 70.250 alleged by Citation No. 9926825 dated April 3, 1979. The violation alleged in the citation was that respondent had failed to submit a respirable dust sample with respect to one employee. The Secretary's counsel stated that the facts surrounding the alleged violation show that the required sample had actually been submitted but that respondent had made an error in listing the employee's Social Security number so that respondent was not given credit in MSHA's records for having submitted the sample. In such circumstances, the Secretary's counsel believed that the petition should be dismissed insofar as it seeks assessment of a penalty for an alleged violation of section 70.250 (Tr. 112).

I find that sufficient reasons were given to warrant approval of the motion to dismiss with respect to the alleged violation of section 70.250.

It should be noted that Exhibit 2(h) and Exhibit B were marked for identification (Tr. 103; 170), but were not received in evidence. It was the responsibility of respondent's counsel to mail a copy of each of those exhibits to me for inclusion in the record. He has had from June to September within which to do so. He was reminded of the fact that Exhibit 2(h) had not been submitted in a letter written to him by the Regional Solicitor on July 14, 1980. Since the testimony and other exhibits are entirely adequate to support the findings and conclusions made in my bench decisions, I find that it is unnecessary for Exhibit 2(h) or Exhibit B to be submitted to me at

this late date. This paragraph is being written solely to explain why the record does not physically contain, and does not need to contain, either Exhibit 2(h) or Exhibit B.

Summary of Assessments and Conclusions

(1) Based on all the evidence of record and the foregoing findings of fact, the following penalties should be assessed pursuant to bench decisions or paid pursuant to settlement agreements.

Docket No. KENT 79-51

Citation No. 72655 10/27/78 § 75.1704 ... (Settled) ...	$ 50.00
Citation No. 72740 10/27/78 § 70.100(b).. (Settled) ...	75.00
Citation No. 9926429 11/15/78 § 70.100(b) (Settled) ...	75.00
Total Settlement Penalties in Docket No. KENT 79-51	$ 200.00

The motions for dismissal made by the Secretary's counsel with respect to the violation of section 75.516 alleged in Citation No. 69599 dated June 2, 1978, and the violation of section 70.250 alleged in Citation No. 68385 dated October 4, 1978, should be granted and the Petition for Assessment of Civil Penalty in Docket No. KENT 79-51 should be dismissed insofar as it seeks assessment of penalties for those two alleged violations.

Docket No. KENT 79-88

Citation No. 71719 9/28/78 § 70.100(b) ... (Settled) ..	$ 75.00
Citation No. 9926520 1/15/79 § 70.100(b).. (Settled) ..	75.00
Total Settlement Penalties in Docket No. KENT 79-88	$ 150.00

Docket No. KENT 79-148

Citation No. 67886 5/12/78 § 75.326 .... (Contested) ..	$ 45.00
Total Penalties Assessed in Docket No. KENT 79-148	$ 45.00

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-148 should be dismissed insofar as it seeks assessment of a civil penalty for a violation of section 75.507 alleged in Citation No. 67918 for failure of proof as found in my bench decision, supra.

Docket No. KENT 79-297

Citation No. 67917 5/5/78 § 75.403 ..... (Contested) ..	$ 20.00
Total Penalties Assessed in Docket No. KENT 79-297	$ 20.00

Total Contested and Settled Penalties in This Proceeding	$ 415.00

The motion for dismissal made by the Secretary's counsel with respect to the violation of section 70.250 alleged in Citation No. 9926825 dated April 3, 1979, should be granted and the Petition for Assessment of Civil Penalty in Docket No. KENT 79-297 should be dismissed insofar as it seeks assessment of a penalty for that alleged violation.

(2) Respondent, as the operator of the Leslie Mine, is subject to the Act and the regulations promulgated thereunder.

WHEREFORE, it is ordered:

(A) Pursuant to the settlement agreements described above and the bench decisions hereinbefore reduced to writing, respondent shall, within 30 days from the date of this decision, pay civil penalties totaling $415.00, as summarized in paragraph (1) above.

(B) The motions for dismissal made by the Secretary's counsel are granted and the Petitions for Assessment of Civil Penalty filed in Docket Nos. KENT 79-51 and KENT 79-297 are dismissed to the extent described in paragraph (1) above.

(C) The Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-148 is dismissed to the extent and for the reason given in paragraph (1) above.

Richard C. Steffey

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

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

22 SEP 1980

CONSOLIDATION COAL COMPANY, Applicant	:	Contest of Citation and Order
v.	:	Docket No. PENN 80-254-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 840658 May 8, 1980
and	:	Docket No. PENN 80-255-R
UNITED MINE WORKERS OF AMERICA (UMWA), Representatives of Miners	:	Order No. 840659 May 9, 1980 Renton Mine

DECISION

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

Before: Administrative Law Judge Melick

These cases are before me upon the application by Consolidation Coal Company (Consolidation) under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., hereinafter the "Act) to contest a citation and subsequent order of withdrawal issued by the Mine Safety and Health Administration (MSHA). At hearing held in Pittsburgh, Pennsylvania, on August 19, 1980, MSHA amended its pleadings in Docket No. PENN 80-254-R changing the citation therein from one issued under section 104(d)(1) of the Act to a citation under section 104(a) of the Act. 1/ Consolidation thereupon moved to withdraw its notice of contest of the amended citation which I approved at hearing and now affirm. The contest in Docket No. PENN 80-254-R is therefore dismissed with prejudice. The violation of 30 C.F.R. § 75.400 (relating to accumulations of combustible materials) is thus proven as charged in Citation No. 840658. Consolidation also concedes in this case that the violation was not totally abated before the section 104(b) withdrawal order

1/ The effect of this amendment was to delete the special "unwarrantable failure" finding that is made in conjuction with a section 104(d)(1) citation. For the ramification of this amendment, see section 104(d) of the Act.

based on that citation was issued on May 9, 1980, but contends that under the circumstances of this case the time allowed for abatement should have been extended.

Section 104 of the Act provides in relevant part as follows:

> (a) If, upon inspection or investigation, the Secretary * * * believes that an operator * * * has violated this Act, or any mandatory health or safety standard, rule, order, or regulation * * * he shall * * * issue a citation * * *. The citation shall fix a reasonable time for the abatement of the violation. * * *.
>
> (b) If, upon any follow-up inspection * * * an authorized representative of the Secretary finds (1) that a violation described in a citation * * * has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall * * * promptly issue an order requiring the operator * * * to immediately cause all persons * * * to be withdrawn from, and to be prohibited from entering, such area. * * *.

Consolidation acknowledges that when the citation was issued, at 10 a.m. on May 8, 1980, accumulations of loose coal and float coal dust did in fact exist in the active workings of the No. 16 south section of the Renton Mine over approximately 750 feet of haulageways, and around and beneath the feeder and tailpiece of the conveyor belt. MSHA inspector Anthony Russo in consultation with a mine foreman set abatement to be completed by 8 a.m. on May 9, 1980. At 11 a.m. on May 8, all production on the affected section ceased and the abatement process commenced. The process continued utilizing 14 man-shifts, a continuous miner and a shuttle car over two shifts. Consolidation cleaned up not only the 750 feet of tram road cited, but also other tram roads totaling 1,150 feet.

When Inspector Russo returned to the section on May 9, 1980, around 8:20 or 8:25 in the morning he was satisfied with the results of the cleanup except for what he described as an accumulation about 20 inches high, 4 feet wide and 18 feet long remaining beneath the feeder. According to Russo, there was 3 inches of water at the bottom leaving about 16 inches of loose, dry coal exposed. Russo concluded that it was a hazard in light of its close proximity to electrical equipment. He estimated it would have taken at most an hour to clean this up.

Russo said that the Renton Mine safety supervisor, John Mlakar, could not explain why the remaining accumulation had not been cleaned up but Mlakar conceded that it should have been. According to Russo, Mlakar refused to clean up the pile before the other company safety people arrived. Concluding that he had no choice in light of Mlakar's conditional refusal, Russo thereupon said he would issue an order. The company safety people arrived at the scene 10 to 15 minutes later. They agreed to clean up the subject pile and actually

began the cleanup process but Russo nevertheless wrote up a withdrawal order. He terminated the order an hour and 15 minutes later.

Mlakar said that he was told by mine foreman John Dickens at 6:50 on the morning of May 9 that the accumulations were all cleaned up. According to Mlakar, Russo was satisfied with the cleanup except for the area beneath the crusher-feeder. Mlakar claims that he immediately sent orders for a work crew with shovels to clean it up. He was not sure that Russo heard him make this request but was confident that he made the request before Russo said he was going to issue the order.

Representative of miners, Louis Hilton, accompanied Inspector Russo that morning. According to Hilton, Mlakar was arguing with Russo that the area beneath the feeder had in fact been cleaned up and needed no further work. Hilton thought the remaining accumulation was not significant and when asked his opinion told Russo that the company should be allowed an extension. Even after Russo said he was going to issue an order, he continued to confer with the company safety people, including Allen Lander, and asked Hilton whether he thought an order should be issued. By the time Russo had decided to write up the order, the work crew had begun the cleanup process disposing of the 2 or 3 bushels of coal in only 10 or 15 minutes.

When Allen Lander, in charge of safety at the Renton Mine, arrived at the feeder, an order had not yet been prepared. He tried to convince Russo not to issue an order. According to Lander, the cleanup had already begun when the order was issued. The actual cleanup consisted of removing 1 or 2 bushels of "wet slop."

When an inspector finds that an operator has failed to abate a violation within the time originally fixed, he abuses his enforcement discretion by issuing a withdrawal order if, under the circumstances, the time for abatement should be further extended. Old Ben Coal Company, 6 IBMA 294 (1976). The overriding factor in reviewing the reasonableness of an inspector's refusal to extend the time for abatement is the degree of danger that any such extension would cause to miners. Consolidation Coal Company, BARB 76-143 (1976). In this case the evidence shows that, at worst, according to Inspector Russo, it would have taken no longer than 1 hour to clean up the remaining accumulation. Since production in the affected section had not resumed and since only the cleanup crew would in any event have been closely exposed to the hazard presented, no increase in the hazard would have resulted from the requested extension. In addition, the potential hazard was limited by the fact that much of the accumulation consisted of wet coal lying in 3 to 5 inches of water. Under these circumstances, the danger in permitting, at most, a 1-hour extension of the order would have been minimal. Moreover, the evidence indicating that the cleanup actually took only 10 to 15 minutes and that the "accumulation" consisted of only 2 or 3 bushels of "wet slop" suggests that indeed there may have been virtually no hazard at all.

A second factor to consider in reviewing the reasonableness of the inspector's refusal to extend the time for abatement is the disruptive effect it would have upon operating shifts. Consolidation Coal Company, supra.

There is little evidence in this case of what disruptive effect the issuance of the order had on the operating shifts other than the fact that the order was terminated 1-1/4 hours after it had been issued.

A final factor to be considered is the diligence of the operator in meeting the time fixed for abatement. Consolidation Coal Company, supra. In this case, Consolidation clearly made extraordinary good faith efforts to accomplish the cleanup process within the time initially set for abatement. Men were immediately assigned to the cleanup task which continued through two workshifts. Fourteen man-shifts, a continuous miner and shuttle car were used to accomplish the task. Indeed, Inspector Russo even complimented Consolidation in this regard. Moreover, not only did Consolidation clean up the 750 feet of haul road initially cited but it also cleaned up an additional 400 feet of road not cited. The "accumulation" that remained was minute by comparison with the areas cleaned up and was obscured by its location between the tracks of the feeder. Moreover, once the condition was brought to the attention of Consolidation officials they made good faith diligent efforts to clean it up. Under all the circumstances, I conclude that the inspector here acted unreasonably in not extending the time for abatement. 2/ I therefore find that Order of Withdrawal No. 840659 was not properly issued and the order is therefore VACATED.

Gary Melick
Administrative Law Judge

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2/ In reaching this conclusion, I have necessarily found on the facts of this case that Inspector Russo did not actually issue the withdrawal order until he committed it to writing. Although he apparently stated at an earlier time that he was going to issue the order, it is apparent from the testimony of Allen Lander and of Miners' Representative Hilton that no final decision had been reached until after all the evidence that I have considered in my decision herein was available to Inspector Russo. Since the reasonableness of the inspector's actions in issuing such an order under section 104(b) of the Act must be determined on the basis of the facts confronting him at the time he issues the order, United States Steel Corp., 7 IBMA 109 (1976); Old Ben Coal Company, supra, the result in this case may have been different had I found that Russo actually issued the order when he first contemplated doing so.

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FALLS CHURCH, VIRGINIA 22041

22 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket No. LAKE 79-119
	:	A.O. No. 33-01157-03054
v.	:	
	:	Docket No. LAKE 80-190
QUARTO MINING COMPANY,	:	A.O. No. 33-01157-03110
	:	
	:	Docket No. LAKE 80-209
	:	A.O. No. 33-01157-03116
	:	
	:	Docket No. LAKE 80-212
	:	A.O. No. 33-00157-03118
	:	
	:	Powhatan No. 4 Mine
	:	
	:	Docket No. LAKE 80-246
	:	A.O. No. 33-02624-03083
	:	
	:	Powhatan No. 7 Mine
	:	
NACCO MINING COMPANY,	:	Docket No. LAKE 80-251
	:	A.O. No. 33-01159-03079
	:	
	:	Docket No. LAKE 80-252
	:	A.O. No. 33-01159-03080
	:	
	:	Powhatan No. 6 Mine
	:	
THE NORTH AMERICAN COAL CORPORATION, Respondents	:	Docket No. LAKE 80-182
	:	A.O. No. 33-00939-03075
	:	
	:	Powhatan No. 3 Mine

DECISION

Appearances: Linda Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner, MSHA; Timothy Biddle, Esq., and John Scott, Esq., Crowell and Moring, Washington, D.C., for Respondents, Quarto Mining Company, Nacco Mining Company, and The North American Coal Corporation.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed by the Government against Quarto Mining Company, Nacco Mining Company, and The North American Coal Corporation. A hearing was held on September 8, 1980. Prior to the hearing, the parties had agreed to have Docket No. 80-251 heard first. At the outset of the hearing, I reserved a ruling on the operator's motion to consolidate these eight proceedings (Tr. 8). As appears, infra, in the bench decision, I granted the motion to consolidate so that the decision applies to all the cases (Tr. 129-130).

The parties agreed to the following stipulations when the hearing began (Tr. 5-6):

(1) The Nacco Mining Company is the owner and operator of the Powhatan No. 6 Mine.

(2) The operator and the Powhatan No. 6 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(3) The presiding Administrative Law Judge has jurisdiction over this proceeding.

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

(5) A true and correct copy of the subject citation was properly served upon the operator.

(6) The annual coal tonnage produced by the Powhatan No. 6 Mine is between 1.1 and 2 million. The operator is large in size.

(7) The average number of violations assessed per year during the 2 years prior to the issuance of the citation was over 50. The average number of violations assessed per inspection day during the 2 years prior to the issuance of the citation was between 0.7 and 0.8. The operator's previous history is average.

(8) Imposition of any penalty in this proceeding will not affect the operator's abililty to continue in business.

(9) The operator demonstrated good faith by correcting the condition within the time specified for abatement and took extraordinary steps to comply by using two men to correct the condition.

(10) All witnesses who will testify are accepted generally as experts in coal mine health and safety.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 10-124). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, oral argument, proposed findings of fact and conclusions of law. Instead, they agreed to have a decision rendered from the bench (Tr. 125). A decision was rendered from the bench setting forth findings of fact and conclusions of law (Tr. 125-130).

BENCH DECISION

The bench decision is as follows:

> This case is a petition for the assessment of a civil penalty for an alleged violation of the operator's dust-control plan adopted under 30 C.F.R. 75.316.
>
> The provision of the dust-control plan at issue provides as follows: "All roadways will be kept cleaned and unless roadways are naturally damp or wet, water or calcium chloride will be applied to allay excessive dust that may be raised into suspension."
>
> In extensive prehearing filings, the operator contended that this provision is too vague to be enforced since it does not give the operator notice of what conduct is required of it. In particular, the operator has argued that the word "excessive" has not been defined, and that its meaning is unknown.
>
> The testimony of the witnesses at the hearing has borne out the operator's position. No-one has been able to explain satisfactorily what "excessive" means in terms of compliance with this plan. As a general matter, an excessive amount of anything connotes that some lower amount or lower level would be permissible. However, what has emerged from the testimony of the two MSHA inspectors and from most of the operator's evidence is that this is an individual judgment to be made in each instance by either the section foreman or the inspector as to whether there is "excessive" dust. A standard that leaves the entire matter wholly within the unbridled discretion of each and every individual who must deal with it is no standard at all.
>
> At one point, the operator's environmental control director expressed the view that "excessive" dust would be dust which exceeded 2 milligrams per cubic meter of air in an 8-hour period. This may or may not be a feasible approach but in any event, it is not in the plan as presently written and, as indicated hereafter, it most certainly is not the approach followed by the two MSHA inspectors who testified.

The testimony most damaging to the validity of the challenged provision came from the inspector who issued the citation. There is no question as to the inspector's conscienciousness and credibility. However, as already noted he did not know what "excessive" meant. But that did not hamper his issuance of the subject citation under this provision of the plan because he paid no attention to the word "excessive" when he cited the operator. Indeed, the inspector stated that as far as he was concerned, unless a roadway was naturally damp or wet, water or calcium chloride should be applied without regard for the rest of the plan's provision which has the stated purpose of allaying excessive dust that may be raised into suspension. Accordingly, the inspector issues citations whenever a roadway which is not naturally damp or wet is dry. By his own admission, the inspector requires the roadways to be wet.

A standard which is so incomprehensible to those charged with enforcing it that its relevant provisions are disregarded is not entitled to be upheld. If MSHA wishes to require that all active roadways be wet, it would be a simple matter for the plan to so provide. Whether requiring wet roadways all the time makes sense, or whether the operator would agree to it, is another matter which is not presented here.

The operator's environmental control director testified that when the language in issue was adopted as a joint undertaking between two of the operator's management people and an MSHA inspector, the operator specifically refused to apply water to the roadways on every shift. It appears to me that problems of interpretation and application were glossed over at the time the plan was adopted by the use of words such as "excessive" when, in fact, there was no agreement or understanding as to what was actually meant.

I have previously stated in other cases that the operator and MSHA cannot avoid difficult interpretative and operational problems by adopting plans containing terms which do not mean anything in and of themselves and which are wholly open-ended. When the parties fail to confront and resolve such issues at the appropriate time, the problems are merely postponed to a later day. That later day always seems to occur in a trial context which in my view is least suitable for an adequate solution. For example, as I have stated, "[t]he parties cannot expect the Administrative Law Judge to rewrite the plan for them or accept interpretations which either are not in the plan or are contrary to what it does contain." Consolidation Coal Company v. Secretary of Labor, MORG 78-331 (October 20, 1978).

In the instant case I will not undertake to rewrite this plan or to read into it something which is not there. The promulgation of a plan is a matter for negotiation between the parties. It is not a matter for judicial fiat. I will not, therefore, take upon myself the responsibility which the law places upon the operator and MSHA to formulate a plan mutually acceptable to them.

In light of the foregoing, I hold the subject provision of the plan is invalid, and that therefore the subject citation based upon it must be vacated.

In light of the foregoing, I hereby grant the operator's motion to consolidate Docket Nos. LAKE 80-209, 80-252, 80-182, 79-119, 80-212, 80-246, and 80-190. All these docket numbers involve the validity of this provision of the plan. I believe, therefore, that the determination set forth above is dispositive of all these docket numbers, although I recognize that there may be some inconsequential factual variations between them. However, in light of the invalidity of the provision of the plan, none of the citations can stand. Accordingly I vacate all the citations based upon section 75.316 contained in these additional seven docket numbers and to that extent I dismiss the Solicitor's petitions in those cases.

Addition to Bench Decision

Docket No. LAKE 80-190 contains two unrelated citations. The operator has advised with written reasons that it is agreeable to settling Citation No. 779973 for $255 and Citation No. 779975 for the original assessed amount of $445. I have been unable to contact the Solicitor and do not wish to delay issuance of this decision because of the press of other matters pending on my docket. However, the Solicitor had previously orally agreed to lower settlements so I assume she will not disagree with these higher amounts. The operator's recommended settlements are approved.

ORDER

The foregoing bench decision is hereby AFFIRMED.

The citations in the above-captioned docket numbers which are based upon the provision of the plan discussed above are VACATED.

The petitions to assess civil penalties based upon the provision of the plan discussed above are DISMISSED.

The operator is ORDERED to pay $700 within 30 days from the date of this decision for two citations in LAKE 80-190.

Paul Merlin
Assistant Chief Administrative Law Judge

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RANGER FUEL CORPORATION, Contestant	:	Contest of Order
	:	Docket No. WEVA 79-217-R
v.	:	Beckley No. 2 Mine
SECRETARY OF LABOR, Respondent	:	

DECISION AND ORDER VACATING ORDER OF WITHDRAWAL

On August 6, 1980, I issued a show cause order in this case. In that order, I stated:

"The uncontroverted facts as presented in those statements are that the operator was issued the order because it did not pay a miner, Raymond J. Woods, for the time spent by him in accompanying an inspector on a C.F.C. spot inspection. The sole issue in the case is whether an operator is required by § 103(f) of the Act to pay a miner who accompanies an inspector during a "spot" inspection of a mine. This issue has been decided by the Commission in Helen Mining Co. PITT 79-11-P, November 21, 1979, and Kentland-Elkhorn Coal Co., PIKE 78-399, November 30, 1979."

The parties were given thirty days to show cause why the case should not be decided upon the uncontroverted facts of record and to present any other evidence or authority which they wanted considered.

Neither contestant nor respondent has filed anything further, therefore the case will be decided upon the uncontroverted facts in record. In Helen Mining Co., supra, the Commission held that miners are entitled to walkaround pay only for regular inspections. In this case a citation was issued because a miner was not paid for his participation in a CFC spot inspection. The order in question here was issued because the operator did not abate the citation within the time permitted.

> "A mine operator contesting the validity of a 104(b) order of withdrawal is entitled to challenge the existence of the violation set forth in the underlying 104(a) citation. United Mine Workers of America v. Andrus, 581 F.2d 888, 894 (D.C. Cir. 1978); Old Ben Coal Company, 6 IBMA 294, 301 n. 3, 83 I.D. 335. 1976-1977 OSHD par. 21,094 (1987). The language of sections 104(a) and 104(b) of the 1977 Mine Act indicate that the withdrawal order must be pronounced invalid where the underlying citation fails to describe a violation of either 1977 Mine Act or a mandatory safety standard."

Consolidation Coal Co., Docket No. WEVA 79-129-R, July 31, 1980.

Because the underlying citation does not describe a violation of the Act or regulations under the reasoning of Helen Mining Co., supra and Kentland-Elkhorn Coal Co., supra, the section 104(b) order in question here is invalid. Therefore, the order is vacated.

WHEREFORE IT IS ORDERED the contest of order is GRANTED and the order of withdrawal is VACATED.

James A. Laurenson

James A. Laurenson, Judge

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2 5 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. KENT 80-103 A.O. No. 15-03161-03041
v.	:	Star UG Mine
PEABODY COAL COMPANY, Respondent	:	

DECISION AND ORDER

The parties move for approval of a settlement of a violation of the Federal Mine Safety Code requirement that "ample warning shall be given before shots are fired." This requirement is incorporated by reference in section 313(c) of the Act, 30 C.F.R. 75.1303, by the permissibility standards relating to the use of explosives in underground mines found in 30 C.F.R. 15.19(e). The specific provision of the Mine Safety Code applicable is section 5b. 16. 1/

A penalty of $7,000 was initially proposed for a violation that involved a failure to post warning flares that resulted in serious injuries to a scoop operator and endangered his helper. The violation was committed by a certified shot firer who admitted the flares should have been posted. He also admitted that if the flares had been properly set the accident would not have occurred. Despite the reckless nature of the firer's misconduct and its almost fatal consequences for his fellow workers,

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1/ This is published as an appendix to Part 15 of Title 30 of the C.F.R. The record and the parties disclosures established that "ample warning" embraces and is understood by the industry to include both visual and verbal warnings. Counsel for the operator is to be commended for his diligence and candor in discovering MSHA's instructions to the industry with respect to the interpretation and coverage of the term "ample warning".

The circuity of the reference to the requirement is unfortunate. It is suggested that MSHA undertake to cross reference the various provisions in its next publication of the C.F.R. and to include in the inspection manual a copy of the relevant MSHA instructions.

MSHA, in accord with its policy of nonenforcement against the workforce, and especially rank-and-file miners such as the shot firer, declined prosecution under section 110(c). In view of this, and the culprit's obvious remorse and contrition, Peabody states no disciplinary action will be taken. So once again the enforcement proceeding has focused solely on the collection of a substantial fine from the corporate treasury, $6,250, while the real culprit goes free on the plea that "he has suffered enough."

Let me make my position clear. I firmly believe that Peabody should pay a substantial fine and I would disapprove this settlement if I thought a larger fine or even the maximum provided by law, $10,000, would persuade Peabody to institute a disciplinary policy, including suspensions without pay or discharges, for knowing violations of the mandatory safety standards that gravely endanger the lives of fellow miners. Fairness, however, dictates that I recognize the reality of the constraints imposed by the collective bargaining agreement on management's freedom to discipline the workforce for violations of the Mine Safety Law. Despite its slogan of "Safety or Else" the Union, I am reliably informed, is unalterably opposed to acceptance of responsibility for enforcement or compliance with the Mine Safety Law either as an organization or by its members. Compare, Bryant v. United Mine Workers, 467 F.2d 1 (6th Cir. 1972), cert. denied, 410 U.S. 930 (1973) with Dunbar v. United Steelworkers, 602 P.2d 21 (S. Ct. Idaho 1979), cert. denied ____ U.S. ____ (1980). Consequently, until MSHA, the Union and management reach a consensus on enforcement of the law against the rank-and-file workforce I cannot conscientiously deny a settlement such as that proposed in this case. See, New River Company, 2 FMSHRC ____ (September 9, 1980). This does not mean that I will not continue to take into account the encouragement to disciplinary action that results from the imposition of substantial fines on corporate operators who fail to insure abatement by appropriate disciplinary action.

The premises considered, and based on an independent evaluation and de novo review of the circumstances, including the parties' pre-hearing submissions and the representations and disclosure made during the course of the lengthy telecon settlement conference of September 5, 1980, I find the settlement proposed, $6,250, is, insofar as the corporate operator is concerned, 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 settlement agreed upon, $6,250, on or before Friday, October 17, 1980, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 25, 1980

LOCAL 9800, UNITED MINE WORKERS OF AMERICA, Complainant	:	Complaint of Discharge, Discrimination or Interference
v.	:	Docket No. KENT 80-216-D
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), or THOMAS DUPREE, Respondents	:	Riverview Mine

ORDER DENYING RESPONDENT'S MOTIONS TO DISMISS AND FOR SUMMARY DECISION; ORDER GRANTING LEAVE TO AMEND SERVICE

Appearances: J. Davitt McAteer, Esq., Center for Law and Social Policy; Washington, D.C., for Complainant; Thomas P. Piliero, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent, Secretary of Labor.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

This case presents the novel issue whether the Mine Safety and Health Administration (MSHA) is subject to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). That portion of the Act protects miners and their representatives from reprisals for engaging in certain safety-related activities. Complainant alleges that an employee of MSHA threatened it with a lawsuit in retaliation for notifiying MSHA of irregularities in certain mine inspections. Respondent, MSHA, has moved to dismiss the complaint and has moved for summary decision. Both motions will be denied.

The action is styled Local 9800, UMWA v. MSHA or Thomas Dupree. Although Dupree is a named respondent, he has not, as far as Commission records show, been served with a copy of the complaint or any

of the pleadings filed herein. On June 16, 1980, Complainant filed a motion to perfect service on Dupree. Respondent did not reply to the motion. The motion will be granted.

STATUTORY PROVISION

Section 105(c)(1) of the Act provides as follows:

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

THE MOTION TO DISMISS

Respondent challenges the complaint on three grounds. First, Respondent asserts that MSHA is not a "person" subject to the provisions of section 105(c). It also states that the conduct alleged is under the jurisdiction of the Labor Department Inspector General rather than the Commission. Finally, it contends that Dupree's conduct cannot be imputed to MSHA since Dupree was not acting in his capacity as an MSHA employee when he made the alleged phone call. Respondent reformulated this last contention as a motion for summary decision on June 27, 1980, and supported it with an affidavit from Dupree. Accordingly, it will be discussed separately.

Respondent's first two contentions will be taken as components of Rule 12(b)(6) motion to dismiss under the Federal Rules of Civil Procedure. 29 C.F.R. § 2700.1(b). Thus, the question is whether

Complainant has stated a cause of action. For the purposes of the motion, the well-pleaded material allegations of the complaint are taken as admitted. 2A Moore, Federal Practice, ¶12.08. A complaint should not be dismissed unless it appears to a certainty that the complainant is not entitled to relief under any state of facts which could be proved in support of the claim. Id. I assume, therefore, that the following pleaded facts are true:

1. In August 1979, Complainant discovered reports of mine inspections by MSHA inspectors that were falsified: The reports recited a general inspection of the Riverview Mine on July 24, 25, and 26, 1979. In fact, the inspectors had not been at the mine on July 25 and 26 and were there only 30 to 40 minutes on July 24.

2. Members of Complainant's safety committee discussed the irregularities with William Craft, Director of MSHA District 10, in late 1979. Craft admitted the discrepancies, stated that steps would be taken to correct the situation and Complainant would be kept informed.

3. On December 2, 1979, not having been informed of steps taken by Craft, Complainant's President, Houston Elmore, wrote to the MSHA Administrator of Coal Mine Health and Safety, requesting an investigation.

4. On or about January 31, 1980, Thomas Gaston, President of UMWA District 23, received a telephone call from Thomas Dupree, an official of the MSHA District 10 Office.

5. The telephone call concerned Elmore's letter of December 2, 1979. Dupree accused Elmore of derisive comments with regard to MSHA inspectors and with libel. He told Gaston that legal counsel had advised him that Elmore or Local 9800 could be held liable for the contents of the letter.

A. IS MSHA A "PERSON"?

Were MSHA not the respondent in this case, the facts pleaded would clearly state a cause of action under section 105(c). A threat to sue a representative of miners because that representative has made a complaint related to the Act, such as a complaint that the provisions of section 103 are not being observed, constitutes, in the circumstances of this case, unlawful interference with the representative's right to make that complaint.

In deciding whether MSHA is subject to liability under the general wording of the statute, the key factor is legislative intent. Cf. Monell v. Department of Social Services, 436 U.S. 658 (1978). Section 105(c)(1) declares that "no person shall discharge or in any

other manner discriminate * * * or otherwise interfere with the exercise of the statutory rights of any miner * * *." The word "person" is defined in section 3(f) as "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." There is nothing in the Act or in the legislative history to indicate that Congress considered the question whether MSHA or any other public agency could be a "person" involved in discriminatory conduct under section 105(c). The task, then, is "not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present." Cardozo, The Nature of the Judicial Process, 15 (1921).

The Senate Committee Report on the wording of section 105(c) states that "[i]t should be emphasized that the prohibition against discrimination applies not only to the operator but to any other person directly or indirectly involved." S. Rep. No. 95-181, 95th Cong., 2d Sess., p. 36 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT, p. 624. The same report directs that section 105(c) is "to be construed expansively" in order "to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." Id

A survey of the law in other fields provides some guidance. It was long the general rule that "the United States, when not expressly named in or made subject of a legislative enactment, and not included therein by necessary implication, is not bound by the terms thereof * * *." 77 Am. Jur. 2d, United States, § 6. See also, United States v. Wittek, 337 U.S. 346 (1949); F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960). But this rule may be ascribed, in large part, to the doctrine of sovereign immunity, which has recently been sharply curtailed by Congress. See 5 U.S.C. § 702. Despite the general rule, an exception was held to obtain where the statute was "intended to prevent injury and wrong." Nardone v. United States, 302 U.S. 379, 384 (1937). That case involved section 605 of the Communications Act of 1934, which declared that no "person," not being authorized, shall intercept communications and divulge them to another. The directive was applied against Federal agents to suppress the introduction of illegally obtained evidence at a criminal trial. See also United States v. Brown, 555 F.2d 407 (5th Cir. 1977); Letter Carriers v. U.S. Postal Service, 333 F. Supp. 566 (D.D.C. 1971); Wycoff's Estate v. C.I.R., 506 F.2d 1144 (10th Cir. 1974), cert. den. sub nom. Zion's First National Bank v. C.I.R., 421 U.S. 1000.

In cases such as this, courts also examine the entire scheme of regulation to see if an effective alternate remedy is available. Pfizer, Inc. v. India, 434 U.S. 308 (1978); United States v. Cooper, 312 U.S. 600, 604-605 (1941); Georgia v. Evans, 316 U.S. 388 (1971); cf., Bivens v. Six Narcotics Agents, 403 U.S. 388 (1971); Davis v.

Passman, 442 U.S. 228 (1979). Here, Complainant may pursue other avenues of relief for the failure to inspect properly and for injuries traceable to this neglect. E.g., Raymer v. United States, 482 F. Supp. 432 (W.D. Ky. 1979). But the act of discrimination alleged is, by its inchoate nature, uniquely within the domain of this Commission. Dupree's remarks were probably not sufficiently pronounced or defined to trigger general tort or criminal liability. They are precisely the sort of threats, from one in a position to carry them out (or so it may have seemed to the union's district president) that section 105(c) is designed to discourage. Complainant may logically claim that the remarks had a chilling effect on its willingness to report dangers to miners' safety and health.

The conduct of elections under the National Labor Relations Act supplies a fitting analogy. The NLRB's goal is to assure that elections for collective bargaining representatives are held under "laboratory conditions." General Shoe Corp., 77 N.L.R.B. 127 (1948). Although only employers and unions may be charged with unfair labor practices, it has long been the Board's position that conduct which can result in setting aside an election need not constitute an unfair labor practice. Id. A coercive atmosphere created by townspeople is enough to set aside an election. Utica-Herbrand Tool Division of Kelsey-Hayes Co., 145 N.L.R.B. 1717 (1964). More to the point, if an agent of the Board gives the appearance of partiality, the election will be set aside. NLRB v. Fresh'nd Aire Co., 226 F.2d 737 (7th Cir. 1955).

The Federal Mine Safety and Health Act seeks to ensure that all persons involved in operating a mine are safety-conscious and safety-oriented in every task they perform. Just as the NLRB aims to promote an atmosphere conducive to free choice, so the Commission and MSHA aim to promote an atmosphere conducive to safety and good health. Such an atmosphere must be receptive to complaints concerning dangerous conditions. Complainant has alleged facts which, if true, could be shown to pose a risk that such conditions might go unreported.

Because the purpose of the statutory provision is to protect miners from discrimination from any source, and, following an "expansive construction," I hold that MSHA is a person under section 105(c) prohibited from discriminating against any miner.

B. THE INSPECTOR GENERAL ACT

Respondent also contends that the Inspector General has jurisdiction over the discriminatory conduct alleged. I have above concluded that the Commission has jurisdiction to entertain this complaint. If respondent can be taken to have requested deferral

of Commission jurisdiction until internal procedures in the Department of Labor have been exhausted, the request is rejected. While resolution of an entire controversy in one proceeding promotes judicial economy and conserves the resources of litigants, this is an inappropriate case in which to inaugurate a deferral policy. Internal procedures at MSHA are directed primarily at vindication of the Government's managerial interest in honesty and efficiency. The Commission exists specifically to safeguard mine safety and health. Moreover, even assuming that the Inspector General entertains Complainant's charges, Complainant would not be a party to any proceedings with a right to participate in the course of litigation, as it is here. It is worthwhile to note, finally, that in cases dealing with discriminatory interference which employee rights, the policy of administrative deferral is in decided retreat. E.g., Newport News Shipbuilding v. Marshall, 8 OSHC (BNA) 1393 (E.D, Va. 1980); Suburban Motor Freight, 103 L.R.R.M. 113 (1980); Banyard v. NLRB, 505 F.2d 342 (D.C. Cir. 1974).

THE MOTION FOR SUMMARY DECISION

Subsequent to its motion to dismiss, Respondent filed a motion for summary decision pursuant to 29 C.F.R. § 2700.64 suported by an affidavit from George Thomas Dupree. In the affidavit, Dupree states as follows: He is a Federal coal mine inspector in MSHA's District 10 Office and is President of Local 3340, AFGE. In the latter capacity, he represents MSHA inspectors in the District 10 Office. In January 1980, he became aware of Mr. Elmore's letter of December 2, 1979, to MSHA's Administrator. The letter contained unfounded serious charges of criminal acts on the part of members of the AFGE local. Because of this, Dupree telephoned Thomas Gaston of District 23, UMWA, to determine whether Elmore's charges were supported by the UMWA membership. Dupree stated that he intended to seek legal counsel as President of AFGE Local 3340 to determine whether Elmore could be liable for the defamatory statements in the letter. The telephone call was made from MSHA District 10 headquarters, but was made in Dupree's capacity as President of Local 3340, AFGE.

Complainant filed a statement in opposition to the motion for summary decision and attached an affidavit from Tommy Gaston. Gaston's affidavit states that on or about January 31, 1980, he received a call from Mr. Tom Dupree, an MSHA employee, who asked Gaston if he was aware of the letter written by Elmore seeking an investigation of the District 10 Office. Dupree stated that he felt that Elmore was accusing all the inspectors of District 10 of falsifying reports. Dupree further stated that the contents of the letter were libelous and that he was advised by an attorney that ~~Dupree~~ could be held liable for them.
Elmore (Erratum 9/26/80)

Under Commission Rules, a motion for summary decision shall be granted only if the entire record shows that there is no genuine issue as to any material fact. 29 C.F.R. § 2700.64(b).

I conclude that, despite the affidavits, issues of fact concerning the scope of Dupree's authority, actual or apparent, remain unresolved. These issues can best be decided after considering the testimony of the people involved.

CONCLUSION

In sum, I find that Complainant has stated a claim upon which relief may be granted under section 105(c). Therefore, the motion to dismiss must be denied. Since the record herein does not show that there is no genuine issue as to any material fact, the motion for summary decision must be denied. Complainant's motion for leave to amend service will be granted.

ORDER

Respondent's motion to dismiss is DENIED; Respondent's motion for summary decision is DENIED; Complainant's motion for leave to amend service so as to serve Thomas Dupree is GRANTED.

James A. Broderick
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 26, 1980

LOCAL 9800, UNITED MINE WORKERS OF AMERICA (UMWA), Complainant	:	Complaint of Discharge, Discrimination or Interference
v.	:	Docket No. KENT 80-216-D
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Riverview Mine
or	:	
THOMAS DUPREE, Respondents	:	

ERRATUM

The last line on page 6 of the Order issued on September 25, 1980, should read "Elmore could be held liable for them." rather than "Dupree could be held liable for them."

James A Broderick
James A. Broderick
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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26 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	Civil Penalty Proceedings Docket No. DENV 79-277-PM A/O No. 41-00023-05001
v.		
GENERAL PORTLAND INC.,	Respondent	Docket No. CENT 79-15-M A/O No. 41-00023-05002 Fort Worth Quarry & Mill

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Michael T. Heenan, Esq., Smith, Heenan, Althen & Zanolli, Washington, D.C. for Respondent.

Before: Judge Charles C. Moore, Jr.

These cases were heard March 25, 1980, in Fort Worth, Texas, pursuant to the Federal Mine Safety and Health Act of 1977 ("the Act"). Respondent General Portland, Inc. engages principally in the production of cement (Tr. 99) and employs 180 hourly and 10 supervisory employees at its Fort Worth Quarry and Mill (Tr. 110) which is the subject of these citations. Respondent's size is such that no penalty assessed herein will affect its ability to continue in business.

At the hearing, the Secretary characterized General Portland's prior history of violation as light (Tr. 147) and submitted in support thereof Petitioner's Exhibit No. M-8, a computer printout purporting to show Respondent's violations since the effective date of the 1977 Act. As the printout is not self-explanatory I can only conclude Respondent had a prior history; I am unable to say whether it was mild or extensive. I find, per stipulation of the parties, that all violations were abated promptly and in good faith (Tr. 147).

Three of the alleged violations in CENT 79-15-M: Nos. 154360, 154363 and 154633 respectively, were settled at the hearing pursuant to joint motion of the parties. They concerned an inoperable reverse signal on a front-end loader from which the operator had a virtually unobstructed view, a standard

pickup truck cited under visibility standards pertaining to heavy-duty mobile equipment, and a coupling guard which had been temporarily removed from a drive shaft located in an isolated part of the plant. The original proposed assessment was $600. I accept the settlement and assess a total penalty of $330 for the three violations.

Seven of the alleged violations concern independent contractors and the remaining citation, issued to General Portland, was submitted on stipulation. The issue of the liability of independent contractors for violations of the Act is discussed post.

Docket No. CENT 75-15-M

Citation No. 154631 alleges a violation of 30 C.F.R. §56.15-7, the standard requiring miners to wear goggles when welding, cutting or otherwise working with molten metal. Inspector Morris observed a contractor's employee wearing only safety glasses while using a cutting torch to install metal steps in a mill building (Tr. 63). Safety glasses lack side shields and permit molten sparks to enter and cause serious injury to the eyes (Tr. 66), whereas goggles cover the entire eye area and provide superior protection (Tr. 65). An employee of Respondent accompanying the inspector immediately instructed the contractor's employee to stop cutting and put on his cutting goggles before resuming work, which the employee did (Tr. 66-67). Respondent maintains that this violation demonstrates its lack of control over and knowledge of the activities of independent contractor employees. This violation would have been readily apparent to Respondent, however, had it made even a cursory inspection of the work place. The record shows the violation to be significant and substantial. MSHA assessed a proposed penalty of $114.

Respondent made an extensive record at the hearing and in its proposed findings of fact and conclusions of law concerning the impropriety of citing operators for violations, as here, committed by independent contractors and their employees (see Tr. 77-91 and Respondent's Exhibit 3). Respondent's arguments are good and were it solely up to me, I would adopt them. But as I read the Commission's decision in Secretary of Labor v. Old Ben Coal Company, 1 FMSHRC 1480 (October 29, 1979), MSHA could have properly cited an owner-operator in the interim before rules for citing independent contractors were promulgated. The Secretary of Labor has promulgated final rules which allow independent contractors to register with MSHA in order to receive an identification number [45 Fed. Reg. 44,494 (July 1, 1980)] which MSHA will then use to identify and issue citations to independent contractors. 1/ These procedures became effective July 31, 1980. Nothing in the rules indicates they are to be applied retroactively although it is clear from the Act [30 U.S.C. §802(d) or §3(d), and Old Ben, supra, at 1483] that MSHA had the power to cite independent contractors before these rules were promulgated. Appendix A to the rules states that MSHA's policy

1/ The rules do not state that every independent contractor working in a mine must obtain an MSHA identification number. But independent contractors can now be cited, remedying the problems addressed in Respondent's brief.

of citing independent contractors took effect July 1, 1980 [45 Fed. Reg. 44,497] and the rules' Summary [Id. at 44,494] speaks simply in terms of "MSHA's enforcement policy" without specifying an effective date. 2/ Since the citations before me were issued before the rules became effective, I will hold Respondent liable for violations of the Act committed by its independent contractors. However, I will consider Respondent's position when assessing negligence under §110 of the Act.

In this instance, the Secretary has upheld its burden and I assess a penalty of $100.

Citation No. 154634 alleges a violation of 30 C.F.R. §56.15-5. This standard requires safety belts and lines to be worn when there is a danger of falling. An employee of an independent contractor was observed standing on the flange of an elevator shaft 125 feet above ground without the protection of a safety belt or line, bolting a cover onto the shaft (Tr. 68-69). There were no handrails to prevent him from falling in the event he lost his footing (see Respondent's Exhibit No. 8). A safety belt could have been attached to the work platform 12 feet below (Tr. 69) which, while possibly not protecting him from minor injuries if he fell, would have prevented him from plunging to the ground (Tr. 70). MSHA assessed a proposed penalty of $920 for this violation. I find that a violation was established, that negligence was high on the part of the independent contractor but low as to Respondent and I assess a penalty of $200.

Citation No. 154361 alleges a violation of section 56.9-11, which requires vehicle cab windows to be kept clean and in good condition. The citation alleges that the windshield of a front-end loader vehicle was

2/ After the parties had submitted briefs in this matter but before a decision had been entered, the Commission, on August 4, 1980, decided Secretary of Labor v. Pittsburg and Midway Coal Mining Company, Docket Nos. BARB 79-307-P et seq., 1 MSHC 2465. In that decision, the Commission, at the suggestion of MSHA, remanded the case to Administrative Law Judge Koutras "for the purpose of affording the Secretary an opportunity to determine whether to continue to prosecute these citations against P&M, or any independent contractors which are claimed to have violated the standards cited, or both." (Id.)

I sent a copy of the Commission's decision in the above case to the parties for their comments. The Solicitor did not respond, but Respondent's letter states that it had been authorized to represent that the Solicitor wished to pursue the matter against General Portland and not the independent contractors since the hearing had already been conducted.

The policy reflected in the trial attorney's statement is not universally adhered to by the Solicitor when representing MSHA before our Commission and its judges. I know of at least three cases, and I strongly suspect there are more, where the administrative law judge ruled in the Government's favor at the hearing only to have the Solicitor's appellate staff argue to the Commission that the judge had erred. Secretary of Labor v. Pittsburg and Midway Coal Mining Company, supra, was one such case.

cracked. The parties stipulated that the windshield was cracked and that a replacement had been ordered (Tr. 96). This is the only litigated citation in the case which did not involve employees of an independent contractor.

Respondent's Exhibit No. 1 is two photographs and a photocopy of each showing the view from the middle of the cab looking out the windshield. These photographs were taken after the windshield had been replaced so the crack is simulated as a smudge in the first photograph and in the second as a dotted line. The parties stipulated that the crack extended one-fourth of the way down the windshield and the photographs indicate that the crack was on the passenger side of the cab. Respondent's Exhibit No. 2 is a purchase order for a replacement windshield dated August 2, 1978. The citation was issued August 3, 1978. There was no testimony offered.

Respondent argues no violation occurred as it made every effort to replace the windshield. The Secretary maintains that the existence of a crack violates the standard. I find that a crack in the windshield does not constitute keeping the windshield in good condition if it interferes with the driver's vision or creates some other hazard. I cannot make a finding to that effect by looking at the photograph that was offered. MSHA has failed to satisfy its burden and the citation is vacated.

Docket No. DENV 79-277-M

Citation Nos. 154436 and 154435 concern violations of 30 C.F.R. §56.15-3 and 30 C.F.R. §56.15-2 respectively, on the part of independent contractor employees. Nine employees were preparing siding which was being hung on a building wall 30 feet above them (Tr. 17). None of the employees was wearing protective footwear, a violation of section 56.15-3, or hardhats, a violation of section 56.15-2. In addition, tools were being used to measure and cut the siding (Tr. 18). Serious injury could result if a piece of siding fell onto the men below or if a tool slipped and cut a miner's feet. On the other hand, serious injury could occur if a man fell as a result of wearing protective footwear when climbing on these structures, as was suggested at the hearing (Tr. 34). No comparable disadvantage was shown with respect to hardhats. MSHA assessed proposed penalties of $40 in both cases. I find that violations did occur and that there was negligence. I assess a penalty of $40 in Citation No. 154436 and $40 in Citation No. 154435.

Citation No. 154434 alleges a violation of section 56.16-6, a regulation requiring covers over the valves of compressed gas cylinders. Four compressed gas cylinders without valve covers were stored outside a contractor's trailer next to a roadway (Tr. 24). Without valve covers, there was a danger that the pressurized contents would escape, possibly causing a fire (Tr. 24). MSHA assessed a proposed penalty of $40. I find that a violation did occur and that negligence was present. I therefore assess a penalty of $40.

Citation No. 154359 involves a similar violation in that a compressed gas cylinder owned by an independent contractor was standing unsecured (Tr. 53). Section 56.16-5 requires compressed gas cylinders to be stored in a

safe manner. The inspector observed this cylinder standing unsecured next to a contractor's trailer alongside a travelway (Tr. 53). Vehicles and employees passed by the cylinder, and seven employees worked within 10 feet of it (Tr. 53). The cylinder weighed between 115 and 135 pounds (Tr. 54) and could cause an injury if it fell on an employee's leg or foot. There was evidently no danger of the cylinder exploding. MSHA assessed a proposed penalty of $32. I find that a violation did occur, that the operator is liable and that negligence was present. I assess a penalty of $40.

Citation No. 154366 alleges a violation of section 56.14-30 which requires mobile equipment in a raised position to be securely blocked in place before repair work is commenced. Three employees of an independent contractor were performing maintenance work on a pit haulage truck, the bed of which had been raised and was supported by jacks. The truck bed is manufactured with two 2-inch holes through which two corresponding safety pins are inserted to support the bed in case the hydraulic system or the jacks, which also support the truck bed when maintenance work is being performed, break or collapse. In this case, one 1/2-inch rod supported the truck bed (Tr. 60). One man leaning over the bed of the truck would have been fatally injured had the truck bed fallen, while the two men working underneath would have been frightened but probably not injured. MSHA assessed a proposed penalty of $66. I find that the violation occurred, negligence was present, and a penalty of $100 is assessed.

ORDER

It is hereby ORDERED that Respondent, within 30 days, pay to MSHA penalties in the amount of $890.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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26 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding	
	:	Docket Nos.	Assessment Control Nos.
	:	KENT 79-37	15-11017-03007
	:	KENT 79-121	15-11017-03004 ✓
v.	:	KENT 79-122	15-11017-03005
	:	KENT 79-123	15-11017-03006
GARRCO COAL COMPANY, INC., Respondent	:	Garrco No. 2 Mine	

DECISION

Appearances: William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
John L. Garrett, Maryville, Tennessee, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a written notice of hearing dated July 21, 1980, a hearing was held in the above-entitled proceeding on September 4, 1980, in Knoxville, Tennessee, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

The consolidated proceeding involves four Petitions for Assessment of Civil Penalty filed by the Secretary of Labor alleging a total of eight violations of the mandatory health and safety standards by Garrco Coal Company. The Petition in Docket No. KENT 79-37 was filed on June 18, 1979, and seeks assessment of civil penalties for five alleged violations. The Petitions in Docket Nos. KENT 79-121, KENT 79-122, and KENT 79-123 were all filed on May 30, 1979, and each Petition seeks assessment of a civil penalty for one alleged violation.

The issues raised by the four Petitions are whether the violations occurred and, if so, what civil penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act.

The parties entered into stipulations with respect to the six criteria. It was stipulated that respondent operated a very small coal business which produced about 50 tons of coal per day and employed five or six employees. Respondent, as the operator of the No. 2 Mine, is subject to the Act and all regulations promulgated thereunder.

Respondent agreed that all of the alleged violations had occurred and the parties stipulated as to the criteria of negligence and gravity. It was stipulated that all of the violations were the result of ordinary negligence and that all of the violations were nonserious except for the one violation of section 75.202 in Docket No. KENT 79-123 which was considered to be moderately serious (Tr. 8-18). Respondent demonstrated at least a normal good faith effort to achieve rapid compliance and in some instances, such as for the violation alleged in Citation No. 123661, there was an outstanding effort to achieve rapid compliance (Tr. 19). It was also stipulated that respondent had less than an average history of previous violations (Tr. 9).

The stipulations discussed above support the assessment of small penalties, but testimony and documents regarding respondent's financial condition support a finding that only nominal civil penalties should be assessed in this proceeding. The foregoing conclusion is based on the discussion set forth below.

Respondent was incorporated on August 15, 1977. Respondent was owned by John L. Garrett, H. Pat Wood, and F. Rodney Lawler. Mr. Garrett owned 50 percent of the stock and the other two men owned 25 percent each. Respondent's efforts to produce coal at a profit failed so completely that it was forced to discontinue in business after about 2 years of operation and the corporate charter was dissolved in 1978 (Tr. 25).

Respondent's income tax returns for the period of its operation were introduced in evidence as Exhibits A and B. The 1977 return covers the period from August 15, 1977, to February 28, 1978, and shows that respondent lost $31,561 during that period even though respondent's stockholders and officers received no dividends, salary, or other compensation. The 1978 return covers the period from March 1, 1978, to February 28, 1979, and shows that respondent lost $16,738 during its second year of operation. Again respondent's stockholders received neither dividends nor any other compensation, despite the fact that Mr. Garrett worked full time at trying to produce coal at a profit.

In addition to being unable to operate economically, respondent suffered the misfortune of having its only scoop stolen. The insurance company paid all but $5,000 of the amount which respondent still owed on the scoop. It was necessary for respondent to pay the remaining $5,000 due on the scoop. Respondent was unable to purchase another scoop. Respondent tried to continue producing coal by renting a scoop at the rate of 75 cents for each ton of coal which was mined. Respondent also paid a fee of $500 per month to rent a roof-bolting machine on which respondent had to pay all expenses associated with maintaining the roof-bolting machine in operable condition (Tr. 22-23).

Mr. Garrett had never had any experience in the coal business prior to undertaking the venture described above. Mr. Garrett emphasized at the hearing that no personal injuries of any kind occurred while he was in the

coal business (Tr. 22). Respondent had no funds in the bank when it discontinued in business and any penalties which may be assessed in this proceeding will have to be paid from Mr. Garrett's personal income which he now receives as a pilot for an airplane which is used in making chartered flights (Tr. 6; 25).

I find that the facts discussed above warrant assessment of only nominal penalties of $1 for each of the eight violations involved in this proceeding. Respondent's efforts to produce coal ended in a financial loss to himself and the other two men who advanced capital for the venture. No miner received any personal injuries while employed by respondent. Mr. Garrett was not cited for any serious violations while he was in business and large penalties would be unwarranted in any event. Additionally, large penalties, even if justified, would have no deterrent effect for a person who is out of business and who has no intention of resuming any mining activities.

WHEREFORE, it is ordered:

Within 30 days from the date of this decision, Garrco Coal Company, Inc., shall pay civil penalties totaling $8.00 for the violations which are listed below:

Docket No. KENT 79-37

Citation No. 123711 11/17/78 § 75.1725(a)	$ 1.00
Citation No. 123712 11/17/78 § 77.1301(a)	1.00
Citation No. 123756 12/18/78 § 77.1301(a)	1.00
Citation No. 123757 12/18/78 § 77.904	1.00
Citation No. 123758 12/18/78 § 75.1711-3	1.00
Total Civil Penalties Assessed in Docket No. KENT 79-37	$ 5.00

Docket No. KENT 79-121

Citation No. 124269 5/16/78 § 75.200	$ 1.00

Docket No. KENT 79-122

Citation No. 123660 10/11/78 § 75.200	$ 1.00

Docket No. KENT 79-123

Citation No. 123661 10/11/78 § 75.202	$ 1.00
Total Civil Penalties Assessed in This Proceeding ...	$ 8.00

Richard C. Steffey

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

Distribution:

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

Garrco Coal Company, Inc., Attention: John L. Garrett, President, 508 Belmeade Drive, Maryville, TN 37801 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

26 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Review of Application for Temporary Reinstatement
	:	Docket Nos. KENT 80-328-D
On Behalf of:	:	BARB CD 80-24
BURL JOHNSON, Applicant	:	Smith No. 12 Mine
v.	:	
HARLAN FUEL COMPANY, Respondent	:	

DECISION

Appearances: Thomas Piliero, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Applicant;
Eugene F. Fidell, Esq., and F. Frank Lyman, Esq., LeBoeuf, Lamb, Leiby & MacRae, Washington, D.C., for Respondent.

Before: Judge Melick

This case is before me pursuant to Commission Rule 44, 29 C.F.R. § 2700.44, 1/ upon a request for hearing effectively filed by the Harlan Fuel Company (Harlan) on August 26, 1980, on the Order of Temporary Reinstatement issued by Chief Administrative Law Judge James A. Broderick. 2/ A timely hearing was held in Abingdon,

1/ 29 C.F.R. § 2700.44(a) provides in substance as follows:
"An application for reinstatement shall state the Secretary's finding that the complaint of discrimination, discharge or interference was not frivolously brought and the basis for his finding. The application shall be immediately examined, and, unless it is determined from the face of the application that the Secretary's finding was arbitrarily or capriciously made, an order of temporary reinstatement shall be immediately issued. The order shall be effective upon issuance. If the person against whom relief is sought requests a hearing on the order, a Judge shall, within 5 days after the request is filed, hold a hearing to determine whether the Secretary's finding was arbitrarily or capriciously made. The Judge may then dissolve, modify or continue the order."

2/ Since Judge Broderick's Order of Temporary Reinstatement was not issued until August 26, 1980, I find that the premature request for hearing, received by the Commission on August 25, 1980, was effectively filed on August 26, 1980.

Virginia, on September 2, 1980, at which the parties appeared and presented evidence. The sole issue before me is whether the Secretary's finding in this case (that the complaint of discrimination, discharge or interference filed by Burl Johnson was not frivolously brought) was arbitarily or capriciously made. Footnote 1/, supra. Whether or not there was in fact a violation of the anti-discrimination provisions of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., hereinafter the "Act") is clearly not an issue at this time. Preliminary hearings under Rule 44(a) are thus similar in nature to preliminary hearings in criminal matters wherein a possible abuse of government power may be prevented through the early intervention of a judicial officer who makes only an interim determination of whether the government has a prima facie case. Rule 5, Federal Rules of Criminal Procedure, 8 Moore's Federal Practice, Ch. 5.1. Under Rule 44(a) the function of the administrative law judge is similarly to prevent an abuse of government power by making an interim determination at an early date as to whether the Secretary's finding (that the complaint of discrimination was not frivolously brought) was arbitrarily or capriciously made.

Since the evidence necessary for reaching a decision on this issue is by its very nature peculiarly within the possession of the Secretary I ordered the production of, over the Secretary's objection, the information and data used by the Secretary in making his decision to apply for the temporary reinstatement of Mr. Johnson. In light of the Secretary's objection that the entire file was privileged under Commission Rule 59 (29 C.F.R. § 2700.59), 3/ I first examined that file in camera. I thereafter ordered photocopies of those portions of the file that I found not to violate Commission Rule 59 to be released to the operator and admitted into evidence. I ordered photocopies of the remainder of the file to be sealed and not to be opened except by order of the Commission or court having jurisdiction for its examination on any appeal that might be taken.

The disclosed evidence consisted primarily of statements made by the two miners alleging unlawful discharge, and by their foreman. The statements of the miners are consistent and suggest that the complainant's discharge was the direct result of his refusal to work under unsafe roof conditions. Sufficient facts are alleged that, if true, could constitute a violation of section 105(c)(1) of the Act. While the statement of the mine foreman indicates, not surprisingly, a differing view of the events it only points out that issues of fact and credibility may have to be resolved at a later hearing, on the merits of the complaint. These are not however issues that can be finally resolved at this preliminary hearing and so long as there is some evidence which reasonably tends to show that the Secretary's finding was not arbitrarily or capriciously made then that finding will be upheld.

3/ 29 C.F.R. § 2700.59 provides as here relevant that "[a] Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner."

In presenting its case Harlan submitted copies of reports completed by an MSHA inspector based on his apparent inspection of the safety violations cited by Mr. Johnson as a basis for his discrimination complaint. 4/ According to the MSHA inspector no "imminent danger" existed at the time of his inspection. This evidence was not included in the report given to those MSHA officials who made the decision on behalf of the Secretary to file the application for temporary reinstatement. The evidence was admitted as possibly reflecting upon the issue of whether the Secretary's finding was arbitrarily or capriciously made. I gave little weight to that evidence, however, since it was never clarified that the area examined by the MSHA inspector was precisely the same area that was complained of by Johnson and since the operator conceded that additional roof support had been added and other action taken after Johnson's complaint and before the MSHA inspection.

"Arbitrary and capricious" is a characterization of a decision or action taken by an administrative agency that is willful and unreasonable and taken without consideration of, or in disregard of, facts or without determining principle. Black's Law Dictionary, 5th edition. "Frivolous" means of little weight or importance. A pleading is frivolous when it is clearly insufficient on its face * * * and is presumably interposed for mere purposes of delay or to embarrass the opponent. Black's Law Dictionary, supra. I find that these definitions appropriately reflect the meaning of the terms as used in Commission Rule 44. Within this framework, it is clear that the Secretary's finding (that the complaint of discrimination brought by Burl Johnson was not frivolously brought) was not arbitrary or capricious. That finding was not unreasonable nor can it be said that it was taken without consideration of, or in disregard of, the factual evidence or without determining principle. There is ample

4/ At hearing, Harlan also requested that counsel for MSHA, Mr. Piliero, be subpoened to testify inasmuch as Mr. Piliero was admittedly one of the authorized representatives of the Secretary who took part in the final decision to apply for temporary reinstatement. It also requested at hearing that subpoenas be issued to other persons in MSHA who took part in that final decision. Upon the Secretary's motion to quash and based on the inability of Harlan to proffer any relevant area of inquiry to present to these witnesses, I granted the motion to quash. 29 C.F.R. § 2700.58(c). I also found that the request for subpoenas was untimely and that Mr. Piliero would be unable at that stage of the case to withdraw as trial counsel and obtain alternate counsel to represent MSHA. I observe, however, that under the ABA, Code of Professional Responsibility, DR 5-101 and DR 5-102, a lawyer who is a potential witness to a proceeding should withdraw from the case. MSHA should be on notice that the testimony of persons making the decision to apply for reinstatement might in an appropriate case become relevant in a temporary reinstatement hearing and it should act accordingly in selecting trial counsel in such cases.

evidence in the record, excluding the privileged evidence not disclosed, to support this conclusion. Therefore, the Order of Temporary Reinstatement issued by Judge Broderick on August 26, 1980, is continued in effect. My bench decision to that effect rendered September 2, 1980, is therefore affirmed.

Gary Melick
Administrative Law Judge

Distribution:

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Eugene Fidell, Esq., LeBoeuf, Lamb, Leiby and MacRae, 1333 New Hampshire Avenue, NW., Suite 1100, Washington, DC 20036 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

2 6 SEP 1980

EASTERN ASSOCIATED COAL CORP., Applicant	:	Application for Review
v.	:	Docket No. HOPE 76-289
	:	IBMA 77-20
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order of Withdrawal No. 1 RDL February 18, 1976
	:	Keystone No. 1 Mine

DECISION

Appearances: Nancy Sproul Bifulco, Legal Assistant, Eastern Associated Coal Corp., Pittsburgh, Pennsylvania, for Applicant; Edward H. Fitch IV, Esq., Office of the Solicitor, U.S. Department of Labor, for Respondent.

Before: Judge Charles C. Moore, Jr.

On September 2, 1980, the Federal Mine Safety and Health Review Commission vacated the decision I had issued in the above case on January 27, 1977, (hereinafter "Eastern II") and remanded it to me for "reconsideration in light of, and entry of a new decision consistent with, Eastern Associated Coal Company, Docket No. HOPE 75-699, IBMA 76-98" (hereinafter "Eastern I") also issued September 2, 1980. That case, concerned two questions: (1) the reviewability of a section 103(f) order issued under the Federal Coal Mine Health and Safety Act of 1969, 1/ and; (2) the validity of that order and its modification. The Commission found that by virtue of the transfer provisions of the 1977 Act it had the authority to review section 103(f) orders and, in so doing, upheld the administrative law judge's decision affirming the order and its modification.

An accident occurred in Eastern I in which a shuttle car operator was injured as a result of being trapped between his shuttle car and the rib. During a faulty unloading procedure the cable hook, which holds the shuttle car in

1/ Section 103(f) of the 1969 Act [30 U.S.C. § 801 et seq. (1976) (amended 1977)] provides:

"In the event of any accident occurring in a coal mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in the mine or to recover the mine or to return affected areas of the mine to normal." 30 U.S.C. § 813(f).

place, came loose allowing the car to move down the tracks and come in contact with the shuttle boom which pushed it off the tracks into the rib.

The Commission held that a section 103(f) order could not be issued for the sole purpose of preserving evidence. Section 103(e) 2/ specifically provided for the preservation of evidence whereas section 103(f) was designed to ensure miners' safety in the aftermath of an accident.

The Commission found sufficient safety reasons to justify issuance of a section 103(f) order in Eastern I. The inspector was unable to determine why the cable hook came loose and caused the accident, so that until such a determination was made the miners' safety remained in jeopardy. An undisturbed accident scene was thus requisite. The Commission agreed with the judge's conclusions that where there is a strong possibility that the accident might be repeated if operations were allowed to resume and if an accident investigation is necessary to determine the cause of the accident and the means by which to prevent a recurrence, a section 103(f) order is appropriate.

Based on these findings, the Commission remanded Eastern II to me for reconsideration. After thoroughly reviewing both cases, I find no reason to disturb my prior decision.

In Eastern II, an inspector issued a section 103(f) order after a minor methane explosion occurred while he was making a regularly scheduled inspection of the mine. It was established at the hearing that the events which caused a cutting machine operator and his helper to report an explosion were a profusion of sparks accompanied by a "poofing" noise. The cutting machine operator immediately returned to the face and performed a spot-check for methane which proved negative. The section foreman shut off power to the section and withdrew all personnel. The inspector was informed of the incident and issued a verbal 103(f) order to the operator which was later reduced to writing. The inspector tested for methane at the face and for ventilation. The methane reading 2 inches inside the cut was 3.1 percent. The ignition level for methane is 5 percent to 15 percent.

After interviewing the cutting machine operator and his helper, the inspector returned to the surface about 1 p.m. and contacted his sub-district office which informed him to return to the mine to collect a dust sample. Instead of returning directly to the mine, he waited for a state inspector to arrive and, as a result, did not collect that dust sample until sometime between 6 and 8:15 p.m. The federal inspector's decision to await the state

2/ "In the event of any accident occurring in a coal mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal mine where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activity in such mine." 30 U.S.C. § 813(e).

inspector stemmed from professional courtesy in conducting accident investigations rather than a concern for safety. Additional support for this conclusion was provided by the fact that the inspector terminated the order immediately upon taking the dust samples so that he must have been convinced that the area in question was safe. I accordingly modified the termination time on the withdrawal order to read 1 p.m.

The inspector's air bottle test for methane later showed full compliance with the Act, however, the dust samples showed traces of coke.

If an ignition did occur and I found that it most probably had, it was caused by a pocket of methane, the presence of which can only be established by the tests which were conducted. Thus, preserving the scene of the accident was not crucial to a determination of the accident's cause, as it was in Eastern I. Similarly, and as the inspector's conduct bears out, the miners' safety was no more in jeopardy at 1 p.m. than it was at 8:15 p.m., contrary to Eastern I. There the inspector did not know the cause of the accident and feared a recurrence. In Eastern II, there were no injuries, the cause was rather apparent and the tests performed showed, so far as they are able, little chance of a recurrence.

In light of these factors and after reconsidering my decision I find that the modification of the withdrawal order was appropriate and I incorporate that decision in toto herein.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Attachment

Distribution:

Nancy Sproul Bifulco, Legal Assistant, Eastern Associated Coal Corp., 1728 Koppers Building, Pittsburgh, PA 15219 (Certified Mail)

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Mary Lu Jordan, Esq., United Mine Workers of America, 900-15th St., NW., Washington, DC 20005 (Certified Mail)

ATTACHMENT

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
HEARINGS DIVISION
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

January 27, 1977

MINING ENFORCEMENT AND SAFETY ADMINISTRATION (MESA), Respondent	:	Review Proceeding
	:	Docket No. HOPE 76-289
v.	:	
	:	Order of Withdrawal
EASTERN ASSOCIATED COAL CO., Petitioner	:	IRDL 2-18-76

DECISION

Appearances: Edward H. Fitch, IV, Esq., Office of the Solicitor, Department of the Interior, for Respondent; Charles Q. Gage, Esq., Eastern Associated Coal Company, and Thomas E. Boettger, Esq., Eastern Associated Coal Company, for Petitioner.

Before: Administrative Law Judge Moore

The above-captioned review proceeding came on for hearing in Charleston, West Virginia, in September of 1976. The United Mine Workers of America had previously filed an answer to the petition for review, but did not appear at the hearing and has not filed any post hearing brief. There has been no motion, request, or even suggestion, however, that the union be dismissed from the proceedings and I accordingly decline to do so. Nor has there been any challenge to the right of this office to review an Order issued under section 103(f) of the Act, and inasmuch as the Board of Mine Operations Appeals has ruled that under certain circumstances Orders issued under that section of the Act are reviewable, I deem any challenge as to whether or not those circumstances have been satisfied, as waived.

The order of withdrawal that is the subject of this proceeding was issued on February 18, 1976, at Eastern's Keystone No. 1 Mine located in McDowell County, West Virginia. Ronald D. Lilly, an inspector for the Mining Enforcement and Safety Administration (MESA), a duly authorized representative of the Secretary, issued the withdrawal order under section 103(f) of the Coal Mine Health and Safety Act of 1969 (the Act). The inspector had arrived at the mine between 7:30 and 8:30 a.m. to conduct a regular scheduled

inspection. His scheduled activities were centered on the main line track haulageway.

At approximately 9:15 a.m., on February 18, 1976, the incident that instigated the subject order occurred. A cutting machine operator and his helper working in the 7 left one panel heard a "woof" or a "poof" as they made a lateral cut along the bottom of the face as part of the conventional mining process. The operator, Mr. Belcher, and his helper, Mr. Graham, reported that they saw a ball of fire or at least a profusion of sparks. The helper immediately fled returning only when Mr. Belcher's spot check for methane proved negative.

The section foreman, Mr. Rotenberry, was informed of the incident. He shut off the power in the section, withdrew the personnel and contacted the assistant and General Mine Foreman, Mr. Pickett. The assistant mine foreman, Mr. Norris, notified Inspector Lilly, of the possible ignition at approximately 10:45 a.m. and arranged for his transportation to the scene. After retrieving his bag from outside the mine, the MESA inspector proceeded to the 7 left one panel and verbally issued the 103(f) order to Mr. Norris and the ventilation foreman accompanying him, Mr. Phelps. The inspector reached the scene at about 11:05 a.m.

Shortly after the incident occurred, and prior to Inspector Lilly's arrival, Mr. Pickett, the general mine foreman, arrived at the panel. He made three safety checks which showed an absence of methane, and a velocity of 5,000 cubic feet of air across the face. The machine operator and his helper were interviewed by Pickett. He examined the cutting bar and found no evidence of charring. General compliance with the Act was noted by Mr. Pickett. Work was resumed and the power returned after his inspection.

Upon arrival at 11:05 a.m., Inspector Lilly began to investigate the incident. The MESA inspector proceeded to test for methane at the face and for ventilation. An air bottle was "broken" to provide for laboratory tests, the results of which showed full compliance with the Act.

The cutting machine operator and his helper were interviewed. The methane detector on the machine was found operable. A methane reading was taken 2 inches inside the cut made by the machine. The reading was 3.1 percent methane. The ignition level for methane is 5 percent to 15 percent.

This initial investigation was completed shortly after 12 noon, the order was reduced to writting, the panel was deenergized and the men withdrawn.

Inspector Lilly contacted the subdistrict office after he reached the surface about 1 p.m. His instructions were to return to the mine to collect a dust sample. He was notified that an accident investigator, Inspector Farley, was on his way. In conjunction with a state inspector's decision to await Inspector Farley's arrival and to attend the interrogation of the witnesses, Inspector Lilly chose to delay his reentry into the mine until Farley arrived. As a crowd gathered around the mine office at the shift change, approximately 4 p.m., the federal inspector proceeded to the mouth of the panel accompanied by several company, union, and MESA personnel to await Farley's arrival.

This group arrived at the mouth of the panel at approximately 4:15 p.m. Farley had arrived in the meantime, and he instructed Lilly to conduct the underground investigation while he, Farley, conducted the interrogations. The state inspector again refused to enter the mine until the interrogations by Farley were concluded. Lilly honored this position and declined to enter the panel until the state inspector arrived.

This delay ended at 6 p.m. The group reentered the panel, Lilly collected two dust samples, one from the cutting bar and one along the cut. Later analysis determined that these samples contained a "trace" of coke. The air and ventilation were again checked, the investigation ended and the order was terminated at 8:15 p.m.

Section 103(f) of the Act states:

> In the event of any accident occurring in a coal mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate state representatives, when feasible, of any plan to recover any person in the mine or to recover the mine or to return the affected areas of the mine to normal.

Under section 3(k) of the Act, an ignition is an accident and there is no question that the Inspector was in the mine at the time of the incident which gave rise to the issuance of the order. If. therefore, an ignition occurred, the Inspector clearly had the right to issue "such orders as he deems appropriate to insure the safety of any person in the coal mine * * *".

The evidence as to whether an ignition actually occurred is not conclusive. Eastern speculates that the cutter bar hit a sulfur ball, actually iron pyrites, and that what the two coal miners saw was a shower of sparks created by the cutter which is similar to a chain

saw, cutting through the sulfur ball. There was no testimony however that at a later time after further mining, a sulfur ball containing a cut had been discovered. On the other hand, the "poof" or "woof" described by the two coal miners is consistent with a low energy methane explosion. I take judicial notice* of the fact that when methane concentrations are near the extreme ends of the explosion range i.e., near 5 percent or near 15 percent a low energy explosion results from an ignition. Also, traces of coke found in the dust samples are consistent with a methane ignition. The fact that the "poof" was followed by smoke (Tr. 32) also indicates an ignition. I therefore find that it is more probable than not that a methane ignition did occur, but even if it did not, the report of a possible methane ignition and the fact that whatever did happen caused the two coal miners to be afraid, and think an ignition had occurred justified the issuance of the order.

Having found that the Inspector was justified in issuing the order in question however, it does not follow that it was proper to continue the effect of the order until 8:15 p.m. In so continuing the effect of the order the Inspector was following and relying on instructions issued by MESA which state that one of the purposes of an order issued under section 103(f) of the Act is to preserve the evidence of the "accident" (Tr. 99). The purpose of the order which the Inspector is to issue under the section in question, however, by its clear language, is to insure the safety of any person in the mine, not to preserve the evidence of the event that gave rise to the order. The section speaks in terms of safety and recovery of the person from a mine and returning the affected area of the mine to normal, but it does not, in my opinion, contemplate an order or the continuation of an order in such a manner as to make the investigation by MESA convenient. The instructions which the inspector relied on are set forth in joint exhibit 1 which consists of a memorandum dated August 7, 1974, from the assistant administrator, Coal Mine Health and Safety to the various district managers and the attached guidelines for issuance of orders under section 103 of the Act. I would like to call attention to the following provision of those guidelines:

> The issuance of a Section 103(f) order is to be distinguished from an order issued under Section 104 of the Act. These two orders have different statutory

*As in the case of official notice, the parties may be heard as to the propriety of taking judicial notice. See Rule 261(e) of Federal Rules of Evidence. Any party may therefore submit, within 10 days of the date of this decision, any material in opposition to the noticed fact.

> bases and criteria for issuance, and should be considered independently. It should be noted that much greater control can be exercised through a Section 103(e) or (f) order than can be obtained through a Section 104(a) "imminent danger" order. Section 104(a) contains an exception of the withdrawal of persons described in Section 104(d). There are no exceptions contained in Section 103(e) or (f) and the authorized representative may take whatever action he deems appropriate to "protect the life of any person", to "insure the safety of any persons" in the coal mine, and to "prevent the destruction of any evidence which would assist in determining the cause or causes of the accident."

In my opinion the quoted portion of the guidelines is designed to delude the inspector into believing that the statute provides for the issuance of an order for three purposes:

1. To protect the life of any person.
2. To insure the safety of any persons; and
3. To prevent the destruction of any evidence which would assist in determining the cause or causes of the accident.

The last quoted words, however, do not come from section 103 of the Act but are similar to words contained in section 103(e). When quoted in context they state:

> The operator shall notify the Secretary thereof [of an accident] and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof.

In my opinion the guidelines clearly represent that statutory language exists when in fact it does not. I think that the instructions that the inspector relied on were erroneous.

He should have been instructed to lift the order when he was satisfied that the order was no longer necessary "to insure the safety of any person in the coal mine". It is of course difficult to determine long after an event what the Inspector's state of mine was at at any particular time during the occurrence, but it is obvious that after he re-entered the mine and took the two dust samples and terminated the order at 8:15 p.m., he was satisfied that there was no continued danger to the miners. The fact that the dust samples later were tested and showed traces of coke could not have entered into his decision to terminate the order. Therefore his second entry into the panel for the purpose of taking dust samples could not reasonably be associated with his fear for the safety of the miners.

If the Inspector feared for the safety of the miners at 11 a.m. when he verbally closed the section, and did not fear for their lives at 8:15 p.m. when he terminated the order, some event must have occurred during that span of time to alter his opinion. If his thinking was changed by listening to interviews on the surface, the record contains no evidence of it. I think it is reasonable to conclude that after the Inspector, on his first visit to the section, had examined the equipment including methane monitors, made methane tests and taken air samples and discussed these matters with his superiors, that he knew at that time as much, insofar as the safety of the miners is concerned, as he knew at 8:15 p.m. when he terminated the order. Waiting for federal Inspector Farley and the state Inspector was insufficient reason to continue the order in the absence of some fear for the safety of the miners. The fact that he had no such fear is demonstrated by the fact that after a delay of some 6-8 hours, and without obtaining any additional knowledge, he terminated the order after taking two dust samples which were not analyzed until the following day. He thus learned nothing new on his second trip to the section where the incident occurred.

I therefore conclude that the order in question was properly issued, but that it should have been terminated when the Inspector reached the surface and informed his superiors of the results of his investigation. I think it reasonable for him to consult with his superiors prior to terminating the order because after hearing his report they might know of some possible danger that he was unaware of that should be checked. That did not occur however and he should have been instructed to terminate the order. If he had proceeded immediately to the section to take dust samples before terminating the order, I would have considered that reasonable. It was not reasonable, however, to delay the matter as was done here. I want to emphasize that I am critizing the instructions (guidelines), not the inspector.

ORDER

IT IS THEREFORE ORDERED, that the Order of Withdrawal be modified to show termination at 1 p.m.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

Distribution:

Edward H. Fitch, Jr., Esq., Mining Enforcement and Safety Administration, Office of the Solicitor, U.S. Department of the Interior, 4015 Wilson Blvd., Arlington, VA 22203

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Harrison Combs, Esq., United Mine Workers of America, 900-15th St., N.W., Washington, DC 20005

Assistant Administrator, Mine Health and Safety, MESA, U.S. Department of the Interior

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

2 6 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		Civil Penalty Proceeding
	Petitioner	Docket No. KENT 80-34
		A.C. No. 15-11526-03002-R
v.		
		No. 1 Preparation Plant
PATCO, INCORPORATED,		
	Respondent	

DECISION

Appearances: George Drumming, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
James Patrick, President, Patco, Incorporated, Hindman, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act." The general issue in this case is whether Patco, Incorporated (Patco), denied entry to an MSHA inspector in violation of section 103(a) of the Act, and, if so, the appropriate civil penalty to be assessed for the violation. Patco does not deny that a former employee, Grover Patrick, swung at MSHA inspector Eugene Lewis while Lewis was on Patco property but claims that it was the result of a personal dispute having nothing to do with Patco. It contends in the alternative that in any event Grover Patrick had no authority to act for Patco; that he was not then even an employee of Patco, having been laid off the month before, that he was at the Patco plant on strictly personal business and indeed that he acted contrary to the consistent policies and practices of Patco not to interfere with MSHA inspectors.

Section 103(a) provides in essence that any authorized representative of the Secretary has the right of entry to, upon, or through any coal mine in order to conduct an inspection prescribed by the Act. MSHA claims that the authorized representative of the Secretary, in this case MSHA inspector Lewis, was denied entry to inspect Patco's No. 1 Preparation Plant on March 30, 1979, and has accordingly petitioned for a penalty of $1,500.

The essential facts are as follows. On the morning of March 30, 1979, Inspector Lewis heard that Patco might have been loading coal at its previously closed preparation plant. Lewis therefore decided to inspect Patco. He first watched the plant from a distance to determine whether it was actually operating. He thought it was. He saw two men inside the scalehouse and a coal truck parked on the scales. He recognized one of the men as Grover Patrick who appeared to be doing "paperwork" inside the scalehouse. He had known Grover to have been at one time an employee of Patco but from his past inspections knew that Grover had never officially represented the company. He did not know that Grover was no longer employed by Patco and did not inquire to find out. Grover had in fact been laid off the month before and was at the plant only for the purpose of using its tools to repair his own truck.

The coal truck and its driver left when Lewis approached Grover. Lewis asked to see James Patrick, Patco's owner and officially designated representative for health and safety. See 30 C.F.R. Part 41. Grover stated that James had gone to town about 5 miles away. Lewis apparently then asked Grover if he had received his papers as a certified mine foreman. 1/ Advised that he had, Lewis thereupon told Grover that he would conduct an inspection. According to Lewis, he then told Grover that the truck that just departed had no backup alarm and Grover allegedly responded that that was the truck driver's problem. According to Lewis, Grover then said "You Goddamn son-of-a-bitch," took four or five steps towards him and swung at him through the window of his jeep. Lewis immediately left the premises and prepared the citation at bar charging that he was unlawfully denied entry by Patco. Lewis conceded that he had inspected Patco on four or five prior occasions, and once subsequently, without difficulty or opposition.

Grover Patrick testified that he had formerly operated a front-end loader for Patco but never served in a management capacity and had never represented to anyone that he had ever served in such a capacity. He had not worked for Patco for more than a month and on the day in question went to the plant to use its tools to repair his own truck. When Lewis arrived, he was reading the truck maintenance manual. The coal truck parked near the scalehouse had not been loaded at Patco. The driver had only stopped to inquire whether Patco intended to reopen. Grover admitted that he swung at Lewis but claims that this was precipitated by his continuing false accusations that he had torn up some construction equipment where Lewis had a parttime job. Lewis had ostensibly harassed him about these allegations on several prior occasions. Lewis denies that he harassed Grover but admits that he did on one occasion ask Grover about the damaged equipment.

James Patrick, president of Patco, testified that his brother Grover was not employed at the time, and was at the yard for the sole purpose of working

1/ As explained at hearing, these papers are issued by the State of West Virginia Department of Mines and have nothing to do with whether or not a person is employed, the capacity in which that person may be employed or by whom he may be employed.

on his own truck. He had seen him there earlier that morning. The plant was not then operating and had not been operating for some time. He had never authorized Grover to act on behalf of the company and was shocked when he learned on the following day what Grover had done. At the first opportunity he went to the MSHA district office to explain things. He had never authorized Grover to act on behalf of the company and certainly never authorized him to bar an inspection of Patco property. It had always been company policy to allow such inspections and to treat inspectors courteously and with respect. James Patrick himself had once been an MSHA inspector. He thought that there had been some personal conflict between Grover and Inspector Lewis that might have precipitated the incident.

The issue before me is whether Inspector Lewis was in fact denied entry by Patco thereby preventing an inspection. The resolution of this issue depends on whether Grover Patrick had the express or apparent authority to act as an agent on behalf of Patco at that time or whether on the facts of this case Patco should be estopped from denying that Grover had such authority. If Grover Patrick did not have such authority then Patco was not in violation of the law but if he did have such authority or if his acts were subsequently ratified then Patco is bound by those acts and is guilty as charged.

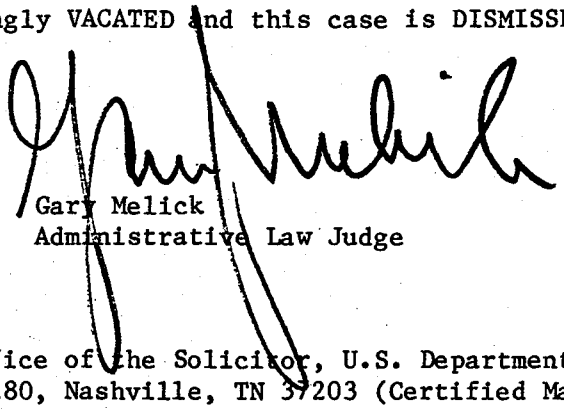
Although the term "agency" in its usual legal sense imports commercial dealings, analogies can nevertheless be drawn to the law of agency in resolving the question at bar. Under the law of agency the authority of an agent arises from an express or implied agreement. 3 Am Jur. 2d Agency § 18. An express agency is an actual agency created as a result of the oral or written agreement of the parties. An implied agency is also an actual agency, but its existence is proved by deductions or inferences from other facts and circumstances of the particular case, including the words and conduct of the parties. The existence of an implied agency, for example, may be inferred from prior habits or from a course of dealings of a similar nature between the parties, especially where the agent has repeatedly been permitted to perform similar acts in the past. 3 Am Jur. 2d, supra.

While the creation of an agency, as between the principal and agent, is a matter of their mutual consent, an agency by estoppel may also be created insofar as third persons are concerned--that is, it may arise from acts and appearances which lead third persons to believe that it has been created. Agency by estoppel may be apparent only and exist because of the estoppel of the principal or agent to deny the same after the third party has relied on such appearance, so that such third party would be prejudiced if the fact were shown to be otherwise. 3 Am Jur. 2d, supra § 19.

In the instant case there is no evidence that Grover Patrick had ever been expressly authorized to act on behalf of Patco in any official capacity. Moreover, there is no evidence from acts, appearances or a previous course of dealing that he had by implication been authorized to act in such a capacity. Thus, there can be no inference that any agency, including an implied agency or any agency by estoppel, existed in this case.

He had never been more than an ordinary employee and was not even an employee on the date at issue. His mere presence on Patco property and the fact that he happened to be the owner's brother is not sufficient evidence standing alone from which to conclude that he was an agent authorized to act for Patco. It is clear, moreover, that Patco, as represented by its president James Patrick, did not ratify the unauthorized acts of Grover Patrick. To the contrary, James Patrick went to the MSHA district office as soon as he could to reaffirm his longstanding position that MSHA inspectors were welcome on his premises at any time and to assure those officials that Grover's acts were not those of Patco. Inspector Lewis himself conceded that neither he nor any other inspector had ever before or since been denied entry by Patco. I find that under these circumstances Grover Patrick was not authorized to act on behalf of Patco and that therefore his acts cannot be attributed to Patco. Thus, Patco is not guilty of the violation charged.

Citation No. 737413 is accordingly VACATED and this case is DISMISSED.



Gary Melick
Administrative Law Judge

Distribution:

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James Patrick, President, Patco, Inc., Route 2, Box 716, Hazard, KY 41701 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

2 6 SEP 1980

RICHARD J. MULLINS, Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	
	:	Docket No. VA 80-60-D
EASTOVER MINING COMPANY, Respondent	:	CD 79-297
	:	
	:	Eastover Mine

DECISION

Appearances: Richard J. Mullins, Norton, Virginia, pro se.;
Karl S. Forester, Esq., Harlan, Kentucky, for Respondent.

Before: Administrative Law Judge Melick

This case is before me upon the complaint by Richard J. Mullins under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., the "Act"), alleging that he was discharged by the Eastover Mining Company (Eastover) in violation of section 105(c)(1) of the Act. An evidentiary hearing was held on August 26, 1980, in Abingdon, Virginia.

Section 105(c)(1) provides in relevant part that:

> No person shall discharge or in any manner discriminate against * * * or otherwise interfere with the statutory rights of any miner * * * in any coal * * * mine subject to this Act because * * * of the exercise by such miner * * * on behalf of himself or others of any statutory right afforded by this Act.

Although Mullins' complaint in this case has never been precisely articulated as best as can be determined he seems to claim that he was unlawfully discharged because he was fired at a time when he was performing his duties as a "fire boss" thereby preventing him from completing the health and safety functions relating thereto. If this indeed is the nature of his complaint then it is of course facially insufficient to raise a justiciable issue under section 105(c)(1) of the Act. The violation of a protected right must necessarily precede and be a cause for the alleged unlawful discharge. In any event I do not find under the circumstances of this case that the Complainant was ever in fact discharged.

The essential facts are not in dispute. Mullins was, at the time in question, the designated "fire boss" on the third shift. Larry Baker was

then the general mine foreman in charge of the third shift and was therefore Mullins' supervisor. In the early morning of August 31, 1979, Baker directed Mullins to take two miners to the No. 2 tailpiece to see if it was "gobbed off," i.e., jammed by falling debris. If such a condition did exist, it is conceded that it posed a serious safety hazard from fire and smoke and would have been a violation of Federal safety standards.

Mullins apparently escorted the two miners to the No. 2 tailpiece then left to "fire boss" another section of the mine. When Mullins returned at around 2:15 a.m., the belt was still not running. Baker had, in the interim, called down to determine whether the belt was working and when advised that it was not, entered the mine himself walking about 1 mile to the No. 2 tailpiece. When Baker arrived, he observed Mullins and the two female miners standing around doing nothing. Baker thereupon picked up a nearby hose and cleaned the belt himself, thereby permitting it to operate. Baker then asked Mullins why he had not remained at the tailpiece to see that the belt was properly cleared and running. Mullins apparently responded to the effect that Baker was not his boss and that he did not have to take orders from him. The exchange over who was the boss became heated and Baker finally told Mullins that "if you keep running your mouth, I'm going to fire you." The argument continued and Baker finally ordered Mullins to go to the surface with him to see Charlie McNulty, superintendent in charge of the mine. When they reached the surface, McNulty told Mullins that he would not make a decision about his job until he heard both sides of the argument. He would act as an arbitrator in the case. Mullins thereupon went to the bathhouse, completed his "fireboss" books, left the premises and never returned. McNulty never made any decision whether to retain or discharge Mullins since Mullins never returned.

Within this framework of evidence, I am convinced that Mullins was never in fact discharged, but rather voluntarily left his job and never returned. The most that can be gleaned from the evidence is that Mine Superintendent McNulty would hear both sides of the argument before deciding what to do. Mullins himself admits that McNulty never fired him and indeed continues to assert that Baker did not have the authority to fire him.

Under the circumstances I conclude that there was, in fact, no discharge at all. Since there was no discharge, there could not have been an unlawful discharge under the Act. The complaint is therefore DISMISSED.

Gary Melick
Administrative Law Judge

Distribution by Certified Mail:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

29 SEP 1980

ERIE MINING COMPANY	:	Contest of Citation
Contestant	:	
v.	:	Docket No. DENV 79-23-M
	:	
SECRETARY OF LABOR,	:	Citation No. 290475
MINE SAFETY AND HEALTH	:	September 20, 1978
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	Erie Mine
UNITED STEELWORKERS OF AMERICA,	:	
Respondent	:	

DECISION

Appearances: Philip D. Brick, Esq., Erie Mining Company, for Contestant; Leo J. McGinn, Office of the Solicitor, U.S. Department of Labor, for Respondent.

Before: Judge Lasher

This proceeding arose when Contestant filed a notice of contest under the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Hibbing, Minnesota, on June 26, 1980, at which both parties were represented by counsel. Shortly after the hearing commenced, counsel for MSHA moved on the record for dismissal on the grounds that Contestant's notice of contest was not timely filed. After lengthy discourse and analysis of the problem on the record (Tr. 9-35), it was determined that the filing of the notice of contest with the MSHA District Office in Duluth, Minnesota, by Contestant's attorney, Philip Brick, on the 30th day after the citation was issued was timely. My ruling in this respect, in its entirety, follows (Tr. 31-35):

> "MSHA has filed a motion to dismiss the application for review in this proceeding on the basis that it was not filed within 30 days after the mine operator received the [citation involved].
>
> The citation in question was issued on September 20, 1978. The evidence reveals that the mine operator's counsel, Philip D. Brick, personally delivered to the District Director of MSHA at the Federal Building in Duluth, Minnesota, a

copy of the document entitled "Application for Review" on or before 2 p.m. on October 20, 1978, which was the 30th calendar day after the citation was issued. One does not count the first day, that is, the day on which the citation was issued, as part of the 30-day time period in computing the 30-day period. The first day is not to be counted as per the provisions of 29 C.F.R. § 2700.11(c) of the so-called Interim Procedural Rules, which I find were applicable to all the events which are pertinent to the motion to dismiss. On the other hand, the document entitled "Application for Review" was not received in the Office of Administrative Law Judges of the Federal Mine Safety and Health Review Commission until October 23, 1978, all of which is established by the date stamp appearing on the first page of the original document which I find would have been placed there in the normal course and routine of business.

Several questions are raised by the motion. One is whether or not service on the Secretary of Labor within the 30-day period is sufficient to toll the 30-day statute of limitations. Another question is whether or not this document entitled "Application for Review" is in effect a "notice of contest" as that term is used in the 1977 Act.

I note that under the 1969 Act all such requests for review were designated "Applications for Review," but that this terminology was changed in the 1977 Act. I find, in order to clear up the confusion, that although labeled "Application for Review," the document in question was the initial pleading which initiated the notice of contest and that there is no question but that the provisions of 29 C.F.R. §§ 2700.18 and 19 are both applicable, although in places there is reference to such documents as being "Applications for Review." The implementing regulations cannot validly affect the rights and provisions of the Act itself in the sense that rights of any of the parties are materially reduced or eliminated.

Section 105(d) of the 1977 Act does permit the operator to notify the Secretary within 30 days of receipt of a citation of the operator's desire to contest the citations and further it provides that upon being notified by the mine operator, the Secretary "shall immediately advise the Commission of such notification."

The proviso to Rule 2700.18(b) appears to be the implementation of the statutory provision contained in 105(d) of the Act. Thus, it states:

> Provided, however, that these rules shall not foreclose the party's right to file the Notice of Contest with the Secretary under section 105(d) of

the Act and such notice, if timely, shall be deemed to satisfy the jurisdictional requirements of section 105(d) of the Act. In that event, the Secretary shall be required to notify the Commission immediately upon receiving a notice from an operator of an intention to contest a citation issued under section 104 of the Act.

I thus conclude that notification to the Secretary within 30 days after receiving the citation by the operator tolls the limitation period.

The question thus remains whether the District Manager of MSHA is an agent for such service or notification.

I would indicate, before answering this question, that I find a conflict between Interim Rule 2700.11 and the proviso to section 2700.18(b) insofar as the circumstances of this case are concerned. Section 2700.11(a) indicates that all initial pleadings in a proceeding such as this one shall be filed with the Commission and provides an address therefor. The proviso, however, preserves the right of the party to file a notice of contest with the Secretary, even though the paragraph previously indicates that the filing of an application with the Commission would be deemed to be timely service on the Secretary.

Thus, the right to serve the Secretary or to notify the Secretary provided in the Act is preserved in the regulation as I understand its meaning.

I find that in view of the situation which existed in the fall of 1978, that it was entirely proper for the mine operator in this case to have filed its contest with the District Director and that apparently in implementing the regulations someone in the MSHA office forwarded the document to the Commission where it was received on October 23, 1978.

I am not certain of this latter finding, but as I recall Mr. Brick's testimony, he indicated he himself did not mail a copy to the Commission and that the only service he effected was that shown on the certificate of service, namely to the District Director and to one Robert Rojeski of the local union.

I find that the 30-day filing period was met by the Contestant in this case and that there is no merit to the motion to dismiss. It is accordingly denied."

A second preliminary matter proved to be dispositive of the case.

In its June 19, 1980, response to a prehearing order, Contestant first questioned the adequacy of the description of the violation in the subject citation, as follows:

> Does Citation No. 290475 allege a violation of 30 C.F.R. § 55.12-14 in that it does not state that the cables in question were energized?

Upon consideration of this question, the broader issue of the general legal sufficiency of the citation became apparent. My ruling thereon, delivered from the bench, appears below as it appears in the record (Tr. 55-65) aside from grammatical corrections and the deletion of obiter dicta:

> "The question to be decided is one which I view to be preliminary in the sense that it must be dealt with prior to hearing the merits of this proceeding since it may be dispositive, (1) of the whole case; or (2) of the issue first raised by the Contestant, Erie Mining Company, in its prehearing submissions.
>
> * * * * * * *
>
> The Federal Mine Safety and Health Act of 1977, section 104(a), provides, "Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the * * * regulation * * * alleged to have been violated." This is (comparable to) the statutory provision contained in the 1969 Act, that is, section 104(e) thereof, which provided, "Notices and orders, * * * shall contain a detailed description of the conditions or practices which constitute a violation * * *.
>
> The citation, No. 290475, is dated September 20, 1978, and reflects that it was isued at 13:15 hours. It cites as the regulation violated, 30 C.F.R. § 55.12-14, and describes the condition or practice as follows: "Power cables in excess of one hundred fifty volts were being moved manually without the use of insulated hooks, tongs, ropes or slings." A termination due date of October 20, 1978, was established by the inspector who issued the citation. [Because] this is the only document which was served on the mine operator since * * * there were no attachments or extensions thereto, the question generally is whether the citation does describe with particularity the nature of the violation. The nature of the violation, to paraphrase it, is that hooks and tongs, etc., shall be used when energized cables are moved manually unless suitable protection for persons is provided by other means. The word "unless" ties the two sections of the regulation together. The requirement for the use of hooks and tongs, etc., is conditional on the absence of other suitable protection being available. For there to be a violation, it must appear that the cables were being moved manually without the use of hooks, tongs, etc., and that other suitable protection was not being

employed. We have a congressional mandate, as far as I am concerned, that citations shall describe with particularity the nature of the violation. There seems to be a liberality and a looseness going on in this particular area with respect to charging persons, whether they be corporate entities or individuals, with violations which can result in the imposition of fines up to the amount of $10,000. The citation in question is really nothing more than a repeat of the regulatory language. Other than the date and time, it provides no real factual details. The fact that it fails to mention that the cables were energized is minor to say the least, but also one detail, among many others, which is left out of the citation. The citation does not indicate how many cables are involved, it does not mention where the cables were, what areas they were, who was exposed to this condition, (or) how many miners were involved manually carrying these cables. There is no description of the cables in terms of length, where they are connected, and the like and I could go on for a long time with the lack of particulars which are conspicuously lacking in the citation.

Even so, this lack of particularity is a minor discrepancy compared to what I view as its major defect and that is that in dealing with this particular regulation, which has two inseparable parts, it only generally and vaguely describes the failure of one of the two prerequisites of the standard. It not only does not indicate that suitable protection was not provided by other means, but it does not indicate why.

The question arises, where is the burden here for establishing a violation? This regulation must not be confused with other regulations which are more simplistic. I find that the failure to deal with the alternate means of suitable protection is a fatal defect. The prejudice to the operator, in turn, is a minor part of the general prejudice which the failure to particularize a citation creates. To begin with, * * * one would certainly have a general instinct of wanting to know precisely what it is (he is) charged with. This is a general political right that I find was envisioned by Congress.

* * * * * * *

I find that in this case there is a prejudice that first starts with that of the problem it created for the mine operator--by not having the particulars, much less an indication, that its alternate system of providing protection was insufficient. The burden in this case was shifted to the operator to * * * file a petition for modification. I construe the mandatory standard allegedly violated as placing the burden on MSHA to first determine whether or not there was suitable protection available and to specify and to state whether

or not that it was or was not adequate and to state why, if MSHA contended that it was inadequate. I am specifically addressing the regulation in question. There may be other regulations and the like where that burden is somewhere else, but I do not find it in this regulation. [There is] substantial prejudice because the * * * whole burden of proof is shifted from MSHA in this case to the mine operator in its modification proceeding. That is one respect in which I find the operator was prejudiced by the lack of specificity contained in the citation.

Secondly, the operator has been prejudiced since its options in achieving abatement in this case are lessened. If it were charged with this regulation properly, that is, allowing cables to be manually moved without the use of hooks and tongs, etc., and not providing suitable protection by other means, the mine operator would have various means of proceeding to achieve abatement. It could then make an informed choice of whether to abate the condition one way or another either using tongs or ropes or by correcting the defect that it was found to have in its alternate system which it refers to as a ground-fault protection system. There is a general prejudice to any party when it is charged with a violation and not given details. I notice that the Commission in MSHA v. Jim Walters Resources, Inc., and Cowin and Company, Docket Nos. BARB 77-26-P and 77-465-P, dated November 21, 1979, indicated that one of the factors which must be considered in determining the validity of the citation is whether or not it prejudices the party charged with the infraction. I think, very generally speaking, [that not being given] details of what you are charged with is a prejudice and that a party should not be forced to go to court to find out with what it is being charged when it can receive a $10,000 penalty. The Commission rightfully recognized that * * * the objective of healthy and safe mines may be advanced when miners, their representatives, and state mine officials are fully informed of mine conditions by notices and orders utilizing specific written descriptions of the pertinent conditions or practices. That can be expanded upon. If a violation is discovered by an inspector, it is certainly helpful to the miners to know precisely what that violation is--and not only the miners but also to the safety representatives, to the union officials, to the foremen and the superintendents at the mine to know precisely what is involved. Indeed to all those people and each and every one of them who have some responsibility toward making the mine safe and who have responsibilities for each others' welfare. There is nothing to be praised or praiseworthy in an order or citation which has just the very bottom line of details in it. Are we to head downhill as fast as we can in some game wherein gold medals are to be handed out by law enforcement officials to those who put the very least

amount of detail into something that someone is to be charged with? I think not. And I think the Commission has recognized this to some degree, in any event, in the Jim Walters' decision. It did decline to follow the decision of the Interior Department Board of Mine Operations Appeals in Armco Steel Corporation, 8 IBMA 88, decided August 17, 1977, wherein the Board held that where an imminent danger withdrawal order failed to give any description of the conditions or practices, such order should be vacated. [Even] in the case of an imminent danger withdrawal order, there is more excuse, more justification present, for [not] providing details than there is in a citation such as the one before us and indeed the typical citation. Where an inspector confronts an imminent danger, it is more understandable why he does not stop and fill in reasonable details and particulars of the violation he is charging the party with. Even so, there is no reason why such details should not be supplied subsequently.

I conclude that there is manifest prejudice to an operator by the failure to provide particulars, generally speaking, and that in this case there is specific prejudice which is apparent from the face of the record itself and that such prejudice to the operator is of a substantial nature. The interest of safety is frequently given as an excuse for lowering the standard of performance of law enforcement officials in providing particulars of the offense charged. This does not stand up under scrutiny. The more details that are required to be provided, the better informed are those involved in safety. That is particularly true here. Furthermore, the psychology inherent in any work place would mandate that if a positive approach is to be taken in correcting and dealing with safety the specifics of alleged violations must be provided. From the standpoint of the party charged, to receive a vague, general, undetailed citation would promote a more negative reaction than a positive one. Health and safety in the last analysis depends upon open, good faith exchange and dealings between law enforcement, mine operators and miners.

[I am unable to] conceive any possible good which comes from a weakening of the procedural requirements and a weakening of the administrative due process requirements of advising a party charged with an infraction precisely what is involved. In the instant case, vacating the citation will cause no great shaking of the system of enforcing the safety standards. The respondent, with the tacit consent of MSHA, continues to implement its alternate ground-fault protection system during the interim period while a Labor Department Administrative Law Judge, Frysiak, is adjudicating the operator's petition for

modification. I believe that this case can provide the Commission with an opportunity to expand and clarify its decision in Jim Walters Resources, Inc., and thereby accomplish a positive result."1/

ORDER

Contestant's position having been found meritorious, Citation No. 290475 is VACATED.

Michael A. Lasher, Jr., Judge

Distribution:

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Mr. Harry Tuggle, Safety and Health Department, United Steelworkers of America, Five Gateway Center, Pittsburgh, PA 15222 (Certified Mail)

1/ Adding two or three sentences, sometimes one sentence and sometimes one word, to citations and withdrawal orders can make a significant input to a positive, constructive safety and health enforcement program. This is the foundation of every legal proceeding which follows the issuance of citations and orders. In this connection, it should also be noted that there are no formalized complaint and answer proceedings or procedures in the mine safety and health field.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

29 SEP 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Civil Penalty Proceeding
	:	Docket No. CENT 79-213-M
Petitioner	:	A/O No. 03-00464-05003
v.	:	
	:	Limedale Lime Plant
ARKANSAS LIME COMPANY,	:	
Respondent	:	

DECISION

Appearances: E. Justin Pennington, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner; Russell Gunter, Esq., House, Holmes & Jewell, Little Rock, Arkansas, for Respondent.

Before: Judge Cook

On August 16, 1979, the Mine Safety and Health Administration (Petitioner) filed a proposal for a penalty in the above-captioned case pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (1977 Mine Act), alleging eight violations of various provisions of the Code of Federal Regulations. An answer was filed by Arkansas Lime Company (Respondent) on September 14, 1979.

On January 28, 1980, Petitioner filed a motion requesting approval of a settlement and for dismissal of the proceeding stating, in part, as follows:

I.

The contested citations in this case and the settlement are identified as follows:

Number	Date	30 C.F.R. Standards	Assessment	Disposition Settlement
163618	1/30/79	56.12-8	$ 255	$ 255 (full amt.)
163619	1/30/79	56.12-30	255	0 (withdrawn)
163620	1/30/79	56.14-6	170	0 (withdrawn)

164181	1/31/79	56.11-2	$ 195	$ 195 (full amt.)
165138A	4/05/79	56.12-8	445	52 (reduction)
165138B	4/05/79	56.12-2	655	52 (reduction)
165140	4/05/79	56.12-13	150	66 (reduction)
165141	4/05/79	56.12-13	225	66 (reduction)

* * * * * * *

II.

This case disposition/settlement will effectuate the purposes of the Act for the following reasons:

1. After a review of all available evidence, the parties agreed that the settlement, attached hereto and incorporated herein, would be just and proper.

2. The proposed assessments for Citation numbers 00165138A, 00165138B, 00165140, [and] 00165141 * * * shown above as reduced were reduced for the following reasons:

a) Citation 00165138A

Upon reconsideration and review of the citation and mine inspector's notes associated therewith, the parties have agreed that little or no negligence was involved, the occurrence of the event at which the standard is directed was improbable, and the gravity of injury if it were to occur would result in no lost work days. By agreement the total points assessed are 23 and the proposed penalty is thereby reduced to $52.00.

b) Citation 00165138B

Upon reconsideration and review of the citation and mine inspector's notes associated therewith, the parties have agreed that little or no negligence was involved, the occurrence of the event at which the standard is directed was improbable, and the gravity of injury if it were to occur would result in no lost work days. By agreement the total points assessed are 23 and the proposed penalty is thereby reduced to $52.00.

c) Citation 00165140

Upon reconsideration and review of the citation and mine inspector's notes associated therewith, the parties have agreed that the operator was only ordinarily negligent, the occurrence of the event at which the standard is directed was improbable, and the operator made extraordinary efforts to insure that the violation was abated within the time given for abatement. By agreement the total points assessed are 26 and the proposed penalty is thereby reduced to $66.00.

d) Citation 00165141

Upon reconsideration and review of the citation and mine inspector's notes associated therewith, the parties have agreed that the gravity of injury if it were to occur would result in no lost work days, the operator was only ordinarily negligent, and the operator made extraordinary efforts to insure that the violation was abated within the time given for abatement. By agreement the total points assessed are 26 and the proposed penalty is thereby reduced to $66.00.

* * * * * * *

3. [Petitioner] has thoroughly reviewed the facts and circumstances pertaining to the violations in citations shown above as "withdrawn". Upon such review and after careful consideration, [Petitioner] has determined that there is insufficient evidence to support said citations and the proposed penalties associated therewith.

4. [Respondent] has agreed to full payment of the proposed assessed penalties as shown above as "paid in full". The parties have agreed that said proposed assessments are fair and reasonable and reflect full consideration of statutory criteria set forth in Section 105(b)(1)(B) of the Act, 30 U.S.C. § 801(b)(1)(B).

5. [Respondent] has complied with the disposition/settlement agreement and has paid the penalty sought by [Petitioner] as heretofore set forth and therefore desires to withdraw its notice of contests to all citations except those indicated above as being withdrawn or stayed, if any.

6. [Respondent] has stated it will comply with the Federal Mine Safety and Health Act of 1977, 83 Stat. 742, 30 U.S.C. 801-960.

On February 5, 1980, an order was issued requiring Petitioner to furnish certain additional information necessary to determine whether approval of the proposed settlement would protect the public interest. On March 3, 1980, Petitioner filed a supplement to its motion to approve settlement stating, in part, as follows:

COMES NOW the Secretary of Labor pursuant to the order entered on February 5, 1980, by the Honorable John F. Cook, Administrative Law Judge and supplements the Motion to Approve Disposition/Settlement filed by the Secretary on the 25th day of January, 1980.

I.

Copies of all correspondence between the Assessment Office and the Respondent as to the violations involved, and Inspector's sheets or statements for each of the alleged violations are attached hereto as Exhibit A and are incorporated by reference herein.

II.

Special reasons for the settlement terms of the [three] mentioned citations or orders are as follows:

1. Orders Nos. 165138A and 165138B

After discussing the above orders with the Supervisory Mine Inspector, counsel for Respondent, and the mine inspector involved it was determined that although a technical violation existed, the penalty proposed was totally unreasonable. The condition cited involved a 110 volt wire cord spliced with non insulating tape. This was plugged into a normal wall outlet, requiring one to pull the plug in order to turn off the light fixture at the other end of the cord. The cord was located in a storage area in an attic where temporary work was being conducted. This area would normally be inacessible to employees of Respondent, and the work was not directly supervised by Respondents' managerial staff. The area was dry, and no other conditions existed which would have increased the possibility of electric shock. In addition, this same condition was cited twice, once under two different standards, thereby duplicating the points assessed for mine size, history, negligence, gravity and probability of occurrence. Because of this, points were assessed for each of the violations based only on the size of the operation, the history of previous violations, and the number of persons affected (1), for a total of twenty-three (23) points.

2. Citation No. 165140

Again after discussion with all parties involved it was determined that a technical violation existed but the penalty proposed was unreasonable. In this case, a multiwired cord was spliced in a manner exposing the inner wires, which were separately insulated. Thus, no bare conductor was exposed. In addition, the spliced cord was laying on the floor or ground, making electrical shock more improbable. Because no bare conductor was exposed, the negligence of the operator was minimal, and was offset by the operator's immediate steps taken to gain compliance. Thus a total of twenty-two (22) points were assessed for size and history, three (3) points for gravity, and one (1) for number of persons affected, with negligence and good faith points offsetting each other, for an agreed total of twenty-six (26) points.

3. Citation No. [165141]

In this case, a 110 volt cord was spliced with a non insulating tape. No conditions existed which would have made electrical shock more probable, nor did conditions exist which would have made death by electrocution a probability. Rather it was agreed, after consultation with all parties, that because the cord was insulated, although inadequately, the probability of shock was low, and in any event would not have resulted in any lost work days. In addition, any negligence on the part of the operator was offset by its extraordinary steps taken to gain compliance. Therefore, a total of twenty-two (22) points were assigned for size and history, three (3) points for probability, and one (1) for the number of persons affected, with good faith and negligence offsetting each other, for a total of twenty-six (26) points.

On March 26, 1980, an order was issued denying the motion to approve settlement because the information submitted was insufficient for the purpose of determining that approval of the proposed settlement would protect the public interest.

On July 18, 1980, a notice of hearing was issued scheduling the case for hearing on the merits on August 26, 1980, in Little Rock, Arkansas. Subsequent thereto, a telephone conference was held, at Petitioner's request, during which the undersigned Administrative Law Judge and representatives of the parties participated. The purpose of the telephone conference was to discuss the January 28, 1980, motion to approve settlement and the March 3, 1980, supplement thereto and the specific reasons why the motion was denied.

When the hearing convened on August 26, 1980, in Little Rock, Arkansas, Petitioner made an oral motion on the record for approval of settlement. The proposed settlement is identified as follows:

Citation/Order Number	Date	30 C.F.R. Standard	Assessment	Settlement/ Disposition
163618	1/30/79	56.12-8	$ 255	$ 255
163619	1/30/79	56.12-30	255	Withdrawn
163620	1/30/79	56.14-6	170	Withdrawn
164181	1/31/79	56.11-2	195	195
165138A	4/5/79	56.12-8	445	195
165138B	4/5/79	56.12-2	655	195
165140	4/5/79	56.12-13	150	140
165141	4/5/79	56.12-13	225	122
		Totals:	$2,350	$1,102

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 August 26, 1980, motion to approve settlement incorporates by reference the reasons set forth in the January 28, 1980, and March 3, 1980, filings. Additionally, the following discussion took place on the record as relates to Order Nos. 165138A, April 5, 1979, 30 C.F.R. § 56.12-8, and 165138B, April 5, 1979, 30 C.F.R. § 56.12-2:

> [MR. PENNINGTON:] Citation No. 165138(a), which alleges a violation of 30 C.F.R. § 56.12-8, the parties again have conferred, and have agreed that the penalty of $195 would be appropriate in view of the evidence and the criteria set forth in the Act, and would move that the Court approve the disposition of that Citation, as stated.
>
> Citation No. 165138(b), which alleges a violation of 30 C.F.R. § 56.12-2, again the parties have conferred and agreed that a penalty of $195 would be appropriate under the criteria set forth under the Act, and in view of the evidence present, and the Secretary would move that this disposition be approved.
>
> JUDGE COOK: All right. Now, before you proceed further, Mr. Pennington, I realize that in the Motions which you have filed, you did go into a discussion as to why you felt that there should be this kind of a disposition.
>
> I wonder if you can -- I hate to have you belabor this issue, but I wonder if you could give a fairly simple explanation of what it was that was alleged to be a violation, and why you feel that it should be that amount of money?
>
> I hate to catch you off guard if you're really not prepared to go into that, but I would appreciate it if you would put on the record now what it is, so that we can have a final statement on the record as to the circumstances.
>
> MR. PENNINGTON: Well, Your Honor, really there would be no material changes to the supplement to the Motion to Approve Disposition of Settlement, which was filed on -- I don't have the date here when that was filed -- but it was in response to your Order dated -- I don't have a date on that Order either -- February 5, 1980. I can give a --
>
> JUDGE COOK: (Interposing) Can you give us a little description of what happened here, and what the problem was?

MR. PENNINGTON: I also have the Compliance Officer here who can also provide you with that background, if you would like to do it that way.

JUDGE COOK: Well, either way, but it's not necessary to put this in the form of a sworn statement, because this is purely a settlement discussion, but if you -- whatever way you want to proceed, but I am interested in getting a better idea of what actually happened.

MR. PENNINGTON: All right. I think what is involved here in Citation No. 165138, that is divided into a Sub-Citation (a) and a Sub-Citation (b), is Sub-Citation (a) relates to a condition where the -- where a cable, an electrical conductor cable was rigged in a fashion such that it was not in compliance with the provisions set out in the Act.

Specifically, the cable ran between -- let me see if I can explain this. We have a metal junction box which is attached to the wall. Attached to the junction box is a porcelain light fixture. The cable that is involved, ran between the metal junction box, and the porcelain light fixture, and was attached or connected to the porcelain light fixture in that fashion.

It was not a permanent cable. It was one that had been placed there to serve a temporary purpose. It was strung up along a rafter on the ceiling of the room in which it was located, down the wall through a door into another room, and was then plugged into a light, or just a regular electrical receptacle or socket on the wall.

It is alleged that this violated two provisions of the Act. First, that the electrical, or that electrical cables or conductors pass through metal boxes or junction boxes, only through proper fittings, and only through fittings that have been properly bushed and are adequately insulated.

It is our contention that the wire passing between the metal box and the porcelain light fixture was in violation of this Standard.

On the other end of the cable, we have just a regular plug which is plugged into the receptacle on the wall in order to energize the cable and turn on the lighting at the other end.

It is alleged that this condition violated the provision of the Act which requires that electrical circuits be provided with the proper switches, on and off switches, to energize and de-energize the circuits.

It is the Administration's position that where the only means of energizing or de-energizing a conductor is by pulling on the plug, that it requires one to come into contact with, or possibly to come into contact with a conductor while it is under load, or while it is still energizing.

Not only is this a prima facie hazardous condition, but it is also in violation of the National Electric Code. Such a switch is not approved by the National Electric Code.

These are the conditions that are alleged in it.

JUDGE COOK: Let me ask you a little more about this so I can understand this.

You are saying that there was really a connection, that is a cable, running from a metal box over to a light fixture.

MR. PENNINGTON: That is correct.

JUDGE COOK: And then there was a cable and light fixture going around to the plug?

MR. PENNINGTON: Well, really, we're talking about the same cable.

JUDGE COOK: I would like to understand this cable more then. You said the cable came out of a metal box. Was that the plug that went into the metal box?

MR. PENNINGTON: I have a picture here if it would help.

JUDGE COOK: All right. I would like to see that, if there is no objection by the operator's attorney.

In fact, Mr. Gunter, if you would like to come up here.

MR. PENNINGTON: I think this is Exhibit M-5. And it is a photograph that was taken at the plant on April the 5th, 1979, in the lime kiln bridge, the lime bridge kiln, or in the area that is mentioned on the Citation.

This particular cable here is a permanent cable (pointing), which does have the proper fittings, which does pass through the proper fittings and into the box as required by the Electric Code and by the Standards.

However, this cable here (pointing), which as you can see it runs between this metal box here and the porcelain light fixture here, has been connected to the light, and this is the cable that is in issue, the second cable.

JUDGE COOK: So, are you really saying that the first permanent one really wasn't in operation?

MR. PENNINGTON: This is correct.

JUDGE COOK: Had it been in operation, the second one wouldn't have been necessary?

MR. PENNINGTON: If it had been in operation, the second cable would have been unnecessary.

JUDGE COOK: Unnecessary.

MR. PENNINGTON: Yes. And the condition that is alleged, violating the Standard, is where the cable passes between the porcelain light fixture and the metal junction box there.

JUDGE COOK: Now, was there any problem about touching any wires in the area just near the porcelain part?

MR. PENNINGTON: No. My understanding is that these wires were adequately insulated. The real problem here is that it does not pass through the proper fittings into the metal box, as required by the Standard.

JUDGE COOK: What can go wrong if it doesn't go through the proper fitting?

MR. PENNINGTON: Well, my understanding is that if it doesn't pass through the proper fitting, that the cable is not properly secured, it can be pulled loose for one thing, and it can rub against the side of the metal box and the porcelain fixture here so that the insulation can be worn thin, and possibly create a shock hazard at some time in the future. That's the purpose of the bushing on the metal box.

JUDGE COOK: All right. So, the bushing problem was right in this area of the location of the porcelain and the metal box?

MR. PENNINGTON: That's correct. There is no bushing there.

JUDGE COOK: Now, that is one part that was alleged in the Citation.

MR. PENNINGTON: Right.

JUDGE COOK: The other part, you say, dealt with the plugging in of this second wire into some receptacle in another room?

MR. PENNINGTON: Right. The same wire, just continuing along this wire here (pointing), it goes along this rafter here that the light fixture is attached to, and I'm not quite sure whether or not that it was attached to the rafter in any way, or whether it was just suspended by being wrapped around the rafter, but at any rate, it comes along the rafter, down the wall, and out a screen door, which is being opened and closed, and then into the next room where it was plugged into a receptacle in the wall, which is approximately four and a half feet above the ground.

JUDGE COOK: Now, was the problem of the wire being affected by a screen door, et cetera, also a problem that they were concerned about?

MR. PENNINGTON: This was not cited, but it was one of the conditions which is alleged to enhance the probability or a possibility of an accident occurring with the metal bushing, for one thing, and it's alleged that the condition of passing through the door increases the probability of an electric shock at some point in the future.

JUDGE COOK: All right. Then, what about then though, the plugging in? Why is that a problem?

MR. PENNINGTON: Well, again as I stated, in order to energize this particular light bulb here, what is required is that you pull the plug out of the wall, out of the receptacle, and if you pull it out of the wall, you are coming into contact with the conductor that is energizing at the time.

JUDGE COOK: But isn't that the case when you are plugging in any lamp in a home?

MR. PENNINGTON: This is true.

JUDGE COOK: Is it different though? In this situation that you're describing in this particular mine, is there some difference between that and the plugging in of a normal lamp in a home?

MR. PENNINGTON: Well, the difference would be, in this particular case here, is that we have nothing to break the circuit between the light bulb itself and the receptacle on the wall.

Usually, in a lamp in a home situation, you have a light switch that can be operated to turn the light on and off, so there is a break in the switch.

JUDGE COOK: I understand that, but, see, what I'm really trying to find out though, is as it relates to the plugging and unplugging, is there a difference? As to the safety problem?

MR. PENNINGTON: May I consult with him?

JUDGE COOK: Certainly.

(Short interruption.)

MR. PENNINGTON: Your Honor, one of the, well, conditions that would be different in this particular instance here, relates to the condition of the cable that was involved.

The cable that was involved was old, it was not in the best of condition. Some of the insulation was weathered.

The Mine Inspector's concern was that if the only way of energizing the circuit was to pull on the cable itself, that it created the possibility of cracking the insulation, or possibly pulling it loose from the socket -- not the socket on the plug, I mean, but on the wall, and that is what the Mine Inspector's concern was with respect to this condition.

In addition, I would also like to point out that the National Electric Code does not approve of this type of set-up. Lamps are required to have an off-on switch and the Standard requires that the electrical set-up, or the cable involved, be operated in the way that it is approved, in an approved fashion, and for this, we would look to the National Electric Code.

JUDGE COOK: All right. Now, Mr. Gunter, of course, I realize that we have asked a number of questions here of Mr. Pennington, and have let him set forth his position here. Is there anything that you want to remark about, at this point?

MR GUNTER: At this point, I would -- Obviously, we are in the process of trying to settle this. I don't think the complaint speaks to the condition of the cable. I think the complaint is that there was not an off-on switch somewhere.

Also, this occurs in a hoist house, which is elevated, which is dry, and in which there are normally no employees around. It was done by an employee, from the evidence I've

been able to ascertain about it, and while we recognize that violations probably did exist in the manner of the rigging, we certainly have very strong differences as to what the consequences of that should be, and we would like to enter into this particular settlement agreement that we feel is a fair settlement.

MR. PENNINGTON: Your Honor, I would just like to reiterate that Mr. Gunter and I have reviewed the evidence, and the Secretary also believes that the settlement that has been proposed is fair and reasonable, under the circumstances.

JUDGE COOK: Apparently in your last filing of information, and supplemental Motion, you did state that you felt that the original proposed penalty was unreasonable.

MR. PENNINGTON: We do believe that the penalty that was proposed was unreasonable.

(Tr. 7-17).

The reasons given above in support of the proposed settlement have been reviewed in conjunction with the information submitted as to the six statutory criteria contained in section 110 of the Act. After according this information due consideration, it has been found to support the proposed settlement. It therefore appears that a disposition approving the settlement will adequately protect the public interest.

ORDER

Accordingly, IT IS ORDERED that the proposed settlement of August 26, 1980, as outlined above, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that Respondent be, and hereby is, ASSESSED civil penalties in the amount of $1,102.

Since Respondent has already paid $686, IT IS FURTHER ORDERED that Respondent pay the remaining $416 within 30 days of the date of this decision.

IT IS FURTHER ORDERED that the proposal for a penalty be, and hereby is, DISMISSED as relates to Citation Nos. 163619, January 30, 1979, 30 C.F.R. § 56.12-30, and 163620, January 30, 1979, 30 C.F.R. § 56.14-6.

John F. Cook
Administrative Law Judge

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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30 SEP 1980

ITMANN COAL COMPANY, Applicant	:	Application for Review
v.	:	Docket No. WEVA 80-132-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Itmann No. 3 Mine

DECISION

Appearances: Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Itmann Coal Company;
David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Secretary of Labor, Mine Safety and Health Administration.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding arises out of an application for review of an imminent danger order of withdrawal issued on November 14, 1979. On December 7, 1979, Itmann Coal Company (hereinafter Itmann) filed the application for review. A hearing was held in Charleston, West Virginia, on May 20, 1980. James Bowman and Arnold Rogers testified on behalf of the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA). Donny Coleman testified on behalf of Itmann. Both sides submitted posthearing briefs.

ISSUE

The issue is whether the order of withdrawal due to imminent danger was properly issued.

APPLICABLE LAW

Section 107(a) of the Act, 30 U.S.C. § 817(a), provides as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of

the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Section 3(j) of the Act, 30 U.S.C. § 802(j), states: "'imminent danger' means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

STIPULATIONS

The parties stipulated the following:

1. Itmann is the owner and operator of the Itmann No. 3 Mine, located in Wyoming County, West Virginia.

2. Itmann and the Itmann No. 3 Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction of this case pursuant to section 107 of the 1977 Act.

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

5. A true and correct copy of the subject order and termination were properly served upon the operator in accordance with section 107(d) of the 1977 Act.

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

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. On November 14, 1979, MSHA inspector James Bowman was conducting a regular inspection of Itmann's No. 3 Mine in the area of the Pineville Mains. He was accompanied by Arnold Rogers, union safety committeeman and walk-around, and Donny Coleman, an Itmann industrial engineer and company escort.

2. During the course of his inspection, Inspector Bowman came around a corner and saw a miner, Doug Shrewsberry, shoveling coal between the tail pulley and the drive pulley with the guard removed and the conveyor belts moving. The miner was working in a precarious position under a moving conveyor belt which was only 37 inches above the floor and between the belt drive and a tail pulley which were 54 inches apart and in motion. The surface on which the miner was standing was damp and slippery and was on a steep slope.

3. After the miner saw the inspector's cap light, he stepped out of the area between the conveyor belts.

4. Upon observing the above condition, Inspector Bowman told Safety Supervisor Coleman that he was issuing an order of withdrawal under section 107(a) of the Act and told Mr. Coleman to turn off the conveyor belts.

5. Thereafter, Inspector Bowman issued a written order of withdrawal due to imminent danger pursuant to section 107(a) of the Act.

6. The miner was questioned in the presence of all three members of the inspection party. He admitted that he had been shoveling coal with the conveyor belts running and unguarded. He further stated that he had been trained and he knew better than to commit such an unsafe act. However, he also stated that he had shoveled coal in this area before with the conveyor belts running and unguarded. He stated that he did not want to stop production and he had not been told to leave the conveyor belts running or to turn them off while performing his duties.

7. It was the practice of the miner, Doug Shrewsberry, to clean the affected area with the conveyor belts running and unguarded.

8. The practice of cleaning the area around the tail pulley and the drive pulley with the conveyor belts running and unguarded could be reasonably expected to cause death or serious physical harm to the miner.

9. The order was terminated approximately 2 hours after it was issued after the miner had been reinstructed by Itmann management concerning safe work habits in turning off the conveyor belts before removing the guard and commencing cleanup of the area.

DISCUSSION

All of the testimony, exhibits, stipulations, and arguments of the parties have been considered. There is no significant dispute of fact in this case. However, Itmann contends that the facts do not support an imminent danger order of withdrawal because the miner was out of the affected area and he was not exposed to any moving parts at the time the order was issued. This defense is similar to the one raised by Itmann in a case I decided earlier this year. In Itmann Coal Company v. Secretary of Labor, 2 FMSHRC Decs. No. 6 at 1643 (June 26, 1980), Itmann contended that although a miner

was seen traveling under unsupported roof, no imminent danger existed because the miner was not under unsupported roof at the time the order was issued. I rejected Itmann's defense in that case as follows: "Even though the miner was no longer under the unsupported roof at the time the order was issued, the practice of miners going under the unsupported roof constituted an imminent danger under the Act." Id. at 1655. Itmann did not appeal that decision.

In the instant case, the inspector saw a miner shoveling coal in a precarious position between moving, unguarded conveyor belts. It cannot be rationally asserted that such a miner was not exposed to death or serious physical injury. The mere fact that such miner sees the cap light of the inspector and thereafter steps away from the danger does not eliminate the imminent danger. Under these facts, it was reasonable for the inspector to believe that the practice of cleaning this area in the manner he observed had not ended. This belief was confirmed by the miner's admission that he had cleaned this area in the same precarious manner before. Therefore, this was not a static condition which would not recur after it was abated. Rather, we have here an unsafe practice which would be likely to result in death or serious injury to a miner before it can be abated.

Section 107(a) of the Act specifically provides that the order of withdrawal is to remain in effect "until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist." (Emphasis supplied.) This section of the Act gives the MSHA inspector the authority and responsibility to continue the order of withdrawal until the conditions or practices that caused the imminent danger no longer exist. Applying the law to the facts of the instant case, I find that Inspector Bowman acted properly in issuing the order of withdrawal due to imminent danger and continuing that order until the miner in question had been reinstructed concerning the need to turn off the conveyor belts before removing the guard or performing any cleanup duties. The imminent danger in this case did not terminate when the miner stepped out of the affected area. At the time this order was issued, there was still an imminent danger under the Act due to the practice of performing this work under unsafe conditions. The inspector would have been remiss if he failed to issue this order.

CONCLUSIONS OF LAW

1. This Administrative Law Judge has jurisdiction of this proceeding pursuant to section 107 of the Act.

2. The inspector properly issued the subject order of withdrawal under section 107(a) of the Act because the practice of cleaning the immediate area around moving and unguarded conveyor belts in this mine constituted an imminent danger within the meaning of the Act.

ORDER

WHEREFORE IT IS ORDERED that the application for review is DENIED and the subject withdrawal order is AFFIRMED.

James A. Laurenson

James A. Laurenson, Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

30 SEP 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 80-259-M
Petitioner	:	A/O No. 41-01094-05003
v.	:	
	:	Docket No. CENT 80-261-M
H. S. JACKSON SAND & GRAVEL, INC.,	:	A/O No. 41-01094-05004-I
Respondent	:	

DECISION

Appearances: Allen Reid Tilson, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner; Henry Jackson, H. S. Jackson Sand & Gravel, Inc., Irving, Texas, for Respondent.

Before: Judge Stewart

The above-captioned cases are civil penalty proceedings brought pursuant to section 110 1/ of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter, the Act). The hearing in these matters was held in Dallas, Texas, on August 25, 1980. The Petitioner called one witness and

1/ Sections 110(i) and (k) of the Act provide:

"(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

"(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court."

introduced three exhibits. The Respondent called one witness and introduced one exhibit. At the outset of the hearing the parties entered into stipulations that Respondent is a small operator having only three employees, Respondent's history of previous violations is good with very few previous violations, that Respondent has in good faith abated the hazard by purchasing safety belts in this case and that the penalty will not affect his ability to continue to do business.

After the evidence had been presented by the parties, they entered into further stipulations that it was probable that the failure to use a safety belt would result in a serious injury, that the failure of the operator to insure the safety belts were used was a violation of a mandatory safety standard, and that there was ordinary negligence as a failure to provide the use of a safety belt.

After the presentation of evidence and oral argument by the parties on each issue, a decision was announced orally from the bench. The decision is reduced to writing in substance as follows pursuant to the Federal Mine Safety and Health Review Commission's Rules of Procedure, 29 C.F.R. § 2700.65.

CITATION NO. 153659

Citation No. 153659 was issued on 8-8-79 by Inspector Allen L. Head. The condition or practice listed by the inspector was as follows: "H. S. Jackson fell approximately 39 feet from the shaker because he was not wearing a safety belt or line. Kip Jackson, foreman, stated that there is not a safety belt on the property."

30 CFR 56.15-5 states as follows: "Mandatory: Safety belts and lines shall be worn when men work where there is danger of falling. A second person shall tend the lifeline where bins, tanks, or other dangerous areas are entered."

Pursuant to the stiplations by the parties, I find that there was a violation; that as to the gravity of the violation it was probable that a serious injury would occur, affecting one person; that the operator was negligent; and, that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

Upon consideration of the statutory criteria, an assessment in the amount of $90.00, is entered for this citation.

CITATION NO. 153660

In regard to Citation No. 153660, the parties have entered into additional stipulations. One of these stipulations is that the telephone number of the local MSHA Office had been changed, but there was a toll free number that could have been called to report the accident.

The parties have also stipulated that Kip Jackson was engaged in taking care of his father relative to the injury he had received, rather than attempting to immediately report the accident that had occurred.

The parties have further stipulated that there was a violation; that it was not probable that the violation would result in injury; and, that there was slight negligence on the part of the operator.

The parties have previously stipulated as to the operator's history of previous violations, the appropriateness of the penalty to the size of the business charged, it being a small business, and the effect on the operator's ability to continue in business.

Citation No. 153660, was issued by MSHA Inspector Allen L. Head on 8-8-79, citing a violation of 30 CFR 50.10. The condition or practice listed on the citation was as follows: "MSHA was not notified of the accident concerning H. S. Jackson falling from the shaker screens to the ground, 8-7-79."

30 CFR 50.10 provides as follows: "If an accident occurrs, an operator shall immediately contact the MSHA district or subdistrict office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA district or subdistrict office, it shall immediately contact MSHA headquarters office in Washington, D.C. by telephone, toll free, at (202) 783-5582."

Pursuant to the stipulations of the parties, I find that there was a violation of 30 CFR 50.10; that as to gravity, it was improbable that the violation would cause injury; that the negligence of the operator was slight; and that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

I have already found that the operator's history of previous violations was good, and that the operator was small in size. I have also found that the penalty will not affect the operator's ability to continue in business.

In view of the consideration of these statutory criteria, the sum of $10.00 is assessed for this violation.

ORDER

The bench decision announced at the hearing is AFFIRMED.

Respondent is ORDERED to pay Petitioner the amount of $100 within 30 days of the date of this order if it has not already done so. 2/

Forrest E. Stewart
Administrative Law Judge

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2/ Section 110(j) of the Act provides:

"(j) Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation occurred or where the operator has its principal office. Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order."

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